Judicial Institute for Scotland

e-Jury Manual

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FOREWORD

to the Amendments to the eJury Manual

by

The Hon. Lord Woolman, Chairman, Judicial Institute for Scotland

I am delighted to introduce the first e-version of the Jury Manual. This new online Jury Manual has many benefits. Firstly it will be possible for amendments to be incorporated into the document immediately rather than waiting for the printing of an annual edition. This will ensure a contemporary and comprehensive production. There will also be a cost benefit as there will no longer be a need for the long and costly process of producing and distributing the manual in conjunction with an external printing company, as the manual will be entirely managed and maintained by the Judicial Institute.

Amendments will be intimated to judicial office holders through alerts via the Judicial Hub. The new online manual is accessible at any time, anywhere, through any device with access to the internet – whether laptop, desktop, ipad or other portable device. It is independent of the SCTS network, and does not require CITRIX or any SCTS connection to view. The manual can also be downloaded for offline use as a pdf or epub, or printed off – as a whole or as individual chapters.

An additional benefit of the online manual is the hyperlinking found throughout – this means that wherever cases, legislation, or similar are referenced, users can easily follow these links to view the document in question, hosted on Westlaw, Lexisnexis etc. There is also internal hyperlinking, allowing easy navigation within the various sections of the manual, and to other Judicial Institute documents hosted on the Judicial Hub.

Once you become familiar with the format I am sure you will find this to be an accessible, invaluable resource.

Stephen Woolman

Edinburgh

2015

IMPORTANT NOTES FOR USERS FOR THE JURY MANUAL

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What ultimately should form the content of the Judge's charge?

The first observation to make is that use of this Manual alone does not mean the presiding judge's duty to provide appropriate directions to a jury has been fulfilled. Lord Malcolm observed in *McGartland v HM Advocate* 2015 HCJAC 23 at para 31;

> "*While improvisation on the criminal standard of proof and the burden on the Crown may well provoke an appeal, in general the jury manual does not remove the trial judge's duty to tailor the charge to the specific circumstances of the case, all with a view to giving proper and clear directions to the jury. Simply to repeat the terms of the manual is no guarantee against a misdirection appeal... The manual is no more than a first port of call, providing a useful, but non-authoritative, checklist of points to bear in mind. Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial.*"

Further in directing a jury in any case, the obligation upon the trial judge is:

> "to provide a framework or "route to verdict" which the jury can follow; the existence of which will render any verdict understandable."[1]

In considering the effect of what was said to the jury, it is to be borne in mind that the standard directions in the jury manual are the product of the experience of many judges and many sheriffs over many trials. They are given in the expectation, again based on experience, that juries composed of reasonably intelligent people who have heard the evidence and have been addressed on that evidence will understand the concept of mutual corroboration when it is explained to them in terms of the standard directions. That said, we do not suggest that a slavish and unthinking repetition of what is suggested in the Jury Manual as merely a possible form of directions will necessarily be sufficient to alert the jury as to how they should go about their decision-making in every case. Effective jury directions must engage with the specifics of the particular trial and the particular issues that arise for decision. That means that they must address, in an appropriately balanced way, the case as it is presented by the Crown and the case as it is presented by the defence.[2]

Use of the term 'victim'

In the case of *Hogan v HM Advocate*[3] the Lord Justice General described as inappropriate the use of the term 'victims' where the issue at the trial was whether or not the complainers were victims of the alleged conduct (see paragraph 34 of the Opinion of the Court).

Efforts are being made to update the Jury Manual to remove reference to the term 'victim' where its use appears inappropriate. However it should be noted that, to avoid incurring excessive printing costs, the word 'victim' has been replaced only on those pages which have been otherwise updated for the 2014 edition.

[1] *Geddes v HM Advocate* 2015 HCJAC 10 at para 97

[2] *DM v HM Advocate* [2017] HCJAC 19, para 16

[3] 2012 SCCR 404

Judicial Management of jury trials- stages of the trial process

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Introduction

There is a considerable body of case law regarding jury selection, management and judicial management of jury trials, in addition to the statutory framework provided by the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

This chapter is intended as a statement of best practice in this area for the assistance of judges who preside over jury trials drawing on relevant case law and judicial experience and expertise.[4]

Jurors are expected to approach their task with open minds, untainted by preconceptions, prejudices or by any private knowledge which they may have of the case or of the individuals involved in the charges. The jury oath or affirmation binds the jurors to "*well and truly try the accused and give a true verdict according to the evidence*". They are presumed to adhere to this oath and to follow the directions in law which the trial judge gives them. Jury selection and management procedures must therefore ensure, as far as possible, that this is in fact what happens. Of course it must be recognised that jury service is a considerable disruption and inconvenience for
members of the public, especially if they are involved in a long case. Also, in small courts in rural areas there is a greater chance that prospective jurors will have heard of the circumstances of some local crime (and the accused) and therefore may not be as objectively impartial as complete strangers. Further, it would be foolish to disguise the fact that some prospective jurors (no doubt a small minority) are not public spirited, or do not have a sense of civic responsibility and may deliberately seek to avoid jury service. While this may be a sad commentary on our life and times, the fact cannot be avoided and ought to be faced squarely.

Procedures for jury selection and management must recognise these competing strands. The jury system would doubtless fall in public estimation if active steps were not taken by all concerned to deal with jurors and their problems openly, fairly and with respect, but also recognising the important public duty which jurors are asked to perform.

See the Appendix: A Paper on Jury Management by Lord Wheatley (Chairman, Judicial Studies Council, 2002 - 2006)

Equality and juror engagement

The public sector equality duty under the Equality Act 2010 applies to SCTS and extends to its engagement with those cited for jury service. The Court Service is obliged to make such reasonable adjustments as are needed to enable a disabled juror who wishes to serve to participate effectively in the process.

Judges may wish to familiarise themselves with changes introduced by SCTS in November 2019 which aim to widen juror engagement for potential jurors with sight and hearing impairment. The Judicial Institute has published a Briefing Paper, entitled "Widening Juror Engagement", which aims to provide judges with practical information on the changes.

The practical changes made by SCTS as at November 2019 are:

- The appointment of Jury Liaison Officers who have received in-house training devised in

consultation with RNIB Scotland and deafscotland.
- The purchase of portable easy to use hearing units and magnifiers to aid those with sight and hearing impairments for use in the court room and jury deliberation environment.
- A short one page information sheet published on the SCTS website in various formats to encourage early engagement by the potential juror.

Judicial Preparation

General

It has been emphasised that it is the duty of the trial judge/sheriff to ensure that she/he has available, in advance of the trial, all that she/he considers necessary to prepare for and be properly informed about the case.[5]

This will include:

- a copy of the indictment, including lists of witnesses and productions;
- copies of the written records and minutes of procedure;
- copies of any special defences;
- copies of documentary productions;
- in cases involving the commission of alleged sexual offences, a copy of any application(s) made in terms of section 275 of the Criminal Procedure (Scotland) Act 1995 and the decision(s) thereon;[6] and
- copies of any preliminary minute(s) and the decision(s) thereon.

In addition, so far as possible / known about, the judge / sheriff should give consideration in advance of the trial to issues likely to arise in relation to the playing of distressing images in court or any late applications or late lodging of special defences, so that these matters can be addressed with parties at the outset.

The judge / sheriff should be made aware by the clerk of any known equalities issues in relation to the cited jurors (see above).

Playing of distressing / disturbing images in court

Where footage/ images lodged in evidence have the potential to be distressing / disturbing to those in court, including the jury, the Appeal Court has recently commented that:

> *"Great care must be taken by both prosecution and defence when deciding whether it is necessary to show such images to members of the jury and to others in the court room... If such images are deemed a necessary element of the proof, their use ought to be discussed by the parties and should be raised with the court at the Preliminary Hearing.....The manner in which [images should be played] ...ought...to be the subject of a considered case management decision."* [7]

Whether or not the issue has been discussed at the preliminary hearing, judges should, in relevant cases, consider canvassing this matter with parties at the trial diet. At present the remote ballot offers an opportunity to raise the issue and once in-court balloting resumes, an opportunity can be found to discuss the issue in the absence of the jury at an early stage in the trial.

Late lodging of special defences– Section 78(1)(b)

The criteria for determining this issue are laid down in *Darbazi v HM Advocate* 2021 HCJAC 10.

In contrast to the test under section 275B for the late presentation of a section 275 application, i.e. the requirement that "special cause" be shown, the test in determining an application to intimate a special defence late is essentially "where the interests of justice lie". Even if the accused acted in a careless or deliberate manner, which has resulted in the special defence not being lodged timeously, cause is shown if the interests of justice lie in the special defence being lodged late. This applies even when account is taken of the desirability of avoiding the unnecessary disruption of the criminal process in the public interest. Account has to be taken of substantial inconvenience to a complainer/witness(es) albeit the weight attributed to this may not be great compared to the exclusion of the only defence for an accused.

There is no legal bar to an accused changing his/her position. The issue is whether this change in position results in prejudice to the prosecutor and/or complainer.

Deprivation of an accused's defence is a very serious matter. Postponement of the trial may entitle the court to refuse to allow an accused to present a positive line of defence in circumstances in which an accused has manifestly, or deliberately, refused to comply with the procedural rules for doing so. These instances are considered to be rare and involve the prosecutor/complainer being seen to be materially prejudiced. If the trial can proceed as scheduled without any substantial new investigations, the balance is weighed heavily in the defence being lodged late, particularly if it is the only defence. The Crown can make the jury aware of the late change of position and possibly cross examine on this point.

Amendment

The power to amend is set out in section 96 of the 1995 Act which provides:

> "96.— Amendment of indictment.
>
> (1) No trial shall fail or the ends of justice be allowed to be defeated by reason of any discrepancy or variance between the indictment and the evidence.
>
> (2) It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the indictment by deletion, alteration or addition, so as to:
>
> (a) cure any error or defect in it;
>
> (b) meet any objection to it; or

(c) cure any discrepancy or variance between the indictment and the evidence.

(3)Nothing in this section shall authorise an amendment which changes the character of the offence charged, and, if it appears to the court that the accused may in any way be prejudiced in his defence on the merits of the case by any amendment made under this section the court shall grant such remedy to the accused by adjournment or otherwise as appears to the court to be just.

(4) An amendment made under this section shall be sufficiently authenticated by the initials of the clerk of the court."

There is a useful discussion in Renton and Brown at 8-70 to 8-78.

The criterion to be adopted ultimately is the interests of justice as explained by the Lord Justice General in giving the opinion of the court in a mid-trial appeal against a judge's decision to refuse to permit a docket to be amended.[8]

The decision illustrates the court's approach to the common situation where objection is stated on the basis of a lack of fair notice of a crime not charged or narrated in a docket which the Crown seeks to cure by amendment.

With reference to *Nelson v HM Advocate* 1994 JC 94, the court restated the requirement of fair notice, at paras 8 and 9, and confirmed that such a failure will not be cured by the disclosure regime. This does not mean that the fact of disclosure could not have relevance in assessing the question of prejudice to the accused in considering whether to allow an amendment.

The court explained what a judge should be considering when an amendment is opposed in para 9:

"…Where the narrative in the libel is incomplete or otherwise defective, amendment may be allowed. **The purpose of allowing an amendment is to ensure that the ends of justice are not defeated by any discrepancy or variance between the libel and the evidence (ibid s 96(1)); that is to say, the test of whether to allow an amendment is whether it is in the interests of justice to do so. That involves not only consideration of any material prejudice to an accused, and the degree to which the Crown may have been at fault, but also the interests of a complainer, and the wider public, in seeing that justice is done, and seen to be done, in the particular case**."

[Emphasis added]

In para 10, the court explained that a docket can be amended, applying the same criteria, and in particular by considering the interests of justice. In para 11 the court explained that principles of fair notice apply to a docket as much as they do to a charge.

The court gave its decision in paras 12 and 13:

> " In the present case, and despite the Crown's protestations to the contrary, the libel in the docket is defective in that it does not cover, and thus give fair notice of, the testimony which the Crown seek to adduce relative to the non-consensual sexual activity involving NA, other than any "stealthing" episodes. That material cannot be adduced unless the libel in the docket is amended. If it is not amended, what are very serious substantive charges, which involve the complainer MM, will not be capable of proof. It is not suggested that the respondent will suffer any prejudice, beyond that consequence. It is on that basis that the court considers that the trial judge erred. It is in the interests of justice that the amendment should be allowed. The trial judge ought, although he was not initially asked to do so, to have allowed amendment and consequently repelled the objection.
>
> [13] The court will accordingly: allow the appeal; allow the docket to be amended… thus making it clear that [the complainer's] testimony of the various rapes referred to in her police statement is competent and admissible; and repel the objection to that testimony. That having been done, the case will be remitted to the trial judge to proceed as accords."

It is competent to amend at any stage until "the determination of the case," i.e. sentence has been passed.[9]

The ballot and route map for the commencement of a trial

A new process for balloting jurors remotely has been developed. This new process will reduce the number of jurors having to come to court by approximately 50% and will continue post-pandemic.

The new process is supported by Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Jury Ballot) 2020/200 which came into force on 19 July 2020.

To enable the jury to be balloted in their absence the following procedure will take place:

Day One

1. On the morning of day one, between 9.30 and 12 noon, the clerk of court will phone potential jurors to ensure that they are available to attend for jury service; those available will be placed in the ballot bowl;
2. The case will then usually call in open court at about 2pm;
3. The first step is always to check that the appropriate means are in place for maintaining an accurate record of everything that happens in open court.
4. Assuming that the proceedings are to be digitally recorded, [10] the judge should ensure that the clerk has checked the recording equipment and that it is functioning satisfactorily. The clerk will maintain a minute throughout the day of the names of the witnesses and the times at which the various parts of their evidence begin. It may, however, be of considerable assistance to the judge, in the event that the playback facility requires to be used, to take a note (at suitable intervals of perhaps 10 minutes, or perhaps at the top of each page of the notebook) of the times of the day at which evidence is given. See "*All hearings to be recorded*" below.
5. The judge then deals with any preliminary matters, such as tendering of pleas, late notices or lists of witnesses, confirmation that a special defence lodged is being insisted on or withdrawn as the case may be, S 67 notices etc.

a. If the accused pleads guilty, in whole or in part, whether or not the partial pleas are to be accepted by the Crown, proceedings associated with this should take place outwith the presence of unempanelled jurors, to avoid any risk of prejudice.[11]
b. Where pleas of guilty to some charges have not been accepted by the Crown, the fact that these pleas were tendered and rejected cannot be founded on by the Crown, and the trial has to proceed in the ordinary way. The trial judge must give the usual directions on onus, standard of proof and corroboration.[12] Since 2020, this will have been done by the judge reading the written introductory directions at the start of the trial.
c. Before the jury ballot commences, it is important for the trial judge to check the terms of any special defence carefully and to raise any problems with the defence before the ballot starts. In *GW v HM Advocate* 2019 SCCR 175, the Lord Justice General explained in the context of a notice of consent, but in remarks which are of general application, that:

"34… All that should be stated in such a defence is that the complainer consented to the conduct libelled or that the accused had a reasonable belief that she had consented to that conduct. The defence, which is intended only to provide notice to the Crown, should not be used as a vehicle in which to provide the jury with a narrative of the accused's account of events in advance of, and potentially in the absence of, testimony to that effect from the accused or other witnesses." [Emphasis added]

Coercion and automatism are regarded as special defences for this purpose.[13]

6. The balloting stage of the trial will be an opportunity for the judge to identify with parties the topics which will require to be the subject of written direction in addition to those which apply in all cases (see below re Day two). It is also an opportunity to ascertain if there can be further agreement of evidence and, having sought the views of parties, to make directions under the Coronavirus (Scotland) Act 2020 schedule 4, where appropriate, that professional and police witnesses give evidence remotely;
7. Parties will be asked by the judge whether this case is one of high profile that may require extra substitute jurors, i.e. more than five. If so, the court may, of its own accord or on the application of parties, direct that the reserve list be increased to a maximum of 10 jurors;
8. Fifteen names ("the first list" plus five or more substitutes ("the reserve list") are drawn by the clerk;
9. There is no longer any right of peremptory challenge, but a juror may be excused on joint application of all parties notwithstanding no reason is given.[14] A juror may be objected to by a party on cause shown;
10. Judge considers making an order under section 4(2) of the Contempt of Court Act 1981 to restrict reporting until the commencement of the trial: otherwise the media could report that a jury in the case has been balloted. This could alert the jurors to the case that they are presiding over and they could carry out research as they have not yet been directed by the court not to;
11. **In relation to Remote Jury Centres which remain in operation only:** Judge makes an order under paragraph 2(3) of schedule 4 of the Coronavirus (Scotland) Act 2020 directing that the jurors need not physically attend the trial courtroom but will attend by electronic means, namely by a television link between the RJC and the trial courtroom. The following wording is suggested:

Style direction – appearance by electronic means

"By virtue of paragraph 2(3) of schedule 4 of the Coronavirus (Scotland) Act 2020, having given all parties an opportunity to make representations, the court considers that a direction under paragraph 2(3) will not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice, and therefore directs that the jurors need not physically attend the trial courtroom but will attend by electronic means , namely by a television link between [Courtroom X] and the said trial courtroom";

12. The clerk of court will then telephone the balloted jurors telling them to attend the next day. It will therefore be necessary for the trial judge, during the ballot procedure, to ascertain the time at which those selected will require to attend.

Day Two

1. On arrival each juror is given a pack containing the indictment, special defences and a copy of the written directions which the judge will later deliver (see below re written directions). The jurors are advised not to look at their pack until told by the clerk that they may.
2. The clerk must speak to all 20 or 25 balloted jurors before the court is convened. In addition to checking the names and addresses of the jurors who have responded to their citations, and covering any relevant safety issues, the clerk will advise them of the name or names of the accused and anyone else named in the indictment and any special defence. [15] This is to ensure that, so far as reasonably practicable, potential jurors are made aware of the names of all of those persons knowledge of whom on their part might give rise to the suspicion of prejudice. The clerk should tell the jurors that if they do have knowledge of such a person, they should speak to the clerk privately about the matter, so as to avoid the risk of tainting other jurors and to give the clerk an opportunity to assess what is said and, if necessary, bring it to the attention of the judge and the parties;
3. The judge should check with the clerk of court before she/he takes the bench that the clerk has carried out these duties and if not, ask them to do so.
4. Jurors will each be given by the Jury Attendant a copy of the document "Your Responsibilities as a Juror".
5. If the priority trial cannot commence see "Repurposing jurors" below.
6. The judge will come onto the bench (see "Procedure after judge takes the bench" below). [For trials proceeding via the Edinburgh Remote Jury Centre, the judge will ask for jurors to be connected by audio/video link. The clerk will call the case. The judge may want to ask the jurors if they can (see and) hear proceedings effectively.]
7. At this stage the judge may want to thank the jurors and substitutes for attending and explain that everyone present should listen to what is said, or could do so after the clerk has called the case and invited the jurors to enter the jury box. (See "Before the indictment is read" below)
8. Not guilty pleas and appearances will be confirmed by parties in the presence of the jury. (See "*Tendering a plea*" below).
9. Before the indictment and any special defence is read, the judge will invite the jury to retrieve those documents from their jury pack.
10. The judge will hand over to the clerk who will read the indictment [and any notices of special defence.] (See "Reading the indictment and any special defence" below)
11. The clerk will administer the jury oath or affirmation. (See "Swearing the jury" below) A procedure was approved for remote trials by the Lord Justice Clerk. The procedure aims to avoid affirming jurors having to move to the front of the jury and do so individually.
12. The judge will then make appropriate opening remarks such as 'suggested opening

remarks and impartiality questions'.

13. The judge will deal will address unused substitutes and allow them to leave with the court's thanks and either confirm that their jury service is complete or provide appropriate instruction on what they must do.
14. The judge will address the jury using words such as those in 'Suggested introductory remarks: Introducing the case and procedure to the jury'.
15. At the conclusion of those remarks, the judge will give read the part of the 'Written Directions' which apply in all trials and any of those in the menu of further introductory directions which are applicable in the trial.

Swearing in the Jury

When administering the oath to jurors, they should raise their right hand, say I do and also nod when taking the oath.

Affirmation

If any juror wishes to affirm they will do so while remaining in their allocated seat and, if there is more than one, they will take the affirmation collectively. The clerk will not ask them to raise their hand. They will be asked as a group, if more than one, to repeat the following, stating their name as noted at the start:–

> *"I, (name), do solemnly, sincerely and truly declare and affirm that I will well and truly try the accused and give a true verdict according to the evidence".”*

Repurposing jurors

Section 88 of the 1995 Act provides as follows:

> *“(1) Where the accused pleads not guilty, the clerk of court shall record that fact and proceed to ballot the jury.*
> *....(4) Notwithstanding subsection (1) above, the jurors chosen for any particular trial may, when that trial is disposed of, without a new ballot serve on the trials of other accused, provided that—*
> *(a) the accused and the prosecutor consent;*
> *(b) the names of the jurors are contained in the list of jurors; and*
> *(c) the jurors are duly sworn to serve on each successive trial.”*
>
> *[Emphasis added]*

If jurors have been balloted for trial A and attend court the following day, but trial A does not proceed for some reason [e.g. the accused pleads guilty or fails to appear, an essential witness is absent] **AND** the Crown has a back-up trial, B, which can proceed, the court can, if all parties consent, use the jurors balloted for trial A as the jury in trial B, which can then start.

The basic requirements to invoke the use of section 88(4) are:

1. that jurors have properly been balloted for “a particular trial”; and
2. “that” trial has been “disposed of”.

This does not mean that the "case" be disposed of. The focus is on the "particular trial" for which the jury have been balloted, not the case.

If the section 88(4) procedure is in play and trial B is due to proceed with the re-purposed jury, then the court should proceed as follows:

- The trial which is not proceeding, and for which the jurors have been balloted, should call and should be "disposed of" for the day, whether by postponing/adjourning, deserting, granting a warrant for the accused etc;
- The clerk should check with the jurors in attendance, as would be normal, that they do not know the accused or a witness in trial B and that there is no other reason for them not to serve;
- Whilst it may be preferable if the back-up trial calls, with the accused present, and the matter of utilising the section 88(4) process is aired, it is not essential.[16]

1.
2. the record of proceedings of
   the subsequent trial states that the jurors who served on the preceding trial
   also served on the assize of the accused then under trial and that no objection
   was made to the contrary; and
3. those jurors must be sworn
   together in the presence of the accused in the subsequent trial.

As it is put in Renton and Brown at para 18-39:

> *"The consent of the accused need not be his personal consent but may be given on his behalf by the counsel or agent appearing for him even although he is not present at the time. It would appear that, at any rate in the latter case, the consent can be withdrawn at any time before the jury is sworn."*

Jurors are then sworn etc. in the normal way.

Note: If there is a chance that the back-up trial might go ahead the judge will need to have prepared the written directions (see below re introductory written directions) for that trial just in case, so that they can be printed and put into folders. It may of course turn out that these are not needed or at least not needed there and then, if the priority trial goes ahead.

All hearings to be recorded

The High Court has recently commented that:

> *"it is quite inappropriate to have what appears to be regarded as informal hearings in solemn proceedings. Any oral exchanges between parties and the sheriff should take place at a hearing after the case has been formally called. Where … the calling is at a trial diet all proceedings require to be recorded."* [18]

Jurors with disabilities

The fact that a juror suffers from a disability is not of itself a reason to exclude a juror, unless s/he seeks excusal on that basis. Any issues in that regard should have been flagged up in advance of the trial with the Jury Liaison Officers[19] so that reasonable adjustments can be made where required, but if issues arise on the day of trial with a balloted juror, the judge should make enquiries via the clerk of court as to what adjustments that person needs in order to participate fully in the trial.

Procedure after judge takes the bench

Before the indictment is read

At this stage - i.e. before the indictment is read and the jury sworn – it may be helpful for the judge / sheriff to address both empanelled and unempanelled jurors along the following lines:

> *"Good morning/afternoon. Thank you for coming in in answer to your citation to serve as jurors. (Apologies for any delay)*
>
> *Can I ask that everyone, those picked for the jury and potential substitutes / those who have not yet been picked, to listen carefully to all that is about to be said?"*

This may save court time in the event that a substitute juror requires to be sworn – see below.

Reading the indictment and any special defence

The indictment is read using the third person and omitting any reference to the designation of the accused, whether that is "*Prisoner in the Prison of..."* or *"whose domicile of citation has been specified as ... "*. Otherwise the indictment is read in full, including any docket thereon, although the judge may direct the clerk to read an approved summary in cases where the indictment is lengthy or complex.

Provision is made in section 88(5)(b) for a summary of the charge (or charges), as approved by the trial judge, to be read to the jury *"because of the length of complexity of the indictment"*. Such a procedure would require some advance work by the prosecutor and defence to prepare such a document for approval and distribution to the jury

Then the clerk reads any special defence which is insisted upon. This requirement may however be dispensed with on cause shown,[20] although in that event the judge must inform the jury of the lodging and general nature of the special defence.

The clerk must not read to the jury any notice lodged by one accused under section 78(1) of an intention to incriminate a co-accused. A judge should be vigilant to ensure that no reference is made to such a notice in the presence of the jury. When this has occurred it has sometimes led to desertion and starting again with a new jury.

If an accused intends to incriminate someone other than a co-accused, then that is a special defence which requires to be read.

Swearing the jury

Once the foregoing is complete, the Clerk of Court should ask the jurors to rise, if they have been allowed to remain seated so far. The clerk then asks each of the jurors to raise her or his right hand and to say "I do" after the clerk has read over the oath to the jury. A juror is entitled to affirm, rather than take the oath. Once the jurors are sworn, they resume their seats.

Once the oath/ affirmation has been administered, the judge makes her or his introductory remarks.

Introducing the case to the Jury: introductory remarks and written directions

Introducing the case to the jury

At one time, it was quite common for a jury trial to proceed immediately with the leading of the first Crown witness, but the practice developed over time of judges introducing the case to the jury, to provide jurors with an overview of the legal and evidential rules governing all cases, to acquaint them with the procedures to be followed and introduce them to agents/counsel involved

During the COVID-19 pandemic significant changes were introduced to the arrangements for conducting jury trials, including to introductory procedures to be followed by judges. Detailed guidance about these procedures is provided in this throughout this chapter. Whilst some of the procedures are expected to be temporary, such as the location of juries at remote sites, others, namely the judge's introductory remarks and the provision of written materials and directions, will continue beyond the pandemic as standard practice as the Lord Justice Clerk explained in giving the opinion of the court in *Hattie v HM Advocate* 2022 SCCR 80. Arrangements which relate to Remote Jury Centre trials only are detailed in the chapter entitled "Specialities in Remote Jury Centre Trials".

Introductory written directions

Since July 2020 all jurors have been provided with the following written materials at the start of the trial:

1. A note of their duties and responsibilities; and
2. A document, entitled "Written Directions for Jurors in Scottish Courts", explaining the general directions that apply in every case, including, if appropriate, specific directions in relation to:
    a. Dockets;
    b. Notices of special defence;
    c. Multiple charges;
    d. Multiple accused;
    e. Concert; and
    f. Mutual corroboration

It is the judge/sheriff's duty in each case to ensure that the appropriate written directions are provided to and read to the jury (see further guidance below), including such of the specific

directions at part C of the written directions, as are relevant to the case.

In addition, the judge/sheriff may consider it appropriate or useful in certain cases to provide additional written directions, either before the case commences or to supplement her/his charge. See Consideration of Additional Written Directions for further guidance on this.

Introductory remarks

Wording is suggested for opening remarks at the very start of the trial including suggested questions to ensure the impartiality of the jurors. There is also a suggested form of introductory remarks, setting out what may be termed "housekeeping arrangements". Judges should feel free to impart this information in their own way and in their own words, reinforcing what is said in the written directions along with the note of responsibilities referred to above, which the jury will already have in their packs.

Before making the suggested introductory remarks, judges should address the issue of whether any juror, on hearing the indictment (and any special defence) being read over, realises that he or she knows something about the case or one of the persons named.

It has become standard practice to ask the jury, and to make it clear that all those present who may be picked as substitutes must also listen, a series of questions along the following lines, before adjourning to allow the jury to settle in.

Jurors should be asked not to answer the questions in open court but to bring any issue to the attention of the clerk of court (via the macer or court officer) during the adjournment (see below) so that any difficulty can be considered and addressed. They should be told not to share any such difficulty with any fellow jury member(s)

1. *Do you know the accused [name(s)] either directly or indirectly?*
2. *Do you recognise the person sitting in the dock, between the two uniformed officers?*
3. *Do you know any other person mentioned in the indictment [or the person(s) named in the special defence]?*
4. *Do you know of any person who is or might be a witness to this case?*
5. *Do you know of any reason why you could not impartially serve as a juror?*
6. *It is impossible to predict with certainty how long the case will last, but those who are familiar with it expect it to take around [..number…] days. Does the length of the trial cause you a really serious difficulty?*

Section 88(7) of the 1995 Act gives the court power to excuse a juror from serving in a trial where the juror has stated the ground for being excused in open court. A literal application of section 88(7) of the 1995 Act runs the risk that a juror says something like "I know the accused because he broke into my house last year".

The judge will be informed of any problem by the clerk and, where appropriate, the judge can have the clerk share the information with parties, or can do so personally in open court, absent the jury. It is for the judge to decide whether or not a particular circumstance is a sufficient ground for excusing the juror. It is then possible to comply with section 88(7) following the adjournment without risking a juror saying something which may derail the whole trial at great inconvenience and expense.

A judge can simply pose a leading question, asking the juror to answer yes or no, e.g.;

> *"Am I right in understanding that in response to the questions I asked you gave certain information to the clerk of court?"*

If a juror has given a valid reason as to why they should not serve, they should be excused and a fresh juror balloted. The indictment (and special defence) must be read over again unless the judge determines under section 88(5) and 89 (2) to direct the clerk in the case of the indictment or him/herself in the case of a special defence to offer summaries. Some judges have sought and obtained the agreement of parties to summarise the charges for a new juror if a long indictment has already been read, and have proceeded to do so without difficulty.

The judge can assess whether it is necessary to go through the questions again with the new juror or whether it is safe to assume that they have been listening from the public benches. (see above)

If, as suggested above, all jurors and potential substitutes were asked to listen to the jury questions, it would be sufficient to ask the new juror:

> *"Did you hear the questions I asked the original jury?*
> *Please answer yes or no; did any of the questions I asked earlier cause a difficulty in your serving on this jury?"*

The answer will usually be negative, but if not then the juror should be asked to speak privately to the clerk and the court could be adjourned briefly for that purpose.

Internet searches

Before any adjournment, the jury should also be given a caution about internet searches. Appendix F includes a suggested form of words.

In this regard, the Appeal Court's observations in *Fraser v HMA* 2013 SCCR 674 at para 55 are informative:

> *"In order to combat the possibility of jurors conducting their own web searches, the courts have adopted a strategy of telling jurors at the start of a trial not to do so and explaining to the jurors why they are being told this. It is a common, and advised, practice to tell jurors that they are not the detectives and that they should not make any investigations or enquiries of their own about anything or anyone connected with the case. They are told that it is vitally important to the administration of justice that they should resist any temptation to carry out an internet search. The reason is often stated as being that the case has to be decided solely on the evidence that the jurors are to hear in court. Some judges ask the jurors to inform on their colleagues in the event of an apparent breach of these words of caution and warn the jury of serious consequences should any juror be involved in such a breach. However, other judges may regard this as overly intimidating and may simply tell the jurors that, if it were discovered that one of them had accessed relevant information on the internet, that could result in the premature termination of the trial or, if a verdict had already been returned, the overturning of the conviction upon appeal. In either case, the jury would be told, a re-trial may be the practical result with all its attendant problems, including inconvenience to almost all directly involved."*

Adjournment after commencement of introductory remarks

It is good practice at this point to have a short adjournment, in order that any issues arising from the questions above can be dealt with and to allow the jurors to go to the jury room to leave coats, bags etc, to get their bearings and to settle themselves down. The macer or court officer should therefore be instructed to take the jurors to the jury room for this purpose; in some courts in which lunch is provided in the court building, menus are available and these can be completed at this point in the jury room.

Unempanelled jurors

During the adjournment, the unempanelled jurors or substitutes should be asked by the judge to remain in the courtroom, in case a substitute juror does require to be taken from their ranks or in case they will be required immediately for a ballot in another courtroom. The judge should also take the opportunity to discuss with the Crown the day or hour at which the unempanelled jurors should return to court for another case (if at all). In busy jury courts, jurors are cited in batches for cases throughout the sitting and some courts maintain a telephone "Helpline" which is updated every afternoon with information as to when jurors may be required. Accordingly, on the basis of discussions with the Crown and with the clerk of court, the unempanelled jurors can be given some indication, albeit tentative, as to when their services might be required again. It would also be appropriate at this stage for the judge to explain to the unempanelled jurors that court staff will do all that they can to avoid inconvenience to them, but that jury service is a very important public duty, etc. A jury citation lasts not just for one case, but for all cases in the sitting.

After this has been done, the judge may require to rise briefly while the macer or court officer checks that the empanelled jurors are ready to return to the courtroom and, if so, to bring them back from the jury room.

Once the empanelled jurors return to the courtroom, and it is clear that no substitute juror is required, the unempanelled jurors can be released. This matter is dealt with in *Pullar v HM Advocate* 1993 SCCR 514 at 523D-G, where it is suggested that if there has been a brief adjournment as suggested, there has thus been an opportunity for any juror to communicate with the clerk about any potential difficulty s/he might have and the trial may simply proceed.

Reading the written directions

After the adjournment, the judge should conclude the introductory remarks and then go on to read the written directions to the jury.

(If the judge thinks it necessary to say something about the pandemic a suggested form of words is contained in "COVID-19 Jury Information" below. As jurors return to court rooms from July 2022 onwards, it can be anticipated that there may be a degree of anxiety for some jurors. In considering whether to use the wording in the "*COVID-19 Jury Information*" section, it may be useful for judges to know that from 4 July onwards, in line with current public health guidance, clerks and other SCTS staff will convey to jurors that the following measures to mitigate the risks of COVID-19 are in place:

- Whilst no longer mandatory, we continue to strongly recommend using face coverings when in our buildings and seated in courts, in the interest of everyone's safety;
- We encourage everyone to take a common sense approach to maintaining and respecting

others' personal space whilst in our buildings and when possible to do so;
- We are maintaining enhanced cleaning arrangements across the estate;
- We are maintaining ventilation levels in line with guidance.

It is the judge/sheriff's duty in each case to ensure that the appropriate written directions are provided to and read to the jury (see further guidance below), including such of the specific directions at part C of the written directions, as are relevant to the case. In addition, the judge/sheriff may consider it appropriate or useful in certain cases to provide additional written directions, either before the case commences or to supplement her/his charge. See Consideration of Additional Written Directions for further guidance on this.

In his Memo to Sheriffs Principal of 26 November 2020, the Lord Justice General concluded as follows:

> *"Some judges and sheriffs may think it burdensome to use this new procedure. Some may feel that it delays unnecessarily starting the trial with the leading of evidence. The answer to such thoughts and feelings is that our court system should not be designed for the convenience of judges and lawyers, but to provide effective and efficient justice. The evidence is clear. The provision of substantive written directions, and to do so in advance, enhances the capacity of jurors to recall and understand the evidence and the content and effect of the legal directions. I would therefore be grateful if you could forward this note to the sheriffs in your sheriffdom and advise them that both I and the Lord Justice Clerk are of the view that the interests of justice require that solemn trials in the sheriff court should be conducted following the same procedure.* The adoption of the new process of providing written directions should not be regarded as optional*" [emphasis added]*

Further, the judge should not seek to depart radically from or summarise these directions, as underlined by the Appeal Court in *Hattie v HM Advocate* 2022 SCCR 80, where the court opined:[21]

> *"[16] Judges are very strongly encouraged, and advised, to use the specimen pre-instruction directions. The specimen written directions are prepared in a clear, concise manner designed to be easily read, digested and understood. Their origin was explained by Lord Turnbull in giving the opinion of the court, comprising also the Lord Justice General and Lord Menzies, in SB v HM Advocate[2021] HCJAC 11 at paras 49 and 50 (emphasis added):*
>
> *"49. The second matter concerns the recent introduction of some quite radical changes to the way in which instruction is delivered to juries by judges. In discussion between the Lord Justice General, the Lord Justice Clerk and the Jury Manual Committee of the Judicial Institute, it was agreed that from July 2020 jurors should be provided with certain materials in writing at the start of the trial. These are, a note setting out the duties and responsibilities of a juror and a document setting out the general directions which apply in every case, as well as, if appropriate, setting out specific further directions which the judge considers are appropriate in the circumstances of the particular case.*
>
> *50. Accordingly, at the commencement of trials jurors are now given general oral guidance on the functions of the personnel and information about the timetabling of the case, all of which is intended to reinforce the written note setting out juror responsibilities which is*

issued to each juror on their arrival at the jury centre or court. This is then followed by the issuing of written instructions, which the trial judge will read to the jury, concerning the separate functions of judge and jury, the nature of evidence, how to assess witnesses, what is meant by an inference, the duty to decide the case only on the evidence, the presumption of innocence, the burden of proof, the standard of proof, corroboration, and how these issues impact upon the defence. Other written directions may be given as necessary concerning issues such as the purpose of a docket, a notice of special defence, the law as to concert and the concept of mutual corroboration."

[17] It is well recognised that whilst slavish and, in particular, unthinking, adherence to the words in the Jury Manual is not to be desired, a judge should not depart from the Manual, in respect of the general pre-trial directions in particular, unless satisfied that it is necessary so to do for the purposes of achieving a fair and proper trial. The issue was addressed in White v HMA 2012 SCCR 807 (Sy), para 13:

"… it should, on the other hand, be appreciated that the contents of the Jury Manual, which have been devised by the judiciary for the judiciary, are intended to be an encapsulation of sound law and good practice over the years. If a sheriff or judge wishes to depart from these contents, he is of course free to do so in a given case, but he requires to take care, in an ordinary case, before omitting a normal direction as described in the Jury Manual, or including an unusual direction or observation. This is particularly important when giving the jury the general directions applicable in almost every criminal case."

As the point is expressed in Renton & Brown, Criminal Procedure, 6th edition, para 18.79.1

"while judges are not obliged to use the ipsissima verba of these directions, they would be well advised to do so."

These observations apply equally directly to the specimen written directions, which are designed to address only the most commonly encountered issues.

[18] It is imperative that the written directions are read to the jury by the judge at the outset of the case. It is not enough to give the directions to the jury and tell them to refer to them if they wish, as the trial judge did in this case, saying "you may care to acquaint yourself with that in due course". The judge must go through the directions with the jury as part of the introduction to the case.

[19] The written pre-instruction directions should be exactly the same as those spoken by the judge. If, as should very rarely happen, the judge chooses not to use the specimen

directions, as the trial judge here chose, the directions should cover the same subjects as the specimen directions. Critically, they should be expressed in a similarly clear and concise way. It is to be borne in mind that the purpose is to assist the jury in the task ahead of them, to understand how to assess the evidence they are about to hear, and to recognise its significance in the context of the case. Clarity and concision are required to assist this process. It is not helpful, as happened in this case, for the trial judge to deliver the pre-instructions in a lengthy, verbose, discursive fashion. It is even less helpful to deliver those directions orally and yet issue the jury with the specimen written directions which have not been read to them and to which only fleeting allusion is made. The jury here were in fact given two different sets of directions at the start of the case: the specimen written directions, which were not read to them; and the more convoluted ones prepared by the judge, which were read to them but not furnished in writing. In this case, given that there had been a clear and serious misdirection on the police interview, the issue of whether a material misdirection resulted from the provision of different written and oral directions at the same time, and the reference to concert, did not arise, but it is difficult to see that the effect of these would have been other than highly confusing for the jury."

Judicial conduct and management of the trial

Witness warrants

Whilst the court has power to grant a warrant to arrest a witness who has failed to attend in response to a citation, or who has taken steps to avoid giving evidence, [22] it is rarely, if ever, appropriate to grant such a warrant in respect of a vulnerable witness, and never in the first instance.

There is an unreported and embargoed pre-trial appeal decision of 28 July 2022, [23] concerning a prosecution brought under section 1 of the Domestic Abuse (Scotland) Act 2018. The complainer was a deemed vulnerable witness and the court explained its thinking in responding to a suggestion that the Crown was at fault for not seeking a witness warrant for the complainer, at para 21 of its opinion:

> "…This is unrealistic. It runs entirely contrary to the modern understanding of the inherent vulnerability of complainers in sexual and domestic abuse cases and the suitably cautious approach of the Crown Manual (above). It is quite inappropriate in sexual and domestic abuse cases for complainers, who may be regarded as vulnerable, to be arrested and thus kept in custody pending liberation at a court appearance, or perhaps even until the trial diet, thus adding to any trauma which they might have already sustained. The appropriate course is, at least initially, to persuade the complainer to attend the trial, no doubt by, amongst other things, putting in place vulnerable witness measures. Better still, as was made clear in *Graham* (at para [20]), steps should be taken to have the complainer's testimony taken on commission. It would certainly have been wholly unsatisfactory, in the circumstances narrated, effectively to end the prosecution, especially without knowing the reasons for the complainer's reluctance to appear in court."

Effective use of court time

In 2023 our solemn courts confront an extraordinary backlog of criminal trials with many accused persons and witnesses having to wait years for trial. The backlog is a serious social problem with

an obviously acute impact on those remanded in custody, some of whom will be acquitted. There is a substantial impact on witnesses, many of whom may be vulnerable, who are kept waiting for years before giving evidence. The backlog puts considerable strain on lawyers, court staff and judges.

Finding ways to shorten trials is the most effective thing that judges can do to address the backlog because shortening trials enables more trials to be run within the same court capacity. By increasing court capacity in this way, we will make better progress in reducing what is proving to be a very durable as well as substantial backlog.

We are running historically high numbers of jury trials in both the High Court and Sheriff Court with extra capacity created to address the backlog. It goes without saying that judges should ensure that optimum use is made of extra capacity.

Recognising the problem, and drawing on our collective experience, that of colleagues and other resources, notably High Court Practice Note No.1 of 2013 (which strictly speaking only applies to the High Court, but contains practice which can readily be followed and indeed often is followed in the Sheriff Court)[24] the Jury Manual Committee has created a new subsection focussed on effective use of trial court time. Many judges may have worked out other ways in which to ensure that time is used effectively but we offer some suggestions which judges can apply as appropriate in the circumstances of their cases.

At all stages of procedure, reducing the number of witnesses called through effective pre-trial preparation and diligent and imaginative use of joint minutes is the most effective measure available to shorten trials and increase court capacity.

Even before the acute difficulties caused for jurors by the Covid:19 Pandemic it was recognised that jury service involves considerable disruption to the lives of members of the public to whom we owe it to take no more of their time than necessary. PN 1 of 2018 which introduced the Long Trial Protocol was another step on the journey to achieving this objective where possible.

For all of these reasons, sound case management and good use of court time are now more important than ever

There is potential to make better use of court time at different stages of the trial which are examined in turn.

Pre-trial

Effective case management at preliminary hearing and first diet is of crucial importance in ensuring that trials require no more court time than is necessary in the interests of justice. These considerations may appear to belong less in the Jury Manual and more in other works such as the Preliminary Hearing Bench Book, with particular reference to what is written at paras 6.7, 6.7.1 and 6.7.2 on the subject of agreement of evidence. Nevertheless they bear repeating and some will continue to be relevant at commencement of trial and throughout its duration.

- Encouraging parties, and particularly the Crown, to make more and better use of statements of uncontroversial evidence is an obvious first step towards shortening the time needed for trial.
- Ensuring that parties comply with their statutory obligation, under section 257 of the 1995

Act, to identify evidence which can be agreed.
- Ensuring that parties, and particularly the Crown comply with the obligation to identify those witnesses who will be called in the trial.
- At PH/FD, it may be useful to remind practitioners of the terms of PN 1 of 2013 at para 7:

> *"7. Adjournments should not normally be granted in the middle of a trial in order for parties to carry out preparatory or other work which should have been attended to before the commencement of that trial. In particular, adjournments to "edit" transcripts, "sort" productions and related matters, which ought to have been completed in advance, should not, normally, be permitted."*

Delay in starting a trial for a short joint minute to be typed was subject to trenchant criticism by the appeal court in *McClymont v HM Advocate* 2020 SCCR 160. At paragraph 50 the court observed that where possible a joint minute should have been completed and signed at first diet and "in any other circumstances joint minutes ought to be prepared outwith court hours."

At para 51 the court referred to prospective jurors being kept waiting for the joint minute to be prepared as unacceptable, explaining that: "This sort of unnecessary delay undermines the court's reputation and standing in the mind of the public and ought not to be repeated."

It continues to be the case that substantially more witnesses than necessary are called to give evidence in solemn trials. Unless there is a very strong presentational or other reason for adducing a witness to speak to undisputed evidence, the relevant facts should have been established by SoUE or joint minute.

The remote ballot

So long as a trial begins with a remote ballot, which considerably reduces inconvenience for potential jurors and must also save considerable costs in jury expenses, there is an inbuilt loss of trial court capacity of a day at present and half a day if it becomes possible routinely to both perform the remote ballot and introduce the case to the jury on the same day.

The remote ballot stage presents an excellent case management opportunity. With no jurors present, it is possible to have a very candid discussion with parties to see if more evidence can be agreed which may reduce the number of Crown and defence witnesses who need to attend. The preparation of any joint minute can be accomplished whilst the clerk is telephoning balloted jurors avoiding the situation which drew the ire of the appeal court in *McClymont*. Discussion with the Crown as to which witnesses are being called, and whether they are actually necessary, can claw back a lot of time and reduce the number of witnesses required who are also travelling and congregating in witness rooms. So there is a wider public benefit as well as the benefit of shortening the trial. Whilst in an ideal world all such matters would have been sorted out at PH/FD it is still better late than never at the start of the trial.

Getting started

If the Crown seek time to consider seeking a witness warrant, judges may usefully encourage the clerk to tell them to get on with it. Once they have the warrant, they do not have to execute it, but they then have some leverage over a witness who may be reluctant. Different considerations apply if the witness is vulnerable; See "Witness Warrants" above.

In current circumstances it is not possible always to permit the Crown, or defence, to insist on adducing witnesses in a particular order, however advantageous it may seem to parties to be for presentational purposes. Court time is a precious resource which must be treated as such.

- If there are problems about the availability of civilian or professional witnesses, is there a police interview recording which can slot in until they arrive? Or an evidence on commission recording?
- If a problem arises during the evidence of a particular witness, judges can encourage the making of progress by interposing another witness using the power under section 263(2).
- The production of a handwritten witness statement, whilst useful is not compulsory as a matter of law. There may be no written statement and yet the sense of what another witness will say about what a witness has said can be put for contradiction . The typed versions are sufficient almost all of the time although in most cases the handwritten statements are available anyway.
- Further agreement of evidence can be used to avoid delay in waiting for a Crown or defence witness if parties apply their minds to the problem and find a mutually acceptable formula for presenting agreed facts which a witness would otherwise have spoken to.
- In the High Court, judges have solved sudden witness availability problems by allowing, with the agreement of parties, evidence to be taken remotely under the emergency coronavirus legislation. It has been used to allow a witness who started giving evidence in person, but had to Covid-isolate during a weekend adjournment, to finish remotely from home. A defence witness whose babysitting arrangements fell through was permitted to give evidence remotely from home. Her evidence was not controversial but considered important by the defence. No problem arose in either instance but judges would be well-advised to consider the views of parties and would need to consider the particular circumstances before determining whether to proceed in this way.

Note

Although certain duties under section 257, to identify facts which might be agreed, subsist only until the start of the trial, there is no restriction under section 256 or at common law to joint minutes of agreement being entered into during the trial and introduced into evidence at times which are convenient for both prosecution and defence. There is no absolute requirement that it must be done at the start even if that is often preferable. It is a common occurrence for parties to enter into further agreement as the trial proceeds and one which is to be encouraged, but as the court explained in *McClymont* it should not delay the trial. In the High Court parties are adept at producing joint minutes outwith court hours.

The judicious use of joint minutes assists the jury, by reducing the number of decisions which they have to make. It benefits parties by conclusively establishing certain facts which are not in dispute.

Proceeding in the absence of the accused - Section 92 and 92(2A)

Ordinarily, all of the trial must take place in the presence of the accused as provided by section 92 of the 1995 Act. This is subject to the provision in subsection (2) relating to misconduct and

removal and subsection (2A) Subsection (2A) empowers a judge, on Crown motion and having heard parties, to proceed with and conclude the trial in the absence of the accused if an accused fails to appear after evidence has been led which substantially implicates the accused in respect of any of the charges on the indictment and where the court is satisfied that it is a stage of the proceedings where it is in the interests of justice to do so..

Plainly there are criteria to be met and judgment is required on where the interests of justice lie but the power has been used in the High Court on a number of occasions allowing trials to be concluded rather than delayed or deserted. It has been used when an accused failed to appear at the stage of speeches and where an accused failed to appear for the judge's charge.

In a multiple accused murder trial, where a remanded accused could not be moved from prison because he was medically unfit in circumstances where it could be inferred that he must have taken illicit intoxicants, the court used the power at a stage when the unfit third accused had already given evidence and the fourth and final accused was giving evidence. The fourth accused continued to give evidence and call witnesses in the absence of the third accused who was permitted to rejoin the trial the following day when he was fit. The third accused appealed on the ground that the situation was not catered for by section 92(2A) and there had been a miscarriage of justice. In refusing leave at first and second sift the court confirmed that the conditions of the subsection were met and there was no miscarriage of justice; *Ross Fisher v HM Advocate*, leave to appeal refused by Lord Justice General, Lord Pentland and Lord Matthews 30 September 2022.

Trial court time and making the best use of it

The trial judge is responsible for ensuring that best use is made of court time as Lord Justice General Gill explained at paragraph 11 of PN 1 of 2013:

> *"The responsibility of ensuring compliance [with the terms of the PN] rests with the trial judge. In that regard, the judge should not always wait until his/her court is 'ready', but should secure that it is ready for him/her on time at the start of each session."*

The Practice Note should be considered by all judges undertaking solemn criminal business who should particularly note the following from it:

- Courts should commence at 10 am on every day of the trial;
- A morning break should be kept to a maximum of 20 minutes at the end of which all personnel should be back in place;
- Judges are encouraged to sit on after 4pm if it will permit a witness, and particularly a vulnerable witness, to conclude their evidence.

In the High Court some judges will sit on till 5, 5.30 or later in order to finish the evidence of a vulnerable witness. Where it can be anticipated, it is helpful to prepare the jury for such a possibility by having the clerk find out, ideally during the lunch break, how late jurors can sit and what arrangements they may need to make for this to be possible. It is also important that parties and court staff are not taken by surprise by the judge deciding to sit late, for example after 4.30pm, so that they can, if necessary, make appropriate arrangements.

- It is open to the trial judge to sit earlier than 10am, in particular if there is a need to claw back lost time, which will require checking that parties and the court can accommodate an

earlier start and the accused, if in custody, can be made available.

- Preliminary business such as adjourned diets for sentence should be scheduled to conclude before 10 am and paragraph 6 of the PN states:

  "Accordingly, although legal representatives may attend to commitments in other first instance courts, provided they are scheduled to conclude before the trial commences/recommences, this should not be permitted to delay trial proceedings."

- Paragraph 5 of the PN is of particular importance in setting out what is required in order to make the best use of court time in trials:

  "Time should not be wasted as the result of early afternoon adjournments. For example, in the normal case, there is no reason why, if time permits, speeches should not be "split" overnight. Equally, there is no reason why a charge should not be "split" overnight. In short, in the absence of exceptional circumstances, speeches and charge should proceed up to the end of the normal court day."

It follows that there is no reason why a jury should not be invited to start their deliberations late in the afternoon so long as judges are careful to ensure that jurors are aware that they will have as much time as they need to consider their verdict. The situation before amendment to section 99 in 2003 was different. Jurors could not separate and would face the prospect of being taken to overnight accommodation, but even then a jury being put out at 1550 and returning a verdict at 1809 having been given a cut-off of 1900 was not a miscarriage of justice. [25]

In recent times High Court judges have been putting juries out to start considering their verdict up to and after 4pm without attracting appeals. In such circumstances juries generally require to come back the next day, but they will have made a start and time is not wasted.

Conclusion

Adhering to the terms and spirit of Practice Note 1 of 2013 to the greatest extent possible will serve to reduce the backlog and reduce its associated pressures on all concerned.

Day-to-day adjournments

From time to time during the trial, a judge may consider it appropriate to remind the jury that they must not discuss the case and the issues in the case with people outside the jury; that they have not heard all of the evidence and that the time for reaching decisions and conclusions on the case and the issues in the case will come when they commence their deliberations after closing directions; and that they should not seek to access outside sources of information about the case and any issue it raises.

Section 88(8) of the 1995 Act covers the exceptional situation in which the court may, either ex proprio motu or on the motion of the prosecutor or the accused, order that the jury should be kept secluded during an overnight adjournment. There appear to be no reported cases in which this particular section has been used. It is of course distinct from section 99(4), which covers the wholly exceptional situation in which a jury has to be secluded overnight when considering its verdict: see "Will overnight accommodation be required?" below.

Pleas of guilty from co-accused during trial

The tendering of a plea of guilty from a co-accused during a trial does not prejudice the fair trial of the remaining accused. If the co accused has a record, this should not be tendered until the jury have delivered a verdict on the other accused.[26]

Judicial intervention and questioning of witnesses

Questioning from the bench should be undertaken with extreme caution.[27] In *SG v HMA* the following excerpt from *Livingstone v HM Advocate* 1974 SCCR (Supp) 68 was highlighted:

> *"I must deprecate the practice of such constant interruptions by a presiding judge. Basically his function is to clear up any ambiguities that are not being cleared up either by the examiner or the cross-examiner. He is also entitled to ask such questions as he might regard relevant and important for the proper determination of the case by the jury, but that right must be exercised with discretion, and only exercised when the occasion requires it. It should not result in the presiding judge taking over the role of examiner or cross-examiner. Normally the appropriate time to put such relevant questions as he may think necessary for the proper elicitation of the truth is at the end of the witness's evidence, and not during the course of examination or cross-examination."*

In referring to that dictum, the court observed in *Green and others v HM Advocate* 2020 SCCR 54 that a presiding judge was entitled, if not required, to clear up ambiguities which the parties have failed to address. This would normally be undertaken when such ambiguities occur. It was not desirable to delay such action until the conclusion of the evidence from a witness. The court further observed that an intervention aimed at questions, which were relevant and important for the proper determination of the case and which remained unanswered, should be posed at the conclusion of the evidence from a witness. These would tend to be obvious questions which had not been asked but it was felt had to be asked prior to the jury considering its verdict. Such situations were considered to be rare and great care should be exercised to avoid opening a matter which parties had deliberately not probed.

The presiding judge/sheriff requires to ensure that questions asked for clarification do not verge on cross examination of a complainer. Further, any comments made from the bench, even outwith the presence of jury/witness, of necessity require to be measured. It is essential that no witness is treated in a bullying or disrespectful manner. The right of cross examination does not extend to insulting or intimidating a witness.[28] In *Donegan v HM Advocate* 2019 SCCR 106, judges and sheriffs were reminded to temper the use of questions of a derogatory and insulting nature, notwithstanding they might be asked without objection from the legal representatives.

The judge at first instance must be prepared, where appropriate, to intervene when cross examination strays beyond proper bounds, both in terms of its nature and length for which a complainer can be expected to withstand a sustained attack.[29]

In *Wilson v HM Advocate* 2019 HCJAC 36 criticism was made of the removal, at the conclusion of the complainer's evidence in chief, of the screen which had been employed to enable the complainer to give evidence, so that dock identification could take place. It was made clear that

this should not have occurred.

Objections to evidence

Objections to the admissibility of evidence ought to have been addressed at the preliminary diet/first diet per section 72(6)(b)(ii) or 71(2) and section 79.

Once a trial has commenced an objection may only be raised with leave of the court which must apply the criterion in section 79A(4) of the 1995 Act:

> *"(4) Where the party seeks to raise the objection after the commencement of the trial, the court shall not, under section 79(1) of this Act, grant leave for the objection to be raised* unless it considers that it could not reasonably have been raised before that time." [Emphasis added]

Before the court can consider such an objection the judge must be satisfied that it "*could not reasonably have been raised before that time"*. The Appeal Court has held that this prohibition should be strictly adhered to and does not contravene the accused's right to a fair trial.[30] The provision has considerable benefits in the management of the conduct of the trial.

Nevertheless, as the Appeal Court observed in *Ahmed v HM Advocate* 2020 HCJAC 37 it is part of the professional responsibility of any representative acting on behalf of an accused to object to the eliciting of inadmissible evidence or any other questions which appear to contravene the law of evidence and procedure. Subject to the terms of section 79A(4) (above) the presiding judge requires to hear an attempt to meet the criterion in that section and if so satisfied, the objection itself, unless it is patently misconceived.

Whenever one of the parties makes an objection to a question put by her or his opponent, the judge has to decide whether to ask the jury to retire when the point is argued. To the extent it can be practically facilitated, time is sometimes saved if the lawyers are invited to have a private word in a corner of the court room away from microphones. This often resolves the issue without requiring to exclude the jury. Whilst exclusion of the jury will sometimes be necessary, some objections can be dealt with immediately if the point is short. The real question is whether the discussion between parties and judge will reveal something which the jury ought not to hear and which might taint their view of the case. This may not be immediately obvious, in which case the judge may require to hear at least some of the argument before deciding whether to put the jury out. The parties themselves may suggest that the objection should be argued outwith the presence of the jury, a suggestion which the judge may choose to follow immediately or may seek a brief and coded explanation of why that would be necessary before deciding if the jury are to be excluded.

Of course, in a case with frequent objections, repeated retirals may annoy the jury but the judge should always ensure that any exasperation which s/he feels is not communicated openly in the presence of the jury, lest it be thought that the judge is favouring one side or the other.

Cases involving sexual offences- section 275 applications

What has been observed already in relation to judicial conduct applies with equal force in cases involving sexual offences. In such cases it may also be necessary to deal with late section 275 applications or to revisit decisions made in earlier applications.

It is worth stressing here the mandatory language of section 274(1) - to the effect that in cases to which it applies, *"the Court* shall not *admit, or allow questioning designed to elicit evidence [of the nature described in the section]"*, unless an application has been granted in terms of section 275.

Any application in terms of section 275 will normally have been disposed of prior to the trial diet.

(Although strictly speaking outwith the ambit of the Manual the principles to be applied are set out in Renton and Brown paragraphs 24.161 – 24.161.4 and in the the full bench decisions of *CJM v HM Advocate* 2013 SCCR 215 and *H v HM Advocate* 2020 SLT 1063. Other decisions of particular relevance to the trial stage include:

- *SG v HM Advocate* 2020 SCCR 79,
- *HM Advocate v JW* 2020 SCCR 174, and,
- *MacDonald v HM Advocate* 2020 SCCR 251.

There is a very useful and detailed synopsis on these provisions in chapter 9 of the Preliminary Hearings Bench Book which can be found on the "Bench Books" page of the Judicial Hub. What is set out in that chapter applies with equal force in sheriff court cases and is essential reading.**)**

Notwithstanding any prior decision to admit evidence or allow questioning in terms of an application made in terms of section 275, the court has power at any time in terms of section 275(9) to limit the extent of such evidence admitted or questioning allowed as it thinks fit. Subsection 275(9) has now been authoritatively interpreted on appeal.[31] The court confirmed that the power to limit can extend to a complete revocation of the earlier decision. The court would be obliged to do so if the effect of the earlier grant of a section 275 application would be to permit the admission of inadmissible material wholly irrelevant to the issues at trial and in breach of the protections bestowed by the statutory regime. The court also confirmed that this may be done during the trial, observing that the statutory language points away from the power only being available in light of changed circumstances. The provision:

> *"not only allows the court to exercise the power "as it thinks fit", but enables it to do so "notwithstanding the terms of its decision under subsection (1) above" or any condition attached to the grant."*

The court reiterated that "the court has a duty to ensure that the legislation is applied" and explained, in examining a judge's power to raise the issue of a subsection 9 limitation ex proprio motu:

> *"This may happen at a subsequent preliminary hearing, or more probably at trial. There may arise circumstances, such as the present case, where it is obvious that an unopposed application has resulted in the prospective admission of evidence which would be wholly*

irrelevant to the issues at trial. The reasons why a limitation on the grant may be appropriate may be more nuanced, resulting from developments at trial or the way certain evidence has emerged. Whether to invoke the power in section 275(9) will be a decision for the individual judge in these circumstances. If there are sound reasons for believing that the effect of the approved application would be to admit evidence which was in reality inadmissible according to law, and in breach of the protections offered by the statutory regime, judges are obliged to review the matter under section 275(9)."[Emphasis added]

As has already been noted under the general observations, it is essential that judges familiarise themselves with the full terms of any prior decision on such an application. Further, the operation of sections 274 and 275 require to be the subject of continual assessment throughout a trial. It accordingly is extremely important to be fully familiar with what is laid down in these decisions as summarised in chapter 9 of the PH Bench Book. Reported appeal decisions reveal instances in which applications made in terms of section 275 have been granted in circumstances in which they should either have been refused or limited to a significant degree.

Jury directions under s.288DA and s.288DB during or after a witness' evidence

[Judges may wish to consider whether to give the statutory directions at the end of, or during, a witness' evidence rather than in closing directions only. This may be appropriate if much has been made of delay etc or in a lengthy trial.]

Possible directions during, or at the end of, a witness' evidence

DELAY IN REPORTING

Members of the jury, you have just heard [adapt as appropriate] evidence suggesting that the complainer did not tell, or delayed in telling, anyone/a particular person about an offence, or did not report, or delayed in reporting it to the police. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature.

When you come to consider your verdict, you will have to consider these matters. But you will need to bear in mind that there can be good reasons why a person against whom a sexual offence is committed may not tell anyone about it, may not report it or may delay in doing so. This does not, therefore, necessarily mean that the allegation is false. [if appropriate] You will also have to consider the explanations given for this.

LACK OF PHYSICAL FORCE OR PHYSICAL RESISTANCE

Members of the jury, you have just heard [adapt as appropriate] evidence suggesting that sexual activity took place without physical force being used to overcome the will of the complainer or without physical resistance on the part of the complainer. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature. When you come to consider your verdict, you will have to consider these matters. But you will need to bear in mind that there can be good reasons why sexual activity can take place without someone using physical force to overcome the will of the complainer or without physical resistance from the complainer. The fact that a person has not used physical force or that the complainer has not physically resisted does not necessarily mean that the allegation is false. [If appropriate] You will also have to consider the explanations given as to why there was no physical force or resistance.

Submissions as to sufficiency of evidence

Sections 97 and 97A deal with submissions in relation to sufficiency of evidence that may be made at the close of the Crown case, the close of the whole of the evidence and the conclusion of the prosecutor's jury speech respectively

Section 97: No case to answer submissions

See generally Renton and Brown at paras 18.74-18.75.3.

A submission that there is no case to answer, which must be made in the absence of the jury, can be made at the close of the Crown case by the defence and the prosecutor is entitled to reply.

Such a submission is essentially directed to the entirety of a charge or any alternative which would arise. Different provisions permit submissions to be directed to a part of a charge, but at a subsequent stage in proceedings.

Section 97 of the Criminal Procedure (Scotland) Act 1995 provides as follows:

> *"97. No case to answer.*
>
> 1. *Immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both-*
>   a. *on an offence charged in the indictment; and*
>   b. *on any other offence of which he could be convicted under the indictment.*
> 2. *If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.*
> 3. *If, after hearing both parties, the judge is not satisfied as is mentioned in subsection (2) above, he shall reject the submission and the trial shall proceed, with the accused entitled to give evidence and call witnesses, as if such submission had not been made.*
> 4. *A submission under subsection (1) above shall be heard by the judge in the absence of the jury."*

The test for sufficiency

The submission is concerned only with the quantity of evidence and not its quality. All assessments of the meaning and quality of the evidence are for the jury to make.

The proper approach to such a submission was explained by the Lord Justice General (Hamilton) in *Mitchell v HM Advocate* 2008 SCCR 469 at para 106:

"…when any question of sufficiency of evidence arises, in the course of a trial or on appeal, the evidence relied on by the Crown is to be taken 'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown."

In a circumstantial case, the threshold for sufficiency is explained in the opinion of a full bench in *Megrahi v HM Advocate* 2002 JC 99 in an often referenced explanation of what may be done with circumstantial evidence at paras 31-36.

It is open to a trial court, i.e., the jury, to hold the guilt of the appellant to be proved on the basis of circumstantial evidence coming from at least two independent sources.

In a case concerned with the significance of the finding of DNA, the Lord Justice General, Carloway, explained in *McPherson v HM Advocate* 2019 JC 171, at para 10 that:

> *"…if one reasonable inference from the evidence is that the accused was the, or a, person who committed the crime, there will thereby be a sufficiency of evidence, notwithstanding the existence of other possible explanations. It is only if the inference is an unreasonable one that an insufficiency will arise (Reid v HM Advocate , Lord Justice-General (Carloway), para 18, citing Hamilton v HM Advocate , Lord Sands, p 5). Where more than one reasonable inference may be drawn, or if the inference is one which may or may not be drawn, it will be for the fact-finder to determine the result, applying the customary standard of proof. In that situation, the issue is not one of sufficiency of evidence, but one of its quality or strength."*

In a straightforward case in which there is a primary source of evidence such as an eye witness describing the commission of the crime by the accused or an admission to the crime by the accused, the requirement for corroboration was explained by a full bench in *Fox v HM Advocate* 1998 JC 94. The decision in Fox, is the basis for the written direction now given on corroboration. That direction was described as a proper direction and applied by the appeal court in *CR v HM Advocate* 2022 SCCR 227, the Lord Justice Clerk, Dorrian, explaining at para 19 of the opinion of the court:

> *"…In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact (Fox v HMA). The trial judge properly directed the jury that where there is a primary source such as an eye witness,*
> *all that is required for corroboration is evidence that provides support for or confirmation of, or fits with the main source of evidence about an essential fact."*

The jurisdiction to determine that no reasonable jury could convict is exclusively an appellate one. See section 97D:

> *"97D No acquittal on "no reasonable jury" grounds*
> *(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.*
> *(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed."*

In assessing submissions under section 97, it is important that the judge does not stray into consideration of matters that are more properly within the function of the jury. In a recent case involving consideration of application of the Moorov doctrine, the High Court commented,

> "it is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer. In particular the judge should not be induced into a detailed consideration of whether a jury's determination that mutual corroboration applied would be reasonable.(see Criminal Procedure (Scotland) Act 1995, s 97D)"[32]

There are many illustrations of these principles in the "Corroboration in rape cases" chapter.

Implications of section 97

It follows from the terms of section 97, that if on a charge of theft by housebreaking the accused could be convicted of theft or reset, the submission could not succeed. If on a charge of murder the accused could be convicted of assault, the submission would not succeed.

As it is put in Renton and Brown at 18.75

> *"…Section 97 will not apply where there is sufficient evidence on any part of a charge (e.g. on some elements of a charge of assault or some articles in a charge of theft) since that evidence would justify a conviction on the charge libelled which is deemed to include an allegation that the accused did all or part of the acts charged."*

That statement is then refined for cases where truly separate offences are combined in one charge; what matters then is substance rather than form. Whether that is the position in a particular case may be a matter of fine judgement and assistance will be found in the cases quoted at fn 5: *Cordiner v HM Advocate*, 1991 S.C.C.R. 652 at 671 per Lord McCluskey; *HM Advocate v Young*, 1997 S.C.C.R. 647 and *Wilson v HM Advocate* 2019 SCCR 273. *Wilson* was a case in which a single charge contained instances of assault which had occurred on a number of separate days and the Lord Justice General, Carloway, adopted what was said by Lord McLuskey in *Cordiner* stating, at para 40 of the opinion of the court, that:

> "…Where there are separate assaults libelled in a single charge (i.e. those occurring on different occasions) an accused is entitled to make a s.97 submission in relation to each one. The spirit of the provision cannot be circumvented by libelling an omnibus charge…"

Statutory submissions which may be made either at the close of the evidence or after the prosecutor's speech

Further provision is made in sections 97A, 97B and 97C which are examined below at the section titled "Submissions after the close of the evidence".

Lengthy Trials

Long trials bring a host of problems many of which can be avoided with effective case management at preliminary hearing/first diet by adopting the guidance in the Long Trial Protocol – Practice Note 1 of 2018.[33] It is best if such cases are managed through pre-trial diets by a nominated judge who will preside over the trial.

Whatever has gone before, the remote ballot day of a trial offers an opportunity for the trial judge to exercise further management of the trial at a stage when parties should know exactly what their case is and what evidence is truly required, which is superfluous and which can be agreed by joint minute.

After the evidence is concluded

Leaving aside the statutory provisions contained in sections 97A to C of the Criminal Procedure (Scotland) Act 1995, a judge presiding over a jury trial has an overarching duty to ensure that the proceedings are conducted properly and fairly. Accordingly, at the conclusion of the evidence, if the judge considers that there are matters which can usefully be addressed, submissions should be sought from the representatives of both Crown and defence outwith the presence of the jury.

Matters which may be usefully addressed include:

- whether alternative verdicts require to be the subject of directions;
- whether there are different groups or combinations of charges to which the principle of mutual corroboration may apply;
- how concert might apply in the circumstances;
- the potential withdrawal of any special defence; or
- exceptionally, whether parties agree that an acquittal verdict is not appropriate.

In this regard, if there is no apparent dispute that the constituent elements of the crime having been established, then there is merit in seeking clarification from the parties as to whether that is indeed the case. In circumstances in which there is no such dispute it may be unnecessary to give directions regarding the crime itself which thus shorten the charge. The adoption of this approach has been encouraged.[34]

If deletions to the libel are thought appropriate these should be raised which may prompt the Crown to move appropriate deletions.

[Judges should be mindful of the danger of wholesale deletions removing all specification of how a crime was committed: see chapter on "Deletions from a charge"]

Submissions after the close of the evidence

In common with a section 97 submission, [see above] such submissions are concerned only with the quantity of evidence and not its quality. All assessments of the meaning and quality of the evidence are for the jury to make. The evidence relied on by the Crown is to be taken 'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown."

Section 97A (2)(a) permits a submission of no case to answer to be made at the close of the evidence or after the Crown speech but it is difficult to see how it could succeed if it did not succeed at the close of the defence case. It could conceivably succeed if made for the first time at the close of the evidence or after the Crown speech.

Section 97A (2)(b) permits a submission at one or other but not both of these points that there is some part of the libel of a charge on which "… there is no evidence to support some part of the

circumstances set out in the indictment."
These are questions of pure legal sufficiency and are not concerned with quality or reasonableness; see section on no case to answer above and section 97D which provides:

> *"97D No acquittal on "no reasonable jury" grounds*
> *(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.*
> *(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed."*

Section 97B directs the court how it is to deal with a submission made under section 97A (2)(a) i.e., that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a "related offence.")

Section 97C directs the court how it is to deal with a submission made under section 97A (2)(b) i.e., that there is no evidence to support some part of the circumstances set out in the indictment.

Representatives' conduct and issues arising from speeches

In addition, the judge has a duty to ensure that representatives behave appropriately, not only in their conduct of the case in general but also in their speeches to the jury in order to secure a fair trial for an accused. The following observation from *Boucher v The Queen*1954 110 Can CC 263 was endorsed in *KP v HM Advocate* 2017 SCCR 451:

> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, - it is to lay before a jury what the Crown considered to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to it legitimate strength, but it must also be done fairly..."*

In *Lundy v HM Advocate* 2018 SCCR 269 the appeal court also referred to the following observations by the Privy Council in *Randall v The Queen* 2002 1 WLR 2237 at paras 10 and 11:-

> *"To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well understood and are not in any way controversial. But it is pertinent to state some of them."*
>
> *"It cannot be too strongly emphasised that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse."*

Serious contraventions of these accepted rules of practice will require detailed and emphatic action on the part of the trial judge.[35] What will constitute such contraventions will depend on the circumstances of each case and the content of the speech. If serious contraventions do occur the

charge requires to address the resultant serious problems caused by such a speech and to restore the balance.[36]

In particular, the prosecutor must not convey any impression that s/he believes the accused is guilty nor that investigations made by the Crown lead to that conclusion.[37]

Addressing issues raised by Crown / Defence speeches

In the case of *Miller v HM Advocate* 2021 SCCR 289 the High Court emphasised that it is the responsibility of the Crown to provide "*clear submissions [to the jury] as to the basis upon which it contends that the crimes charged have been established and as to the evidence relied upon for that purpose*".[38] It is similarly the responsibility of the defence to provide clear submissions as to the basis on which they are proceeding. In the absence of such, judges and sheriffs may, before charging the jury, seek submissions from parties.

In *Garland v HM Advocate* [2020] HCJAC 46 the Lord Justice General explained the obligations on a judge in directing the jury where the Crown speech fails to identify a relevantly corroborated case, at para 20:

> *"it is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful.…He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration."*

Any propositions which are put to the jury in speeches by Crown and defence which are unsupported by the evidence which has been led during the trial require to be addressed and corrected in the charge.[39]

See also the observations in *Menni v HM Advocate* 2014 SCCR 203 where the judge's charge was challenged (unsuccessfully) *inter alia* as not having dealt adequately with the failure of an advocate depute to put certain documents to a witness whose credibility he challenged, when he later relied on those documents in his speech as undermining that witness' credibility.

In cases alleging sexual crime, if there is no evidence to support the contention that the complainer consented to the alleged act, the question of consent requires to be withdrawn from the consideration of the jury.[40] Similarly if there is no basis for reasonable belief in consent that has to be specifically dealt with in the charge.[41]

Further, great care requires to be taken to ensure that issues which are not live for the jury to consider are not the subject of direction.[42]

In addition, in the event of a defence speech to the jury taking on the character of an undiscriminating and degrading attack on the general character of the complainer, this constitutes an impermissible attack on character and this should be made clear in the charge.[43] Similarly, if appropriate, reference to character of the complainer or attempts to evoke sympathy by a prosecutor will require to be specifically addressed in a charge.

If issues are raised concerning the failure to report the commission of any alleged sexual offence or physically to resist during the commission of such an offence, the necessary directions envisaged in sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995 require to be given.[44]

Clear and robust action is required in the event of a party providing the jury with a mistaken explanation of a legal principle.

It is not appropriate for a judge simply to point to what the prosecutor has said in lieu of any detailed legal directions required, in particular in complex cases involving mutual corroboration.[45]

The scenarios in *Morrison v HM Advocate* 2013 SCCR 626, Lundyand KP provide examples of what a presiding judge may face and what steps might be required to rectify the situation. Thus inappropriate comments by Crown or defence may require specific, clear and even robust directions to remedy the situation. In extreme instances, it may be necessary to interrupt the speech and address the representative outwith the presence of the jury. In circumstances in which the content of a party's speech to the jury has no evidential basis a judge would be perfectly entitled to make comment to the jury.[46]

The fact that the representative of the accused may endeavour to counter robustly any such transgressions of the part of the prosecution in the speech to the jury is of no moment. It is not their role to correct the deficiencies of the crown speech.[47]

Juror illness and COVID-19

(This section deals with information previously contained in the Amalgamated Briefing Paper on Restarting Solemn Trials, Appendix H.)

The clerk will tell jurors at the start of the trial that they should stay home / go home if they become unwell. Where that situation arises, the clerk will advise the judge and, in most cases, the juror will be excused.

From 2 May 2022 there is no longer an SCTS protocol on what is to be done if a juror displays symptoms of or tests positive for COVID-19. The process for managing this will thus be the same as for other cases of illness.

If a juror displays symptoms of illness that could be COVID-19 whilst at court or in a remote jury centre, the following procedure will be followed:

1. Juror informs an SCTS Official (jury attendant) that they have become unwell and explains what their symptoms are;
2. The jury attendant informs the clerk of court. The clerk will inform the judge.
3. The jury attendant will take the juror to a private room and will offer the juror a face covering if they wish to wear one. Supplies of disposable face coverings are held in all SCTS buildings;
4. The juror will be asked to go home where possible, they should minimise contact with others, e.g. use a private vehicle to go home. If it is not possible to use private transport,

then they should be advised to return home quickly and directly, and if possible, to wear a face covering). They may then wish to consult their General Practitioner regarding their symptoms;
5. If the juror is so unwell that they require an ambulance, the clerk will phone 999 and let the call handler know the juror is displaying symptoms of a respiratory disease, if applicable;
6. The juror is discharged, court adjourns to the following day and the room is cleaned in the intervening period.

Whenever the situation arises and a juror is excused, the judge will have to say something to the remaining jurors about the missing juror, such as:

"You will see, members of the jury, that one of your number is no longer with us. I have discharged that juror and the trial will now proceed with 14 / 13 / 12 of you"

More often than not the judge will also say something like:-

"I cannot go into the reasons for that juror being discharged and you should not speculate"

In the case of the juror with COVID symptoms, the situation is different and unique and it is suggested that judges consider being more transparent about the reason for the juror's discharge, without going into any detail. Of course, this may risk remaining jurors feeling anxious and unsettled about taking part in the trial and more disruption to the progress of the trial. Reassurance from the bench might go some way to allay concerns and minimise such a risk. The judge might also take the opportunity to underline for the remaining jurors the importance of following public health advice to minimise any risk. It is always a matter for the assessment and discretion of the judge, having regard to the particular circumstances of the case.

Jury misconduct, etc

If something arises during the trial which suggests juror misconduct or any other reason why a juror might have to be excused, then this ought to be brought to the attention of the judge immediately so that appropriate enquiry may be made and the matter dealt with. It is for the judge to determine the procedure to be adopted in making inquiry into such matters, having regard to the particular circumstances of the case. Judges have adopted different approaches in different cases and the key authorities are discussed in *Ferguson and Others v HM Advocate* [2021] HCJAC 15, where the court observed (per Lord Carloway at paragraph [39]) that:

> *"These cases illustrate that, where an allegation of juror misconduct is made, the nature of any inquiry will depend on the particular facts and circumstances. If there is information which prima facie supports the allegation, some inquiry will almost certainly be necessary. It is important to note, first, that any such inquiry has to be made in the context of a continuing jury trial, which should not, for a variety of reasons, be unduly delayed or interrupted and in which the jurors' attention should not be unnecessarily distracted from the central questions in issue. Secondly it is equally important that any inquiry should be as transparent as is reasonably practicable."*

All matters of concern should be raised with the parties in open court outwith the presence of the jury and not discussed in chambers. It may be necessary to hear argument in open court and exceptionally for the judge to question the juror concerned in chambers about the problem, in the presence of the clerk, although the court in *Ferguson* (supra) cautioned that "*any such interview should, in the modern era, normally be recorded*".

There are a number of reported examples of this, all of which turn on their own facts. For example:

- *Allegations of bias/prejudice* - The fact that a juror knows a witness is not *per se* a reason for assuming potential bias and acceding to a motion to reduce the jury to 14. There has to be something more, whereby the fair minded and informed observer, having considered the nature of the connection between the witness and juror, can conclude that there was a real possibility that the juror (and hence the jury) would be biased.[48] Alleged prejudice of a juror towards an accused is discussed in *McCadden v HM Advocate* 1985 JC 98. The problem of "familiarity" more generally is dealt with fully in *Pullar v HM Advocate* 1993 SCCR 514[49] and in *Robertson v HM Advocate* 1996 SCCR 243.
- *Allegations of jury interference* - The question of attempts at interference with jurors is considered in *Stewart v HM Advocate* 1980 JC 103.[50] Where a juror had been discharged on an assertion that he had been approached and offered a substantial bribe in return for influencing the other members of the jury, the trial judge should direct the remaining jurors that they should put out of their minds anything which had been said by the discharged juror. It was unnecessary and inappropriate to tell them that there had been a suggestion that improper pressure had been brought to bear on the discharged juror. That could only encourage them to search for any clues in his words or conduct that might point to the source of the improper influence, and that could only tend to distort, one way or the other, an objective and balanced approach to the evidence.[51]

Section 90 of the 1995 Act deals with the situation where either a juror dies during the course of a trial or where the court is satisfied that it is for any reason inappropriate for any juror to continue to serve as a juror. Under this section the judge may direct that the trial shall proceed before the remaining jurors (being not less than 12 in number) and thereafter the remaining jurors are a properly constituted jury. By section 90(2), however, any majority verdict of guilty cannot be taken unless 8 jurors are in favour of that verdict. The judge will require to give the jury directions on this. If fewer than 8 jurors are in favour of a verdict of guilty and there is not a majority in favour of any other verdict, the jury is deemed to have returned a verdict of not guilty.

- *Juror visits a locus* - It may happen that during a trial a juror goes to visit the locus of the crime. The mere fact that he does so does not infer impropriety: *Gray v HM Advocate* 1994 SCCR 225. It would only vitiate proceedings if it had the effect of depriving the accused of a fair trial.[52]
- *Juror wishing to ask questions* - It may happen that a juror will want to suggest questions that might be put to witnesses: see *Miller v HMA*, 1994 SCCR 818, for a discussion of this problem.

The judge charges the jury

Timing of the charge

In *Aitken v HM Advocate* 1984 SCCR 81 (when juries were normally secluded overnight), it was observed that the jury should not be asked to retire late in the day, especially after a long or difficult trial. Now that juries are usually sent home for the night when deliberating, the issue is of less importance.

It is, however, a matter for the trial judge's discretion whether to commence the charge at the conclusion of the speeches, to deliver part of the charge immediately with a view to concluding it the next day or to decide that the point in the court day has been reached at which it would be appropriate to adjourn.

No absolute rules can be laid down and these matters must be left to the discretion of the presiding judge in each case.

The sort of issues to be considered are the jury's ability to concentrate on and retain the content of speeches and charge at the close of the day, the number of charges and accused and whether speeches and/or the charge should be split over two days. Regard should be had to paragraphs 4 and 5 of the Practice Note No 1 of 2013[53] from the Lord Justice General where it is emphasised that speeches and charge should proceed up to the end of the normal court day, in the absence of exceptional circumstances.

Content of the charge

The content of the charge to the jury depends, of course, on the circumstances of the case. The judge has the sole responsibility of giving the jury proper directions on the law which they have to apply. Detailed guidance and specimen charges in relation to particular offences are provided in the following chapters.

As said in *McGartland v HM Advocate* 2015 SCCR 192 *(Lord Malcolm para 31),* however,

> *"in general the jury manual does not remove the trial judge's duty to tailor the charge to the specific circumstances of the case, or with a view to giving proper and clear directions to the jury … Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial."*

In particular where there are evidential and/or legal complexities, the judge must ensure that clear guidance is provided as to the route to verdict available to jurors. If necessary, the judge can require submissions from parties to make clear the basis on which they are proceeding, in particular from the Crown as to the basis on which it seeks a conviction and on what evidence it relies.[54]

To encourage greater jury note taking, or engagement with the evidence, the trial judge should, in their concluding remarks, before sending the jury out to consider their verdict, consider inviting jurors to take a short period of time at the start of their deliberations to review the notes they have taken, or reflect on the evidence they have heard.

Recapping of written directions

In *SB v HM Advocate* [2021] HCJAC 11 the court confirmed that there is no requirement in the charge to repeat at length all of the written directions provided at the start of the trial. The jury should, however, be reminded that they have copies of the written directions and that they must

follow those as well as any additional directions provided in the charge.. One possible formulation might be to say at the start of the charge:- "I gave you directions in law at the start of the trial and you have a copy of them. You must apply those directions when considering your verdict. I will not repeat all of them but I will expand on or revisit some of them in light of the evidence in this case."

The degree to which those directions require to be repeated, refined or expanded upon will be informed by matters such as:

- the evidence and the precise nature of the issues raised;
- the conduct of the trial;
- the length of the trial parties' submissions and speeches;

In a Moorov case, for example, directions on corroboration will need to be very specific.[55] Or, where corroboration is an issue, such as in a wholly circumstantial case or one where corroboration of a witness was to be found in circumstantial evidence, more will be required. In other cases, such as an assault where the only issue is self-defence, the introductory directions on corroboration may suffice.

Whatever requires to be repeated or elaborated upon, reference should still be made to the guidance in the chapter on General Directions.

In summary, at all times it should be remembered that the introductory directions are just that. While they cover much of what is to be found in the opening part of a charge they will not be sufficient of themselves in every case. Directions in the charge must always be tailored to the circumstances of the case.

And finally

Once the charge has been completed, the judge should *not* ask the parties whether there are any other directions which they wish given.[56] The Clerk of Court, however, maintains a check-list of the general directions which have to be given in every case and uses this while the charge is being delivered. So, if the judge forgets to tell the jury anything about, for example, corroboration, it is possible/likely that the clerk will draw this to the attention of the judge before the jury retires. It is possible too that the prosecutor or the defence ex proprio motu may ask the presiding judge to give other or further directions, or point out any slip of the tongue.

Closing of the court during charge

There once existed a practice of preventing the public from entering the court during the judge's charge.

It was reinforced by notices on the doors saying something like "No entry-Judge's Charge". The exact origins of the practice are unclear.

In normal circumstances there is no warrant for preventing access to the Court. It may indeed be unlawful to do so as a general rule, hence the need for section 92(3) of the 1995 Act.

At times it may be appropriate to exclude members of the public, such as when they are being disruptive or intimidating witnesses. Judges can use their discretion in dealing with them but the default position is that the court must remain open.

There is no reason why a sign asking the public to enter and leave quietly or some such wording should not be affixed in a prominent place, if that is not already the position, but there is no special rule in relation to the charge as opposed to any other part of the proceedings.

The jury retires

It is of paramount importance that the jury be given sufficient time to consider its verdict.

In some cases it may be appropriate to emphasise to the jury members that they are under no pressure of time from the court to reach a verdict and that they must take whatever time, however long or short, they need to consider their verdicts.

The lunch interval

It often happens that a jury is asked to retire to consider its verdict in the morning and has not completed its deliberations before lunch. Most judges consider it sufficient to send the clerk to tell the jury to cease their deliberations and arrange for them to go/break for lunch. The jury should be told that if they are still deliberating at lunch time the lunch interval is not to be used for a continuation of their deliberations; they should simply avail themselves of the break which lunch provides.

The clerk of court is usually given the authority to ensure that the jury are brought back from lunch into the jury room and secluded thereafter. See generally section 99(4) of the 1995 Act, which is discussed further under the heading "Supply of meals, etc." below.

Jury wish to see productions

The jury have no absolute right to see any productions in the case; the matter is wholly within the discretion of the judge. For a recent discussion see *Begum v HM Advocate* 2020 SCCR 223.The cases are reviewed in Renton & Brown, *Criminal Procedure*, 6th ed at paragraph 18-87.

If the jurors wish to see a production, the Clerk of Court will communicate their request first of all to the judge. The judge should consider the matter and, if in any doubt about the request, the court should be convened and it can be canvassed then, in the absence of the jury, but in the presence of the parties including the accused. Even if the judge is inclined to exercise her or his discretion in favour of letting the jury see the production, she/he should nonetheless instruct the Clerk of Court to communicate the jury's request to each of the parties' representatives. If any one of them expresses any objection or doubt about the request, the Clerk of Court should bring that to the attention of the judge and again the court should be convened so that the whole issue can be canvassed in open court.

Care requires to be taken in the choice of words used in giving directions to the jury about access to productions. See *McLellan v HM Advocate* 2009 SCCR 55 at paras [6] and [22], where the trial judge's choice of words may have carried an implication that the jury could not see one production.

Jury requests further directions

This often happens. The jury should be instructed by the clerk to produce their questions in writing, and the clerk should advise the parties of these.[57] When further directions are requested,

the court must reconvene without the jury, in the presence of the accused, and the judge should invite views from parties on how the question should be answered. Whilst it is the judge's responsibility to determine how to answer, submissions can be helpful.

Thereafter, in the presence of the jury, the judge should read their request to them and confirm that this is the question to which they seek an answer.

Further directions may then be given as the circumstances require. Sometimes there is little a judge can say, but if the question was ambiguous, the judge could ask the jury if their question has been answered.

Once any further directions have been given, the jury should then be invited to retire again to consider their verdict. The necessity of giving further directions in open court is dealt with in *Cunningham v HMA*, 1984 SCCR 40, 1984 JC 37 and in *McColl v HMA*, 1989 SCCR 229.

If the jury spontaneously ask a further question, the judge would need to decide whether to adjourn to seek the views of parties or whether the point was so clear that she/he can be confident that an immediate answer can be given. The former will often be the safer course.

Sometimes a jury request further directions, but by the time everyone has assembled, they have changed their minds and do not require further guidance. In *Brown v HMA* 1997 SCCR 201, the request for further directions came at a point when another jury were being selected for the next case. There was a long delay in attending to the request and the jury decided to proceed regardless. An appeal against conviction failed; the court rejected arguments that the jury might have convicted in a fit of pique and held that it was not lightly to be inferred that jurors would betray their oath because of resentment at the delay; in any event the verdict actually returned in this particular case was a "discerning" verdict.

Sometimes the judge may decide ex proprio motu that further directions should be given. This is provided for in section 99(3) of the 1995 Act.[58] Once again, this should always be done in open court in the presence of all parties.[59]

Once the jury has retired court staff such as bar officers should not answer any questions put to them by the jury, e.g., about the verdict: *McLeod v HMA* 2006 SCCR 679.

Supply of meals, etc.

This is covered by section 99(4) of the 1995 Act. It is competent under this subsection for the judge to give such instructions as she/he considers appropriate about: the provision of meals and refreshments for the jury; the communication of a personal or business message, unconnected with any matter in the case, from a juror to another person or vice versa; and the provision of medical treatment or other assistance immediately required by a juror. Section 99(4) and (7) also covers the question of adjournment overnight after the judge has charged the jury and of provision of accommodation, if the judge concludes that the jury require to be secluded overnight, which is discussed in the Appendix - "Provision of overnight accommodation for the jury".[60]

Will overnight adjournment be required after the jury have commenced discussing their verdict(s)?

Section 99(7) of the 1995 Act, inserted by section 79 of the Criminal Justice (Scotland) Act 2003,

provides that the court may, if it thinks fit, permit the jury to separate after they have retired to consider their verdict. The jurors may, therefore, be allowed to go to their own homes overnight if they have not reached a verdict at the end of the day and this is now almost invariable practice.

Although the section is framed on the basis that the jury is to be secluded while considering its verdict unless a direction is made under section 99(7) to allow them to separate and go home for the night, such a direction is invariably given in practice and it is suggested that seclusion should nowadays only be ordered if there are concerns for the safety or protection of the jurors which cannot be otherwise addressed.

In any event, since it may still be appropriate in some, albeit highly exceptional, cases for the jury to be secluded overnight and to be provided with overnight accommodation, detailed guidance as regards such exceptional cases is included in an Appendix, Provision of overnight accommodation for the jury.

It is a matter for the judge to determine at what time it may be reasonable to require the jury to break off their deliberations and adjourn overnight or for the weekend. That decision may turn to some extent on external considerations, including the weather and access to the court building or jury centre. A judge will also have to consider the particular circumstances of jurors who may have caring responsibilities or a long or difficult journey to get home.

At some point in the afternoon the question requires to be broached with the jury whether they expect to be able to deliver a verdict that day. Whilst older case reports describe such issues arising well after 6pm it is suggested that, subject to the foregoing considerations, it would generally be appropriate to leave the jury until about 4.45pm before making enquiry. If the jury let it be known before then that they are tired and wish to adjourn, many judges consider it reasonable to accommodate their preference.

This issue has been considered in a number of cases which were concerned with the pre-2003 Act regime where the jury required to be secluded in a hotel if there was an overnight adjournment. The relevant case law (considered in detail in the relevant Appendix) may be of assistance, although it is recognised that these cases were decided in a different era when the court was routinely considering arrangements which were complex and disruptive, not the least for jurors.

Whilst the court should be mindful of section 99 generally - the terms of subsection (5) suggest that a breach of the provisions of section 99 would lead to acquittal - the appeal court has explained that acquittal would follow only if an approach had been made to the jury which had as its purpose some improper influence or pressure being brought to bear on the jury with the aim of securing a conviction.[61]

The general principles to apply when considering whether to adjourn are that

1. The judge should determine at what time the jury should be asked whether they wish to adjourn or to carry on considering their verdict(s) a bit longer.. In making any such enquiry, whatever else is said, the jury must be told that no pressure is being put on them to reach a verdict and that they can take as much time as they consider necessary It should not be suggested to the jury that an overnight adjournment will cause inconvenience to anyone. It will be for the judge to decide whether the case should be called in court for the judge to make the necessary enquiry of the jury or whether, as frequently occurs in practice, especially in the High Court, the enquiry is made by the clerk on the judge's instructions.

The latter course is less cumbersome and saves time, but care is required as explained below.

2. Since the late 1990s the practice in the High Court has been for the clerk of court, on the instruction of the judge, to make the relevant enquiry of the jury by asking if they wish to adjourn for the evening or to continue their discussions. This can save time and inconvenience if the jury are close to delivering a verdict, provided that the court can accommodate that, in which case they can continue their discussions, but if the case is to be adjourned overnight the case will be called in court and the judge will require to reiterate the position as necessary.
3. Provided care is taken, this procedure does not breach the provisions of section 99 because the clerk is assisting the court, under the instruction of the judge, to address the issue of whether the jury should be secluded overnight or, in reality, to separate and go home per section 99(7).
4. The giving of the instruction by the judge to the clerk should be minuted. If the jury wish to carry on their discussions this should also be minuted and the parties informed.
5. The clerk should make it clear to the jury that it will be for the judge to determine if they should be directed to break off their discussions and to go home. If the clerk encounters any difficulty, then they should tell the jury to cease their discussions and advise that the case will call in court so that the judge can determine further procedure.
6. If the jury indicates to the clerk that they wish to adjourn, the case will be called in court in the presence of the accused and the judge should explain to the jury that the time has been reached when it would be appropriate to adjourn for the day and reiterate that the jury are under no pressure to reach a verdict and should take as long as they consider necessary.
7. The jury should be directed to cease their discussions until the next court day and not to resume their discussions until the case has called again in court the next morning. At that point the diet should be adjourned.
8. On adjourning, the judge should also remind the jury that they should not be discussing the case and any issue in the case with people outside the jury and that they should not be carrying out any investigations of their own, through the internet or otherwise, about the case, the people involved in it and any issue it raises.

Discharge of jurors

At the end of the trial it is customary for the judge to thank the jury for their service, for their attention to the case and for carrying out their duties. If the verdict comes late in the day, it may be appropriate to discharge the jurors immediately the verdict is recorded by the clerk and confirmed by the jury as correct, so that the jurors do not have to wait during any pleas in mitigation etc. if they wish to leave immediately. But before discharging the jury, the judge should always check with the clerk of court as to whether the jurors are required to return for any further cases in the sitting. The clerk of court will normally take care of any problems with jury expenses. It is probably not necessary to tell the jurors, when discharging them, that they may receive a letter within a few days from the clerk of court asking them to come back and re-assemble.[62]

When a case has been exceptionally long or stressful, some judges have discharged jurors from further jury service for a specified period of years. Any jurors who have served on a jury are entitled to claim exemption from further jury service for five years from the date to which they were cited (Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 sections 1 and 1A and schedule 1, part III Group F (a)) and judges may wish to inform jurors, when discharging them, that they may wish to claim that exemption. It is nonetheless open to the trial judge in appropriate

cases to direct the exemption of jurors for a longer period (1980 Act, sections 1 and 1A and schedule 1, part III Group F (b)) and to advise them accordingly. In either case it is suggested that the jurors should be referred to the Guide to Jury Service Eligibility and Applying for Excusal (which is available on the Scottish Courts website), and told to keep a note of the dates of the present case so that they can ensure any timeous claim for exemption can be dealt with in due course.

Post-trial support for jurors

In certain trials it may be appropriate to refer jurors to the availability of post-trial support. See the memo from Lord Justice Clerk Dorrian on the Judicial Hub, posted 7th July 2016.

COVID-19 Jury Information

What follows is a short suggested set of wording which judges may wish to use when speaking to the jurors about COVID-19. Alternatively, judges may wish to develop their own set of wording.

On the jury returning after the adjournment.

"First of all, can I assure you that I recognise that there may be a level of anxiety in having to perform jury service while the pandemic continues. I acknowledge that and very much appreciate your coming to perform your public duty as a jury in these circumstances.

Please be assured that your health and wellbeing are a priority. You have already been made aware of the arrangements in place to protect your safety during this trial. If you have any concerns at any stage please speak to the jury attendant or, if necessary, the clerk.

I will now move on to give you some information on the trial, your role and the role of others in the trial and the fundamental legal principles which apply."

[4] See Pullar v HM Advocate 1993 SCCR 514, where the High Court provided guidance on certain aspects of the problems that can arise

[5] *SG v HM Advocate* 2020 SCCR 79

[6] see *SG v HM Advocate* above

[7] *Smith v HM Advocate* 2021 S.C.C.R. 238, postscript at [26]

[8] *HM Advocate v Loughlin* [2022] HCJAC 42

[9] *Cochrane v West Calder Co-operative Society* 1978 SLT (Notes) 22; *McGlynn v HM Advocate* 1996 JC 224

[10] See the SCTS guidance on digital recording; and in respect of shorthand writers below: In the exceptional case where there is a shorthand writer (probably only where the recording equipment is completely inoperable and cannot be made to function without considerable delay), they will

normally take their place on the bench beside the judge or at another convenient place from where they can hear clearly all that is said. A rule of procedure that is no longer necessary is for the clerk to minute the administration of the oath de fideli to the shorthand writer. (Criminal Procedure Rules 1996, r.14.7) But the rule does not specify that the oath need not be administered. Although probably not necessary, a few judges continued to administer the oath in the standard form: “Do you swear by Almighty God that you will faithfully carry out the duties of shorthand writer at this trial?” If this is done, the judge should remember to repeat the procedure if a different shorthand writer is used on subsequent days during the trial or sitting.

[11] *Fraser v HM Advocate* 2003 SCCR 768

[12] *McLean v HM Advocate* 2007 SCCR 363 para [9]

[13] see 1995 Act, s.78(1) and (2)

[14] see 1995 Act, s.86

[15] *Pullar v HM Advocate* 1993 SCCR 514 at 522E-F

[16] Lamont (William) v HM Advocate 1943 JC 21

[17] Act of Adjournal Criminal Procedure Rules 1996, Rule 14.4

[18] *McGarry v HMA* [2022] HCJAC 18

[19] see Briefing Paper on Widening Jury Engagement

[20] see 1995 Act, s.89(2)

[21] Per LJC Dorrian @ para [16] et seq

[22] 1995 Act section 90A

[23] which judges can find on the T drive folder "Appeal Opinions - Pre-Trial" in the sub-folder “Time-bar cases,”

[24] available on the Scotcourts Website.

[25] *Sinclair v HM Advocate* 1991 SCCR 520.

[26] *McHale and another v HM Advocate* 2017 SCCR 427

[27] see *Donegan v HM Advocate* 2019 SCCR 106 paras 54-56, *SG v HM Advocate* 2020 SCCR 79 paras 26-28

[28] *Dreghorn v HM Advocate* 2015 SCCR 349 and KP v HM Advocate [2017] SCCR 451

[29] *Dreghorn v HM Advocate* 2015 SCCR 349 at para 39 and *Donegan v HM Advocate* 2019 SCCR 106 at paras 54-56

[30] *Bhowmick v HM Advocate* 2018 SCCR 35

[31] *JW v HM Advocate* 2022 JC 1

[32] *HM Advocate v BL* [2022] HCJAC 15 @ para[10]. See also *HM Advocate v MMI* [2022] HCJAC 19.

[33] This
can be found on the Criminal Courts Practice Notes and Directions page of the scotcourts website

[34] *Docherty v HM Advocate* 2014 SCCR 495 para 25

[35] *Lundy* para 52

[36] *Morrison v HM Advocate* 2013 SCCR 626

[37] *KP v HM Advocate* 2017 SCCR 451 para 17

[38] per Lord Turnbull at para [67]

[39] *MacDonald v HM Advocate* 2020 SCCR 251 at paras 44-45

[40] *MacDonald v HMA above,* para 41

[41] *W v HM Advocate* 2022 HCJAC 16

[42] *MacDonald v HMA* paras 41-43

[43] *W v HM Advocate* 2022 HCJAC 16.

[44] *MacDonald v HMA* above, para 46

[45] see *Stalley v HM Advocate* 2022 HCJAC 12

[46] Dalton v HM Advocate 2015 SCCR 125*; paras 14, 37 and 38. See also KP v HM Advocate* 2017 SCCR 451

[47] Lundy at para 60

[48] *McKay v HM Advocate* 2015 SCCR 275

[49] and see also its sequel in the European Court of Human Rights: *Pullar v United Kingdom*, 1996 SCCR 755

[50] and *Hamilton v HM Advocate* 1986 SCCR 227

[51] *Murray & O'Hara v HM Advocate* 2009 SCCR 624

[52] *Gray v HM Advocate* 2005 SCCR 106 at para [28], *Adam v HM Advocate* 2006 SCCR 354 at para [27]

[53] this can be found on the Criminal Courts Practice Notes and Directions page of the scotcourts website

[54] see above discussion of *Miller v HM Advocate 2021 SCCR 289*

[55] see further guidance in the chapter on Corroboration: the Moorov Doctrine

[56] *Thomson v HM Advocate* 1988 SCCR 534

[57] *Boath v HMA*, 2005 GWD 35-659 [2005 HCJAC 116] at para [11].

[58] and see *Cunningham v HMA* above dealing with the corresponding section in the 1975 Act

[59] *Boath v HMA* (above) at para [11]

[60] See also 1995 Act, section 99(1), (2) and (3)

[61] *HM Advocate v McDonald* 2017 SLT 267, following *Thomson v HM Advocate* 1997 JC 55

[62] see *HMA v Khan & Others*, 1997 SCCR 100

Suggested opening remarks and impartiality questions

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1. Opening remarks

2. Impartiality questions for the empanelled jurors

3. To unempanelled jurors

[Please note that these remarks are suggested and are not mandatory. Judges should feel free to impart this information in their own way and in their own words. A Word doc version of this text is available for download here**]**

Opening remarks

to empanelled and unempanelled jurors, which can be made either when the judge first takes the bench with the jurors present, or after the clerk has called the case and invited the jurors to enter the jury box:

"Good morning/afternoon. Thank you for coming in in answer to your citation to serve as jurors. (Apologies for any delay) Even those of you who have not been picked have already performed a valuable public service by forming part of the pool from which the jury has been drawn. Your services may not be at an end, though, as will be obvious from what I am going to say."

Can I ask all of you, jurors and substitutes to listen carefully to everything that is about to be said."

[The clerk reads the indictment and any special defences and then has the jury swear/affirm.]

Impartiality questions for the empanelled jurors

"Fifteen of you have been picked to serve on this jury, you have just heard the indictment (and notices) read out. The indictment sets out the charges the accused faces.

It is very important that you are completely impartial in this trial. You have heard the charges read and so you now know something about what is alleged in this case. You know that the accused is named as [**INSERT]** *and that certain names* [**REFER TO THEM**] *appear in the charges* [**and in the notices of special defence – REFER TO THEM IF APPLICABLE**]

So I am going to ask a series of questions. It would be helpful if everyone here for jury service listens to these questions, even those who have not been picked for the jury.

Please do not answer these questions out loud. If the answer is yes, or if you are in doubt or difficulty about it, please keep your thoughts to yourself. Do not discuss any such issue with the other members of the jury. I will be adjourning the court shortly to let you make yourselves

comfortable before we start the trial and the clerk of court will be available to speak to you. If you have any issues arising from my questions, please alert the jury attendant who will arrange for you to speak confidentially with the clerk of court. Please do not discuss any such issue with the other members of the jury or substitutes.

So the questions which I would like you to consider, but not please to answer out loud, are these:

1. *Do any of you know [any of] the accused either directly or indirectly?*
2. *Do any of you recognise the person/people in the dock, between the officers?*
3. *Do any of you know any other person mentioned in the indictment, or the person named in the special defence?*
4. *Do you know anyone who may be a witness in this case?*
5. *Is there any reason why you could not serve impartially on this jury?*

[**It ought to have been possible at the time of the ballot the previous day to ascertain the length of the trial and so this final question may be unnecessary. If not:**]

I have one more question for you once I have some information from the Crown and defence lawyers. [**Ask parties how long the trial will take**]

Now it is impossible to make an accurate prediction of how long the trial will actually last at this stage. Unexpected problems can arise in trials which can make them take longer than expected. These days, it is quite common for trials to be shorter than estimated.

However, the experienced lawyers who know most about the case think that it will last [**INSERT**].

That seems a reasonable estimate. However, in case there are problems let us work on the basis that the trial could last until [**INSERT OUTSIDE END DATE IN YOUR JUDGMENT**].

My last question is this:

1. *Does the possible length of the trial cause anyone a really serious difficulty?"*

[**In a high profile case something more elaborate may be required - see** HMA v Sheridan**. Judges may also wish to refer to** a suggested direction **for cases which have attracted publicity.**]

"Now I am not talking about inconvenience. I am sure it is inconvenient for every one of you to serve on this jury. I am talking about a difficulty which would make your life almost impossible. If anyone is in that situation, once again please do not discuss it with your colleagues, but do please alert the jury attendant that you need to speak to the clerk. You should not describe the issue in the presence of the other jurors and substitutes. The jury attendant/court officer/macer will arrange for you to speak privately to the clerk about it when I adjourn the court.

Now if you think that there may be a reason why you should not serve as a juror it is important that you let the clerk know during the adjournment. Even if you think it is a trivial reason it may not be, you should not think that you are causing us any difficulty if you tell us about something which is on your mind. On the contrary it will cause a great deal of difficulty if you do not tell us something now and it turns out to be important. We can deal with a problem now by picking another juror to take the place of anyone who cannot serve but it might be that the trial would

have to stop and be started again if you only told us about it later.

Before I adjourn the court I must give you an instruction which applies from this moment until the end of the trial.

I will explain the reasons for this when you return to court. My instruction is that from this moment until the end of the trial, you must not make any outside investigation or enquiry of your own about this case, the people involved in it or any issue it raises.

I am telling you this now because everyone knows that people carry smart phones and other devices which allow instant access to the internet. In so far as any researches on the internet, or otherwise, would involve you trying to find out about this case, the people involved in it or any issue it raises, that is something you are not allowed to do from now until the end of the trial.

I remind you that if there is any issue you need to raise with the clerk following the questions I asked, please do not discuss it with the other members of the jury or the substitutes. Please ask to speak privately with the clerk of court with whom you can raise any problem, confidentially.

In a moment I will adjourn the court. When we resume in a few minutes I will give you an explanation of how the trial will work and some further guidance to help you follow the trial."

To unempanelled jurors

Before we adjourn, can I speak to those of you who have not been selected for this jury? Whilst it is unlikely that your services will now be required, I cannot release you quite yet in case any of you are required to take the place of a juror who has been picked. So, please be patient with us for a little longer. When we resume after the adjournment I will be able to tell you what the position is.

The court will now adjourn for a short period".

[On resuming, the judge will thank the balloted substitutes for attending and either excuse them, which is currently the norm, or give them further direction as to what is required of them. The judge would then introduce the case using wording such as those in "Suggested introductory remarks: Introducing the case and procedure to the jury**"]**

Suggested introductory remarks: Introducing the case and procedure to the jury

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3. Jury's function

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9. ** Suggested direction for cases which have attracted significant publicity

[Please note that these remarks are suggested and are not mandatory. Judges should feel free to impart this information in their own way and in their own words. A Word doc version of this text is available for download here**].**

An introduction

"Members of the jury, you now have copies of the indictment, which sets out the charge[s] the accused face[s]

[Where appropriate:

and the notice of defence which was read to you.

and the notice at the end of the indictment which was read to you which is known as a docket.]

You have also been given a document which summarises the duties which every juror has. You should study it carefully in due course. I will now tell you a bit more about that and indeed will be repeating much of what is contained in it. I will also explain how the trial will work. Then I will give you general directions on the rules of law which govern criminal trials so that you understand them from the start."

Judge's function

"You and I have different functions in the trial. My job is to ensure that the trial is conducted fairly and in accordance with the law. You, the jury, will decide whether or not the charges are proved on the evidence presented in the trial and you reach your verdicts only on the basis of the evidence in court. The words of the oath (and/or affirmation) which you took were "to return a true verdict according to the evidence*".*

Jury's function

"You, the jury, are the judges of the facts of the case and you are not detectives. It follows, and I must stress this very strongly, that you must not make investigations or enquiries of your own about anything or anyone connected to this case, or any issue it raises. Everyone knows that a search on the internet can produce information within seconds. It is vitally important to the administration of justice in this case, and in general, that you do not carry out any outside researches or enquiries about this case, the people involved in it or any issue it raises through the internet, or otherwise, for any reason. This instruction applies until the trial has finished. I do not know whether there is any information about the events of this case, or anyone connected with it, out there. But you must appreciate that, even if there is any such information available, there is no guarantee that it is accurate and, more fundamentally, it is not evidence in the case*.*

The circumstances of some cases attract media attention. If you have seen, heard or read or do see, hear or read anything like that about this case you must ignore it. Throughout the course of this trial, you should seek to avoid such material which relates to this trial or any issue it raises."

[In an appropriate case reference can be made to the examples of what has been said in high profile cases using the hyperlinks below. These can be adapted to suit the circumstances. See for example Lord Bracadale's judgment in HMA v Sheridan **in which his Lordship explains how he resolved a plea in bar of trial and sets out some of what he said about publicity during the trial: at the start; during the trial and in his charge. Judges may also wish to refer to a suggested direction (see "**Suggested direction for cases which have attracted significant publicity**" below for cases which have attracted publicity)].**

"As I say, this case has to be decided only on the evidence presented in court and that is why you must not access external sources of information. Such is the importance of this rule that I have to require you to police it collectively, so that if you become aware of any fellow juror who has conducted independent investigations, please speak to the clerk of court – via the macer / bar officer / jury attendant (as necessary) - but do not discuss it with the other members of the jury.

I do have to tell you that, having given you this instruction, if I become aware of any juror carrying out such investigations I would have to take a very serious view of it. It could well result in the trial collapsing with all the costs and problems that would involve. It could constitute a contempt of court on the part of the person concerned and, if it did, that could be serious for that person.

Now can I apologise to you if all of this sounds very severe and threatening. I do not wish to threaten you; I do not wish to make you uncomfortable; and I do not wish to get off to a bad start with you. I just have to make it absolutely clear to you that you must not carry out any independent investigations.

That is because you must decide this case only on the basis of the evidence presented in court, and

you must not be influenced or even distracted by any outside source of information."

[**A judge may seek to provide some reassurance after this stern admonition.**

e.g. "Now I can see that you are responsible people who have understood what I have said to you and I am entirely confident that you will follow this instruction. So you can relax. You need not sit there in a state of terror over the next few days. There will be no problem if you follow this simple instruction as I am sure that you will."]

Procedure

"Let me explain a bit more now about how the trial works.

The prosecution is brought by the Crown, the name given to the public prosecutor in Scotland. The Crown has to prove the charges, and it seeks to do so by presenting evidence.

The case for the Crown is presented by the Advocate Depute/Procurator Fiscal, who is sitting at the table to my right. The [first] accused is represented by (X) [the second accused is represented by (Y)] sitting at the opposite side of the table.

In Scotland there are no opening speeches and, after I have stopped speaking to you, we go straight into the evidence.

Sometimes evidence is agreed or is unchallenged and, if so, it is recorded in a statement of facts known as a joint minute [or it may comprise a statement of uncontroversial evidence]. If that features in this case, it will be read to you and you will be given a copy of it.

All witnesses will swear or affirm to tell the truth.

First, you will hear evidence from witnesses for the Crown. The prosecutor will question first and this is known as examination in chief. The witness may then be cross-examined on behalf of each/the accused [in order] and may then be re-examined by the AD/PFD.

After the Crown has led all its evidence, each/the accused, may lead evidence if they wish to do so. The defence do not have to lead evidence but if any witness is called for the defence the order of questioning is changed.

During the trial there may be objections to the evidence, or legal points may crop up. If that happens, I may have to switch off the connection / ask you to leave the court room [as necessary] to allow me to hear legal argument and decide the issue in your absence. If that does happen it should not trouble you because, as I have explained, I have to decide all issues of law in the case. On the other hand, the facts are for you. I can reassure you that if this situation arises any witness will leave the court at the same time as we disconnect and so you will not miss any of the evidence. You will hear all of the evidence in the case.

After all of the evidence has been presented, you will hear closing speeches, first for the Crown, and then on behalf of the/each accused. After that, I will give you additional directions on the law applicable to the specific circumstances of this case.

After that you will retire to consider your verdict(s). You must then use all of the directions which I

have given you in deciding whether the charge(s) has/have been proved or not. The directions I gave at the start and those at the end of the trial, taken together, provide you with the complete legal framework for reaching that decision.

It is very important that you keep an open mind about this case, and all of the issues in the case, until you have heard all of the evidence, speeches and my closing legal directions. Only then do you start to reach your conclusions and decisions in the case."

The court day

"On a normal court day we sit from 10am to 1pm and then, after lunch, from 2pm until about 4pm or so. These times may have to be varied to take account of the availability of witnesses or the stage the evidence has reached. If we can get started promptly at 10, then about half way through the morning session we will break for no more than 20 minutes to allow you to stretch your legs, have a tea or coffee and make sure that you are comfortable and able to concentrate."

[For remote jury trials it will be necessary to inform the jury that, while they are in a separate room, they are all participants in the trial process and can be seen by all in the court room. It is therefore important that they do not speak among themselves during the evidence and that, if they have any difficulties, they should raise the matter with the jury attendant so that the judge can address it.

The clerk will also have given the jurors a description of the cleaning etc arrangements in place for the trial.

Following the trial

"Given that you will be deciding this case on the evidence, it is important that you listen carefully to what witnesses say and pay close attention to all of the evidence. If you have any difficulty hearing, if someone is speaking too quickly or if there is any other problem, please signal that to me or to the Clerk of Court immediately - via the jury attendant / macer / bar officer (as necessary) - and I will try to do something about it.

You will not be given a recording or transcript of the evidence, so you have to rely on your own memory of it. You have been provided with pencils and paper and you can take notes of the evidence if you wish, or you may prefer to listen carefully and watch the witnesses as they give their evidence. I would strongly encourage at least some of your number take some notes. Any notes which you make will be destroyed after the trial.

Whichever way you choose to go about it, can I encourage you to pay close attention to the evidence throughout the trial. It quite often happens that a witness will say something which may not seem important at the time, but by the end of the trial it may turn out to be highly significant. So you should follow the evidence as closely as you can throughout the trial."

Privacy of the jury

"During the trial, when you are leaving the [court/Jury Centre] and whilst travelling to and from it, you must not discuss anything to do with the trial with anyone, including the other members of the jury. Your discussions about the case must only take place in the privacy of the jury room. "

[**The following instruction may only be necessary in remote jury trials and can be adapted to local circumstances, if required at all:**

"So, if when you are deliberating at the end of the trial, you need to access facilities elsewhere in the building, you must avoid talking to anyone at all. In that situation, the jury's deliberations must stop and resume only on your return."]

Avoiding outside influence

"During the trial, you must not be at risk of outside influence or distraction.

If you see anybody connected with this case or who seems to be interested in the case, inside the jury centre / court building [as necessary] or outside, please do not speak to them. In the past there have been conversations between persons with some interest in the case and jurors trying it. Most often these have been perfectly innocent, but sometimes they have not. Whenever something like that happens, it can cause problems for the juror concerned, and it does cause difficulties for the court. So it is simplest and best to avoid any such interaction.

If anyone approaches you and tries to discuss the case with you, you should not respond. If you are approached by anyone in this way, do not tell the other jurors but do please speak with the Clerk of Court urgently - via the macer / bar officer / jury attendant (as necessary). I have no reason to believe anyone would approach you, but if that happens, you must let the Clerk know.

Until the trial has finished, you must not discuss the case with anyone outside the jury; even family, people you live with at home, friends and work colleagues. All that you should tell someone who needs to know is that you are serving on a jury for the length of time suggested. Whilst the case is continuing you must not discuss the detail of the evidence, the events of the day during the trial or any issue relating to the case with anyone outside the jury. If necessary, to avoid embarrassment, you can simply say that the judge told you not to discuss the case with anyone at all.

So whilst the trial is continuing, you must not speak to other people about it or communicate electronically through Facebook, Twitter or anything else. You must keep your thoughts about the case private from anyone outside the jury, until the trial has finished. Even then you must not discuss what was said in the jury room during your deliberations. These are private and nobody is allowed to ask you about them.

This case must be decided by you, the jury, only on the basis of the evidence in court. You deliberate on your verdict only with fellow jury members and, even then, only once you have heard all of the evidence, speeches and my closing legal directions.

I will move on now to explain the general legal principles which apply in criminal trials.*"*

** Suggested direction for cases which have attracted significant publicity

"When I addressed you before the adjournment I mentioned the publicity which this case has attracted [and the fact that the accused is (as appropriate)]. I want to say more about this in a different context. You have now taken your oath, which requires that you must reach your verdict only on the basis of the evidence which you hear in court. The words of the oath or affirmation which you took were 'to return a true verdict according to the evidence'. That means that you must put out of your minds anything that you have in the past read in the newspapers, or seen or heard

on TV or radio about the accused or the circumstances giving rise to these charges. As the trial proceeds you should put out of your minds anything that you read, hear or see about the case. Anything you have seen, read or heard about the accused must be ignored and you must not access such material throughout the course of this trial.

I am not suggesting for a moment that reporting of the trial will be misleading, I am simply stressing the importance from your point of view of focusing solely on the evidence which you hear in court and proceeding on your own recollection of the evidence."

[The following two sentences only apply if the accused is well known:

"*Anything you think you know about the accused from media sources or from your own impressions of him/her, whatever they may be, are irrelevant to your task. All such matters must be cast aside entirely.*]

Jurors are expected to approach their task with open minds, untainted by preconceptions, prejudices or by any perceived public or private knowledge which they may have of the case or of the individuals involved in the charges. That is why I asked you a series of questions before taking the oath. So please remember, you cannot allow yourselves to be swayed by sympathy or prejudice or the contents of press articles. You must be impartial, since you are effectively acting as judges in this case.

Another aspect of this issue is this. It is quite likely that on the internet there will be websites where information about the accused or the background circumstances may be discussed. You must not access such material during the trial. If any such material exists, not only is it not evidence in the case, there is no guarantee that it would accurate. Again, I repeat: you must decide the case only on the basis of the evidence you hear in court. These instructions are in your own interests as well as in the interests of justice. In order to ensure a fair trial for the accused and to maintain the integrity of our legal system it is essential that you follow them.

You must be disciplined about this, members of the jury, in keeping with the dignity and impartiality of the role you are now undertaking, and if you become aware of a fellow juror accessing any such information, you should immediately speak to the clerk of court - via the macer / jury attendant / bar officer (as necessary). I may say that I would take a very serious view about any such conduct, in light of the warning which I have just given."

Thereafter the written directions should be distributed to the jury, if this has not already been done, and should be read to them.

Written Directions for Jurors in Scottish Courts

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[Please note that a Word doc version of the Written Directions is available here. Clerks have access to this Word version of the Written Directions and this is the version which is printed off for distribution to jurors

General

Towards the end of the trial I will give you the legal directions you will need when you begin deliberating on your verdict(s), but in the meantime it will be helpful if, before we start hearing evidence, you are aware of certain fundamental rules and principles which apply in almost every case.

Separate functions of Judge and Jury

You and I have completely different functions.

Judge

I am responsible for all matters of the law which arise in the case.

The law tells us what the ingredients of an offence are and what must be proved to establish that an offence has been committed. I will tell you about that at the end of the trial when I direct you on the law. The law also regulates how trials must be conducted and what evidence may or may not be allowed. I will deal with that as the trial goes on and, if necessary, I will tell you what you may and may not do with particular pieces of evidence.

Jury

You on the other hand are responsible for all questions of fact. You and you alone will decide:

- What the evidence was;
- What is to be made of it;
- What reasonable inferences or conclusions should be drawn from it; and
- What verdict should be reached in light of it.

In other words, you will decide:

- Which evidence you accept and which you reject;
- Which evidence you believe and which you disbelieve;
- Which evidence you find reliable and which unreliable; and
- What reasonable inferences or conclusions you can draw from evidence which you accept.

When the time comes for you to consider your verdict, you will decide what has been proved and what has not been proved.

Part A: Evidence

Agreed facts

Sometimes facts are agreed. If that happens they will be set out in a document called a Joint Minute, which will be read to you. The facts set out in such a document must be accepted by you as conclusively proved and taken into account when you come to consider your verdict.

Evidence

What is evidence?

- Evidence may come in the form of photographs, recordings such as CCTV footage and objects which are produced or shown in court.
- Most commonly, evidence comes from witnesses. Evidence from a witness is what the witness is able to tell you based on their direct observation.

What is not evidence?

- What the lawyers will say in their speeches and what I will say to you when I direct you on the law is not evidence.
- Questions or suggestions put to witnesses by the lawyers are not evidence.
- Assertions of fact put to a witness who cannot remember them, or who does not know about them, or who does not agree with them are not evidence. The evidence consists in the witness' answer. If all a witness did was to agree with a suggestion you would need to take care in deciding what weight – what importance - to give to that.
- Hearsay evidence, namely what a witness tells you was said by someone else, is generally not allowed.

Possible exceptions to the rule against hearsay

There are exceptions to that rule which I will tell you about in my directions at the end of the trial

in more detail if they arise. For example:

- Evidence of what a witness says they heard someone say may be allowed to explain the witness' state of knowledge or why they did something;
- Evidence of what was heard to be said or shouted whilst an alleged crime was actually being committed is usually allowed;
- Evidence of what an accused person was heard to say is evidence in the case. I will direct you about this if it arises;

Witnesses may also be asked about earlier statements made by them to other people. There are three main reasons for this:

1. To jog the memory of the witness, who may then be able to give evidence from recollection;
2. To enable the witness to adopt an earlier statement, which then becomes evidence. Statements are adopted if they are proved to have been made by a witness and the witness accepts that they were telling the truth at that time; and
3. To undermine a witness's evidence. A statement may be used to contradict what the witness has said in court by demonstrating that the witness has said something different on an earlier occasion. The earlier statement, unless adopted, is not evidence of the truth of what is in it but it is available to help you in your assessment of the witness's evidence.

In certain other situations, where a witness is unavailable, hearsay evidence of a previous statement by that witness may be available as evidence of what is in the statement. You will be directed on that should it arise.

Assessing evidence

You will have to judge the quality of the evidence of witnesses. You should judge the evidence of all witnesses in the same way.

In doing so, you can look at their demeanour, or body language, as they gave evidence. You may want to be careful how much you can draw from the way a person presents. You do not know the witnesses and you do not know how they normally present. It can be hard to decide if a person is truthful or not just by their presentation.

What you can do is compare and contrast their evidence with other evidence in the case which you accept.

There are two aspects to the evidence of witnesses; credibility and reliability.

Credibility

You will find the evidence of a witness on any particular matter to be credible when you are satisfied that the witness is doing their best to tell the truth about it.

Reliability

Even the most honest witness doing their best to tell the truth about a particular matter may simply get it wrong. Their evidence about it may not be reliable. There may be various reasons for that, such as:

- the passage of time;
- poor hearing or eyesight; or
- the consumption of drink or drugs.

However even with such factors present you may still be prepared to accept the evidence as being reliable. It is very much a matter for your judgement as a jury, applying your collective experience and common sense.

You can only convict the accused on the basis of evidence which you find to be credible and reliable.

It is not all or nothing with the evidence of a witness

You are free to accept the evidence of a witness in whole or in part. You may accept bits of what a witness has had to say and reject other bits. You may pick and choose as you see fit in light of what you make of the evidence. If you reject what a witness has said, either in whole or in part, that does not establish that the opposite is true. If you reject evidence for whatever reason just put it out of your minds as if it had never been given.

It may be that some evidence will be inconsistent in itself or when compared with other evidence. Quite often witnesses give differing accounts of the same event, especially if things happened quickly or unexpectedly. If there are discrepancies or differences you will have to decide whether you think they are important and undermine the evidence of a witness or witnesses. Can any discrepancies be explained?

For example:

- by the impact of traumatic events;
- by the passage of time;
- by differing powers of recall;
- by different viewpoints which witnesses might have had.

Ultimately, it is for you to decide if there are any differences and if so, whether they undermine the evidence of a witness or witnesses in whole or in part.

Inferences

If you accept a piece of evidence or a body of evidence then you may be able to draw an inference or conclusion from it, but any inference must be a reasonable one and there must be evidence to support it. You cannot indulge in speculation or guesswork.

Direct and circumstantial evidence

The sorts of evidence which can be relied on will vary from case to case but in general terms there

are two types of evidence – direct evidence and indirect or circumstantial evidence. A case may be proved:

- entirely on the basis of direct evidence;
- entirely on the basis of circumstantial evidence; or
- by a combination of direct and circumstantial evidence.

Direct evidence

The classic example of direct evidence is evidence from an eye witness describing an event they observed.

Circumstantial evidence

Circumstantial evidence is simply evidence about various facts and circumstances relating to the crime alleged or to the accused, which, when they are taken together, may connect the accused with its commission. On the other hand, it may point the other way.

In considering circumstantial evidence, please bear in mind that:

- each piece of circumstantial evidence may be spoken to by a single witness;
- a piece of circumstantial evidence need not be obviously incriminating in itself and it may be open to more than one interpretation; and
- you can choose an interpretation which supports the Crown case or one which undermines it, so long as it is a reasonable interpretation.

Where circumstantial evidence is based on accurate observation, it can be powerful in its effect. Individually each fact may establish very little but in combination they may justify the conclusion that the accused committed the crime charged. When you come to decide on your verdict, however, you should consider all of the evidence.

It is for you to decide what weight - what importance - should be given to a piece of evidence. Ultimately, you will have to consider what conclusions you can draw from the evidence and, in particular, whether you are satisfied beyond reasonable doubt that the crime you are considering was committed and that the accused committed it.

You decide the case only on the evidence

It is important that your verdict should be based only on the evidence. When you come to consider your verdict you must not be swayed by any emotional considerations or any prejudices or any revulsion which you might have for the type of conduct alleged. You will put aside any feelings of sympathy you might have for anyone involved in the case. Your verdict, whatever it is may have consequences, but these will be for others to deal with and you should put them out of your minds.

At the end of the day you will require, as the oath or affirmation which you took said, to return a true verdict according to the evidence.

Part B: Certain fundamental principles

Some rules of law apply in every criminal trial in Scotland:

1.The presumption of innocence

The first rule is this. Every accused is presumed innocent until proved guilty. Accused persons do not have to prove their innocence.

2.The burden of proof is only on the Crown

Secondly, it is for the Crown, the prosecution, to prove the guilt of the accused on the charge or charges which the accused faces. If that is not done an acquittal must result. The Crown has the burden of proving guilt.

3.The standard of proof – proof beyond reasonable doubt

Thirdly, the Crown must establish guilt beyond reasonable doubt. A reasonable doubt is a doubt arising from the evidence and based on reason, not on sympathy or prejudice. It is not some fanciful doubt or theoretical speculation. A reasonable doubt is the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty but it is more than a suspicion of guilt and more than a probability of guilt. This does not mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you have to be satisfied of the guilt of the accused beyond reasonable doubt before you return a verdict of guilty on a charge.

4.Corroboration

Fourthly, the law is that nobody can be convicted on the evidence of one witness alone, no matter how credible and reliable their evidence may be. The law requires a cross-check, corroboration.

There must be evidence you accept as credible and reliable coming from at least two separate sources, which, when taken together, implicate the accused in the commission of the crime. Evidence from one witness is not enough.

Be clear about this:

Every incidental detail of a charge, such as the narrative of how the crime is alleged to have been committed, does not need evidence from two sources. But there are two essential matters that must be proved by corroborated evidence.

These are:

- that the crime charged was committed; and
- that the accused committed it.

Please note that in a case where there is a main source of evidence, such as a witness describing the event in which a crime was committed, corroborative evidence does not need to be more

consistent with guilt than with innocence.

All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with, the main source of evidence about an essential fact.

What is the position of the defence in relation to the four rules?

The burden of proof lies only on the Crown. The accused is presumed to be innocent. There is no burden of proof on accused persons.

The requirements of proof beyond reasonable doubt and corroboration apply only to the Crown case. They do not apply to the defence.

Accused persons do not have to prove their innocence. They are presumed to be innocent. They do not have to give evidence or call witnesses and if they choose not to do so, nothing can be taken from that.

If evidence is led for the defence, any witnesses they choose to call, which may include the accused, should be treated like any other witnesses in the case. However, there is no particular standard of proof which defence evidence has to meet and defence evidence does not require corroboration. It follows that:

- If you accept any piece of evidence, from wherever it comes, that shows that the accused is not guilty then you will acquit;
- If you do not fully accept that evidence but it raises a reasonable doubt then again you will acquit; and
- Even if you completely reject any defence evidence, that does not assist the Crown case. Just put that evidence out of your minds as if it had never been given and consider what, if anything, the Crown has proved beyond reasonable doubt on the evidence which you do accept.

In summary:

- **The law is for the judge**
- **The facts are for the jury**
- **The verdict must be based only on the evidence and in accordance with the law as explained by the judge**
- **The accused is presumed to be innocent**
- **The burden of proving guilt is on the Crown**
- **The standard of proof which the Crown must reach is proof beyond reasonable doubt**
- **The benefit of any reasonable doubt, from wherever it comes, must be given to the accused**
- **The Crown must prove its case on corroborated evidence**
- **There is no burden of proof on the accused; accused persons have nothing to prove.**

Part C: Other directions to be used as appropriate

These directions will not apply in all cases and therefore in the version held by clerks are

formatted on separate pages which can be handed out if required.

Where there is a docket

Please note that you will only be returning a verdict on the charges. The clerk also read a notice which is attached to the indictment. The purpose of this notice is to inform the defence that evidence of the kind described in the notice may be led by the Crown during the trial. What is in the notice is not another charge or charges and you will not be asked to reach a verdict on those matters. If evidence of the sort mentioned in the notice is led, it may be of relevance to a charge which does appear on the indictment (charges which do appear on the indictment). I will tell you more about that at a later stage, if it should be necessary.

Where there is a notice of special defence

You have had read to you a notice of special defence and you may hear more about that later. However, the only thing special about a special defence is that notice of it has to be given to the Crown before the trial starts so that they may investigate it if they wish and are not taken by surprise by any evidence which may be led in support of it.

A notice does not constitute evidence. A notice of special defence does not in any way alter the burden of proof. If it arises on the evidence it is not for the accused to prove it but for the Crown to disprove it.

Where there is more than one charge

You will see that there is more than one charge on the indictment. When you come to consider your verdict, each charge must be considered separately. A separate verdict must be returned on each charge. It may be that certain evidence will have a bearing on more than one charge. Nonetheless, when you come to consider your verdict, the evidence will have to be considered separately in relation to each charge.

Where there is more than one accused

You will see that there is more than one accused. You must give separate consideration to the cases for and against each accused. It may be that some evidence will have a bearing on the position of more than one accused. Nonetheless, when you come to consider your verdicts, that evidence must be considered separately in the context of the case against each of the accused. You must return a separate verdict in respect of each accused.

Concert

The issue of joint criminal responsibility may arise for consideration. If it does I will give you full directions at the end of the trial, but let me give you some understanding of this at the outset.

Normally a person is only responsible for their own actions, and not for what somebody else does.

However, if people act together in committing a crime, each participant can be responsible not only for what that participant does but also for what everyone else does while committing that crime. This happens where the crime is committed in furtherance of a common criminal purpose, regardless of the part which the individual played, provided that the crime is within the scope of

that common criminal purpose.

The principle applies both where there is a crime committed in pursuit of a plan agreed beforehand and also where people spontaneously commit a crime as a group in circumstances where you can infer that they were all in it together.

Joint criminal responsibility is referred to as concert and someone who is acting in concert with another is said to be acting art and part with that person. These are merely different terms used to describe circumstances where joint criminal responsibility arises.

So if you have to consider this issue you will be deciding whether it has been established that:

1. people knowingly engaged together in committing a crime;
2. what happened was done in furtherance of that purpose; and
3. what happened did not go beyond what was planned by, or reasonably to be anticipated by, those involved.

Mutual corroboration etc.

Someone against whom a crime is said to have been committed is known as a complainer.

In some cases, in certain circumstances, evidence of one complainer about one charge can be corroborated by the evidence of another complainer about another charge. This is known as mutual corroboration.

There can also be cases where, in certain circumstances, evidence of one complainer about one crime can be corroborated by evidence from a separate source about another crime against the same complainer.

Should these issues arise, I will give you full directions at the end of the trial on how you deal with corroboration in this case

Specialities in Remote Jury Centre trials

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Background

Following the impact of the pandemic the remote jury centre model was announced in September 2020 with plans to open remote jury centres ("RJCs") for High Court trials in Edinburgh from September at the Odeon Fort Kinnaird cinema complex, and in Glasgow from October at the Odeon Braehead. In this model the jury views proceedings remotely from a RJC rather than from the court room or a room in the same building as the court. The aim was eventually to re-establish

pre COVID-19 pandemic levels of business with 16 trial courts capable of running simultaneously, spread across Edinburgh Lawnmarket and Sheriff Court, Livingston, Glasgow Saltmarket and Sheriff Court and Paisley Sheriff Court. Since 2021, the High Court has also been sitting at Dundee, Stirling, Inverness and Airdrie (now Lanark) allowing 20 trial courts to operate.

As at 30 June 2022 there are plans to decommission the majority of the RJCs beginning with the High Courts per the timetable outlined below:

Courtroom	**Date Jurors will return to in-person**
Inverness High Court	04 July 2022
Aberdeen High Court	04 July 2022
Paisley High Court	11 July 2022
Glasgow High Court – Courts 3,4,6 and West	18 July 2022
Glasgow High Court - Courts North, South, East and 5	25 July 2022
Edinburgh High Court – Courts 1, 2 and 3	08 August 2022
Livingston High Court	08 August 2022
Stirling High Court	29 August 2022
Dundee High Court	05 September 2022
Lanark High Court	19 September 2022

This chapter replaces the content previously contained within the Amalgamated Briefing Paper where it pertains to RJCs **only**. All other content from the Amalgamated Briefing Paper, where it remains relevant to **all jury trials**, has been reflected in the 'Judicial Management of Jury Trials - stages of the Trial Process' chapter.

When judges are approaching trials proceeding via RJCs it is recommended that they read the 'Judicial Management of Jury Trials' chapter in conjunction with this 'Specialities in Remote Jury Centre trials' chapter.

Recruitment and training of staff, provision of equipment

Each RJC has a RJC Manager and a sufficient number of reception staff.

Each jury room within each RJC has a Jury Attendant.

SCTS is using existing and supplementary staff to undertake these duties.

All RJC staff undertake the appropriate training before conducting any trials.

At each RJC, SCTS has a dedicated office space for the RJC Manager and support staff. The office has SCTS issued equipment such as laptops, phones and a printer.

Technical support

"Sparq" is a technical event production company and as part of the contract agreed with Odeon Cinemas will be managing and supporting the in-house projection screen and audio equipment at the RJCs. Sparq will provide the cameras which show the jurors on screen in the court and will also provide point to point communication with the Court.

A Sparq technician will be present in each jury room who will ensure that all the equipment is working and highlight any problems to the Jury Attendant.

Police presence at RJCs

Police Scotland undertook a risk assessment, and made 27 recommendations which SCTS acted upon. One of the recommendations was that the RJCs be given a marker at the respective Police Scotland Area Control rooms and so that any calls would be given a heightened response rate.

Cleaning of RJCs and opening hours

RJCs are maintained to the same, high baselines measures as all SCTS buildings as set out in the Organisational Risk Assessment.

RJCs trade as cinemas on weekday evenings and at weekends. In some locations, SCTS only occupies a limited number of screens and the cinemas will trade during the day in "their" screens.

It is strongly suggested that judges check with the clerk both:

a. the opening and closing times for RJCs; and;
b. whether there is a time at which a particular screen in which a jury is sitting will require to be made available by the company which owns the building.

How does the set-up of a trial with a RJC work?

The court will be the trial court and will contain the judge, clerk of court, accused, prosecutor and defence counsel and/or solicitor, witness, and public, including families. Members of the public, family representatives and the media may also be in attendance.

The RJC will host the jury in an auditorium which will be the same room used as the Jury Room for deliberations.

A live two way visual and audio link will be established from the court to the RJC. A large video wall will be in place in the court permitting all in court to see all of the jurors' faces. The jury will see the court room, in particular the witness giving evidence, the accused and productions that

are shown in court, on a large 4 quadrant screen (the normal cinema screen) in the RJC. Two way audio will be in place to allow communication between the court and the RJC.

The split screen shows in the four quadrants:

Quadrant 1	**Quadrant 2**
Accused and, when examining, the AD and defence counsel. The dock escorts could also be seen, plus a large part of the public benches.	The witness box.
Quadrant 3	**Quadrant 4**
Overview of the courtroom.	Evidence presentation equipment.

All live links will be able to be disconnected instantly by the clerk of court.

How do jurors communicate with court?

There will be a microphone available for the jury to communicate with the court via the Jury Attendant. The microphone will be controlled by the Jury Attendant, who will activate the microphone and inform the court of any issues, such as sound, image or a juror requiring the attention of the court. In particular, if a juror, for example, realises before the evidence starts that he/she knows the accused, the juror will inform the Jury Attendant. The Jury Attendant will inform the court that there is an issue using the microphone in the RJC that is linked to the courtroom. The juror will be isolated away from other jurors.

The Jury Attendant will contact the clerk of court – an SCTS mobile phone will be available for the Jury Attendant to do this and can also be used by the juror in the presence of the Jury Attendant. This method will apply for any forms of communication the jury needs to have with the clerk.

The impartiality questions:

At the moment when a judge asks the impartiality questions, the jury is told not to answer out loud, but to speak privately to the clerk of court if there is an issue.

It is suggested that the following could/should be said by the judge to the jury about how they communicate:

> *"If in answer to any of the questions your answer is yes, or if there is a difficulty or doubt, please do not mention it to the other members of the jury but do please speak privately to*

the Jury Attendant who will arrange for you to speak confidentially with the clerk of court."

Productions and documents

Each juror will have a folder to allow them to store a copy of the indictment and other documents, such as notes, joint minutes and copies of productions etc.

At the end of each day the folder will be placed in a lockable storage box by the Jury Attendant. The storage box will be taken to the storage screen and that screen will be locked by the RJC Manager.

If further documentation needs to be given to the jury, the Clerk of Court will email this to the RJC Manager. The RJC Manager will print the documentation. Any member of SCTS staff handling the documentation will wear gloves and a face covering.

Deliberating

Once the jury has been charged by the judge and is ready to commence deliberations they will, where the particular facility allows, move down to a deliberation area which is immediately below the screen and is equipped with 15 physically distanced chairs and side tables. The chairs are set out in a large oval. On each table there is a microphone to aid communication amongst the jurors, some of whom are quite a distance from others. The Jury Attendant and technician from Sparq will leave the room.

Where there is insufficient floor space for a deliberation area, the jurors will remain in their allocated seats when deliberating. Each will have a microphone and the image on the screen will be changed to show a live view of the 15 jurors. This will allow the jurors to see and communicate with one another without having to turn back and forth in their seats, which are obviously fixed facing forwards.

If a member of the jury needs to use the toilet facilities during deliberations they will be escorted by the Jury Attendant to a disabled toilet (single use). The Jury Attendant will ensure that the juror does not interact with any other person.

The Jury Attendant will remain outside the screen and ensure that no one enters the room.

If the jury has a question for the Judge, the clerk will clear the court room and speak to the jury privately. The clerk will write down the question or request and confirm it with the jury before proceeding in the normal way by bringing it to the attention of the judge and then the parties. At one point it was thought that the jury's question could be committed to writing, scanned and emailed to the clerk. It transpires that there are no scanning facilities in the RJCs. Anecdotally it seems that in some instances the question may have been photographed and sent by email or text to the clerk. The main thing is that the clerk accurately understands what the question is and can check that with the jury.

Once the jury has reached their verdict they will inform the Jury Attendant. The Jury Attendant will then message the Clerk of Court to inform them that the jury has reached a verdict. The jurors will be asked to return to their allocated seats.

In the High Court only:

- Once the jury has intimated that the verdict is ready the clerk should be facilitated to have a private discussion from a closed court room with the whole jury to ensure that they are clear that they do indeed have a verdict. Otherwise there is substantial room for error and confusion of a kind which clerks are very good at nipping in the bud.
- On another but related point, it is known that juries sometimes ask clerks at this point to remind them of the procedure for delivering the verdict, which is entirely proper and saves the embarrassment of the spokesperson getting it wrong. This should also be facilitated via a closed court communication between the clerk and the jury.

Breaks

Jurors will need the opportunity to have a fresh air break during any court breaks, as the proposal would mean that they jury would not be seeing any natural daylight for the duration of the day they are in court. Essentially the procedure in respect of breaks will not be changed, it will remain as it was pre-COVID, but with jurors asked by clerks to respect each other's personal space. Smokers will be permitted to go for fresh air or a smoke during the court breaks. They will be accompanied by a Jury Attendant.

Decorum

Everyone has to realise that, if the video link is live, the jurors can see the court and those in court can see the jurors on individual screens in high definition colour and quite close up. Those in court should not be lounging around, drinking coffees or whatever. Meanwhile the jurors must behave as they would if present in the court. This means no eating snacks or drinking juice etc.

Introducing the parties

If the judge, as part of the introduction, introduces to the jury the various "actors" in court – Advocate Depute ("AD"), defence counsel, clerk, macer, accused – it has to be borne in mind that the only view of these people that the jury will have at that stage, other than of the accused who has his/her/their own screen (in the top left of the jurors' screens), is the court overview screen. All of the court personnel will only be visible to the jury as small, relatively indistinct figures. The usual practice of the AD and defence counsel turning to the jury or nodding when introduced will be of no value, probably barely visible. It may be that at least the AD and the defence counsel could be asked to stand up when introduced. Perhaps the macer could stand in front of the witness box which also has its own screen.

Audio to jury room

Everyone has to realise that if the video link to the jury room is live then it is likely that the audio is live. The microphones in the court are very sensitive. Sotto voce remarks will run the risk of being heard in the jury room. All need to be aware of that.

Generally there might be an argument for deciding that the link to the jury will only go live when the judge has already come on the bench.

Audio from jury room

During the first Edinburgh trial (with the jury in a different room) the jurors could not initially be heard responding “I do” to the administration of the oath. This continues to be a problem and judges/clerks are asking jurors to nod when they say “I do.”

More generally on audio, if jurors are to be able to communicate with the court direct from their seat (as if sitting in the jury box) the only means of communication available in the first Edinburgh trial was a single portable microphone in the jury room. That worked well when the spokesperson came to deliver a verdict. It is somewhat cumbersome otherwise, and requires a jury attendant to deliver the microphone physically (and, one is to assume, only after it has been wiped with a cleaning agent) whenever a juror raises a problem, and only when the juror has made known to the jury attendant the existence of a difficulty. A satisfactory solution requires to be found. The current set up seems to be that there is a fixed microphone to which the spokesperson needs to come in order to deliver the verdict and that any other difficulty would need to be communicated by the juror to the jury attendant.

Judge’s ability to engage with jury

Following the experience of the mock trial a way was found for the clerk to zoom the court overview camera in on the judge’s position, but only to a certain degree. However, from the jury perspective, the judge remained a relatively distant figure. Moreover, the images of the individual jurors are shown very clearly on the screens to the left of the bench. When addressing the jury the most natural thing to do is to look at them. Under the current arrangements that cannot be done if the judge wishes to speak direct to the camera. The judge’s ability to engage with the jury is compromised by the need to address them while speaking straight ahead. The level of intimacy one might expect in a “normal” trial will never, using this method, be achievable. It is hoped that a solution can be found whereby (i) the judge can look at the jury while speaking to them, and (ii) the jury’s view of the judge when he/she does so is less remote.

Also, because the judge appears to be so far away from the jury, when he speaks it was not obvious that his remarks were being directed at the jury. There is no discernible body language as there would be in a normal pre-COVID trial so without verbal cues it will be tricky for a juror to know what is happening.

If the judge uses the expression “Ladies and Gentlemen” it may not be obvious that he means the jury especially if there are female and male lawyers, macer etc. The expression “Members of the Jury” has the benefit of clarity and, incidentally, avoids any criticism based on gender stereotyping. Some judges may not like this term and may choose to adhere to “Ladies and Gentlemen” but for these remote trials it may be that using the term “Members of the Jury” is advisable.

The position in the RJCs used for High Court trials is that it is possible for the clerk to adjust the view so that, for the jury, only the judge is on screen which is optimum for when the charge is being delivered.

In some courts, the positioning of a camera above the jury screen allows a judge to speak almost directly to the jury whilst also looking at them which is important both for engagement and monitoring attentiveness.

For remote jury trials it will be necessary to inform the jury that, while they are in a separate

room, they are all participants in the trial process and can be seen by all in the court room. It is therefore important that they do not speak among themselves during the evidence and that, if they have any difficulties, they should raise the matter with the jury attendant so that the judge can address it.

The clerk will also have given the jurors a description of the cleaning etc arrangements in place for the trial.

Counsel addressing the jury

This is best done by counsel standing in front of the witness box so that the relevant camera can show them in reasonable close up. However there is the same difficulty that if counsel looks at the jury screen he/she is not, from the jury perspective, looking at them. Counsel should be encouraged to remain relatively still so that they are within range of the microphone without which the jury will not hear them well.

General Directions

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Introduction

From July 2020, following discussion and agreement among the Lord Justice General, Lord Justice Clerk and Jury Manual Committee, jurors are provided with certain written materials at the start of the trial. These are:

1. A written note of their duties and responsibilities; and
2. A document setting out the general directions that apply in every case, as well as, if appropriate, specific directions on certain matters particular to the case.

Although in *Lyttle v HMA*, 2003 SCCR 713 it was held that nothing said in the opening introductory remarks could be prayed in aid to make good a deficiency in the charge, that pre-dated the issuing in every case of the approved standard written directions. The information then given to the jury was only labelled "introductory remarks" and not highlighted as legal directions which the jury had to follow.

Lyttle has now been reconsidered in the case of *SB v HMA* [2021] HCJAC 11 where Lord Turnbull, delivering the Opinion of the Court, said:-

> *"It is therefore clear that the import of the decision in the case of Lyttle is confined to the practice with which it was concerned. It was concerned with the then practice of making what were truly introductory remarks, in the sense of introducing the personnel and the general procedure. The case was not concerned with information which was encapsulated in writing and was introduced as legal directions which the jury had to follow.*
>
> *In conducting a trial in accordance with the recently introduced procedures a judge will no doubt think carefully about the issues and areas of law which he or she wishes to include in the charge. The content of the charge will vary according to the length of the trial and the issues raised. In many cases it may be sufficient to draw the attention of the jury to their copies of what was delivered earlier and to remind them that they must follow both those directions and what is said in the charge itself. In other cases the judge may feel it necessary, or appropriate, to recap some of what was said or to revisit some aspects of the earlier directions in more detail. The evidence led and the speeches of the crown and defence will doubtless inform the extent to which anything more need be said in relation to the written directions. In any charge, the directions as a whole must be tailored to the circumstances of each case."*

It is thus clear that the directions now provided in writing should be incorporated into the eventual charge by reference (and in some cases recap) in due course so that the issue of possible discrepancy raised in *Lyttle* will not arise.

Content of introductory / general directions

Whilst there is no requirement to repeat at length all of the written directions during the course of the Charge. It should, however, be remembered that the introductory directions are just that. While they cover much of what is to be found in the opening part of a charge they will not be sufficient of themselves in every case.

In preparing and delivering the charge:

1. The jury should be reminded that they have copies of what was delivered earlier and it should be stressed that they must follow both those directions and what is said in the charge;
2. Judges and sheriffs should be alive to the fact that the conduct of the trial, the exact nature of the issues raised and perhaps even the length of the trial will mean that some repetition, refinement or elaboration is needed of what was said at the start, both in relation to the more general directions and any further matters such as, for example, concert, prior statements, special defences or dockets. It should always be borne in mind that the directions must be tailored to the circumstances of each case.
3. The evidence and submissions of the parties will inform the extent to which anything more need be said in relation to matters touched upon in the introductory directions. In a Moorov case, for example, directions on corroboration would have to be very specific. In some cases, such as an assault where the only issue is self-defence, the introductory directions on corroboration may suffice. Where corroboration is an issue, such as in a wholly circumstantial case or one where corroboration of a witness was to be found in circumstantial evidence, more maybe required.
4. Whatever requires to be repeated or elaborated upon, reference should still be had to the suggested general directions which still appear as an appendix to the Jury Manual.

The separate functions of judge and jury

Stair Encyclopaedia, Vol 17, para 763;

Renton & Brown, *Criminal Procedure*, 6th ed, paras 18-79 to 18-79/11.

1 Legal Principles

Unless circumstances of some special character are alleged, all questions relating to the credibility of witnesses are prima facie for the arbitrament of the jury.[63] Care should be taken not to confuse the issue by mixing the question of reliability of evidence with that of sufficiency.[64] In general no difficulty arises from directing the jury that as a matter of law there is sufficient evidence to support a conviction. However there may be circumstances in which it is inappropriate. In *McPhee v HMA* [65] it was observed that the practice of trial judges telling juries in bald and unqualified terms that there is sufficient evidence in law to convict may in some circumstances be unhelpful and particularly confusing. There is usually no need for any general positive statement of legal sufficiency. In some cases it has the potential to confuse, e.g. a jury may reject a corroborating witness's evidence, and then have to consider sufficiency in the absence of that.

2 Referring to the evidence

The primary duty of the judge is to direct upon the law; and it is usually necessary for her or him to refer to the evidence to which the relevant law applies. It is, however, a matter for discretion, in the light of the whole conduct of the trial, to determine the extent to which it is appropriate to refer to the evidence.[66] In *Simpson v HM Advocate* 1952 JC 1, the Lord Justice General (Cooper) said (at 3) that:

> *"It is always the right, and it may often be the duty, of a presiding judge to review and comment upon the evidence; but in so doing it is essential that the utmost care should be taken by the presiding judge to avoid trespassing upon the jury's province as masters of the facts."*

In long or complicated cases there may be an obligation to refer to some of the evidence so that the jury can focus on the critical issues for their decision. This *could* apply in cases involving the deaths of infants in which there is often a dearth of direct evidence, the jury's decision being dependent on inferences to be drawn from medical evidence. In some such cases, in particular, an obligation may lie upon the trial judge to provide the jury with a succinct balanced review of the central factual matters for the jury's determination.[67] A more recent decision in a case involving death of an infant, *Younas v HM Advocate* 2015 JC 180 takes a rather different approach which represents current appellate thinking. A number of issues pertinent to the treatment of evidence in the charge, are well summarised in the rubric:

> *"1) there was no general requirement on a judge to rehearse or summarise the evidence in a charge to a jury (paras 55, 56); (2) the mere fact that medical evidence had been given at some length during the course of a trial did not mean that a jury had been presented with complex testimony of a technical nature, such as might require special direction by the trial judge, and the fact of there being conflicting views held by members of the medical profession on a cause of death did not, of itself, render a case complex or difficult, and the evidence in the case could not be described as of such intricacy or complexity that it required any special treatment by the trial judge (paras 61–66); (3) the trial judge had provided the jury with a route or path to verdict which was simple and straightforward and would have enhanced the informed observer's understanding of the reasons for the verdict and accordingly the requirement for a reasoned verdict had been met (paras 67, 68); (4) there was no reason to give the jury any special direction on how to treat the evidence of the child witness, nor would it have been appropriate to do so, and his evidence ought to have been assessed in the same way as that of any other witness (para 73);"*

The Lord Justice General's Practice Note of 18 February 1977, recorded:

> *"Accurate assessment of the quality of, and of the weight which ought to be given to certain competent and admissible evidence which is of material consequence in the determination of a jury's verdict is often a matter of real difficulty and delicacy on which the jury is entitled to receive such guidance and assistance as the presiding judge can properly afford."*

A court of appeal is not in a position to review this discretion of the presiding judge on matters which concern the best way of conducting the case before him"[68]

Provided the trial judge does not trespass into the jury's territory by, in essence, expressing a personal view on the evidence, it may be helpful in certain cases for the jury to be directed upon where they can find the testimony upon which they would be entitled to convict.[69] In some cases, perhaps particularly in sexual offence cases where issues of corroboration are not straightforward or have not been adequately addressed by parties, there may be an obligation to identify where corroboration can be found; *Garland v HM Advocate* 2021 JC 118, particularly at para 20. If evidence is referred to for reasons other than to illustrate specific points of law, it requires to be done in a balanced manner putting both Crown and defence case to the jury. There is no

requirement to rehearse all points made, but rather to present the substance of the parties' cases to the jury.[70]

Siddique v HMA [71] illustrates the importance, in a statutory charge, of giving precise directions on the definition and meaning of the crime charged, and on the elements necessary to be proved by the prosecution, in terms which reflect closely the words of the statute. That is particularly necessary where there is also a statutory defence, which can operate properly only on the basis of a strict application of the statutory language.

3 Credibility and Reliability

> *"A person who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed. Credibility may be judged on the moment, whereas reliability may be only capable of being addressed having regard to the person's "track record", so to speak."*[72]

The language is somewhat outdated because these are judgments to be made of pieces of evidence and not character. When directing the
jury in the closing charge, it should be recalled that the jury can accept and
reject different parts of a witness's evidence and, as stated in the written directions, the jury ought to be assessing the **evidence** for credibility and reliability.

This may require specific direction when a Crown witness was previously a person who was alleged to have also been involved in the offences which the accused faces. It has been decided that there is no rule of law which requires a judge to give the jury a cum nota warning in every case in which a *socius criminis* was called as a Crown witness. Delivering the Opinion of the Court in *Docherty v HM Advocate* 1987 SCCR 418, at page 431, Lord Justice General Emslie observed:

> *"[T]rial judges need only give to juries in all cases, whether or not any socius criminis has been adduced as a witness for the Crown, the familiar directions designed to assist them in dealing with the credibility of witnesses and any additional assistance which the circumstances of any particular case may require. If, for example, the credibility of any Crown witness, including a socius criminis, is in any particular case attacked by the defence on the ground of alleged interest to load and convict the accused or, indeed, on any other ground, the trial judge will normally be well advised to remind the jury that in assessing the credibility of the witness concerned, they should take into consideration the criticisms which have been made of the witness in the course of the presentation of the defence case."*

Whether some particular direction should be given in relation to the evaluation of the credibility of some particular witness must be a matter for the discretion of the trial judge to be exercised in the light of the particular circumstances of the case in question. Relevant to the exercise of that discretion would plainly be the matter of what had been said about a particular witness's evidence in the course of the speeches to the jury.[73]

3(a) Identifying a piece of evidence which is essential to the Crown case

It may be necessary to direct the jury that in order to convict they must accept a particular piece of evidence or chapter of evidence.[74] In framing any such direction it is important to recall that a jury does not have to accept all of the evidence of a witness, it is usually a particular fact or facts

which are essential for conviction.

Many of the specimen directions throughout the jury manual do include a version of this direction but others do not and it is the responsibility of the presiding judge to determine whether or not to give such a direction. Sometimes it will be necessary. Sometimes it will not be appropriate. Judges will always have to make an assessment in the particular circumstances of the case.

A direction to this effect is contained in the specimen directions on mutual corroboration (see Corroboration: the Moorov doctrine) and it is suggested that having said it once in explaining mutual corroboration will be sufficient and it need not be repeated on each charge. In such a case a judge could summarise the position on the charge as being that:

> "*The Crown founds on the evidence of the complainer and invites mutual corroboration from other complainers on other charges.*"

LJG Emslie's forthright views in this regard were perhaps qualified by LJG Hamilton when he stated that there are some circumstances in which it is appropriate and common to give a direction that acceptance of particular evidence is a necessary precondition for conviction of a crime. [75]

There are also illustrations of the appeal court deprecating excessive use of such directions, for example in cases founded on multiple sources of evidence. [76]

In refusing an appeal based on the proposition that the judge ought to have directed that acceptance of certain evidence was essential for conviction, LJG Hope explained:

> *"The trial judge made it clear, and indeed he was right to do so, that the jury had to be satisfied upon looking at the evidence as a whole. For the judge to have isolated [X's] evidence, important though it no doubt was, as evidence about which the jury had to be particularly satisfied would have been to distort the picture which they had to look at, as they had to look at the evidence as a whole. It would have suggested that other parts of the evidence necessary for a conviction need not be subjected to the same scrutiny*. [77]

It can be seen that judgement is always required about the particular nature of the Crown case. Such a direction is commonly given in sexual offence cases because some part of a complainer's evidence, eg re lack of consent, may be essential for proof.

Even in sexual offence cases, the evidence may be such that this direction is not appropriate. Examples might include where there is clear CCTV footage showing a crime being committed or an admission of guilt by the accused along with circumstantial evidence, or eye witnesses who describe the accused having sex with a sleeping complainer.

The jury is bound to accept and to apply such directions in law as the trial judge sees fit to give them. It is assumed that juries act upon original, and upon corrected, directions. [78]

> *"When the High Court lays down what a trial judge ought to do when directing a jury on a particular point, the High Court expects that trial judges will follow the advice given to them ...."* [79]

It is not for the trial judge to indicate to the jury what weight should be placed on particular parts

of the evidence.[80] There is always a risk that a judge in his charge may stray into comments about a witness's testimony and that these will be put, as it were, under the microscope on appeal. For these reasons these comments are best avoided. Thus it will be wise to avoid describing parts of a witness's evidence as "curious". [81] In this regard particular care requires to be taken in the event of failure to cross examine. Reference is made to the succeeding section.

If the trial judge unduly impresses on the jury her or his own views about the facts, in some circumstances that defect cannot be cured by other directions to the effect that the facts are for the jury.[82] In addition to considering the transcript of the judge's charge the Appeal Court may decide to listen to the tape recording of the charge if it is suggested that emphasis had been placed on certain words and phrases in a way which might be regarded as unfavourable to the accused.[83]

> *"The purpose of charging a jury is to give the jury the necessary directions in law to provide a framework for their consideration of the facts and in particular to give them proper directions on the matters which were in issue in the trial. It is not the function of the trial judge to speculate about possible lines of defence which have not been advanced in any way by the accused."*[84]

Failure to cross-examine

See *Burgess v HM Advocate* 2010 SCCR 803;*Rauf v HM Advocate* 1997 SCCR 41; *McPherson v Copeland* 1961 JC 74, 1961 SLT 373; *Mailley v HM Advocate* 1993 SCCR 535; 1993 JC 138; 1993 SLT 959.

1 Failure to cross examine a witness as to a contrary scenario or account does not render later testimony from an accused inadmissible.[85] Rather it may expose the accused in particular to adverse comment as to credibility. This is based on the assumption that an accused, if frank and straightforward, would give a full account of all pertinent matters within his/her knowledge to his/her legal adviser in advance of the trial. It neither matters whether the accused has been cross examined to the effect that his/her account is not credible or reliable for that reason nor whether there has been any comment in this regard in the speech to the jury.

N.B. Judges should be astute to check the minutes and any checklist in commission cases. The presiding judge will often record an undertaking from the Crown that they will not comment on a failure to put the defence case to a child or other vulnerable witness at commission.

2 Similar principles may apply to a witness other than the accused. However, the assumption that a full account will have been provided is not as secure. Such a witness may not have been precognosced fully or at all. Something unexpected may emerge which may require the giving of specific directions as in *Burgess v HM Advocate*.

Use of the word 'victim'

1 Whilst every judge charging a jury is encouraged to develop a style of their own and not to

slavishly follow a text prepared by others, there are matters which have to be covered and words, the use of which is discouraged. One such word is 'victim'. In *Hogan v HM Advocate* 2012 SCCR 404 at paragraph 34 Lord Justice General Hamilton observed that the use of 'victim' was inappropriate. This opinion gained further support in the dicta of Lord Eassie in *Wishart v HM Advocate* 2014 SCCR 130 para 7:

> *"In the context of criminal proceedings it will generally be the case that until guilt is admitted or proved it will not be appropriate to refer to a complainer as being a "victim". The very purpose of the criminal process is, of course, first to establish whether the alleged crime has been committed and secondly whether the accused was the perpetrator. In general it is only once the first of these purposes has been achieved positively to the prosecutor that it may properly be said there is a victim of the crime charged. It is therefore important that in most aspects of the criminal process care is taken to avoid referring to a person making an allegation of criminal conduct towards him or her as a "victim" other than in a context in which guilt is proved or is assumed for valid reasons. A particularly important part of the criminal process is, of course, the giving of instructions to the jury in cases prosecuted under solemn procedure, where correspondingly particular care should be taken. In that respect, users of the "jury manual" should bear in mind the important note issued with the last amendment drawing attention to the observations in* Hogan v HM Advocate"

The presumption of innocence

Stair Encyclopaedia, Vol 10, para 754.

1 The accused is presumed to be innocent of the charges brought against him/her. The presumption of innocence is not a presumption based on factual inferences. It has no positive effect, being no more than a means of expressing the rule that the Crown enjoys no initial evidential advantage, but, in order to succeed, requires to break down the presumption by proving the accused's guilt beyond reasonable doubt.[86]

2 One consequence of paragraph 1, above, is that, as a general rule, the accused is not obliged to prove anything. In certain exceptional cases a limited onus rests on the accused; for example, when s/he pleads diminished responsibility, or puts forward a special defence of insanity, or if s/he is charged under a statutory provision which imposes an onus upon him/her.

3 There may be certain cases, *"in which the proved facts may raise a presumption of guilt, and in which, in the absence of some explanation by the person accused – where the person accused is the one person who can know the real truth – a jury may be entitled to proceed to draw an inference of guilt*".[87] The circumstances in which it is permissible to comment upon an accused's failure to give evidence are extremely rare and judges should exercise extreme caution in giving directions on this issue.[88] Where defence counsel makes careless and undisciplined remarks about the absence of evidence from a co-accused, adequate directions on the proper approach to the co-accused's right to silence should be given.[89]

The burden of proof on the Crown throughout and the standard of that proof

Stair Encyclopaedia, Vol 7, paras 124-125; Vol 10, paras 746-761.

> "*The burden of proof that the accused committed the crime libelled against him rests upon the prosecutor throughout the trial. The standard required is proof beyond reasonable doubt. This onus is not transferred or affected by any common law defence pleas other than insanity or diminished responsibility.*"[90]

1 In a case where the complainer and the accused are the only eye-witnesses, the jury may be directed that they had to choose between competing accounts, provided they have been given clear general directions about onus of proof and reasonable doubt.[91] Use of words suggesting that the defence has to raise a reasonable doubt can suggest to a jury that the defence has to do something, which is not the case. A suggestion to the effect that if a reasonable doubt points to innocence, then the accused is entitled to the benefit of such a doubt is potentially misleading.[92]

> "*[U]nder present day practice it is common for judges to direct juries that a reasonable doubt is a doubt which would cause them in the conduct of their own affairs to hesitate or pause before taking a decision. Such a direction is a sound direction, but it obviously need not be given in every case ...*"[93]

> "[*I]t is desirable to adhere as far as possible to the traditional formula and to avoid experiments in reformulation*."[94]

2 To add the words 'and reconsider' after the words 'hesitate and pause' has been held not to set an unduly high standard for reasonable doubt, and thus lower the standard incumbent on the Crown, or to alter the standard in a sense adverse to the accused. It does not, for example, add an implication that a reasonable doubt is one which would dissuade a juror from a particular course of action.[95] The use of the expression "cogent reason" in the context of contrasting that to a far-fetched, fanciful or impulsive doubt, or a gut reaction, or a sympathetic or emotional response was held not to carry a risk of misleading a jury into applying a higher standard than reasonable doubt, but might in other circumstances give rise to the risk of applying the wrong standard.[96]

Indeed in *Armstrong v HMA*, 2006 SCCR 21 at para [8] the Appeal Court reminded trial judges of the desirability of adhering to the traditional formula, and that substantial departures from, or unnecessary elaborations, of it are simply liable to generate appeals. It is not an accurate expression of the standard of proof to tell the jury that they are entitled to convict if they were reasonably sure of the accused's guilt. That is not an alternative way of saying that they must be satisfied beyond reasonable doubt.[97] The standard of proof beyond reasonable doubt is not the same as that of reasonable certainty.

The absence of burden of proof on the accused (except in certain special cases)

1 Apart from exceptional cases, such as a plea of diminished responsibility, a special defence of insanity or an onus imposed by statute, there is no onus on the accused to prove anything, and there is no requirement that any evidence led by the defence requires to be corroborated.[98]

Reverse burden of proof

2 Where a persuasive burden is imposed on an accused to establish a statutory defence, the defence must be proved on a balance of probabilities, and there is no need for corroboration.[99] The same standard of proof is required to establish a common law special defence of insanity at the time of the offence, but corroborated evidence is probably required.[100] If a persuasive burden rests with the accused a jury is adequately directed by being informed that this burden is lower than that applicable to the Crown. It is open to the presiding judge to further advise the jury that the defence will have proved a fact if the jury conclude it is "more probable than not" or "more likely than not" that the fact existed.[101]

3 Offences where a persuasive burden rests with the accused to establish a defence include those relating to:

- Communications devices in prison
- Firearms
- Incest
- Indecent images of children
- Offensive weapons (see chapters on Prohibition of the Carry of Offensive Weapons and Having, in a Public Place, Article with Blade or Point)
- Protection of vulnerable groups
- Sexual offences
- Terrorism.

4 Problems may arise with the reverse burden of proof. The different approaches to the thorny issues of legal and evidential burdens taken in the obiter opinions in *R v Lambert* [2002] 2 AC 545, [2001] 3 WLR 206, [2001] 3 All ER 577, and *R v Johnstone* [2003] 1 WLR 1736, [2003] 3 All ER 884; and those considered by the House of Lords in *Sheldrake v DPP* [2005] 1 All ER 237 have not really been resolved in a way that eases the task of trial courts. Unless the Crown or the defence give notice under section 71(1)(d) of the 1995 Act to raise the issue pre-trial, or unless the jury speeches make clear the parties are agreed on the nature of the burden – at the moment the trial court is only left with *AG's Ref (No. 1 of 2004)* [2004] 1 WLR 2111 at [52] as a general guide as to whether a legal burden on the accused should be read down to become simply an evidential burden. For the Scottish position particularly in respect of possession of bladed articles and also probably offensive weapons see *Donnelly v HMA* 2009 SCCR 512 and *Glancy v HMA* 2011 HCJAC 104. In that event a direction in the style of what is generally said about special defences would be appropriate.

In brief, *AG's Ref* says:

1. At present, *Johnstone* is the latest word on the subject.

2. Reverse legal burdens are probably justified where the Crown has to prove the essential ingredients of the case, but there are significant reasons why it is fair and reasonable to deny the accused the normal protection of the presumption of innocence.

3. Where an exception is proportionate, it is sufficient if the exception is reasonably necessary.

4. An evidential burden on an accused does not contravene Art 6(2).

5. The court has to decide what will be the realistic effects of the reverse burden.

6. If an Act creates an offence plus an exception, that strongly indicates no breach of Art 6(2).

7. The easier an accused can discharge a burden, the more likely it is that it is justified. The ultimate question is: "Would the exception prevent a fair trial?" If it would the provision must be read down if possible, or declared incompatible.

8. The need for a reverse burden is not necessarily reflected by the gravity of the offence.

9. *Salabiaku* 13 EHRR 379, 388 para 28 gives guidance on the European approach.

Corroboration needed for crucial facts

Stair Encyclopaedia,Vol 10, para 766-768.

1 Crucial facts are facts which establish the guilt of the accused in respect of the crime charged. There are two prime facts which are crucial; first, that the crime charged was committed and, secondly, that it was committed by the accused.[102] Proof of these two prime facts involves proof of the appropriate mens rea but it is always a matter of inference from the primary facts and corroboration of mens rea is not required, it may be inferred from a single source of evidence. Crucial facts require to be proved by corroborated evidence. Proof that the crime charged has been committed may in turn depend on proof of other crucial facts, each of which requires corroborated evidence.[103]

2 The requirement of corroboration is based on the view that it is unsafe to rely on the evidence of a single witness to prove a crucial fact. If a witness gives direct evidence of a crucial fact, corroboration can be supplied by another witness also giving direct evidence of that fact, or by a witness giving evidence of facts and circumstances which are capable of supporting the direct evidence. Each circumstance may be spoken to be a single witness other than the witness who gives the direct evidence.[104] In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact.[105]

3 In charging a jury the trial judge should, by reference to the words used in the indictment, identify the crucial facts which require to be established by full legal proof. The judge should also tell the jury, in such detail as appears appropriate, what evidence the Crown relies upon to prove the crucial facts, and whether that evidence is sufficient in law to entitle them to convict the accused of the charge. Care has to be taken to ensure that evidence proceeding from the same source spoken to by more than one witness is not misconstrued as corroboration. This could arise where two witnesses speak to hearing the accused admit the crime in simple terms.[106] If the Crown relies on circumstantial evidence to corroborate direct evidence, the judge should direct the jury as to whether or not that circumstantial evidence is capable of supplying the necessary corroboration in that it supports or confirms the direct evidence, and is not merely neutral.[107]

4 If all the evidence relied upon by the Crown to prove a crucial fact is circumstantial, a

circumstance which by itself is neutral may acquire an incriminating character when it is placed in context.[108] To that end motive for an accused may, in certain circumstances be evidence to support the responsibility of an accused for an otherwise unexplained event.[109]Where there are a considerable number of relevant circumstances it is not realistic or helpful for the trial judge to go through all the many possible permutations of circumstances that the jury might or might not accept.[110]

5 Corroboration is not an easy concept for lay persons to understand, and legal terms such as "direct evidence", although easily understood by professionally qualified lawyers, should be clearly explained, where relevant, to enable jurors properly to grasp the legal requirement of corroboration and apply it correctly to their decisions on the facts of the case.[111]

6 Relevant and recent case law of general application illustrating the current law on how and where corroboration can be found is examined in detail in the chapter entitled "Corroboration in Rape cases".

Please note that there are other chapters which may be of assistance when considering corroboration:

Corroboration: Evidence of Distress

Corroboration: the Howden Doctrine

Corroboration: the Moorov Doctrine

Corroboration: Special Knowledge Confession

Corroboration: Omnibus/ Composite charges

7 In the case of common law crimes and other crimes requiring mens rea it is necessary to direct the jury that if they consider the act in question was carried out by the accused that it was done with criminal intent. Failure to direct the jury specifically that they could convict only if such acts were committed with the necessary mens rea could constitute a material misdirection in certain circumstances.[112]

The different kinds of evidence

1 The general rule is that any fact that may be proved in any case may be established:

- by oral evidence, which consists of what is said by any witness when testifying before the court;
- by documentary evidence, which is afforded by any document produced to the court;
- by real evidence, which is any material produced to the court for inspection; or
- by any combination of these forms of evidence.[113]

Usually in the course of the general directions, the judge will contrast direct and indirect evidence, giving examples of each.

2 Where evidence in the case is presented to the jury in the form of a minute of admissions or a minute of agreed facts such facts are "*deemed to have been duly proved*".[114] Accordingly there can be no question of the jury having a choice of accepting or rejecting all or any part of the agreed facts and the jury should be given specific directions to this effect.[115] It is important that the joint minute clearly sets out agreed facts rather than simply referring to the likes of content of a document is "*a true and accurate record*". If a joint minute is in such terms the intention of parties should be clarified before the joint minute is read to the jury.[116] The trial judge should always take the opportunity to check that the terms agreed reflect only evidence which may be competently admitted. Please refer to the Briefing Paper on Joint minutes of agreement in solemn proceedings.

The duty to acquit if any piece of evidence, including the evidence of the accused, even if not believed in part, casts reasonable doubt about his/her guilt

1 Where a special defence is pled, all that requires to be said of the special defence, where any evidence in support of it has been given, either in the course of the Crown case or by the accused or by any evidence led for the defence, is that if that evidence is believed, or creates in the minds of the jury a reasonable doubt as to guilt the Crown case must fail and that they must acquit.[117] Failure to take such a course may result in encouraging appeals on the ground of alleged misdirection, in which a conviction may be periled upon a favourable construction being given to the charge as a whole.[118] Where there has been defence evidence it is best to specifically refer to it and to direct that if it creates a reasonable doubt the jury must acquit.[119]

2 Where the accused gives evidence and his/her evidence constitutes a defence to the charge, then the jury must be told that if they believe him or her then they must acquit them. Even if they do not wholly believe the accused but his/her evidence leaves a reasonable doubt in their mind about his/her guilt, then they must acquit.[120]

The need to consider each charge separately, including any charge libelled in alternate forms

1 If there is more than one charge, the jury must be directed to consider each charge separately but evidence relevant to one charge may be thought relevant to another.[121] If there are alternative forms of a charge, the jury cannot convict of both alternatives. A general conviction in respect of alternate charges is incompetent.[122]

2 On occasions the libel of a charge on indictment may involve a number of events which in themselves constitute separate crimes. One example may be a charge of historic sexual abuse where the charge libels that certain acts occurred on various dates. In such circumstances it may be necessary to regard a charge as comprising distinct offences which should be addressed separately by the jury in returning their verdict with a view to ensuring that the veridict is comprehensible and the reasons therefore are clear.[123]

3 As the court will not convict anyone twice for one and the same crime, a prosecutor cannot, in general, demand a conviction against an accused person for more than one offence arising out of the same species facti, or libel the offences cumulatively as separate crimes.[124]

What then?

Having given the introductory general directions, the next stage of the charge to the jury is usually for the judge to explain the significance of the instance and other constituent parts of the indictment. The jury must be told the number of charges on the indictment upon which a verdict is required and that they must deliver a separate verdict on each charge in respect of each accused. If any charge is libelled in the alternative, then the jury must be told they cannot convict of both. The jury must be told to consider the evidence on each charge separately in respect of the accused; if there is a plurality of accused, the jury must consider separately the evidence against each and deliver a separate verdict against each.[125]

It might then be appropriate to explain to the jury just where the judge proposes to go from here. He might explain that he does not propose to "sum up" the case at all, but merely to explain the law applicable to each charge and to "focus the issues" for the jury. Or he might choose to say that he is going to summarise the evidence, without going to great lengths. But whatever else is done, it is necessary in all cases to define the crime(s) charged, by specifying the overt acts which must be established, together with whatever criminal intent is necessary to constitute the particular crime or crimes.

Other miscellaneous points

Where a minute of admissions has been entered into, it is tendered to the court. That is normally done in the course of the Crown case. When it is tendered the minute must be read to the jury. In the Sheriff Court, the clerk of court reads it to them. In the High Court, the Advocate Depute's junior does so. At some point in the charge to the jury it will be necessary to explain the significance of this and that facts admitted are held to be proved. Please refer to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.

One matter which can arise during a trial is reference to irrelevant matters or to the prior history of an accused. It is for the trial judge to determine whether such matters so compromise the prospects of a fair trial that desertion is inevitable. In most instances considerable weight is placed on the views of the trial judge who has the benefit of presiding over the trial and judging the context in which the issues arise. A number of options are available namely:

1. to ignore the offending evidence and do nothing, lest the matter be emphasised;
2. to direct the jury to ignore that evidence and, as here, to advise the jury that they should do so because it has "no bearing on the matter before" them; and
3. to desert the diet because of the inevitability of an unfair trial as a result.[126]

[63] *Macmillan v HMA*, 1927 JC 62 per LJ-G Clyde and LJ-C Alness

[64] *Sweet v HMA* Appeal Court 6 June 2002 para [12]; the sheriff misdirected the jury by suggesting they did not have to consider the issue of corroboration. In fact corroboration was vital to this case because the only contested evidence was conflicting medical opinion as to how the complainer sustained her injuries. The jury were also inadequately directed on the issue of

reliability which was more pertinent to the evidence of medical witnesses than that of credibility.

[65] 2009 JC 308. See also *Douglas v HMA* [2013] HCJAC 56 paras [17], [24] and [31]

[66] *Shepherd v HMA*, 1996 SCCR 679, 684 per Lord McCluskey (opinion of the court). See also *Liehne v HMA* 2011 SCCR 419

[67] *Liehne v HMA*, supra, *Hainey v HMA* 2013 HCJAC 47. See also Skilled Witnesses and Expert Witnesses.

[68] *Hamilton and Others v HMA*, 1938 JC 134, 144 per LJ-G Normand; approved in Shepherd, supra, at 685

[69] *Beck v HMA* 2013 HCJAC 51

[70] Snowden and Ors v HMA, 2014 HCJAC 100 paras 50, 51

[71] 2010 SCCR 236.

[72] Jenkins v HMA 2011 SCCR 575 at para 44

[73] *O'Donnell v HM Advocate* 2011 SCCR 536

[74] *McIntyre v HM Advocate* 1981 SCCR 117; *Spiers v HM Advocate* 1980 JC 36

[75] *Touati v HM Advocate* 2008 JC 214 at para 23

[76] *Leandro v HM Advocate* 1994 SCCR 703; *Fraser v HM Advocate* 2008 SCCR 407 at para 175

[77] *Leandro v HM Advocate* 1994 SCCR 703 at page 709

[78] *McIntosh v HMA (No 2)*, 1997 SLT 1320, 1324 per LJC Ross (opinion of the court).

[79] *Smith v HM Advocate*, 1994 JC 56, 60 per LJC Ross.

[80] *McKenna v HMA*, 2003 SCCR 399 at para [17], 2003 SLT 769.

[81] *Thomson v HMA* 2005 GWD 14-241, [2005] HCJAC 17

[82] *McDade v HMA*, 1994 SCCR 627, 631 per LJC Ross (opinion of the court).*Hunter & Others v HMA* 1999 SCCR 72, 84B per LJC Cullen sub.nom. *Silverman v HMA* 1999 JC 117, 121H; *Fulton v HMA* 2005 SCCR 159 – see paragraphs [24] and [25]; *Harkness v HMA* 2006 SCCR 342, where the sheriff's comments about credibility and reliability were either adverse to the appellant or supportive of the Crown, and for the most part strongly so. The balance was so tipped against the appellant that the standard direction, that if the jury did not agree with anything the sheriff said on the facts they should ignore it, was not sufficient

[83] *Clark v HMA* 2000 JC 637, 2000 SCCR 767; 2000 SLT 1107 at para [6] *Thomson v HMA*(supra).

[84] *Hobbins v HM Advocate* 1996 SCCR 637 per Lord Sutherland at page 645,*Johnston v HM Advocate* 1997 SCCR 568, 1998 SLT 788 and *Mackay v HM Advocate* 2008 SCCR 371, 2008 GWD 10 – 182 para [16].

[85] *McPherson v Copeland*; *Mailley v HM Advocate*

[86] *Stair Encyclopaedia*, supra, at para 754

[87] *HM Advocate v Hardy* 1938 JC 144, 147 per LJ-C Aitchison; see also *McIntosh v HM Advocate (No 2),* 1997 SLT 1320, 1324 per LJ-C Ross. See also *Larkin v HM Advocate* 2005 SCCR 302, paras [10] and [11] and *Mack v HM Advocate* 1999 SCCR 181; 1999 SLT 1163. The decision of *McIntosh v HM Advocate (No 2)* dealt with defence counsel repeatedly putting allegations to Crown witnesses "in the most aggressive and hostile manner conceivable" during cross- examination; these allegations must have come from the accused. McIntosh was described in *Hogan v HM Advocate* 2012 SCCR 404 as turning very much on its own circumstances.

[88] *Paterson v HM Advocate* 1999 SCCR 750; *Hogan v HM Advocate* 2012 SCCR 404

[89] *Shevlin v HM Advocate* 2002 SCCR 388; 2002 SLT 739.

[90] Renton & Brown, *Criminal Procedure*, 5th ed, para 18-02, quoted in *Lindsay v HM Advocate,* 1997 JC 19, 21 per LJG Hope

[91] *McD v HM Advocate,* 2002 SCCR 896

[92] *Black v HM Advocate,* 2011 SCCR 87

[93] *DA v HMA* 2007 SCCR 85 at para [5] *MacDonald v HMA,* 1996 SLT 723, 728 per LJ-C Ross. See also *Buchanan v HMA,* 1998 SLT 13; *Kelly v HMA,* 1998 SCCR 660.

[94] *McKenzie v HMA,* 1959 JC 32, 37 per LJ-C Thomson. *Dickson v HMA,* 2005 SCCR 344 at para [20]. See also *Adam v HMA* 2005 SCCR 479 para [9] where it was held that the words "and reconsider" added after the word "pause" in the traditional formula did not alter the standard of proof in a manner adverse to the accused. That was because pausing or hesitating did not alter the standard of proof in a manner adverse to the accused. That addition did not set an unduly high standard for reasonable doubt, and thus lower the standard of proof incumbent on the Crown. In *Gilmour v HMA* 2007 SCCR 417, 2007 SLT 893 the trial judge had defined a reasonable doubt as a real doubt in the jury's mind, not an insubstantial or fanciful one. He went on to say "for a verdict of guilty you need not be absolutely certain of guilt – and I emphasise absolutely certain – but you must be reasonably certain, because if you are not reasonably certain you have a reasonable doubt". This was conceded to be a misdirection, for the reasons given in A v HMA (below). However, this was not held to have caused a miscarriage of justices, since the trial judge had repeatedly emphasized that the jury must acquit if there was reasonable doubt in their minds.

[95] *Adam v HMA* 2005 SCCR 479 at para [9], *Urquhart v HMA* 2009 SCCR 339 at para [6].

[96] *Aiton v HMA* 2010 SCCR 306, [2009] HCJAC 15 at paras [41] and [42].

[97] *A v HMA*, 2003 SCCR 154 at paras [10] – [13], 2003 SLT 497. In *Meyl v HMA* 2005 SCCR 338 at para [14] it was said that what was set out in *A v HMA* at para [12] did not prescribe a mandatory form of direction, but indicated what would be sufficient for a trail judge to fulfil his duty.

[98] *Lambie v HMA*, 1973 JC 53.

[99] *King v Lees*, 1993 JC 19, 23 (opinion of the court).

[100] *Stair Encyclopaedia*, Vol 7, para 125 note 4

[101] *Robertson v HMA* 2012 SCCR 450.

[102] *Bennett v HMA*, 1976 JC 1, 3 per LJ-G Emslie. See also *Boncza-Tomaszewski v HMA* 2000 JC 586; 2000 SCCR 657 at para [10].

[103] Stair Encyclopaedia, supra, at para 767.

[104] *Fox v HMA*, 1998 JC 94, 98, 1998 SLT 335, 339, per LJ-G Rodger. *Campbell v HMA* 2004 SCCR 220 at para [92], 2004 SLT 397. See also *Ingram v HMA* Appeal Court 31 March 1999.

[105] Fox *supra* at p 126F and 134E, *Chatham v HMA* 2005 SCCR 373 at para [7], *CR v HM Advocate* 2022 JC 235

[106] *Callan v HMA* 1999 SCCR 57: 1999 SLT 1102.

[107] *Fox v HMA*, supra; SCCR 2002 647. *Walker v Smith*, 1975 SLT (Notes) 85. *Scott v HMA* 2008 SCCR 110, *HMA v Al-Megrahi* 2002 SCCR 509, para. 34 and *HMA v Smith* 2008 SCCR 255.

[108] *Smith v Lees*, 1997 JC 73, 109 per Lord McCluskey.

[109] *Geddes v HMA* 2015 HCJAC 10 at para 92

[110] *Murray v HMA* [2006] HCJAC 10

[111] See generally *Callan v HMA*, 1999 SLT 1102, 1999 SCCR 57.

[112] *McNee v HMA* Appeal Court 30 October 2002 para [7].

[113] *Stair Encyclopaedia* ,Vol 10, para 522.

[114] See section 256(3) of the Criminal Procedure (Scotland) Act 1995

[115] See *Kerr v HMA* 2004 SCCR 319 para [9]

[116] See *Liddle v HMA* 2012 SCCR 478 para [16]

[117] *Lambie v HMA*, 1973 JC 53, 59.

[118] *Dunn v HMA* 1986 SCCR 340 per LJ-C Ross at page 345; *Meighan v HMA* 2002 SCCR 779 para [13].

[119] *Douglas v HMA* 2000 GWD 37-1388; Appeal Court 26 October 2000 at para [5].

[120] *Lyttle v HMA* 2003 SCCR 713 at para [20]; *Elsherkisi v HMA* 2011 SCCR 735.

[121] *Gibson v HMA* 2008 SCCR 857

[122] *McCullochs v Rae*, (1915) 7 Adam 602.

[123] See *Murphy v HMA* 2012 HCJAC 66 at para 19 and *Cordiner v HMA* 1991 SCCR 652 as examples. It is however not the position that in circumstances where the charge contains distinct offences the jury is required to deliver separate verdicts for each separate offence libelled.

[124] Renton & Brown, *Criminal Procedure*, 6th ed, para. 8-64; *Dickson v HMA*, 1994 SCCR 478, 1995 SLT 703; *Diamond v HMA (No. 1)*, 1999 SCCR 411, 1999 SLT 973

[125] See also *Johnston v HMA*, 1998 SLT 788

[126] *Fraser v HM Advocate* 2013 SCCR 674

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Written Directions - Assisting the jury

1. Introduction

The introductory directions, given also in writing to the jury, are now an embedded and permanent part of solemn trials. Some judges may not like the new procedure but jury trials are not conducted for the amusement of judges or for that matter, prosecution and defence lawyers. They are conducted to do justice in serious criminal cases by placing all decisions of fact with a body of people with no legal training who must nevertheless apply the law as explained by the judge.

Whilst the directions may not be a perfect fit for every case, they allow a judge to give a more focused charge at the end of the trial. More importantly, there has been some extremely positive feedback from jurors about how helpful they find the directions provided at the start of the trial and made available in writing.

2. Background

The issue of what kind of written directions would be most useful for a jury was under discussion

within the Jury Manual Committee for a number of years before the introduction of appendix G of the Amalgamated Briefing Paper on Restarting Solemn Trials in 2020. We learned from academics who spoke to the Committee, and who had reviewed the literature and conducted their own experiments and data gathering, that there is research from all over the world demonstrating how written directions enhance a jury's understanding. [127] In short:

> *"The empirical evidence suggests that the most effective ways of enhancing juror memory and understanding are juror note-taking, pre-instruction, plain language directions and the use of written directions and structured decision aids (routes to verdict). Each of the methods targets different issues (some improve memory, some improve understanding and application of legal tests) and there is evidence to suggest that they are best used in combination, rather than as alternatives."*

This is all known to the Scottish Government which commissioned the footnoted research paper. If the judiciary had not done something to address this, it is almost certain that the Scottish Parliament would have done. We are one of the last countries with juries to have faced up to the need for written assistance for juries, no doubt influenced by our strong oral tradition.

In England there is an extremely prescriptive regime in place for written directions which some might consider to be cumbersome and difficult to apply in a jury trial in Scotland. The Jury Manual Committee considers that there may be better and more flexible ways to assist Scottish juries by the provision of appropriately targeted written directions.

3. Where next and why?

The model adopted with written introductory directions is as far as we have got in Scotland so far with written directions. It is not the final destination. There are many other ways in which a judge may assist a jury by providing written directions and we would encourage judges in every jury trial to consider what further written assistance might be provided to the jury.

There is a fuller and useful discussion to be found in the Lord Justice Clerk's Report "Improving the Management of Sexual Offence Cases" at chapter 5.58-5.69.

It is important that the reader understands that the phrase "route to verdict" can have different meanings. In Scotland, the term has been used in this way:

> *"[13] The terms of a trial judge's charge to the jury should be such as to enable the informed observer, who has heard the proceedings at the trial, to understand the reasons for the verdict. In other words, there must be a discernible route to the verdict. This approach meets the requirement for a reasoned verdict (Judge v United Kingdom at (2011) 52 E.H.R.R., pp.242–243 , paras 35–39, following Taxquet v Belgium; Younas v HM Advocate, Lord Justice Clerk (Carloway) at 2014 SLT, p.1054; 2014 S.C.L., p.51 , para.68).*[128]

The path or route to verdict which was found sufficient in *Younas v HM Advocate* 2015 JC 180 at para 68, is explained in para 67 of the opinion. The appellant was charged with murdering his baby daughter by shaking her or otherwise inflicting trauma on her head and neck. The trial judge:

> *"67… did provide the jury with a route or path to verdict. In particular, he told the jury that, in order to convict, they would require first to be satisfied that the Crown had excluded inhalation of food or vomit as the cause of A's collapse. This was, of course, precisely the*

hypothesis advanced by the defence witnesses. The judge went on to direct the jury that they would require to be satisfied that other causes, such as natural disease and genetic condition, had also been excluded. He moved onto the subject of shaking as a cause of death and of other traumatic factors which might have been instrumental."

The Lord Justice Clerk's Review para 5.69 states:

> *"The 2018 review indicated that such limited research as there is seems to suggest that structured routes to verdict are more effective than written directions in improving applied comprehension, so long as the accompanying oral directions are tailored to the route to verdict provided, otherwise there is a danger that jurors ignore the route to verdict. We recognise that there is merit in providing the jury with the means to find what the court in H v HM Advocate referred to as "a discernible route to the verdict". We are not entirely convinced that this need be in a formal or structured way. The evidence base for formalised routes to verdict is very limited.*
>
> *Such formal approaches may run the risk of inhibiting the jury's consideration of the evidence as a whole, and may have some of the risks associated with the posing of specific questions designed to obtain a reasoned verdict from a jury, as discussed above. There is a risk that the case is presented to the jury on the basis of an unduly limited hypothesis. We accept that this is another issue which might benefit from further research. We also consider that judges should be encouraged to formulate their directions in a way which more clearly provides for the jury the "road map" to help them find a route to verdict. No doubt this is a matter which the Jury Manual Committee would wish to address at the earliest opportunity."*

Review recommendation 4 (e) states:

> *"The Review Group considered the use of what are known as "routes to verdict", structured aids to assist juries in reaching a verdict. The Review Group concluded that the Jury Manual committee should consider ways to assist judges to formulate their directions in a way which more clearly provides the jury with the "road map" helping them find a "route to verdict", but without necessarily introducing structured "routes to verdict".*

Given how much impact the particular circumstances of the individual case will have on what directions are required, we have not set about providing prescriptive guidance on further written directions such as "routes to verdict." We consider that the presiding judge is best placed to determine if further written directions, and if so what type, would assist the jury in a particular case but we give some examples below.

In a suitable case, which might be any case but especially where the issues of law are complex such as defining statutory crimes with multiple modes of commission, judges should consider providing more written direction.

The definition of terrorism offences under the Terrorism Acts of 2000 and 2006 provides one example where it has proved helpful to the jury where the trial judge provided the definition of the offence in writing.

In some, and perhaps many, charges involving the definition of the offence in the Domestic Abuse

(Scotland) Act 2018, section 1, it is very likely to assist the jury if the trial judge provides in writing the definition of the crime and/or an explanation of the stages the jury must go through to reach their verdict.

In cases under the Sexual Offences (Scotland) Act 2009, at the conclusion of the evidence the judge will know whether reasonable belief is a live issue in the trial (which usually it will not be) and will prepare appropriate directions for charging the jury. It would be possible to prepare the charge in such a way that a written direction on what constitutes the crime, what must be proved, what must be proved by corroborated evidence and, in some cases, where corroboration may be found for a crucial fact (distress is a good example) could be extracted from the charge and provided to the jury in writing.

The primary function of the charge is to explain the applicable law to the jury. Since it is for the jury to determine what the evidence was and what is to be made of it, judges should be cautious in deciding how much they should say about the evidence generally and particularly in any directions to be provided in writing along with the charge. It will generally be more helpful, and safer, to confine any further written directions to matters of law. That said, in a High Court case where the judge provided the whole text of the charge in writing, which included reference to important pieces of evidence, there was no appeal against conviction following the conviction of both accused.

The Jury Manual Committee is aware of various examples of further written directions being provided to juries. In particular:

- one of our number has given the jury a written note of his directions on the meaning of certain terrorism offences;
- one of our number, where there were numerous sexual and non sexual crimes charged, with parties' agreement, gave the jury a printout of her directions on the definitions of the crimes;

- another of our number, having alerted parties that this would happen (they agreed) gave the jury the whole typed text of the charge in a complex case of murder where there were multiple issues before the jury including self-defence; concert; accident; murder; or culpable homicide where such a verdict could have been reached by two routes;
- where it has been necessary to provide directions on a number of possible alternative verdicts, another of our number, having again alerted parties and with their agreement, has provided a written note of the text of the final chapter of his charge ("Verdicts") with an explanation of how any alternative verdicts should be returned;
- we are aware of judges answering jury questions by giving a repeated or further direction orally before providing it in writing;
- we are aware of judges providing the full text of sections of their charge as written directions on Moorov and concert in the course of their charge;
- one of our number, where the indictment contained over 60 charges, with parties' agreement, gave the jury a grid listing the crimes charged in order, the available verdicts, whether unanimous or by majority and whether under deletions, for the jurors' assistance.

Whilst amongst these examples judges sometimes had agreement from parties that directions would be provided in writing, a judge is entitled to provide appropriate written direction

regardless of the views of parties. Parties do not ordinarily have a say and they never have a veto on the terms of a judge's charge to the jury. If the same information is provided in written as well as spoken form, there can be no miscarriage of justice unless there is a material misdirection as there may be if the directions were given only orally. The provision of written directions can make no difference other than to assist the jury.

Judges should note that if they are considering providing a jury with a "route to verdict" then the final section of almost every Jury Manual specimen direction on the constitution of the offence concludes with a summary of what must be proved before a guilty verdict is returned. Such directions provide the starting point for a template of what may be required.

We provide an illustrative example of a road map or route to verdict which was given orally in a murder trial. It might usefully have been provided in writing and, we consider, could then have helpfully included a brief written synopsis of the three conditions for self-defence and the four conditions for provocation. If using this model it would be more helpful still to provide written directions on self-defence and provocation to which the jurors could refer back.

Illustration

"As long as you apply the rules of law that I have told you about, it is for you to go about your task as you see fit. You might find it helpful if you consider the following series of questions:

1. Are you satisfied beyond reasonable doubt that the accused caused the death of X by placing his hands around his neck and compressing it?

That has not been disputed in this case and there is ample evidence to prove it and I will assume that you will be satisfied of this, so the next issue is:

2. Was the accused acting in self-defence?

This involves you considering the three conditions relating to self- defence.

It is for the Crown to exclude self-defence beyond reasonable doubt.

If the accused was acting in self-defence as I have explained it to you, or you could not exclude that beyond reasonable doubt, you would acquit the accused and go no further.

On the other hand if you were to exclude self-defence beyond reasonable doubt, you would then require to consider the evidence again and determine if the accused was acting under provocation, which would lead to a third question.

3. Was the accused acting under provocation?

This involves you considering the four conditions relating to provocation

It is for the Crown to exclude provocation beyond reasonable doubt.

If you had excluded self-defence and found that the accused was acting under provocation as I have explained it to you, he would be guilty of culpable homicide.

If provocation is excluded beyond reasonable doubt, you would still need to consider if the assault was murderous in nature, and this involves determining if the accused wickedly intended to kill the accused or if he assaulted X, intending to cause physical injury, and acting with wicked recklessness as to whether X lived or died, which leads to a fourth question

4. Regardless of any question of provocation is the crime culpable homicide?

If you had excluded self-defence but were not satisfied that the accused had a murderous state of mind, you would find him guilty of culpable homicide

5. Before you could find the accused guilty of murder you would have to have excluded self-defence and provocation beyond reasonable doubt and be satisfied on a fifth question:

Are you are satisfied beyond reasonable doubt that either?

1. he wickedly intended to kill or,
2. he assaulted X, intending to cause physical injury and acting with wicked recklessness as to whether X lived or died

If you are satisfied beyond reasonable doubt that he wickedly intended to kill X, you would find him guilty of murder.

Equally, if you were satisfied beyond reasonable doubt that the accused assaulted X, intending to cause physical injury and acting with wicked recklessness as to whether X lived or died, then you would find the accused guilty of murder.

It is your decision what conclusion you reach on each question."

[127] Chalmers. J, and Leverick. F, Methods of conveying information to jurors: evidence review" , Scottish Government, 2018, accessible at:https://www.gov.scot/publications/methods-conveying-information-jurors-evidence-review-research-findings/

[128] *CH v HM Advocate* [2016] HCJAC 4 at para 13

Alibi

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1. Law

2. Possible form of direction on Alibi

Law

1 Alibi means that the accused was not at the locus delicti at the material time but that he was at another definite place, which must be specified.[129]

2 Where an indictment is unspecific as to the date and is framed therefore with a latitude as to the time of commission of the alleged crime, and the accused lodges a defence of alibi specifying a time, or a time period, within the Crown latitude, then for the purpose of testing the alibi the time or period named by the accused will be taken as the correct one.[130]

3 There may be cases where, although the accused is admitting being near the place libelled in the charge, he offers an explanation for his being present at the locus. In these circumstances notice of a special defence of alibi does not require to be given.[131]

4 In charging the jury the trial judge is not bound to emphasise all the details of a special defence of alibi.[132]

5 It is for the Crown to meet the defence and satisfy you beyond reasonable doubt that it should be rejected.[133]

Possible form of direction on Alibi

“In this case the accused has lodged a special defence of alibi. That was read out to you at the start of the trial, and you have a copy of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It does not take away from the accused’s stance that s/he is not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence do not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it is believed, or if it raises a reasonable doubt, an acquittal must result.

In this case the accused is saying that at the time the crime was committed s/he was not there, but at another place. Hence s/he is not the perpetrator. It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected.

To support that the defence rely on:

On the other hand the Crown challenge that evidence and say:

You should look at all the evidence, consider the points made for and against alibi, and then decide if the Crown has proved guilt beyond reasonable doubt."

There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[134] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the presence of the jury before parties address the jury.[135]

[129] Macdonald, *Criminal Law*, 5th ed, p 265.

[130] Macdonald, supra, at p 219.

[131] *Balsillie v HMA*, 1993 JC 233, 237.

[132] *McGhee v HMA*, 1991 SCCR 510, 516 (opinion of the court).

[133] *Henvey v HM Advocate* 2005 SCCR 282; 2005 SLT 384 [11].5

[134] *Carr v HMA* [2013] HCJAC 87.

[135] *Lucas v HMA* 2009 SCCR 892.

Attempted Crime

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1. LAW

1.1. Attempts in relation to the Sexual Offences (Scotland) Act 2009

2. POSSIBLE FORM OF DIRECTION ON ATTEMPTED CRIME

LAW

See *Stair Encyclopaedia*, Vol 7, paras 161-170; Gordon, *Criminal Law*, 3rd ed, Vol I, chapter 6.

> "A person who has mens rea and acts in some way in order to bring about what he has intended may be guilty of an attempt to commit that crime. The reason why the attempt fails is not important. It makes no difference whether this was because the accused was acting under a mistake or was interrupted or desisted before the crime was completed. What matters is that the intention to commit the crime was brought forward to the stage of perpetration by the doing of some act to bring the intention into effect."[136]

1 For a relevant charge of an attempt to commit a crime, it must be averred that the accused has the necessary mens rea and that he has done some positive act towards executing his purpose, that is to say that he has done something which amounts to perpetration rather than mere preparation.[137]

2 An attempted crime is constituted either when the accused has embarked sufficiently along the train of events intrinsic to its commission before being interrupted so as to enable it to be reasonably concluded that the crime was being physically attempted in fact, or when all the necessary acts essential to the completion of the crime have been committed upon the mistaken belief inextricably bound up with the criminal intent that the crime was being achieved.[138]

Attempts in relation to the Sexual Offences (Scotland) Act 2009

An attempt to commit such a statutory offence in terms of the Sexual Offences (Scotland) Act 2009 is just that: it is not another form of offence of the kind referred to in another section. The *mens rea* for the former is the same as that required for the completed act, even though the *actus reus* be different. [139]

POSSIBLE FORM OF DIRECTION ON ATTEMPTED CRIME

"Charge is a charge of attempted [X].

by law, an attempt to commit a crime is a crime itself, so an attempt to commit [X] is criminal in itself.

To define attempted [X] I must first define [X]: (take in definition as appropriate)

To find the accused guilty of the crime of attempted [X] you would need to be satisfied that he had made a positive move towards committing the crime, but had not yet completed it. In other words, that he had got beyond preparation for the crime to the stage of having begun to commit it: that he was engaged in some action directed towards the intended result. Each case depends on its own circumstances, but disconnecting a burglar alarm on an outside wall would indicate attempted housebreaking with intent to steal. That gives you the flavour of attempt.

For the Crown to prove this charge, you would have to be satisfied that:

1. the accused intended to commit [X];
2. he carried out the acts referred to in the charge;
3. these were directed towards committing the crime; and
4. that the stage of preparation had been passed."

[136] *Docherty v Brown*, 1996 JC 48, 50 per LJ-G Hope.

[137] *Docherty v Brown*, supra, per LJ-C Ross at 60.

[138] *Docherty v Brown*, supra, per Lord Johnston at 74.

[139] *RCB v HM Advocate* 2016 SCCR 374 para 17

Automatism

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON AUTOMATISM (spiked drinks case)

LAW

See *Stair Encyclopaedia*, Vol 7, paras 151-158.

> *"[A]utomatism consisting of an inability to form mens rea which is due to an external factor, and not to some disorder of the mind itself which is liable to recur, is a defence so long as there is evidence that three requirements are satisfied. These are that the external factor must not be self-induced, that it must be one which the accused was not bound to foresee and that it must have resulted in a total alienation of reason amounting to a total loss of control of his actions in regard to the crime with which he is charged"*.[140]
>
> "*But the whole point of the defence is that the accused was suffering from a total loss of control over his actions in regard to the crime with which he is charged. Unless there is evidence directed to this essential point, the defence is not available. It is a point of such importance that it cannot be left to speculation, and a few casual remarks or feelings by the witnesses will not do. There must be clear evidence to support it, and this means that the evidence must be specific on all details which are material. The evidence must relate to the state of mind of the accused. It must relate to the time at which the crime charged was committed. And it must provide a causative link between the external factor and the total loss of control. It is unlikely that these requirements will be satisfied unless there is some expert evidence, since the essence of the defence is a state of mind which requires to be precisely diagnosed and the cause of it must be explained. A genuine case will have the basis for it carefully laid, by eliciting from the eyewitnesses who observed the accused's condition at the critical time all the elements which are necessary for an informed diagnosis to be made*."
>
> "*It is unlikely that these requirements will be satisfied unless there is some expert evidence, since the essence of the defence is a state of mind which requires to be precisely diagnosed, and the cause of it must be explained*".[141]

See also the chapter on Intoxication.

POSSIBLE FORM OF DIRECTION ON AUTOMATISM (spiked drinks case)

"In this case the accused has lodged a special defence of automatism. That was read out to you at the start of the trial, and you have copies of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It does not take away from the accused's stance that he is not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence do not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it's believed, or if it raises a reasonable doubt, an acquittal must result.

In this case the defence say that at the time of this incident the accused could not form the intent necessary for committing this crime because his drink was spiked. Hence he should be acquitted. It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected.

Automatism should not be confused with insanity. Insanity is due to a mental illness or mental disorder. It is organic in origin. It causes a permanent or recurring total loss of reason. Automatism is due to an external factor such as the consumption of alcohol or drugs, exposure to toxic fumes, or concussing head injuries. It causes a temporary total loss of reason.

Automatism describes acting in a state of grossly impaired consciousness. In such a state a person is not aware of what he is doing, and so could not have the intent to commit a crime such as this. If the accused was is such a state he would fall to be acquitted.

But that could happen if, and only if, these three requirements are met:

1. The external factor causing loss of reason mustn't be self-induced. You cannot deliberately or recklessly drink yourself silly and avoid responsibility for your actions; that would be knowingly and voluntarily depriving yourself of your self control. But if your drink had been spiked by somebody else, that would not be a self-induced cause.
2. That external factor must not be something you could have foreseen. You must have had no reason to think your drink might have been spiked.
3. The result must be a total alienation of reason amounting to a complete loss of self-control. That is a matter for expert medical evidence.

There is sufficient evidence for you to consider this defence, but the assessment of its quality, strength and effect is for you to decide.

If you accept the evidence that:

1. the accused was not responsible for spiking his drink;
2. he had no reason to think that anyone else would spike his drink;
3. the result of his drink being adulterated was a total alienation of reason amounting to total loss of control of his actions, then you could conclude that he was not able to form the intention necessary to commit this crime, and that he should be acquitted."

There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the

jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[142] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the presence of the jury before parties address the jury.[143]

[140] *Sorley v HMA*, 1992 JC 102, 105 (opinion of the court), explaining five judge decision in *Ross v HMA*, 1991 JC 210

[141] ibid at 107.

[142] Carr v HMA [2013] HCJAC 87

[143] Lucas v HMA 2009 SCCR 892

Bail and Other Statutory Aggravations

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LAW – BAIL AGGRAVATION

General References

Criminal Procedure (Scotland) Act 1995, section 27 as amended by s3 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007.

Legal Principles

1 "When trial judges require to refer to charges under the Bail Act or, more recently, the aggravation of a charge by reason of its having been committed while the accused was on bail, very little requires to be said in regard to such consequential matters. All that a judge requires to do is to direct the jury that, if they convict on the charge it follows that conviction of contravention of the Bail Act will follow. Conversely, if they acquit on the relevant charge, it will follow automatically [that] they acquit in regard to that matter. Any explanation which is given to the jury about the significance of the accused being granted bail should be expressed in words that are chosen with care and restraint."[144]

2 Section 27(4A) of the 1995 Act, which applies to a bail aggravation occurring after 4 July 1996, provides that the fact that the offence libelled was committed while the accused was on bail is held to be admitted, unless challenged by a notice of preliminary objection under section 72(1)(b) (or that provision as applied by s.71(2)). Where there is a challenge, or in relation to a contravention of a bail order between 31 March 1995 and 4 July 1996, the Crown has to prove the bail order.

3 Section 27(4B) of the 1995 Act, which came into operation on 10 December 2007, provides that the fact that the accused was on bail, was subject to any particular bail condition, failed to appear at a diet, or was given due notice of a diet, is held to be admitted, unless similarly challenged.

4 It should be noted that a reasonable excuse may be raised by the defence: see ss27(1) and 27(7).

LAW – OTHER STATUTORY AGGRAVATIONS

The various statutory provisions are set out before each section dealing with each specific aggravation. The following applies equally to each aggravation.

General Reference

Renton and Brown *Criminal Procedure Legislation* Vol 2 para A6-38

Some active misconduct making reference to the victim's race/religion/sexual orientation etc. requires to be established. It is not necessary for the accused to be established to be ideologically prejudiced in the particular way. It is enough that at the time of the offence, his behaviour was motivated in part by the particular prejudice – *Brown v HMA* 2000 SCCR 736. The use of a word such as 'Afro' could satisfy the race aggravation albeit it could also refer to a hair style – *Sennels v McGowan* 2011 SCCR 180. Similarly the use of the phrase 'Geordie bastard' would entitle a jury to conclude that the accused was motivated in whole or in part by malice and ill will towards persons of English origin based on the complainer's membership of that group by reason of association with it and identified by his place of origin –*Moscrop v McClintock* 2011 SCCR 621.

LAW – RACE

CRIME & DISORDER ACT 1998

Section 96 Offences racially aggravated.

(1) The provisions of this section shall apply where it is— (a) libelled in an indictment; or (b) specified in a complaint, and, in either case, proved that an offence has been racially aggravated.

(2) An offence is racially aggravated for the purposes of this section if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a racial group; or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group,

and evidence from a single source shall be sufficient evidence to establish, for the purposes of this subsection, that an offence is racially aggravated.

(3) In subsection (2)(a) above—

• "membership", in relation to a racial group, includes association with members of that group;

• "presumed" means presumed by the offender.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—

(a) the fact or presumption that any person or group of persons belongs to any religious group; or

(b) any other factor not mentioned in that paragraph.

(6) In this section "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

LAW – RELIGION

CRIMINAL JUSTICE (SCOTLAND) ACT 2003

Section 74 Offences aggravated by religious prejudice

(1) This section applies where it is—

(a) libelled in an indictment; or

(b) specified in a complaint, and, in either case, proved that an offence has been aggravated by religious prejudice.

(2) For the purposes of this section, an offence is aggravated by religious prejudice if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

(2A) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state— (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or (ii) otherwise, the reasons for there being no such difference.

(5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

(6) In subsection (2)(a)—

• "membership" in relation to a group includes association with members of that group; and

• "presumed" means presumed by the offender.

(7) In this section, "religious group" means a group of persons defined by reference to their—

(a) religious belief or lack of religious belief;

(b) membership of or adherence to a church or religious organisation;

(c) support for the culture and traditions of a church or religious organisation; or (d) participation in activities associated with such a culture or such traditions.

LAW – DISABILITY

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) ACT 2009

Section 1 Prejudice relating to disability

(1) This subsection applies where it is—

(a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to disability, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to disability if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to a disability (or presumed disability) of the victim, or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or a particular disability.

(3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by prejudice relating to disability,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state— (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or (ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), "presumed" means presumed by the offender.

(7) In this section, reference to disability is reference to physical or mental impairment of any kind.

(8) For the purpose of subsection (7) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.

LAW – SEXUAL ORIENTATION OR TRANSGENDER IDENTITY

Section 2 Prejudice relating to sexual orientation or transgender identity

(1) This subsection applies where it is—

(a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) the transgender identity (or presumed transgender identity) of the victim, or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—

(i) a particular sexual orientation, or

(ii) a transgender identity or a particular transgender identity.

(3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to sexual orientation or transgender identity.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state— (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or (ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), "presumed" means presumed by the offender.

(7) In this section, reference to sexual orientation is reference to sexual orientation towards persons of the same sex or of the opposite sex or towards both.

(8) In this section, reference to transgender identity is reference to—

(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or

(b) any other gender identity that is not standard male or female gender identity.

LAW – TERRORIST CONNECTION

COUNTER TERRORISM ACT 2008

Section 31 Sentences for offences with a terrorist connection:

(1) This section applies where in Scotland, in relation to an offence specified in Schedule 2 (offences where terrorist connection to be considered)—

(a) it is libelled in an indictment, and

(b) proved, that the offence has been aggravated by reason of having a terrorist connection.

(2) Where this section applies, the court must take the aggravation into account in determining the appropriate sentence.

(3) Where the sentence imposed by the court in respect of the offence is different from that which the court would have imposed if the offence had not been aggravated by reason of having a terrorist connection, the court must state the extent of, and the reasons for, the difference.

(4) For the purposes of this section, evidence from a single source is sufficient to prove that an offence has been aggravated by reason of having a terrorist connection.

(5) This section has effect in relation only to offences committed on or after the day it comes into force.

LAW – CONNECTED WITH SERIOUS ORGANISED CRIME

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

Section 29 Offences aggravated by connection with serious organised crimes

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

LAW - HUMAN TRAFFICKING

HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) ACT 2015

Section 5 General aggravation of offence

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with human trafficking activity, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with human trafficking activity if the offender is motivated (wholly or partly) by the objective of committing or conspiring to commit the offence of human trafficking.

(3) It is immaterial whether or not in committing an offence the offender in fact enables the offender or another person to commit the offence of human trafficking.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with human trafficking activity.

LAW - DOMESTIC ABUSE

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

Section 1 Aggravation of offence where abuse of partner or ex-partner

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—

(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or

(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.

(3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).

(7) In this section—

- “cause” includes contribute to causing (and “causing” is to be construed accordingly),

- "psychological harm" includes fear, alarm or distress.

POSSIBLE FORM OF DIRECTION ON BAIL AGGRAVATION

"You'll see that added at the end of the charge is an allegation that the accused committed that crime while he was on bail. If a court grants someone bail, that's on condition that he doesn't commit any crime while he's on bail. If he does, that crime becomes more serious.

In case, there's been no challenge, and therefore the accused is held to have admitted, that he was on bail at the time."

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY REASON OF RACE

You'll see that added at the end of the charge is an allegation that the crime was committed as a result of being aggravated by reason of race. The Crown say that the crime which they assert was committed by the accused was racially aggravated. This is an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was aggravated by reason of race, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

You require to be satisfied beyond reasonable doubt that:

(a) Immediately before, at the time, or after the offence was committed, the accused showed malice and ill-will to the complainer (name the person), based on his membership, actual or presumed by the accused, of a racial group. Membership includes association with members of that group.

Or

(b) The offence committed was wholly or partly motivated by malice and ill-will towards members of a racial group, based on their membership of that group.

In either case, it's immaterial that your malice and ill-will is also based on the victim's membership, actual or presumed, of any religious group, or any other factor. What this means is that it is irrelevant for the purposes of deciding whether the offence is aggravated by reason of race that that the accused may have had another reason for acting in the way it is alleged.

When I use the phrase 'racial group' this means any group of persons, defined by race, colour, nationality, citizenship, or ethnic or national origins.

So, for example, the use of phrases or words before, during, or after the commission of the offence might satisfy you that the aggravation applied in this case.

Now in considering this matter what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the

offence detailed in the charge was committed by the accused.

You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY RELIGIOUS PREJUDICE

You'll see that added at the end of the charge is an allegation that the crime was committed as a result of being aggravated by religious prejudice. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was aggravated as a result of religious prejudice, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

You require to be satisfied beyond reasonable doubt that:

(a) Immediately before, at the time, or after the offence was committed, the accused showed malice and ill-will to the complainer (name the person), based on his membership, actual or presumed by the accused, of a religious group, or of a social or cultural group with a perceived religious affiliation. Membership includes association with members of that group.

Or

(b) The offence committed was wholly or partly motivated by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

In either case, it's immaterial that the accused may have had another reason for acting in the way it is alleged.

When I use the phrase 'religious group', this means a group of persons defined by reference to:

(a) their religious belief or lack of such belief, for example Christians, Moslems, atheists,

(b) membership of or adherence to a church or religious organisation, for example Protestants, Catholics, Baptists, Mormons,

(c) Support for the culture of a church or religious organisation or

(d) Participation in activities associated with the culture or traditions of a church or religious organisation.

So, for example, the use of phrases or words before, during, or after the commission of the offence might satisfy you that the aggravation applied in this case.

Now in considering this matter what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the

aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY PREJUDICE RELATING TO DISABILITY

You'll see that added at the end of the charge is an allegation that the crime was committed as a result of being aggravated by prejudice relating to disability. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was aggravated as a result of prejudice relating to disability, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

It is important to stress that simply because you decide that the accused committed the offence because the complainer happened to be disabled and thus vulnerable is not enough in itself to establish this aggravation.

What do you need to be satisfied of if this aggravation is to apply to the charge?

You require to be satisfied beyond reasonable doubt that:

(a) Immediately before, at the time, or after the offence was committed, the accused showed malice and ill-will to the complainer (name the person) relating to a disability, actual or presumed by the accused, of the complainer. Membership includes association with members of that group.

Or

(b) The offence committed was wholly or partly motivated by malice and ill-will towards persons who have a disability or a particular disability.

In either case, it's immaterial that the accused may have had another reason for acting in the way it is alleged.

Disability refers to physical or mental impairment of any kind. A medical condition which has or may have a substantial or long term effect or is of a progressive nature amounts to an impairment for the purpose of the aggravation.

So, for example, the use of phrases or words before, during, or after the commission of the offence might satisfy you that the aggravation applied in this case.

Now in considering this matter what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to

consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY PREJUDICE RELATING TO SEXUAL ORIENTATION OR TRANSGENDER IDENTITY

You'll see that added at the end of the charge is an allegation that the crime was committed as a result of being aggravated by prejudice relating to sexual orientation or transgender identity. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was aggravated as a result of prejudice relating to sexual orientation or transgender identity, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

You require to be satisfied beyond reasonable doubt that:

(a) Immediately before, at the time, or after the offence was committed, the accused showed malice and ill-will to the complainer (name the person) relating to (i) the sexual orientation, actual or presumed, of the complainer or (ii) the transgender identity, actual or presumed, of the complainer,

Or

(b) The offence committed was wholly or partly motivated by malice and ill-will towards persons who have a particular sexual orientation or transgender identity.

In either case, it's immaterial that the accused may have had another reason for acting in the way it is alleged.

Sexual orientation includes heterosexuals, bisexuals, and homosexuals. Transgender identity includes transvestism, transsexualism, intersexuality, and changing one's gender.

So, for example, the use of phrases or words before, during, or after the commission of the offence might satisfy you that the aggravation applied in this case.

Now in considering this matter what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused.

You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY A TERRORIST

CONNECTION

You'll see that added at the end of the charge is an allegation that the crime was committed as a result of having a terrorist connection. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime has a terrorist connection, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

Firstly, an offence has a terrorist connection if the offence either is, or takes place in the course of, an act of terrorism, or is committed for the purposes of terrorism.

Secondly what constitutes terrorism?

Firstly the use or threat of action anywhere in which the action involves one of the following:- serious violence against a person, involves serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public anywhere or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly that use or threat is designed to influence the government or an international governmental organisation or to intimidate the public anywhere or a section of the public (if the use of firearms or explosives are involved this factor is satisfied without any further evidence).

And thirdly that use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

Reference to government means any national government or the devolved governments in the United Kingdom and Northern Ireland.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIMES

You'll see that added at the end of the charge on the Indictment is an allegation that the crime was committed as a result of being connected to serious organised crime. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was connected to serious organised crime, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

Firstly, the person committing the offence requires to be motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

Secondly what constitutes serious organised crime? This is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences.

What qualifies as a serious offence?

These directions should be adapted to the circumstances of the case.

The offence must be committed either: (a) with the intention of obtaining a material benefit for anyone; or (b) must comprise a threat or violent act intended to obtain such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind.

Now in considering this matter it does not matter that the offence in the charge actually enabled the accused or another to commit serious organised crime. Further what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY HUMAN TRAFFICKING

You'll see that added at the end of the charge is an allegation that the crime was committed and had a connection with human trafficking activity. This is an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime had a connection with human trafficking activity, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

An offence is aggravated by a connection with human trafficking activity if you are satisfied that the person committing the offence has done so whilst motivated (wholly or partly) by the objective of committing or conspiring to commit the offence of human trafficking. It is of no relevance that the accused by committing the offence in fact enables him/her or another to commit the offence of human trafficking.

The offence of human trafficking is defined as follows (adapt the direction for section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015)

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY DOMESTIC ABUSE

You'll see that added at the end of the charge is an allegation that the crime involved abuse of the partner or ex-partner of the person committing it. This is an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime involved abuse of the partner or ex-partner of the person committing it., it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge?

An offence is aggravated in the manner alleged (as appropriate)[if in committing the offence the accused intends to cause the partner or ex-partner/if in committing the offence against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner] to suffer physical or psychological harm. Psychological harm includes fear, alarm or distress. Reference to cause and causing includes contribute and contributing to causing.

For the aggravation to apply no physical or psychological harm does in fact have to be caused to the partner/ex partner.

A partner includes a spouse, civil partner, a person living with the accused as if a spouse or civil partner, or a person in an intimate relationship with the accused. An ex partner is anyone who formerly fell within that category.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

[144] *Friel v HMA*, 1998 SCCR 47, 49.

Causation

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1. LAW

LAW

See generally *Johnston v HMA* 2009 JC 227 at paras 45-57.

For there to be a conviction of either murder or culpable homicide it must of course be shown that death was caused by the assault under consideration.

In law, an accused's act need not be the sole cause, or even the main cause, of the death; it is enough if his act made a material contribution to that result.

To put it another way, an accused's act need not be the only cause, or even the main cause, of the death, it is enough if his act made a significant contribution to death occurring.

Whether that causal connection is established in a particular set of circumstances is a question to be determined by the jury applying its common sense. Such common sense principles do not require to be explained to a jury. Deciding questions of causation on the facts of an unusual case may be difficult, but it does not follow that that amounts to a difficulty in law on which the jury requires direction. The causal connection required by law may be perfectly clear. Its application to the facts may be a different matter with views differing. [145]

The personal vulnerabilities of a person which result in the consequences of the assault being fatal are of no significance even although a person of normal health would have survived. Similarly lack of knowledge of these vulnerabilities is of no consequence. [146]

In relation to an assault, if as a result of the attack a person suffers injury by coming into contact with something else, the attacker is responsible for that resultant injury. [147]

For causation in road traffic cases, please see the chapter on the Road Traffic Act 1988.

[145] *Johnston v HMA* para 56

[146] *McDade v HMA* 2012 HCJAC 38

[147] *Dennie v HMA* 2018 HCJAC 67

Coercion

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON COERCION

LAW

See *Stair Encyclopaedia*, Vol 7 para 202; Hume, *Commentaries*, Vol I, 51, 52, 53; Gordon, *Criminal Law*, 3rd ed, paras 13-24 to 13-29.

> "*But generally, and with relation to the ordinary condition of a well- regulated society, where every man is under the shield of the law, and has the means of resorting to that protection, this is at least a somewhat difficult plea, and can hardly be serviceable in the case of a trial for any atrocious crime, unless it have the support of these qualifications: an immediate danger of death or great bodily harm; an inability to resist the violence; a backward and an inferior part in the perpetration; and a disclosure of the fact, as well as restitution of the spoil, on the first safe and convenient occasion. For if the panel take a very active part in the enterprise, or conceal the fact, and detain his share of the profit, when restored to a state of freedom, either of these replies will serve in a great measure to elide his defence*".[148]
>
> "*[I]t is only where, following threats, there is an immediate danger of violence, in whatever form it takes, that the defence of coercion can be entertained, and even then only if there is an inability to resist or avoid that immediate danger. If there is time and opportunity to seek and obtain the shield of the law in a well- regulated society, then recourse should be made to it, and if it is not then the defence of coercion is not open. It is the danger which has to be 'immediate', not just the threat*".[149]

In the context of offences being committed in which the accused alleges that he/she has been the victim of human trafficking reference is made to *Phan v HMA* 2018 HCJAC 7.[150]

Even if the "qualifications" described by Hume are satisfied, there is authority that, as a matter of law, coercion may not be a defence in Scotland to the crime of murder.[151] But it may be a defence to other crimes.

Although coercion is not a special defence, prior notice of such a defence must be given: see Criminal Procedure (Scotland) Act 1995, s.78(2), applying s. 78(1) to such a case.

Where coercion may apply, the law deliberately applies an objective test. This goes some way towards ensuring consistency of approach, and keeps the defence of coercion, which is not regarded with particular favour, within fairly strict bounds. This ensures that people who are responsible for their actions under the criminal law cannot use the defence of coercion to avoid

the consequences of their acts, simply because of some failing in their personality or make-up which they should be trying to master.[152] That test requires the jury to consider whether an ordinary sober person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did. In a case where the accused lacks reasonable firmness, the jury must disregard that particular characteristic, but have regard to his other characteristics.[153] That means that the jury has to ignore the fact that a particular accused was more than normally pliable, vulnerable, timid or susceptible to threats, except where that characteristic results from some mental illness, mental impairment or recognised psychiatric condition.[154] Evidence can be led about all the various aspects of an accused's make-up which affected his conduct so that the accused can have the benefit of the jury's views of the facts for the purposes of mitigation.[155]

The common law imposes strict limits upon the availability of coercion as a defence.[156]

See also chapter on Necessity below.

POSSIBLE FORM OF DIRECTION ON COERCION

See *Cochrane,* above.

In the event of the defence of coercion being relied on in instances in which the accused alleges s/he has been the victim of human trafficking reference is made to *Phan v HMA 2018* HCJAC 7.[150]

"In this case the accused has lodged a special defence of coercion. That was read out to you at the start of the trial, and you have copies of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It does not take away from the accused's stance that s/he is not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence do not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it is believed, or if it raises a reasonable doubt, an acquittal must result.

In this case the defence say the accused was forced into doing what s/he did by threats from [X]. Hence s/he should be acquitted. It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected.

Normally the law regards your actions as being the result of your own free will, and holds you responsible for what you do. But if the exercise of your free will has been compromised or undermined by serious threats from someone else, your choice of action has been limited. If the choice you have is self-sacrifice or breaking the law, that is an unacceptable dilemma for anyone to be in. The law says it is unfair that you should be held responsible for your actions in these circumstances.

But that could happen if, and only if, these two conditions are met:

1. If you had reason to believe, and did believe, you were in immediate danger of death or serious injury to yourself (*quaere* a third party). The threat must be of immediate harm. Future harm is not enough.

2. Committing the crime must be the only way you could avoid the danger. In that sense the threat must be unavoidable. If you could have escaped, or sought the protection of the police, that is what you should have done.

"Actions can speak louder than words", they say, and sometimes in assessing an accused's credibility, it is useful to compare what exactly s/he did at the time and what s/he says in court later. If s/he played only a minor part in committing this crime, that could point to reluctant compliance, and support what s/he now says. But if s/he took a very active part that could point to a readiness to be involved, and could go against his or her actions being under coercion. Again, if s/he told someone of his or her involvement at the earliest safe opportunity that could support what s/he now says, but if s/he tried to hide it that could go against his or her actions being under coercion.

You have to judge his or her actions objectively. Ask "*Would the ordinary sober person of reasonable firmness, sharing the accused's characteristics, have responded to the threat as he did*?" If you thought the accused was more pliable, vulnerable, timid or susceptible to threats than your normal person, you must ignore that. The only exception would be where his or her state results from a mental illness, mental impairment, or a recognised psychiatric condition. But in the ordinary case, abnormal susceptibilities are not relevant to deciding if the accused should be acquitted on the grounds of coercion, although they might be relevant to matters I would have to consider at a later stage in this case.

There is sufficient evidence for you to consider this defence, but the assessment of its quality, strength and effect is for you to decide.

You should approach the issue of coercion with some caution. There have to be very strict limits on its availability as a defence. It is the sort of claim that is easy to make, and it could be an easy way out for someone charged to say s/he was coerced into doing what he did. It would make life simple for criminals, and very difficult for those who enforce the law. It cannot be allowed to become an easy answer for those with no real excuse for their actions, or for those who have let themselves be dominated by some criminal threat.

If you accept the evidence that:

1. the accused was threatened by [X] that unless he did [Y] then [Z] would happen;
2. s/he had good grounds to believe, and did believe, s/he was in immediate danger of death or serious harm if he did not comply;
3. committing the crime was his or her only way out of the dilemma

then you could hold his actions excusable, and acquit him or her."

There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application.

So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[158] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not

being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the presence of the jury before parties address the jury.[159]

[148] Hume, *Commentaries*, i. 53.

[149] *Thomson v HMA* 1983 JC 69, 77 (opinion of the court) explaining the first two 'qualifications' which, according to Hume, Commentaries Vol i at p 53, are generally required to support a plea of coercion.

[150] paras 42 and 43

[151] *Collins v HMA*, 1991 SCCR 898, 902 per Lord Allanbridge (charge to a jury); Stair *Encyclopaedia,*Vol. 7, para 202.

[152] *Cochrane v HMA*, 2001 SCCR 655 at paras [19] and [20].

[153] *Supra*, at para [29]. The test suggested here appears to combine objective and subjective elements. This may lead to difficulties in formulating directions to the jury and great care will be required in selecting the appropriate form of words to use in any particular case.

[154] *Supra*, at para [22].

[155] Supra, at para [25].

[156] *HM Advocate v McCallum* (1977) SCCR Supp. 169 per Lord Allanbridge

[157] paras 42 and 43

[158] *Carr v HMA* [2013] HCJAC 87

[159] *Lucas v HMA* 2009 SCCR 892

Concert

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LAW

See *Stair Encyclopaedia*, Vol 7, paras 177-1931; Gordon, *Criminal Law,* 3rd ed, Vol I, Chapter 5.

1 Two or more accused persons may have contributed in varying degrees to the commission of the offence charged. But where several accused persons have engaged in the same criminal conduct, it does not necessarily follow that each of them is guilty of every criminal act that is performed.[160] In such situations liability of the several accused depends on proof of participation in a known criminal enterprise.[161]

An accused person may have become a participant as the result of a prior agreement, but concerted action may also occur spontaneously.[162] *Donnelly v HMA* 2007 SCCR 577 and the more recent case of *Miller v HMA* [2021] HCJAC 30 demonstrate how important it is that trial judges should give clear directions on concert, and in particular be clear as to what evidence may support a conclusion that parties were acting in concert and what may not, as well as whether there is evidence available to point to planned or spontaneous concert (see below).

2 Where a number of persons act together in pursuance of a common criminal purpose, each of them is criminally responsible for a crime which is committed in pursuance of that purpose, regardless of the part which he or she played, provided that the crime is within the scope of the common criminal purpose and whether or not the concert is antecedent or spontaneous.[163]

3 The nature and scope of a common criminal purpose should be determined on an objective

basis. In the case of an individual accused, the question is what was foreseeable as liable to happen, and hence what was or was not obvious.[164] In the event of breaking into domestic premises in the middle of the night, it must be in the contemplation of the parties to that enterprise that violence may be required and used against the occupant who would be expected to be present. [165]

4 Even if the violence libelled in the charge is committed by some person other than the accused, the latter may be held responsible for the consequences. Such responsibility will, however, depend upon proof that the accused shared the common criminal purpose and participated by some means or other in its implementation.[166]

5 If two or more accused are proved to have acted in concert, the evidence against each is evidence against all. Before it can be determined whether or not two or more accused acted in concert, the evidence relating to each of them must be considered separately. Provided that the available evidence is sufficient for the purpose and the matter is put in issue, the culpability of each accused should be separately assessed.[167] It is therefore possible to find that one accused acted in concert with another although the latter did not act in concert with the former.[168]

6 Where the criminal act libelled is that of one or two persons and it cannot be affirmed which, it is essential to a verdict against either of them that the jury under sufficient direction finds both to have acted in concert.[169]

7 The trial judge must leave issues of fact in relation to the application of the principle of concert to the jury. This is so even where the issue of concert is not directly disputed by the accused, but neither is it conceded by him.[170]

8 Although our law does not recognise a defence of "dissociation", evidence of "dissociation" by a participant in the preparation of a crime in contemplation will be highly relevant in any decision as to whether he can be held to be in concert with those who proceed to commit it.[171]

9 In a case of two or more charged with murder, where an individual accused knows that weapons are being carried for use in order to carry out a common criminal purpose, and these are weapons of such a nature that they can readily be used to kill, it is open to the jury to convict him or her of murder on the basis that it was foreseeable that such weapons were liable to be used with lethal effect.[172] Where both accused arrived at the locus with the joint intention of attacking the victims and that arming themselves with weapons there was in their contemplation, the question comes to be whether there was evidence entitling the jury to find that it was objectively foreseeable that such violence as was liable to be used carried an obvious risk that life would be taken.[173]

10 Where the only evidence against the accused is that he had been a member of a group of persons, pursuing a common criminal purpose in terms of the alleged offence it is important that the judge should indicate precisely how the jury are entitled to approach the evidence. It may be that there is no direct evidence of the accused doing anything specific or any such direct evidence may not be corroborated. The judge should make clear in these circumstances that any conviction could only be on a concert basis.[174]

11 In a case of antecedent concert in murder, an accused is guilty of murder art and part where:

1. by his conduct, for example his words or actions, he actively associated himself with a common criminal purpose which is or includes the taking of human life or carries the obvious risk that human life will be taken,[175] and
2. in the carrying out of that purpose murder is committed by someone else. Where the accused is not proved to have associated himself with that purpose or is proved to have participated in some less serious common criminal purpose in the course of which the victim dies, he may be guilty art and part of culpable homicide whether or not any person is proved guilty of murder.[176]

12 In appropriate circumstances it is open to the jury to make a distinction between the different accused, and in particular to convict one of murder and another of culpable homicide upon the basis of their different levels of participation (if significant enough) in the events leading to the death.[177] A person may have been part of a group who had acted together in pursuance of a common criminal purpose even though he had not inflicted any blow on the victim.[178]

Where spontaneous concert is alleged

13 Where spontaneous concert is alleged the accused can be convicted art and part of an assault by a co-accused with a knife only if the accused actually knew the co-accused had the knife, and with that knowledge, had continued the joint attack. Such knowledge may be inferred from the circumstantial evidence.[179] A safe formulation of the appropriate direction is to adopt the wording "You have to be satisfied that [X] knew or must have known that a weapon was being used." That enables the jury to draw inferences about [X's] knowledge from all the evidence, including circumstantial evidence.[180] It is incorrect to charge the jury that the accused could be convicted if they considered that he knew or saw, or ought to have known or seen, that the co-accused had the knife.[181] Likewise, it is incorrect to charge the jury that the accused could be convicted if he knew or had the means of knowing that at the time the co-accused was using the knife.[182]The jury should be told that an accused who did not use a weapon could only be found guilty on an art and part basis if there was sufficient evidence to prove that he actually associated himself with the attack in the knowledge that the weapon was being, or was likely to be used, in the course of it.[183]

14 In charging the jury on concert, the issue should be dealt with in the following order:

1. Tell the jury that they must first consider what the evidence is which implicates each accused separately, so that they may determine whether there is sufficient evidence against each accused.
2. Then they should consider, and be directed, what they should do if they are satisfied that there is sufficient evidence against each accused.
3. They should then go on to consider the law of concert and its application to the evidence they accept. (Frequently the law is illustrated by the circumstances of a bank robbery.) The jury must be clearly directed on the question whether or not the accused or any combination of them were acting together in furtherance of a common criminal purpose.
4. The jury should be directed what they should do if they do not find it established that the accused were acting in furtherance of a common criminal purpose. That is, that they should convict the accused only in respect of what they are satisfied beyond reasonable doubt each did. [184]

15 The appropriateness of trying to apply the concept of concert in cases under section 4(3)(b) of the Misuse of Drugs Act 1971 is to be doubted.[185]

16 Where there is sufficient evidence to entitle the jury to convict the accused on the basis of his involvement either as actor or art and part, the Crown may present both cases to the jury in the alternative. In these circumstances the trial judge must give the jury appropriate directions on both alternatives, and direct them as to the evidence relevant to each. But if the Crown seeks conviction on one basis only the trial judge must direct the jury that they could convict the accused only on that basis.[186] Accordingly, where there is a confession by the accused which is capable of supporting either case the judge should direct the jury that it is available to them only in support of the basis on which the Crown has put the case to the jury.[187]

Where antecedent concert is alleged

17 In some cases the nature of the weapon unexpectedly produced and the manner of its use may be such that no jury could properly conclude that its use was foreseeable by the other participants. But that issue is ordinarily one of fact and degree to be determined objectively by the jury. Special considerations may apply where some specific weapon or weapons are agreed to be used or are foreseeably to be used in furtherance of the common plan.[188]

18 While weapons may have different characteristics, a knife is not, as a matter of law, different from a baseball bat. Much may depend on the manner in which the particular weapon is used. When knives are commonly used in street violence, the use of a knife in the course of a serious assault involving use of a baseball bat cannot be said to be beyond the scope of a criminal enterprise involving the use of serious violence.[189]

Importance of clear / tailored decisions

19 In the recent case of *Miller v HMA* referred to above, the Court observed:

> *"There may be many cases based on concert where the relevant issues are straightforward, such as in the case of a group of men going together to rob commercial premises or in the case of a group of men who arm themselves in advance of attending at the house of another in order to assault him. ...In such circumstances it may be that the trial judge or sheriff can adequately direct the jury simply by addressing them as sent out in the Jury Manual. However there will be other circumstances in which the evidential basis upon which concert is alleged is far less straightforward or obvious".*[190]

In the latter case it is incumbent on the judge to tailor the directions to the specific case providing *"clear guidance … as to the route to verdict which [is] available to the jurors."*[191]

The court made it clear that the Crown has a responsibility to provide *"clear submissions as to the basis upon which it contends that crimes charged have been established and as to the evidence relied upon for that purposes",* reminding judges that they may *"seek submissions from the Crown, or the defence, if the relevant speech does not make it plain upon what basis the party is proceeding".*[192]

POSSIBLE FORM OF DIRECTION ON CONCERT

“This charge is brought against more than one person **OR** The accused here is charged “while acting along with another / others”. This raises the issue of joint criminal responsibility.

Normally you are only responsible for your own actions, and not for what somebody else does. But if people act together in committing a crime, each participant can be responsible, not only for what he himself does, but for what everyone else does while committing that crime. That arises if:

1. people knowingly engaged together in committing a crime
2. what happened was done in furtherance of that purpose
3. what happened did not go beyond what was planned by, or reasonably to be anticipated by, those involved.

These examples will give you the sense of this:

- Take a case of bank robbery. There is a man with a gun, a look out, and the driver of the get-away car. Each one has a different function. But if it is proved they were acting together, and holding up the bank teller was part of their plan, all three are guilty of armed robbery. That is an example of a crime planned in advance. Some crimes happen on the spur of the moment. Suppose one person in a group of three picks a fist-fight with someone in the street. If the two others in the group then join in punching the other person, they would also be guilty of assault by punching, after each of them joined in. That is an example of spontaneous involvement.

But it is not always quite as simple as that.

- Suppose three men plan a housebreaking. One does the driving. One is the look- out. One breaks in and steals. All three are guilty of theft by housebreaking. That was the common plan, that is what happened, and that is what each anticipated would happen.

But suppose the one who breaks in disturbs the occupier, and lifts a poker and kills him. All three would be guilty of theft by housebreaking, but only the poker-man would be guilty of murder. That is because using the poker as a weapon went beyond what was planned, and was not expected by the others.

- Going back to our street fight, suppose the initial attacker, unknown to the others had a knife, and stabbed the other person. All three would be guilty of assault by punching, but only the first would be guilty of assault by stabbing. That is because using the knife was not expected by the others.

But if the other two saw the knife was being used, or must have known that was being used, and continued punching the other person, they would also be guilty of assault by stabbing, because they had accepted the escalation of violence in the joint criminal purpose. So, an unarmed

attacker can be responsible for an attack with a weapon if he knew or must have known the co-accused was armed, and continues his attack.

These examples give you the flavour of joint criminal responsibility.

- So, where there is a planned crime, acts done that are part of the plan are the responsibility of everyone involved, who was party to that plan. Acts that are outwith the plan are the responsibility only of whoever committed them. That has to be judged by an objective test. So, ask yourselves "What was foreseeable as likely to happen?"
- Where the crime is spontaneous, acts done that are known, or must have been known to the others, who then continue their participation, are the responsibility of everyone involved. Acts outwith the knowledge of the other participants are the responsibility only of those who committed them.

Here the Crown says the evidence shows there was a joint or common purpose in the committing of this crime, and you can infer each accused's actings came within that. The essence of the Crown's case is this:

The defence say no such conclusion can be drawn. The substance of the defence position is:

In deciding this you should look at the evidence in stages:

1. decide what is the evidence against each accused separately;
2. if there is sufficient to implicate each one, decide firstly if there was a common criminal purpose among them, and secondly, if there was, what it was;
3. then, with each accused, decide if he was party to that, and if so, to what extent. If he was, he is responsible along with the other participant(s); if he was not, you could convict him only of what he did himself.

So, depending on the degree of an individual accused's criminal responsibility you could convict: both/all of the accused of this charge, or only one/some of them, or an accused only of what he did himself."

(In case of three – accused pre-planned attack)

Now, looking at all this in a practical way, what it boils down to is this:

Take the case against…….....(main perpetrator) (no 1 acc)

If you are satisfied he had and used …….....(his weapon)

you could find him guilty of that, and the consequences of that.

But if you are also satisfied you can infer:

1. all the accused were parties to a planned attack on (the person named in the charge)
2. .....(no 1 acc) knew……(no 2 acc) had……. (no 2's weapon)

3. .....(no1) knew that weapon was going to be used in the attack you could also find him jointly responsible for its use.

Similarly, if you are also satisfied you can infer

1. all the accused were parties to a planned attack on (the person named in the charge)
2. ……..(no 1 acc) knew……..(no 3 acc) had ……..(no 3's weapon)
3. ……(no 1) knew that weapon was going to be used in the attack you could also find him jointly responsible for its use.

(Then go through the permutations for the involvement of the other accused)

(In case of three – accused spontaneous attack)

Now, looking at all this in a practical way, what it boils down to is this:

Take the case against……(main perpetrator) (no 1 acc)

If you are satisfied he had and used ……(his weapon) you could find him guilty of that, and the consequences of that.

But if you are also satisfied you can infer

1. …. (no1 acc) knew, or must have known,…… (no 2 acc) was wielding…….(no 2's weapon)
2. ……. (no 1 acc) then continued in his own part of the attack you could also find him jointly responsible for its use.

Similarly, if you are also satisfied you can infer

1. (…. (no 1 acc) knew, or must have known,…… (no 3 acc) was weilding ……(no 3's weapon)
2. (……. (no 1 acc) then continued in his own part of the attack you could also find him jointly responsible for its use.

(Then go through the permutations for the involvement of the other accused)

Antecedent concert in murder

"If you are satisfied that:

1. those involved were acting together with the joint purpose of committing this crime
2. their purpose involved killing the deceased, or carried an obvious or foreseeable risk that he would be killed
3. in carrying it out one of the accused killed the deceased then each of the other accused would be guilty of murder if they each actively associated themselves with that joint

purpose, by word or action.

(Where appropriate) If an accused did not associate himself actively with that purpose, or if he participated in a less serious common criminal purpose in course of which (the person named in the charge) died, you could find him guilty of culpable homicide, irrespective of whether you find any other accused guilty of murder."

Spontaneous concert in murder

"If you are satisfied that:

1. there was a joint attack on (the person named in the charge)
2. one of the accused used a knife on him, intending to murder him, or with the wicked recklessness needed for murder
3. the other accused knew that, or must have known that the knife was being used, and continued their attack on (the person named in the charge) or alternatively, in a situation where each of the accused was in possession of a potentially lethal weapon but did not know that one of them had and used a knife [such a weapon]
4. the scope of the attack was murderous, and each of the accused was in possession of and openly used a weapon which could be lethal, even though they did not know that one of them had, and used, a knife. You could find not only the knife-man, but also the others, guilty of murder.

(Where appropriate)

But if you thought the knife-man was guilty of murder, but the others did not appreciate fully the use of the knife, and thought it was only going to be used to inflict a less serious injury, they would lack the intent needed for murder, but you could convict them of culpable homicide.

If you thought the knife-man lacked the intent needed for murder, you could convict him only of culpable homicide, and you could convict the others of no more than culpable homicide."

[160] Macdonald, *Criminal Law*, 5th ed at pp 6-7.

[161] Stair *Encyclopaedia*,Vol 7, para 187

[162] Stair *Encyclopaedia*, supra.

[163] *McKinnon & Ors v HMA*, 2003 SCCR 224, 2003 JC 29, 2003 SLT 281 (court of five judges), at para [27].

[164] *McKinnon*, supra, at paras [22] and [29].

[165] *Shepherd v HMA* 2010 SCCR 55

[166] Stair *Encyclopaedia*, supra.

[167] *Malone v HMA*, 1988 SCCR 498; *Johnston v HMA*, 1998 SLT 788

[168] *Low v HMA*, 1994 SLT 277

[169] *Docherty v HMA*, 1945 JC 89

[170] *Hobbins v HMA*, 1996 SCCR 637

[171] *MacNeill v HMA*, 1986 JC 146, 159 (opinion of the court).

[172] McKinnon, supra, at para [31] disapproving*Brown v HMA*, 1993 SCCR 382.

[173] *Poole v HMA* 2009 SCCR 577 at para [11].

[174] *Fisher v HMA* 2003 GWD 13-411; Appeal Court 14 March 2003 paras [13] to [15].

[175] *Campbell v HMA* 2004 SCCR 220

[176] *McKinnon*, *supra*, at para [32].

[177] *Melvin v HMA*, 1984 SCCR 113, 1984 SLT 365; *Malone v HMA*, 1988 SCCR 498; *Docherty v HMA*, 2003 SCCR 772, 777D, 2003 SLT 1337, 1340C. See also *Brown v HMA* 1993 SCCR 382 while features of this decision were disapproved of in *McKinnon* 2003 SCCR 224 see the note in *Docherty* 2003 SCCR 772 at page 778 where a Brown direction may be appropriate in spontaneous concert. It may be necessary for the trial judge to leave a verdict of culpable homicide open to the jury, even where the defence have not specifically invited such a disposal:

[178] *Vogan v HMA*, 2003 SCCR 564. Para [10]; *Touati & Gilfillan* 2008 SCCR 211.

[179] *Peden v HMA*, 2003 SCCR 605, 2003 SLT 1047.

[180] *McFadden & Spark v HMA* 2009 SCCR 902 at para [41].

[181] *Peden,* ibid.

[182] *Dempsey v HMA* 2005 SCCR 169.

[183] *McKinnon v HMA* (*supra*), *Herity & McCrory v HMA* 2009 SCCR 590.

[184] See *Cussick v HMA*, 2001 SCCR 683, 686G-687B.

[185] *Clark v HMA*, 2002 SCCR 675 at para [12].

[186] *O'Donnell v HMA*, Appeal Court 18 February 2004, at paras [25] and [28].

[187] Supra, at para [35].

[188] *Black v HMA*, 2006 SCCR 103 at para [33].

[189] Black, *supra* at para [33]. See also *Donnelly v HMA* 2007 SCCR 577 at paras [28] and [30].

[190] per Lord Turnbull at paragraph [59]

[191] per Lord Turnbull at paragraph [65]

[192] per Lord Turnbull at paragraph [67]

Consent

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CONSENT

LAW

Section 78 of the Criminal Procedure (Scotland) Act 1995 provides as follows:

(1) It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless—

(a) a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated in writing in accordance with subsection (3) below—

(b) the court, on cause shown, otherwise directs.

(2) Subsection (1) above shall apply to a defence of automatism, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent as if it were a special defence.

(2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent.

(2B) In subsection (2A) above, "complainer" has the same meaning as in section 274 of this Act.

Section 288C of the 1995 Act provides as follows:

(1) ...

(2) This section applies to the following sexual offences—

(a) rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 9));

(b) sodomy;

(c) clandestine injury to women;

(d) abduction of a woman or girl with intent to rape;

(da) abduction with intent to commit the statutory offence of rape;

(e) assault with intent to rape;

(ea) assault with intent to commit the statutory offence of rape;

(f) indecent assault;

(g) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);

(h) an offence under section (non-consensual sexual acts) or 313 (persons providing care services: sexual offences) of the Mental Health (Care and Treatment)(Scotland) Act 2003;

(i) an offence under any of the following provisions of the Criminal Law (Consolidation)(Scotland) Act 1995 (c.39)—
(i) sections 1 to 3 (incest and related offences);
(ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);
(iii) section 6 (indecent behaviour toward girl between 12 and 16);
(iv) section 7(2) and (3)(procuring by threats etc.);
(v) section 8 (abduction and unlawful detention);
(vi) section 10 (seduction, prostitution, etc. of girl under 16);
(vii) section 13(5)(b) or (c)(homosexual offences);

(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9)—
(i) section 2 (sexual assault by penetration),
(ii) section 3 (sexual assault),
(iii) section 4 (sexual coercion),
(iv) section 5 (coercing a person into being present during a sexual activity),
(v) section 6 (coercing a person into looking at a sexual image),
(vi) section 7(1) (communicating indecently),
(vii) section 7(2) (causing a person to see or hear an indecent communication),
(viii) section 8 (sexual exposure),
(ix) section 9 (voyeurism),
(x) section 18 (rape of a young child),
(xi) section 19 (sexual assault on a young child by penetration),
(xii) section 20 (sexual assault on a young child),
(xiii) section 21 (causing a young child to participate in a sexual activity),
(xiv) section 22 (causing a young child to be present during a sexual activity),
(xv) section 23 (causing a young child to look at a sexual image),
(xvi) section 24(1) (communicating indecently with a young child),
(xvii) section 24(2) (causing a young child to see or hear an indecent communication),
(xviii) section 25 (sexual exposure to a young child),
(xix) section 26 (voyeurism towards a young child),
(xx) section 28 (having intercourse with an older child),
(xxi) section 29 (engaging in penetrative sexual activity with or towards an older child),
(xxii) section 30 (engaging in sexual activity with or towards an older child),
(xxiii) section 31 (causing an older child to participate in a sexual activity),
(xxiv) section 32 (causing an older child to be present during a sexual activity),
(xxv) section 33 (causing an older child to look at a sexual image),
(xxvi) section 34(1) (communicating indecently with an older child),
(xxvii) section 34(2) (causing an older child to see or hear an indecent communication),

(xxviii) section 35 (sexual exposure to an older child),
(xxix) section 36 (voyeurism towards an older child),
(xxx) section 37(1) (engaging while an older child in sexual conduct with or towards another older child),
(xxxi) section 37(4) (engaging while an older child in consensual sexual conduct with another older child),
(xxxii) section 42 (sexual abuse of trust) but only if the condition set out in section 43(6) of that Act is fulfilled,
(xxxiii) section 46 (sexual abuse of trust of a mentally disordered person);
(k) attempting to commit any of the offences set out in paragraphs (a) to (j).

(3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.

(4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or ex proprio motu, make an order under this subsection.

POSSIBLE FORM OF DIRECTION ON CONSENT

"In this case the accused has lodged a special defence of consent. That was read out to you at the start of the trial, and you have a copy of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It does not take away from the accused's stance that he is not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence does not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it is believed, or if it raises a reasonable doubt, an acquittal must result.

In this case the accused is saying [insert name of complainer] was a willing participant, and consented to what happened. It is for the Crown to prove the absence of consent, not for the accused to prove the existence of consent.

To support that the defence rely on [specify].

On the other hand the Crown challenge that evidence and say [specify].

You should look at all the evidence, consider the points made for and against the defence of consent, and then decide if the Crown has proved guilt beyond reasonable doubt."

There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[193] It is normal and accepted practice for the accused's

representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the presence of the jury before parties address the jury.[194]

[193] *Carr v HMA* 2013 SCCR 471

[194] *Lucas v HMA* 2009 SCCR 892

Corroboration: Evidence of Distress

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1. LAW

1.1. Rape

1.2. Reaction

2. POSSIBLE FORM OF DIRECTION ON EVIDENCE OF DISTRESS

2.1. Where competing source is alleged

LAW

1 A full bench determined in *Smith v Lees*, 1997 JC 73:

1. That evidence of a complainer's distress could corroborate her evidence that she was subjected to conduct which caused her distress;
2. But that in itself the evidence of distress could not tell the jury or sheriff more than that something distressing occurred;
3. That to corroborate an eyewitness's evidence on a crucial fact, the corroborating evidence had to support or confirm the eyewitness's evidence by showing or tending to show that what the eyewitness said happened did actually happen;
4. That as there was no independent evidence supporting the allegation that the pannel had carried out the acts libelled, the evidence of ...distress could not be used to support her evidence that specific acts were committed upon her by the pannel; and accordingly
5. That the brother-in-law's evidence of the complainer's distress could only corroborate her evidence that something distressing had occurred but could not in itself corroborate the crucial fact of whether the pannel had carried out the crime libelled; and appeal allowed .

It was observed that evidence of distress could also be used as corroboration of certain aspects of a complainer's account (such as lack of consent in a charge of rape) where the jury were satisfied that the distress arose spontaneously due to the nature of the incident rather than to the circumstances outside it and that the complainer was exhibiting genuine distress as a result of the alleged incident rather than feigning it.

The words "in itself" may be of some significance. Distress is an example of circumstantial evidence which juries are told is to be viewed alongside the rest of the evidence.

Accordingly, it may follow that in certain circumstances, distress when viewed alongside other evidence may have a part to play in proving more than the absence of consent.

This was alluded to by LJG Carloway giving the opinion of the court in *Jamal v HM Advocate* 2019

JC 119 at para 20:

> *"... In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in Smith v Lees (Lord Justice-General (Rodger), p 79). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an extreme nature, as a significant factor which, at least when taken with other circumstances, 'supports or confirms' a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape, in whatever form, can be seen as being corroborated when all the surrounding facts and circumstances are taken into account."*

Nevertheless, so entrenched has been the view that distress only goes to prove the absence of consent that care should be taken in suggesting otherwise.

Rape

2 In a charge of rape a complainer's distress is capable of providing corroboration of her evidence that she did not consent to sexual intercourse. That is because distress is an objective condition observable in the complainer, and is therefore an independent source of evidence that may point to the truth of the material allegation. Whether or not distress provides such corroboration depends in every case on the circumstances. The jury must be satisfied that the distress shown by the complainer was both genuine and related to the absence of her consent and not wholly to some other cause.[195]

In circumstances in which there is no evidence of the distress being attributable to any other cause and the offence involves both violence and non consensual intercourse it may be highly artificial to separate what was attributable to violence and what to lack of consent.[196] The fact that the distress might have been caused in whole or in part by some other incident, including a physical assault, is irrelevant to this pure issue of sufficiency.[197]

There is no prescribed interval of time after which a complainer's distress cannot constitute corroboration. The jury in every case has to consider the intervening occasions on which the complainer might have exhibited signs of distress or complained of rape, but did not do so; the persons to whom she might have been expected to display distress, but did not do so; and the nature and extent of such distress as she did show.[198] Whilst there are cases where the circumstances were said to be such that no reasonable jury properly instructed could find corroboration in the complainer's distress, [199] the crucial issue is whether the shocked condition or the distress of the complainer was caused by rape. Accordingly failure to disclose events or show distress until the expiry of approximately thirty six hours, although the complainer is in the company of parents and boyfriend, may still provide corroboration when other evidence is taken into account. [200]

Reaction

3 It is possible to consider evidence of the reaction of a witness to a piece of information or a situation occurring as an adminicle of evidence independent of the witnesses' own testimony.[201]

POSSIBLE FORM OF DIRECTION ON EVIDENCE OF DISTRESS

"In this case there has been evidence from others that (insert name of complainer) was distressed following on the incident.

Such evidence of her distress is simply a piece of circumstantial evidence. You can accept or reject it. If you do accept it, it cannot of itself corroborate her evidence about what happened during the incident. But it could confirm that she suffered some distressing event. It could corroborate her evidence about her state of mind at the time of, or soon after, the incident. So, it could corroborate her evidence that she did not consent to what happened. It can also support the credibility of her evidence.

Before you could regard that evidence of distress as a source of corroboration, you would need to be satisfied that:

1. the distress was genuine, and
2. it was due, wholly or partly, to (*insert name of complainer*) not consenting to what the accused did, and not wholly to some other reason. In deciding that you can take into account what she said, as well as the circumstantial evidence about (e.g. damaged clothing, injuries).

Where competing source is alleged

The Crown says you can infer the cause of the distress was her lack of consent. The defence say you cannot, and it could be due to [specify].

You will have to look at the evidence about distress carefully, and decide what was responsible for it.

If you thought the cause was as the defence suggest, then the distress could not provide corroboration of lack of consent. But if you thought the distress was due to her lack of consent, that evidence could provide corroboration of that fact."

[195] *Moore v HMA* 1990 SCCR 586 per LJ-G see Hope at page 591 C-D and 592 A-B; *McDonagh v HMA* Appeal Court, 15 February 2002 at para [8]; *DS v HMA* 2012 SCCR 319.

[196] Dalton v HMA, 2015 HCJAC 24 para 41

[197] Drummond v HMA, 2015 HCJAC 30

[198] *McCrann v HMA*, 2003 SCCR 722 at para [12]. In *CJN v HMA* 2013 SCCR 124 it was suggested that in normal circumstances distress exhibited after three weeks or so had elapsed would have little or no corroborative effect.

[199] *Cannon v HMA*, 1992 SCCR 505, 1992 SLT 709, 1992 JC 138

[200] *Ferguson v HMA* 2019 SCCR 70; See also *JN v HMA* 2013 SCCR 124 where the court discussed the corroborative value of distress exhibited three weeks after the event

[201] *Fulton v HMA* 2000 JC 62; 1999 SCCR 851; 1999 SLT 1423.

Corroboration in Rape cases

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LAW

Identification, penetration, the absence of consent

1 In most, but not all, cases of rape the principal source of evidence will be the complainer who is likely to speak to the identification of the accused, the requisite act of penetration and the absence of consent. Identification is not usually in dispute in such cases, it is often the subject of a joint minute and there is rarely any difficulty with corroborating the identification of the accused. The act of penetration will require corroboration although it is not usually in dispute. In most cases of rape the real issue will be consent, the absence of which requires to be proved on the basis of

evidence coming from more than one source.

2 Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances.[202] A more recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no "free agreement" in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T drive, "Appeal opinions, pre-trial" folder.

3 In *HM Advocate v SM* (No 1) 2019 JC 176 the court explained that the definition of consent, free agreement, introduced by the Sexual Offences (Scotland) Act 2009 did not innovate on what consent already meant at common law. Please note that, in the rare case in which an issue may arise as to the accused's state of mind, ie whether he lacked an honest (common law) or reasonable (2009 Act) belief, corroboration is not required and any necessary inference can be drawn from the evidence of the complainer (see *Briggs v HM Advocate* 2019 SCCR 323 (common law) and *Maqsood v HM Advocate* 2019 JC 45 (2009 Act)). This was re-affirmed in *AA v HM Advocate* [2021] HCJAC 9 and by a full bench in *Duthie v HM Advocate* 2021 SCCR 100.

Sources of corroboration

4 Corroboration of an essential fact may be supplied by another witness also giving direct evidence of that fact, or by a witness giving evidence of facts and circumstances which are capable of supporting the direct evidence.

5 Corroboration may also be found in an agreed fact in a joint minute or the conclusive proof of a fact in a joint minute may itself constitute full legal proof of an essential fact or facts e.g. if it is set out in a joint minute that the accused penetrated the complainer's vagina with his penis, then there is no further evidence required for a sufficiency of proof of penetration or identification although such evidence will normally be given by a complainer in explaining the nature of the interaction and the absence of consent.

6 Corroboration of a complainer's evidence on an essential fact may be found:

- in a statement made by an accused person either orally or in electronic messages;
- from evidence of things including CCTV footage and
- occasionally in words or noises which form part of the res gestae.

7 Very commonly, corroboration of a complainer's evidence that there was no consent will be sought from one or more adminicles of circumstantial evidence and emotional disturbance/distress observed by another witness is a common example. There is guidance on distress elsewhere in the Jury Manual, see chapter on "Corroboration: Evidence of Distress".

8 However, the circumstances which are capable of affording corroboration are wide and variable and careful consideration ought to be given to all relevant evidence in evaluating sufficiency. Recent examples of corroboration being found in circumstances which do not neatly follow particular examples in cases which had been decided previously can be seen in *PM v Jessop* 1989 S.C.C.R. 324, *LW v HM Advocate* [2020] HCJAC 50, *Munro v HM Advocate* [2014] HCJAC 40 and *Garland v HM Advocate* [2020] HCJAC 46 all of which are discussed below.

9 Once past the stage of no case to answer, evidence given by the accused or a defence witness may provide corroboration of an essential fact.

Assessing sufficiency

10 In considering a submission on the sufficiency of evidence, and whether evidence is capable of affording corroboration, the correct approach is to take the evidence at its highest and, for circumstantial evidence to be interpreted in the way most favourable to the Crown as LJG Carloway explained in *LW v HM Advocate* 2021 SCCR 15:

> *"[12] Where absence of consent is to be corroborated by circumstantial evidence, the question will be whether the circumstances are capable, in combination, of yielding an inference which supports or confirms the complainer's testimony. When this arises as a question of sufficiency, the evidence relied upon by the Crown is to be taken at its highest. It is to be interpreted in the way most favourable to the Crown (*Mitchell v HM Advocate, 2008 S.C.C.R. 469*, Lord Justice General (Hamilton), delivering the opinion of the court, at [106])."*

What is required of corroboration?

11 As the introductory written directions explain, corroborative evidence does not need to be more consistent with guilt than with innocence. All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with, the main source of evidence about an essential fact. This was stated to be the law in the full bench decision of *Fox v HM Advocate* 1998 JC 94 and was applied in *Chatham v HM Advocate* 2005 SCCR 373. It was applied and restated in the context of implicit admissions in a series of appeal decisions in June, July and August 2022; see para 37 below. If a judge is directing a jury, the judge must have been satisfied that there is evidence which is capable of providing corroboration and it will then be for the jury to decide whether it does.

12 As LJG Carloway explained in *Garland v HM Advocate* 2020 HCJAC 46, at para 21:

> *"...where the question is whether proof of certain facts and circumstances affords sufficient corroboration of direct testimony, it is not necessary for those facts and circumstances to be more consistent with the direct evidence than an explanation or account given by an accused. It is sufficient that they are capable of confirming or supporting the complainer's testimony. It is a matter for the jury to determine whether to accept the facts and circumstances as corroborative or to interpret their meaning in a different manner."*

13 Against this background, it may assist judges to note examples of situations in which evidence has been authoritatively determined to be sufficient to constitute corroboration in cases of rape which may be relevant when considering sufficiency at the close of the Crown case, or the close of the evidence, or when formulating closing directions.

Identification

14 As a matter of generality, it is long established that where there is a positive and unequivocal identification of the accused by an eye witness, very little else is required to provide corroboration [203]. In *Ralston* a second witness speaking to a resemblance was sufficient. *Ralston* was not a sexual

offence case, but adoption of the principle in the sexual offence context is seen in *WMD v HM Advocate* [2012] HCJAC 46 and *PM v HM Advocate* 2018 SCCR 23 discussed below. It has been suggested that the phrase "very little else is required" should not be used in directions.[204]

Penetration

15 It has been observed that dishevelment of a complainer's clothing could in certain circumstances corroborate the complainer's account of penetration.

16 In *Jamal v HM Advocate* 2019 JC 119 in giving the opinion of the court at para 20, LJG Carloway explained in a passage of general relevance, that:

> *"There is no sound reason for restricting the availability of corroboration of the act of rape to the type of scientific, medical or other evidence set out above. In relation to penetration, corroboration can be found in facts and circumstances which 'support or confirm' the direct testimony of the commission of the completed crime by the complainer (*Fox v HM Advocate *, Lord Justice-General (Rodger), p 100). In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in* Smith v Lees *(Lord Justice-General (Rodger), p 79). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an extreme nature, as a significant factor which, at least when taken with other circumstances, 'supports or confirms' a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape, in whatever form, can be seen as being corroborated when all the surrounding facts and circumstances are taken into account."*

17 The finding of the appellant's pubic hair inside the crotch area of the complainer's pants has been held to be capable of corroborating a complainer's account of penile/vaginal penetration.

See also *Munro v HM Advocate* 2015 JC 1. In giving the opinion of the court at para 7, LJC Carloway explained, in refusing the appeal, that:

> *"...Where there is an allegation of rape, which of course involves proof of sexual intercourse in the sense of penetration, the finding of an accused's pubic hair adhering to the inside crotch area of a complainer's pants will support the complainer's testimony that sexual intercourse occurred. In that connection, it is not something dependent upon a scientific view of consistency, as a scientist rather than a lawyer would use that term, but whether an appropriate inference of fact can be drawn by a jury."*

18 The finding of the appellant's DNA in semen in-mixed with DNA from the complainer on a duvet cover found some months after the incident on the bed on which the complainer said she was raped could corroborate the complainer's account of penetration.

In *Palmer v HM Advocate* 2016 SCCR 71 in giving the opinion of the court at para 11, LJC Carloway explained, in refusing the appeal, that:

"...There is evidence that the duvet cover had been on the complainer's bed at the material time. The finding of the appellant's semen, in-mixed with the DNA of the complainer, was indicative that

there had been sexual activity involving ejaculation by the appellant on that bed. That provided sufficient support or confirmation of the complainer's evidence that penetration had taken place."

Consent Distress, injury etc

19 The absence of consent may in certain circumstances be corroborated by the presence of injury on a complainer's person or by evidence of emotional disturbance or distress observed by another witness, and in certain circumstances by evidence of damage to clothing. These are just some examples of circumstantial evidence capable of providing corroboration of a complainer's evidence that consent was not given.

Corroboration found by inference from the nature of family relationships

20 *LW v HM Advocate* 2021 SCCR 15, para 12 of which is quoted above, also provides an illustration of how the absence of consent can be corroborated by inference from the nature of the family relationships of those involved. There was a section 259 statement by a deceased complainer implicating her father as having raped her on various occasions when she was between 16 and 19 and he was between 28 and 31. Intercourse was corroborated by a joint minute which established that the appellant had fathered the complainer's child. The part of the decision relevant to the corroboration of the absence of consent starts by noting, at para 11, that incest is a cultural taboo before explaining, in para 12, how sufficiency is to be evaluated.

The circumstances from which the necessary inference could be drawn are then explained:

> *"[13] In the complainer's situation, not only had she been in a close family relationship with the appellant, which was in effect one of parent and child, she had also been in that relationship since childhood. There was a significant age gap between the appellant and the complainer, albeit not one that would cause concern in relationships involving adults. The complainer's mother was in a continuing relationship with the appellant. It is the combination of these circumstances, which permits an inference to be drawn, that provides confirmation or support for the complainer's account that sexual relations with her step-father took place without her consent."*

Corroboration in a case where the complainer was asleep or otherwise incapable of consenting because of the effect of alcohol etc

21*HM Advocate v Bilaal Afzal* [2019] HCJAC 37**demonstrates that it is the absence of consent which must be proved on the basis of corroborated evidence and not necessarily the fact of being asleep.**

22 The accused was charged with raping the complainer, "*while she was asleep and incapable of giving or withholding consent.*" The trial judge upheld a submission of no case to answer on the ground that there had to be corroborated evidence that the complainer was asleep and whilst one witness had spoken to that, that was not precisely what the complainer had said. She spoke of being awake but hazy when she felt her vagina being penetrated by a penis. The Crown's appeal was sustained, LJG Carloway explaining that:

> *"[7] The complainer gave evidence that she had not consented to having intercourse with anyone other than Kamil. There was scientific evidence that she had intercourse with someone other than Kamil. That other person was the respondent, as testified to by the*

witness and as demonstrated by the DNA findings. Taken at its simplest, the witness said that the complainer was asleep at the material time. There is scientific evidence of intercourse having taken place with the respondent. The complainer said that she did not consent to having intercourse with the respondent. In these circumstances the jury would be entitled to find that the complainer had not consented to intercourse with the respondent, but that such intercourse had taken place. That would entitle the jury to return a verdict of guilty of rape. There is a sufficiency of evidence in that regard."

This decision is the most contemporary guidance on this issue.

23 Reference was made in submissions to *Van Schyff v HM Advocate* 2015 SCL 783. In *Van Schyff*, the charge was sexual assault, under section 3 of the 2009 Act, and the libel so far as can be ascertained from the judgment included averments that the complainer had been asleep and whilst she was incapable of withdrawing or giving her consent the assault had occurred. The complainer's evidence was that she had awoken to find that her underwear had been removed but was drowsy and affected by alcohol and felt unable to say or do anything to stop the accused touching her vagina. She did not consent.
Somewhat surprisingly, the sheriff directed the jury that it was necessary for the jury to accept that the complainer was asleep, but the phrase "asleep and" was deleted in their guilty verdict, but the phrase, "*whilst she was incapable of withdrawing or giving her consent*," remained. The appeal court rejected a submission that there was a miscarriage of justice where the appellant's argument was that the verdict was contrary to the sheriff's direction.

In para 14, LJC Carloway, giving the opinion of the court, observed:

"...The sheriff could have given a specific direction that the jury could have deleted the whole element of the libel in relation to capability of giving consent, but his general direction on that matter was sufficient..."

24 This may be seen as supporting the view, urged on the jury at the trial by the fiscal depute and on the appeal court by the advocate depute, that the jury could, on the evidence, have properly convicted even if all reference to capability of consent was deleted. Such an interpretation would be consistent with the decision in *Afzal*.

25 Where the allegation is that intercourse occurred because a complainer was incapable on account of the effect of alcohol of consenting, it was determined by the court in *Maqsood v HM Advocate* 2019 JC 45, LJG Carloway giving the opinion of the court, that:

"[19] In a case, as here, where intercourse is admitted or otherwise proved, and the Crown contend that the complainer was incapable of consent as a result of the effect of alcohol, that incapacity does require formal proof. It will be proved where the complainer speaks to such a state (as the complainer did here) and there is supporting evidence of that state. The corroboration in this case came from the evidence of the complainer's friend, the bar staff, the CCTV recording and the complainer's boyfriend and his mother. In this situation it is the complainer's state of intoxication, rather than any distress, that is important. If it is held that the complainer could not consent because of the effects of alcohol, that is all that is required as a matter of sufficiency. The jury would still have to consider an accused's evidence that the complainer was not so incapacitated through drink that she could and did consent, but that is another matter."

In *HM Advocate v MMI* [2022] HCJAC 19, where there was evidence suggestive of the complainer's substantial intoxication before and after an act of intercourse which followed her being picked up by a stranger in a bar, it was open to the jury to infer that she had been incapable of consenting at the time of the incident.

The LJG explained at para 9 of the opinion of the court:

> *"It is important to note at the outset that a judge does not have the power to direct a jury to return a not guilty verdict on the ground that no reasonable jury could convict (*Criminal Procedure (Scotland) Act 1995, s 97D*). This differs from the position in England and Wales (*R v Galbraith [1981] 1 WLR 1039*, Lane CJ at 1042). Where no issue of corroboration arises (and there is none in this case), it is only where there is no evidence from which a jury can infer that a fact in issue is proved that a no case to answer can be sustained. Where the issue is one of capacity to consent, that is to reach a "free agreement" (*Sexual Offences (Scotland) Act 2009, s 12*), it will rarely be open to a judge to sustain a submission where the evidence is of a young woman, "alone at night and vulnerable through drink, [who] is picked up by a stranger who has sex with her within minutes of meeting her". This is only a partial quotation from Hallett LJ in* R v H [2007] EWCA Crim 2056 *(at para 34), where the complainer was only 16 and had said that she would not have consented in the circumstances. However, the court agrees with Hallett LJ that issues of consent and capacity to consent should normally be left to the jury to determine. So it is the case here."*

26 However, evidence of distress may also have a part to play as illustrated in *Wright v HM Advocate* 2005 SCCR 780 where the complainer's evidence that she was asleep and awoke to find the appellant penetrating her was capable of being corroborated by evidence from her husband that she had gone to bed between 9.30 and 10.30pm, and at 11pm was seen to be wearing a nightgown and in a state of distress after the appellant left her room. These circumstances were capable of supporting her evidence that she was asleep and the court also observed that, "*distress was, in the particular circumstances, an important element of the total picture*."

27 In *Fox v HM Advocate* 1998 JC 94, Lord McFadyen had directed at first instance that distress could corroborate the complainer's evidence that sexual intercourse took place against her will and it is apparent that evidence about the complainer being drunk, being sick and being put to bed along with evidence of distress was considered to be sufficient corroboration, penetration being amply proved by the complainer's account and an admission by the appellant.

The libel, taken from the report at 1998 SCCR 115, narrated:

> *"[O]n 4th June 1995 at 19 Glenartney Terrace, Perth, you did assault [A.T.] and while she was unconscious, asleep, then under the influence of alcohol and bereft of the power of resistance, remove her bra and pants, handle and insert your fingers into her private parts, force her legs apart, lie on top of her and have sexual intercourse with her without her consent, to her injury."*

LJG Rodger explained that:

> *"The essential elements in the charge of clandestine injury were (1) that the appellant had intercourse with the complainer and (2) that at the time of the intercourse she was in such a state of intoxication as to be incapable of consenting or not consenting to sexual interference. The Crown therefore required to prove these elements by corroborated*

evidence. The first element was not in doubt since the appellant admitted the intercourse. So far as the second element was concerned, the trial judge directed the jury that corroboration of the complainer's evidence that she had not consented could be found in the evidence of various witnesses that she had been in a state of distress following the sexual encounter with the appellant."

The trial judge had directed the jury, according to Lord Rodger's paraphrase:

"... on what can constitute corroboration of her evidence that intercourse took place without her consent while she was asleep. The trial judge first refers to the evidence about the complainer being drunk, being sick and being put to bed. He then continues:

'Another matter to which you are entitled to have regard is the evidence about the complainer's distressed state immediately after the alleged incident..."

28 Whilst much of the reasoning in the case is directed at overturning Lord Hope's decision in *Mackie v HM Advocate* 1994 JC 132 all of the judges agreed with Lord Rodger's, and the trial judge's decision, that there was sufficient evidence to permit the conviction of the appellant of clandestine injury.

29 It should be noted that *Fox* was decided in 1998 and the opinion in *Van Schyff* and the decision in *Afzal* may be taken as an up to date and sound illustration of what is required to prove a charge of rape where identification and penetration have been established; simply that the complainer did not consent.

Miscellaneous

30 In *PM v HM Advocate* 2018 SCCR 23 issues arose as to corroboration of identification and commission in a charge libelling sexual offending against a child aged between 3 and 5 which included sexual touching, digital/anal penetration and oral penetration and thus rape. She was 5 and 6 when she gave her accounts in a series of joint investigative interviews which formed evidence in chief. The facts of the case are quite complex and are not fully summarised here.

31 The last date of the libel was 15 April 2015 and the complainer's mother spoke to the appellant being the only male in their house that day and to his having opportunity and to other circumstances, which included the complainer's ability to describe lesions on the appellant's penis, the presence of which was also spoken to by the mother, were sufficient to provide the very little which was required to corroborate the complainer's identification (see paras 27 and 28 of the opinion).

32 In para 29, the court was discussing corroboration of averments which included digital penetration of the child's anus using a lubricant and penile penetration of her mouth.

"...The descriptions and simulations given by this very young complainer in her recorded evidence were indicative of knowledge of sexual matters which would not be expected of a girl of the age of this complainer. The evidence of [a psychologist that the sexual knowledge exhibited by the complainer was unusual for a child of her age] was one of the elements of the body of circumstantial evidence which supported the complainer's account. Further elements included the lesions on the appellant's penis, which the complainer was able to describe accurately; this, and her description of the appellant's penis as being "hard like

bones", is consistent with the complainer's face being very close to the appellant's erect penis, and indeed, being in physical contact with it. There was the evidence about the blue coloured lubricant, which "tingled" and felt like it burned, and the evidence of the complainer's mother in this regard. Taking all the factors to which the advocate depute referred us, we are satisfied that there was ample circumstantial evidence available to the jury, should they choose to accept it, to provide sufficient support for the complainer's account. We do not consider that there is substance to the first or second grounds of appeal."

33 At para 30, the court affirmed the soundness of the trial judge's directions that accurate gestures representing sexual activity which the child was able to act out for the camera recording the joint investigative interview was not a statement de recenti but evidence of behaviour from which, in combination with the evidence of the psychologist and the application of common sense, incriminating inferences could be drawn supportive of her evidence of what had been done to her.

Is corroboration required for the use of a knife in a charge of rape? - No

34 In *Yates v HM Advocate* 1977 SLT (Notes) 42, also reported as a note at page 378 of the report of *Moore v HM Advocate* 1990 JC 371. The terms of the charge are not reproduced in either report and so care is needed in determining what can be taken from it but, in a case in which the complainer gave evidence that she was compelled by threats with a knife to go to a secluded place where the appellant had raped her, the court concluded on appeal that distress was capable of corroborating her account and it was not necessary for there to be distinct corroboration for the use of the knife. Although there was no corroboration from any source that a knife was used, the jury was entitled to convict of rape leaving the reference to the knife in the libel.

Mutual corroboration

35 Whilst there is a chapter dealing with mutual corroboration elsewhere (see Corroboration: the Moorov Doctrine), it is convenient to note here the decision in *CW v HM Advocate* 2016 SCCR 285 where Lady Dorrian, giving the opinion of the court explained, at paras 27-36, that a sexual offence for which the absence of consent is not an essential ingredient can provide corroboration for a sexual offence such as rape of an adult where the absence of consent is an essential fact for which corroboration is required. Lady Dorrian explained, at para 36:

"In such circumstances, where the offence is one, such as a s.3 offence, which has certain essential elements for its commission, the account of the complainer speaking to that charge would require to provide evidence from which all three elements could be established. Once he has given such evidence, however, his account may be corroborated by the evidence of the second complainer, without any requirement for the second complainer's evidence to cover exactly the same essential elements. As long as both witnesses can be viewed as credible and reliable, and that they are satisfied, having been properly directed, that the doctrine can apply, the jury may convict of both charges. In the present case the first complainer did speak to all three elements..."

Corroboration from the evidence of the accused and duties on a judge generally in directing the jury

36 *Garland v HM Advocate* [2020] HCJAC 46, is not a rape case, but one of sexual assault of a child by compelling her to touch the appellant's penis and placing his hand inside her pants and

touching and rubbing her bottom. However, it is illustrative of where corroboration can be found and also the obligations on a judge in directing the jury where the Crown speech fails to identify a relevantly corroborated case.

On the latter point, LJG Carloway said this at para 20:

> *"it is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful. The judge's understanding of the AD's speech reflected the focus on the letters, or rather a letter, rather than the appellant's testimony. He left it to the jury to decide whether the letter contained "any admission". He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration."*

LJG Carloway then explained where corroboration could be found. This explanation should be taken to proceed on the basis that the jury were entitled to reject the part of the appellant's evidence in which he said that contact between the back of the complainer's hand and his penis was accidental and accept that there was such contact. At para 22:

> *"The following facts and circumstances, when taken together, provided sufficient corroboration of the complainer's direct testimony. First, the relationship between the appellant and the complainer was not a familial one, or at least not strongly so. The appellant's relationship with the complainer's mother had only commenced about three months before the incident. The complainer was not living in her mother's home, but with her grandmother. Secondly, notwithstanding the relatively remote nature of the relationship, the appellant was buying the complainer presents of significant value. The jury would have been entitled to consider that he was deliberately ingratiating himself to her. Thirdly, the incident occurred when the complainer's mother was away at work and would therefore not be returning home at the material time. Fourthly, the appellant accepted that he was in bed with the complainer, that is to say an 11 year old girl, at about 4.00pm. The jury would have been entitled to regard this as unusual in a situation in which he was only supposed to be looking after the complainer in the period between her return from school and going to her grandmother's house. Fifthly, the appellant also accepted that he was in close physical contact with the complainer, involving at least cuddling, under the bedcovers. That, in itself, would have been a strong corroborative circumstance had it been spoken to by an independent eye witness, and it is no less so when it is described by the appellant. Sixthly, the appellant accepted that the complainer's hand was touching his penis, albeit over his shorts, on two separate occasions. The same consideration applies here in relation to testimony from an eye witness who might have observed this happening."*

Corroboration from an implied admission

37 In *CR v HM Advocate* 2022 SCCR 227 where the appellant was charged with specific crimes of lewd, indecent and libidinous practices against two complainers, the court agreed with the trial judge that it was open to the jury to find corroboration from implied admissions made in response to a non-specific allegation by a complainer that he had sexually abused her.

It was also open to the jury to find corroboration when a non-specific allegation by one of the

complainers in the presence of the other, "*…you know why we're here. You have to admit it because I can't take any more of this…[the second complainer] can't take any more and we need to talk about what happened*" was met with the appellant replying: "*I couldn't help myself but I'm not like those people you hear about on the radio, on the news.*"

The court rejected the proposition that there had to be evidence of the detail of the conduct in question having been put to the appellant, to which his answers were a response, before the answers could be regarded as an admission.

The court distinguished *Gracie v HM Advocate* 2003 SCCR 105 and *G v HM Advocate* 2012 SLT 999, casting some doubt about the soundness of the decision in *Gracie* at para 15 of the opinion, before explaining:

> *"[19] If the impression has been gained from Gracie and G that only unequivocal admissions in the clearest terms may provide corroboration of a crime, that is not consistent with long established authority. In the first place, such an approach would not be consistent with the law on corroboration. In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact (Fox v HMA). The trial judge properly directed the jury that where there is a primary source such as an eye witness,*
>
> *"all that is required for corroboration is evidence that provides support for or confirmation of, or fits with the main source of evidence about an essential fact."*
>
> *[20] In relation to admissions, it is well established that it is not only clear and unequivocal admissions which have evidential value. In Greenshields v HM Advocate 1989 SCCR 637 a reply to being cautioned and charged for murder and dismemberment that "You don't think I did it myself do you; but I'm telling you nothing about it until I see my lawyer", was considered to be capable of constituting an implied admission to murder."*

In an unreported pre-trial decision of 3 August 2022, which judges can access on the T drive, in giving the opinion of the court, the Lord Justice General noticed and applied the reasoning of the court given by the Lord Justice Clerk in *CR*. He explained:

> *"[17] In CR v HM Advocate [2022] HCJAC 25 it was said (LJC (Lady Dorrian), delivering the opinion of the court, at para [15]) that:*
>
> "Whether, and to what extent, a comment or reply made by an accused person may properly be regarded as an admission is a fact specific question, the answer to which depends on the nature and content of the comment and the circumstances in which it was made. The contextual situation is important."
>
> The court in CR "readily distinguished" both Gracie v HM Advocate and G v HM Advocate

because in these cases, "rightly or wrongly", there was insufficient means by which to identify the nature of the conduct to which the accused's comments were related. In CR, the context was "clearly an allegation of having sexually abused" the complainer. The court was at pains to point out that, if Gracie or G had given the impression that only unequivocal admissions in the clearest terms could provide corroboration, that was not consistent with authority. It was sufficient if the admission was capable of providing support for, or confirmation of, or fitted with, the principal source of evidence (Fox v HM Advocate 1998 JC 94). It was not only clear and unequivocal admissions which had evidential value (Greenshields v HM Advocate 1989 SCCR 637). CR v HM Advocate has been followed in WM v HM Advocate [2022] HCJAC 28.

[18] The court agrees with the rationale in CR v HM Advocate and is unable to identify any reason to distinguish it from the present case…"

The significance of failing to challenge or refute an accusation

38 In a case of assault, *WM v HM Advocate* [2022] HCJAC 28, the court examined a conversation in which there was an allegation put to the appellant which he did not challenge or refute. The principles are equally relevant when considering corroboration in sexual offence cases.

There were charges of assault against each of complainers A and B and clear admissions in respect of B. Complainer A had given a statement, which was evidence in chief per section 271M of the 1995 Act, implicating the appellant in repeatedly assaulting him by hitting him to the head and that sometimes his mother would tell the appellant to stop it but retracted it on commission, saying his grandmother had made him say it. The court noted that the jury could reject the retraction and prefer what was in the statement. The issue in the appeal was whether there was free-standing corroboration of the charge featuring A. The relevant evidence came in a telephone call with JG, the mother of both A and B. The court explained:

"[5] The corroboration relied on was in the form of comments made by the appellant in the course of telephone calls made between him and JG during his period on remand, which calls had been recorded and transcribed. Much of the content related to assaults on B. There were however other passages relied on in relation to A.

[6] In one call the two were discussing the children in general, albeit with some specific reference to B, and the issue of his parentage. The appellant stated that he wanted all the children "Every single wan ah them" home (they were by then in foster care). JG disputed this, repeatedly saying "Naw ye don`t". and "Naw ye don`t … ye don`t even give a Fuck". The appellant then said "They`re aw ma boys ….aye they are, that`s the wie ah see them". The conversation continues with comments about child B, and then turns to the issue of the appellant`s past disciplining of the children where he says-

"An even you, even you did me for when Ah grabbed G by the face. Ah know Ah've done that a couple of times an you get me tolt for that baby an Ah love you for it. Stop bein that rough wi him he`s only fuckin 10 an aw that baby. Ah love you for that Ah dae. Ah dae baby so see it doesnae matter what anybody…. See any times that Ah have wanted tae an Ah`ve

been beelin` baby you shout, you shout behind me they`re only fuckin weans you, fuckin wrap it and it makes me stop you know that dain`t ye?"

[7] There shortly follows a further exchange as follows:

"Appellant … Ah`m sorry ..for all the bad years we had. Am ur. They fuckin haunt me baby. JG Baby it`s awright. Appellant: They geen me the guilty heed baby. Ah`m sorry baby. JG Well stop hittin them. Appellant Yer ten times better than that baby. You`re a million times better than one, you`re ma darling you ur. Man you`re no even that an aw you`re ma big smoking hot darling".

In determining that it was open to the jury to find corroboration from this conversation, the court applied *Fox v HM Advocate* 1998 JC 94,[205] and concluded:

"[13] The statement "Well stop hittin' them" was made in the context of a much broader conversation in which the appellant made comments regarding his attitude and behaviour towards the children in question. The fact that he did not remonstrate with the comment, deny or dispute it, may be a relevant factor in considering what to make of the conversation as a whole, but it is the conversation as a whole which must be examined to identify whether the evidence may properly be said to be criminative of the accused.

[14] The statement made by JG to the appellant was made in the course of a conversation in which the appellant refers to disciplining the children to such an extent that JG required to intervene to stop him. This also accords with the evidence of A regarding JG, that "She 6 tells ma dad to stop it." It would be open to the jury to treat the relevant parts of the conversation as criminative of the appellant having hit the children, including A. It is correct to say that the trial judge did not give specific directions in relation to the failure of the appellant to respond to what was said by JG. However that was not the real issue: the real issue, as his directions made clear, was whether the conversation provided corroborative support for the primary evidence. The trial judge directed the jury that the content of this, including to some extent what was said by JG, could provide independent corroboration. The jury were directed that it was a matter for them to determine the significance of what was said in the phone calls, and that the conversations had to be taken as a whole. The evidence of the conversation as a whole was clearly capable of providing support for the primary evidence in the case. The appeal will therefore be refused."

[202] *HM Advocate v SM* (No 1) 2019 JC 176, *Briggs v HM Advocate* 2019 SCCR 323

[203] *Ralston v HM Advocate* 1987 SCCR 467

[204] *Kearney v HM Advocate* [2007] HCJAC 3, Lord Johnston giving the opinion of the court at para

31

[205] see paras 10-12 of the opinion

Corroboration: the Howden Doctrine

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Law

In a case where an accused is charged with two offences and is fully identified as the perpetrator of one of them, if the jury is satisfied beyond reasonable doubt on the circumstantial evidence that the second offence was committed by whoever committed the first one, the accused can be convicted of both offences, even although he has not been identified as the perpetrator of the second one.[206]

But the essential question is not simply whether the two crimes are similar in type or in the manner and circumstances of their commission, but whether these and any other similarities go to the identification of the accused as the perpetrator of both.[207]

Proof of identity can be achieved by eyewitness evidence or circumstantial evidence. It can come from forensic evidence alone.[208]

Where there has been an absence of identification of the accused as the perpetrator of the crime charged, which would prevent the normal application of the Moorov principle of mutual corroboration, reliance may be placed on the Howden principle. The lack of identification may be overcome by proof of facts and circumstances which show that that crime must have been committed by the same person as committed another crime libelled.[209] The particular facts and circumstances may be any modus operandi, peculiar physical features, or clothing.[210]

The extent of the identical features and proximity in time and place are significant. In situations in which it can be inferred that the same gang committed the crimes, if the accused is proved to have been involved in one, there may be sufficient evidence to draw the same conclusion in relation to another. Identical crimes on the same night in close proximity may suffice whereas a gap of weeks may not even although it can be proved the ringleader was the same person.[211]

Possible form of direction on the Howden doctrine

“In this case there is enough evidence, if you accept it, to link the accused with committing the crime in the first charge. But with the second charge you will maybe think there is not enough evidence to link him with its commission.

In these circumstances a special rule can apply. It is this:

If you are satisfied beyond reasonable doubt that

1. both these crimes must have been committed by the same person, and
2. one of them was committed by the accused

you could infer he committed the other one also.

You will have to look at the evidence with great care. Before you could apply this rule, you will have to be satisfied that:

1. the crimes are similar in type, and
2. similar in the circumstances of their commission, and
3. there are other similarities pointing to the same person as the perpetrator of them both.

The Crown says that rule can be applied in this case. It relies on these points of similarity ….

The defence says it should not be applied. It relies on these points of dissimilarity…

OR The defence do not suggest that the circumstances of each incident are so dissimilar that the rule cannot be applied.

In this case, there is enough evidence in law to show that the accused committed the first of these crimes, to show that the other crime was committed by whoever committed the first one, and for the rule to be applied. But you have to decide:

1. if that evidence is credible and reliable
2. if both crimes must have been committed by the same person
3. if the accused committed the first one
4. if the rule should be applied.

If you do apply it, then you could convict the accused of both these charges."

[206] *Howden v HM Advocate*, 1994 SCCR 19; *Townsley v Lees*, 1996 SCCR 620, 1996 SLT 1182.

[207] *Gillan v HM Advocate*, 2002 SCCR 502, 2002 SLT 551 para [24]

[208] *HM Advocate v Chung* 2017 HCJAC 48

[209] *McPhee v HMA* 2009 JC 308 at para [22].

[210] (*supra*) at para [28].

[211] *McHale and another v HMA* 2017 HCJAC 35

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3. Possible form of direction on single complainer Moorov

Law

See *Stair Encyclopaedia*, Vol 10, para 769.

1 The five-judge Bench decision on Moorov -*MR v HM Advocate* 2013 SCCR 190 summarised the law as follows:

> *"[16] It can hardly be necessary for the court to explore once more the law in relation to the application of the principle of mutual corroboration, standing the recent detailed analysis in* B v HM Advocate 2009 JC 88*. There, Lord Eassie scrutinised the meaning of the several opinions in* Moorov v HM Advocate 1930 JC 68 *as they distilled the words of the Institutional Writers on criminal law and evidence. Ultimately, he formed the view (para [34]) that, for the principle to apply, the charges had to involve "the same crimes in any reasonable sense". He took the view that masturbating openly at different times in front of females of different ages involved crimes which were "inherently different" in essence. However, Lord Eassie's "valiant, if foredoomed, attempt to hold back the extension of the Moorov doctrine" (commentary at 2009 SCCR 119) was the minority view and this court has little hesitation in endorsing the majority opinions, notably that of the Lord Justice General (Hamilton).*
>
> *[17] Almost at the outset of his Opinion, the Lord Justice General correctly pointed to the significant element which requires to be taken into account in any analysis of Moorov (supra). This is simply that the law has moved on since 1930 (para [3]). It has done so in an attempt to keep pace with modern societal understanding of sexual and other conduct and, in particular, what are perceived to be characteristic links between the perpetration of different types of sexual and physical abuse especially, but not exclusively, of children and young persons. The court today will not proceed upon outdated perceptions, such as those of Lord Sands (at p 89) on the connection between different forms of conduct by errant husbands, but upon its own developing knowledge of sexual and other behaviour and how one type of illegal activity can often be intimately connected with other types of different, but still illegal, acts. Sexual and physical abuse of different kinds perpetrated by one person but occurring within the same family unit, extended or otherwise, is one model of this type*

[18] There had, of course, been recognition of the connection between different levels or types of sexual abuse even before the decision in Moorov (supra). Thus HM Advocate v McDonald 1928 JC 42 *determined that incest could be corroborated by lewd practices, where both were perpetrated on the daughters of the accused. This was so albeit that incest is not "in any reasonable sense" the same crime as lewd practices, although it may involve very similar conduct up to and surrounding the act of intercourse. The connections were not, however, always acknowledged by particular judges and, indeed, could not be if a rigid test of "the same crime" were applied*
e.g. HM Advocate v Cox 1962 JC 27*; and* HM Advocate v WB 1969 JC 72*). However, the courts were beginning to favour a broader approach which paid real heed to the test of underlying unity of purpose (HM Advocate v Kennedy (1963) 79 SLR 221;* PM v Jessop 1989 SCCR 324*; and* KP v HM Advocate 1991 SCCR 933*).*

[19] Matters reached a watershed at appellate level in McMahon v HM Advocate 1996 SLT 1139*). The Lord Justice-General (Hope), delivering the Opinion of the Court, expressed the law thus (p 1142):*

"The fact that each crime is described as an instance of lewd, indecent and libidinous conduct, or as an indecent assault, is not a conclusive pointer in favour of the application of the rule. Nor does the fact that the crimes each have a different nomen juris necessarily point against its application. It is the underlying similarity of the conduct described in the evidence, not the label which has been attached to it in the indictment, which must be examined in order to see whether the rule can be applied".

Thus it was for the jury to determine whether there was an underlying similarity between behaviour which involved an attempt at penile penetration of one girl (assault with intent to rape) and conduct involving attempted digital penetration of another girl (lewd practices). That the dictum of the court in McMahon (supra) accurately represented the law was stated relatively recently in Hughes v HM Advocate 2008 SCCR 399 *(Lord Osborne,delivering the Opinion of the Court, at para [9]) and B v HM Advocate (supra, LJG at para [4], Lord Nimmo Smith at [9]).*

*[20] What the court is looking for are the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel (see S(NK) v HM Advocate 2008 SCCR 70, Lord MacLean, delivering the Opinion of the Court, at para [10]) such as demonstrate that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused (*Ogg v HM Advocate 1938 JC 152, *LJC (Aitchison) at 158;*K v HM Advocate 2011 SCCR 495*, LJC (Gill) at para [10]). Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury (*Reynolds v HM Advocate 1995 SCCR 504*, LJG (Hope), delivering the Opinion of the Court, at 508) under proper direction of the trial judge.*

[21] There is then no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of what is libelled as a more serious crime. Once that is recognised, it can be seen that the conduct of the appellant in charge (6) (1973) in removing the clothing of his 11 year old niece, lying on top of her and then raping her in the manner libelled may be corroborated by the conduct in charge (4) (1978) of climbing on top of his 16 year old daughter, removing her clothing and placing his private member against her private parts with the stated intention of having intercourse with her. The penetration in charge (6) is sufficiently corroborated by what appears to have been near penetration

and an expressed desire to achieve it on charge (4). The trial judge's directions in that regard were correct and the appeal on this ground must be refused."

The reference to "time, *place* and circumstances" is out of kilter with the conventional expression of "time, *character* and circumstances." In the most recent full bench decision on Moorov, *Duthie v HM Advocate* 2021 SCCR 100, the court including both the Lord Justice General and Lord Justice Clerk, adopted the conventional expression "time, *character* and circumstances."

2 There is no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of what is libelled as a more serious crime.[212] That the nomina iuris of the crimes charged differ does not prevent the application of the Moorov doctrine.[213] It is the nature of the offending behaviour which should be examined. The critical element, apart from similarity of time, character and circumstance, is the similarity of the conduct described in the evidence in order that one course of criminal conduct is established as persistently or systematically[214] pursued by the accused. The similarities relate to the evidence relating to the conduct as opposed to the charge itself.[215] Whether such similarities exist will often be a question of fact and degree to be determined by the jury properly directed.[216] For an exploration of issues of character and circumstances in unusual circumstances see *Watson v HM Advocate*.[217] The greater the similarity in conduct the less important a significant time gap may be. Compelling similarities merit consideration of the whole circumstances even where there has been a substantial passage of time between offences.[218] It has been said that the correct approach is to look at the character and circumstances of the individual offences as a whole and not in a compartmentalised or individual way.[219] However care has to be taken to direct a jury that similarities in conduct need not corroborate all the essential facts in a charge. The evidence from a complainer in relation to another charge does not require to cover all the essential facts of the charges laid in respect of another complainer.[220] In circumstances in which the perpetrator is male and the complainer female, instances of behaviour which constitute physical abuse and others which constitute sexual abuse are unlikely to amount to corroboration for the operation of the doctrine.[221]

3 The evidence from the various complainers relied on for the operation of the doctrine to establish a criminal course of conduct can be used in assessing whether the complainers are both credible and reliable.[222]

4 A lengthy gap between offences does not of itself rule out the application of the Moorov Doctrine. In circumstances where there is such a gap, the circumstances and character of the offences may nevertheless be of such similarity to justify an inference that the accused was engaged in a course of conduct, particularly in relation to abuse within a family where a 'generational gap' might explain why there had been a gap between incidents,[223] or in cases involving the sexual abuse of children by adults, where:

"there already exists a special, compelling, or extraordinary circumstance which will be sufficient for the jury to find the necessary course of conduct established, at least in cases which do not involve an exceptionally long gap in time".[224]

To the extent that the case of CS v HM Advocate[225] suggested that it was necessary for a trial judge, in cases involving lengthy time gaps between offences, to direct a jury of the need for some special feature of the behaviour, making the similarities compelling despite the substantial time

gap, it was overruled by the Court in Duthie v HM Advocate,[226] the Lord Justice General (Carloway) stating, at paragraph [28] thereof:

> *"It is not the case that, as a matter of law, in a lengthy time gap case, there require to be special compelling or extraordinary circumstances before the appropriate inference can be drawn. What is essential, in terms of the settled law, which was described in Adam v HM Advocate (at para [28]), are similarities in time, character and circumstances such as to demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused. The jury will have to be directed to that effect but, normally, that is all that is required. A judge or sheriff may elect to explain to the jury in a particular case that there is a long time gap and that, because of that factor, the similarities would require to be strong ones when compared to those needed where the incidents are already closely linked in time. The giving of such a direction is not essential and in some case it may be undesirable."*

5 It is doubtful if it is helpful to a jury to read them lengthy extracts from law reports that they do not have in front of them. They might find it difficult to put in context what is being read to them.[227] All that the trial judge is required to do in such [Moorov] cases is to give a concise definition of the Moorov principle and some general guidance as to how it might be applied by the jury to the evidence in the case.[228]

6 If the features of time, character, and circumstance would allow a jury to conclude that each charge is part of a course of criminal conduct persistently pursued by the accused, the matter should be remitted to the jury for assessment unless it can be said that on no possible view could the inference of an underlying course of conduct be drawn.[229] For an example in which on no possible view could it be said that there was any connection between the two offences see *HM Advocate v SM(2).*[230]

The court has again sought to make clear that generally such assessments are quintessentially jury judgements (see *HM Advocate v BL* 2022 JC 176). This was a case in which the trial judge had upheld a submission of no case to answer, deciding that the jury could not find mutual corroboration for sexual offences which varied in nature, frequency and gravity between two child complainers who were brother and sister. The court allowed the Crown's appeal, refused the no case to answer submission and remitted to the judge to proceed as accords. The Lord Justice General explained:

> *"[10] It is no doubt correct, as the judge observed, to say that there were dissimilarities in the accounts of the abuse spoken to by the two complainers. The scale of the abuse of the second complainer was far greater than that said to have been perpetrated against the first complainer. Whether that is significant will be for the jury to gauge. It is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer. In particular the judge should not be induced into carrying out a detailed examination of whether a jury's determination, that mutual corroboration applied, would be reasonable (see Criminal Procedure (Scotland) Act 1995 (cap 46), sec 97D).*
>
> *[11] The type of evaluative exercise which was carried out by the judge, involving questions of fact and degree, nuance and impression, falls quintessentially within the province of the jury. The jury's role in that regard must be respected.* The judge has to ask himself simply whether on no possible view of the evidence could it be said that the respective accounts

> of abuse constituted component parts of a single course of criminal conduct systematically pursued. This is a very high test. It is one that in modern practice will rarely be capable of being passed in cases of child sexual abuse (see Adam v HM Advocate *, Lord Justice General (Carloway), delivering the opinion of the court, para 35, citing Moorov v HM Advocate , Lord Justice General (Clyde), p 74, and Lord Sands, pp 87, 88).* In so far as HM Advocate v P suggests otherwise, it is disapproved.*"*
>
> [Emphasis added]

7 Decisions and observations in Duthie, *Stalley v HM Advocate* [2022] HCJAC 12 and *Dodds v HM Advocate* 2002 SCCR 838 have important implications for directing juries in trials in which mutual corroboration is sought amongst groups of charges of different crimes and how far a judge must go to anticipate what a jury might do with permutations of charges.

The full bench in *Duthie* rejected the proposition that an act which contains no sexual element at all (common assault) could corroborate a sexual one even when they occurred in a domestic context of abusive, controlling or coercive conduct, going on to explain in para 22:

> *"Although a person, who is of a controlling disposition, may perpetrate a number of different types of crime against his partners, perhaps including not only physical or sexual assaults but also theft, malicious mischief and contraventions of the Communications Act 2003, that does not make these offences "similar" for the purposes of mutual corroboration. … the test of similarity must first be met. That test is a necessary precursor to the search to see if the inference of a course of conduct persistently pursued is met. The Crown's central contention that testimony about physical assaults can afford corroboration of rapes is rejected."*

Duthie was applied in *Stalley* in which several complainers had spoken of crimes of rape, sexual assault, common assault, breach of the peace and conduct covered by sections 38 and 39 (stalking) of the Criminal Justice and Licensing (Scotland) Act 2010. The Advocate Depute in his speech to the jury had analysed mutual corroboration in appropriate groupings, but went on to suggest that there was "*a general theme that ran through the evidence which enabled the jury to say that all of the charges constituted a single course of criminal conduct.*"

The court concluded in para 30 that: "*…The judge referred to the jury evaluating whether there was a "single course of conduct". This suggests an acceptance that the AD's contention that mutual corroboration could be found in every charge, was correct. It is not.*"

The important point to take from the decision is found in para 33:

> *"In short, the judge ought to have been far clearer in directing the jury, under reference to the particular charges, on which testimony was capable of mutually corroborating which other testimony on different charges.* This would not require a charge by charge analysis and could be done by reference to groups of charges or the types of conduct in the libel*…"*
>
> **[Emphasis added]**

Judges should note that this is as far as the appeal court has gone and a judge is not expected to anticipate all of the options which may arise in light of decisions the jury may make on a particular

charge or charges.

In Dodds, where seven charges were put to the jury, Lord Justice Clerk Gill explained, at para 4 of his opinion, that;

> *"…the idea that the trial judge should have attempted to direct the jury on all possible permutations of verdict on those charges is unreasonable. To have attempted to do so, even in outline, would have required a direction of such complexity as to leave the jury bewildered.".*

If need be, a verdict which leaves a group of charges amongst which conviction was not available on some of the charges, can be corrected on appeal as happened in Dodds.

8 In a case in which the Crown founds on both mutual corroboration and a free-standing body of corroborated evidence on a charge or charges, and perhaps where those options are available, judges should be alert to *Garland v HM Advocate* 2021 JC 118 where the Lord Justice General explained the obligations on a judge in directing the jury where the Crown speech fails to identify a relevantly corroborated case, at para 20:

> "it is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful.…He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration."

Single Complainer Moorov cases

9 Moorov can apply even where each charge, or each incident in an omnibus charge,[231] has the same complainer, provided that there are two sources of evidence to prove crucial facts. "*The principle can apply to the evidence of a single complainer who speaks to separate offences, which are all committed against her, where there is a separate witness who speaks to one or more of these offences* and the whole series constitutes the requisite course of conduct."[232]

10 Faced with a case where corroboration is sought on the basis described in the paragraph above, a judge should adapt the directions on mutual corroboration to the circumstances of the particular case. A possible form of words is suggested below.

11 For more guidance on charging on omnibus charges see relevant chapter on "Corroboration: Omnibus/ Composite charges", infra.

12 For the use of evidence led by means of dockets see relevant chapter on the Sexual Offences (Scotland) Act 2009.

Possible form of direction on the Moorov doctrine

Note: It is always incumbent on a judge to tailor her/his charge to the particular circumstances of the case, in particular in complex Moorov cases involving a number of charges, where a simple repetition of the general Moorov direction below may not be sufficient. It is not appropriate to invite the jury simply to "take into account" what the prosecutor has said in this

regard. [233] **Where the prosecutor has not been clear in her/his speech about the basis on which they invite the jury to apply Moorov to the charge, it is open to the judge to seek submissions on that - see** Addressing issues raised by Crown/defence speeches **above. Either way, it is the judge's responsibility to give clear direction on this and, if necessary, on the route (s) to verdict available. See paragraph 7 et seq above.**

"Sometimes crimes are committed, and for various reasons there is little or no eye- witness evidence. In such cases a special principle can apply.

It can apply where:

- *an accused is charged with a series of similar crimes;*
- *there is a different person in each crime;*
- *the commission of each crime is spoken to by one witness whose evidence you accept as credible and reliable when they say that the crime was committed by the accused; and*
- *the accused is identified as the person who committed each crime.*

The principle is this: if you are satisfied that the crimes charged are so closely linked by:

1. *their character,*
2. *the circumstances of their commission, and*
3. *the time of commission*

as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then, the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of each of the other crimes. In looking at the charges, it is the underlying similarity of the conduct which is described by the witnesses which you have to consider in deciding whether the doctrine applies."

[Where appropriate]*"It does not matter that the charges have different names or are more or less serious."*

"For it to apply, you have to accept the evidence from each of the witnesses who speak to the individual charges as being credible and reliable in its essentials. If you do not, there can be no corroboration. In reaching your decision as to whether a witness's evidence is credible and reliable in its essentials you can have regard to the evidence from the other witnesses. So if you accept the complainer's evidence in any particular charge then you would have to find corroboration from another witness whose evidence you accept as credible and reliable who speaks to any of the other charges. If you do accept that witness's evidence in its essentials, you then have to decide if by reason of the character, circumstances, and time of each charge, the crimes are so closely linked that you can infer that the accused was pursuing a single course of crime. It is not enough if all that is shown is that he had a general disposition to commit this kind of offence. You have to apply this principle with caution.

The Crown says that principle can be applied in this case. It relies on these points of similarity [.....]

The defence says it should not be applied. It relies on these points of dissimilarity [.....]"

OR

"The defence do not suggest that the circumstances of each incident are so dissimilar that the principle cannot be applied.

It is for you to decide whether the crimes alleged are sufficiently close in time, character, and circumstance for the principle to apply. But you have to decide:

1. *if that evidence is credible and reliable*
2. *if the necessary link in time, character and circumstances has been established, and*
3. *if the principle should be applied.*

If you do apply it, then you could convict the accused of both/each of these charges."

Possible form of direction on single complainer Moorov

Note: The direction below may be appropriate where there are a series of charges each alleging that the accused committed a similar crime against the same complainer, and there is an independent source of evidence capable of corroborating one of the crimes. The direction may also arise in more complex scenarios eg where there is more than one source of independent evidence, in omnibus charges or where Moorov arises. The direction will require to be adapted as appropriate. Examples of directions adapted to particular circumstances are provided in the Illustrative directions on single complainer Moorov Appendix.

"You will recall that I mentioned in the general directions that nobody can be convicted on the evidence of one witness alone, no matter how credible and reliable their evidence is. The law requires corroboration, evidence coming from two or more sources which in combination show that

a. the crime was committed and
b. the accused committed it.

Sometimes crimes are committed in circumstances in which there is only one eye witness. In such cases a special principle can apply.

It can apply where:

- An accused is charged with a series of similar crimes;
- Each crime is spoken to by the complainer whose evidence you accept as credible and reliable in its essentials;
- The accused is identified as the person who committed each crime.

The principle is this: If you are satisfied that the crimes charged are so closely linked by:

1. their character,
2. the circumstances of their commission, and
3. in time

as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then, evidence corroborating the complainer's evidence about one crime can corroborate the same complainer's evidence about another crime.

It is the underlying similarities which you have to consider in deciding whether the principle applies. It does not matter that the crimes have different names or are more or less serious than each other. It is not enough if all that is shown is that the accused had a general disposition to commit this kind of offence. You have to apply this principle with caution.

For it to apply to any charge, you have to accept the essential parts of the complainer's evidence, namely that the accused committed the crime charged. In deciding that, you can have regard to the other evidence in the case. If you did not accept the complainer's evidence in its essentials, you would acquit the accused of that charge.

If you accepted the complainer's evidence on the essentials of a charge, you may be able to find corroboration from another source of evidence which supports her evidence. If you also accepted that second source of evidence as credible and reliable, you could convict the accused of committing the crime without recourse to the principle I have explained.

If that was your decision, that second source of evidence could then become relevant to the other charges. It could corroborate any one or more of the other crimes charged if you considered that the principle should be applied. It is for you to decide if the crimes are so closely linked by their character, circumstances of commission and in time, that you can infer the accused was systematically pursuing a single course of criminal conduct.

In this case, in charge 1, the primary source of evidence comes from the complainer. A second source of evidence comes from (specify). If you accept the complainer's evidence in its essentials and accept the evidence (specify) you could find corroboration for charge 1 without applying the principle.

However, for charge 2 the only source of evidence that the accused committed the crime is the evidence of the complainer. If you accept her evidence in its essentials, you would then need to consider whether the principle should be applied to corroborate charge 2 as part of a course of criminal conduct systematically pursued by the accused. If that is your view, the second source of evidence from charge 1 can corroborate the complainer's evidence on charge 2."

[212] *MR v HM Advocate* 2013 SCCR 190, *Jamal v HM Advocate* 2019 HCJAC 22

[213] B v HM Advocate 2009 SCCR 106at para [16]

[214] *RB v HM Advocate* 2017 SCCR 278

[215] *CW v HM Advocate* 2016 SCCR 285 paras 34-36

[216] *MR v HM Advocate* 2013 SCCR 190

[217] 2019 HCJAC 51

[218] *AS v HM Advocate* 2015 SCCR 62 para 10

[219] *Donegan v HM Advocate* 2019 HCJAC 10

[220] *CW v HM Advocate,* supra, at paras 34-36

[221] *KH v HM Advocate* 2015 SCCR 242

[222] *PGT v HM Advocate* 2020 HCJAC 14

[223] *RB v HM Advocate* 2017 SCCR 278 para 30

[224] *Adam and another v HM Advocate* 2020 HCJAC 5 at para [35]; see also *GH v HM Advocate* 2020 HCJAC 44

[225] 2018 SCCR 329, at para 11

[226] [2021] HCJAC 23

[227] *Kenney v HM Advocate*[2006] HCJAC 5 at para [14]

[228] *supra* at para [15]

[229] *Donegan v HM Advocate 2019 HCJAC 10*

[230] [2019] HCJAC 40

[231] Please see Corroboration: Omnibus/Composite charges chapter

[232] *Rysamanowski v HM Advocate* 2020 JC 84, per Lord Carloway, LJG @ para 21, referencing *HM Advocate v Taylor* 2019 JC 71 *(emphasis added).* See also *Wilson v HM Advocate*2019 SCCR 273

[233] See *Stalley v HM Advocate* [2022] HCJAC 12, in particular per LJG Carloway @ paras [29], et seq

Corroboration: Special Knowledge Confession

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON SPECIAL KNOWLEDGE CONFESSION

LAW

Stair Encyclopaedia, Vol 10, para 770.

> *"The fundamental rule is that no one who confesses to a crime, unless by a formal plea of guilty, can be convicted solely on his own confession. There must be evidence from some other source which incriminates the accused."*[234]

If a confession is properly before a jury and accepted by them, it can be sufficiently corroborated if the contents of the confession are confirmed by the discovery of things, or real demonstration of fact, contained in it – a "special knowledge" confession.[235] It is not necessary to show that no-one, but the perpetrator of the crime could have had the information; it is enough that the accused had no reason to be aware of it other than that he was guilty of the crime i.e., that the only reasonable inference to be drawn from his knowledge is guilt.[236] Where a special knowledge confession is relied upon, there must be evidence from two witnesses to the effect that the accused made the statement attributed to him.[237] But where there are two separate confessions to different hearers each may be spoken to by only one witness.[238]

> "*It has often been said that if there is a clear and unequivocal admission of guilt, then very little evidence in corroboration of such an admission is required .... [I]t is not appropriate that this approach to what is required to corroborate a clear and unequivocal confession should be described as a rule .... there is a risk that, by describing the requirement in minimal terms by using the words such as "very little" and then elevating it into a rule, there will be a weakening of the principle that there must be a sufficient independent check of the confession to corroborate it.*" [239]

POSSIBLE FORM OF DIRECTION ON SPECIAL KNOWLEDGE CONFESSION

"Because the essential facts in the Crown case need to be corroborated, an accused's confession on its own, no matter how clear it is, is not normally enough for a conviction. But there is an exception to that rule, and it is this.

If an accused's confession contains detailed information:

1. which the accused could not have known unless he had committed the crime,
2. and the accuracy of that information is confirmed by independent evidence,

then the confirmed accuracy of that information corroborates the confession. In effect, if the only reasonable explanation for the accused having accurate "inside" knowledge is that he must have committed the crime, that is enough for a conviction.

So, suppose a suspect says to the police, "I stabbed her, and I will show you where the knife is hidden", and he does, evidence of the finding of the knife points to his involvement and corroborates his admission.

The Crown does not need to show that nobody except the person responsible for committing the crime could have had that information. It is enough if the accused had no reason for knowing it unless he was involved in committing the crime. There must be two witnesses who speak to the confession. This type of admission is what we call a special knowledge confession. Normally an admission can be spoken to by one witness only, where it is only one of several elements in proof of the Crown's case. But because a special knowledge confession is really the only link between the accused and the commission of the crime, its making has to be proved by two witnesses. Before you could convict, you must be satisfied on the evidence of at least two witnesses that the confession was made and that it displays special knowledge.

(Where two separate special knowledge confessions: ADD

Here there are two separate special knowledge confessions, made to different people at different times. Because there are two, they do not need to be spoken to by two witnesses each. It is enough if there is only one witness speaking to each confession. Before you could convict, you must be satisfied that each confession was made and that each displays special knowledge.)

Here the Crown says this confession contains these facts, which the perpetrator of the crime would have known, ….

The defence say that the information in the confession was obtained from other sources, namely…. If that is your view, then its contents cannot corroborate the confession. For a conviction there would need to be corroboration elsewhere in the evidence.

OR

The defence say that there are inconsistencies between the facts and the details in the confession, which rule out their corroborating the confession. You will have to decide if the confession is sufficiently corroborated. You do not do that simply by comparing numbers of consistencies and inconsistencies. You look at their quality and importance. If you thought the inconsistencies were due to unsurprising mistakes, you might feel these could be ignored. But if they were material, you would have to decide if their quality outweighed the quality of the consistent evidence. If that is your view, then its contents cannot corroborate the confession. For a conviction there would need to be corroboration elsewhere in the evidence. But if the quality of the consistencies makes you feel you can ignore the inconsistencies, all you have to decide is whether the facts corroborate the confession."

[234] *Meredith v Lees*, 1992 JC 127, 130 per LJ-G Hope.

[235] *Manuel v HMA*, 1958 JC 41.

[236] *McAvoy v HMA*, 1982 SCCR 263; *Wilson v HMA*, 1987 SCCR 217.

[237] *Low v HMA*, 1993 SCCR 493, 510 per LJ-C Ross. *Wilkes v HMA* 2001 SLT 1268 at para [12].

[238] *Murray & O'Hara v HMA* 2009 SCCR 624, 2009 JC 266 at para [42].

[239] Meredith v Lees, supra, at 130-1 per LJ-G Hope.

Corroboration: Omnibus/ Composite charges

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1. Law

1.1. Background

1.2. Recent case law

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Law

1 Where the Crown libels a charge that includes the component elements of a number of separate criminal offences, great care is required in directing the jury on what are the essential elements of the crime and what is required by way of corroboration.

What is required will depend on whether the charge libelled is:

1. a charge libelling a number of separate events, each of which constitutes a separate crime;
2. a charge libelling a single event *"involving different elements, occurring at or about the same time or as part of an uninterrupted continuum"*(see *Rysamanowski v HM Advocate* 2020 JC 84 per LJG Lord Carloway @para 17) **or**
3. a statutory charge constituted by a "*course of conduct*", comprising elements that constitute separate crimes and elements that might not otherwise be criminal but become so because they are part of that course of conduct (such as a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018, or section 39 of the Criminal Justice and Licensing (Scotland) Act 2010).

Background

2 In *Cordiner v HM Advocate* 1991 SCCR 652 the Appeal Court determined that in circumstances in which a charge contained a number of separate elements which in themselves constituted separate charges, it was preferable that the jury be directed to return separate verdicts on each constituent element of the charge. Further Lord McCluskey considered that a submission of no case to answer in respect of one of the separate elements of the charge should have been entertained.[240] That decision, including the observations of Lord McCluskey, was subsequently followed in *HM Advocate v Young* 1997 SCCR 647 and *HM Advocate v Stewart* 2010 SCCR 341. In the last decision, in contrast to *Cordiner* and *Young* the charge libelled on the indictment was not subdivided by letters but ran as one narrative. The commentary to Stewart suggested that the decision was thus difficult to reconcile with section 97 of the Criminal Procedure (Scotland) Act 1995.

3Whilst recognising this line of authority, in *RM v HM Advocate* 2012 SCCR 611the Appeal Court

determined that there was no requirement to break down a composite charge into its different elements to be addressed separately by the jury in delivering their verdict. Care is required however in directing the jury about what is required by way of corroboration and providing appropriate routes to verdict in such cases.

Recent case law

4 A number of recent cases have discussed the importance of being clear in this context about the difference between a charge libelling a number of separate events, each of which constitutes a separate crime, and a charge libelling a single event "*involving different elements, occurring at or about the same time or as part of an uninterrupted continuum.*"[241]

In the case of the latter, it is not necessary that each element is corroborated, provided there is corroboration of the essential elements of the crime.

In the case of the former, however, it is not correct to direct the jury to approach the charge as if it constitutes a single crime in which the separate episodes do not require to be corroborated. Where what is libelled in a charge comprises a series of separate crimes over a period of time, the judge requires to direct the jury that, to convict of any separate element, they have to be satisfied on the basis of corroborated evidence in relation to that element.

5 In such circumstances the jury will still be invited to deliver one verdict upon the charge, notwithstanding it contains elements constituting separate crimes. It is thus essential that the jury is made aware that they can delete an element from the libel if they are not satisfied that that element has been proved.[242] In a case involving eight allegations of assault over four years[243] or a number of allegations of rape over significant passages of time,[244] each incident of criminal behaviour required to be proved by corroborated evidence.

6 Where separate crimes are libelled as part of a single charge, an accused is entitled also to make a section 97 submission in relation to any one or more of those.

7 Whether what is charged is a single continuing crime or series of separate crimes may itself in certain cases be a matter for the jury to determine, in which case the judge's charge will have to provide directions on alternative routes to verdict. [245]

This may particularly be the case in charges libelling statutory offences that are constituted by a "course of conduct" or "course of behaviour" involving a number of incidents, some of which on their own might not amount to criminal conduct.[246]

Sufficiency of evidence in composite charges

8 The next issue relates to issues of sufficiency of evidence. The requisite corroboration may, depending on the evidence, be afforded by any of the usual mechanisms, including the operation of *Moorov* or *Howden* (see below) but the judge's charge needs to make it clear to the jury what is required for sufficiency in each case and where they may find it.

9 Moorov can apply even where each incident in an omnibus/composite charge, has the same complainer, provided that there are two sources of evidence to prove crucial facts. *"The principle can apply to the evidence of a single complainer who speaks to separate offences, which are all*

committed against her, where there is a separate witness who speaks to one or more of these offences and the whole series constitutes the requisite course of conduct."[247]

10 Thus, it has recently been held that in instances where the charge consists of a number of allegations occurring over a short period of time with similarities in the character of commission, provided there are two sources of evidence to prove the crucial facts, the complainer in the allegations does not require to be different.[248] The fact that the separate incidents of criminal behaviour are libelled as one single charge is of no consequence.[249] What is required in such circumstances is that there is evidence from one source relating to each separate charge or each separate aspect of a single charge.[250]

11 Examples of charges involving application of the Moorov doctrine to single complainer Moorov charges can be found in the chapter on Corroboration: The Moorov Doctrine.

12 The Appeal Court commented on this matter in *Rysamanowski v HM Advocate* 2020 JC 84 in the following terms:-

> *"[17]. It is apparent that this area of the law is continuing to cause difficulties in practice. It need not do so. First, although the Crown may be allowed considerable latitude when framing a criminal charge involving young children (Allison, Practice 256; Hume, Crimes ii, 222–223) that has no bearing on the need to corroborate each separate criminal act, whether these form part of a course of conduct or not and whether the crimes are sexual in nature or not. Secondly, the need for corroboration may be satisfied as a result of the application of mutual corroboration. In this case, the events libelled, which occurred on separate days over a period of time during which the complainer was otherwise living normally with her family, were separate criminal acts (Spinks v Harrower, LJG (Carloway), delivering the opinion of the court, at para.13; cf, Stirling v McFadyen). Corroboration could not be supplied in the same manner as in a single assault, involving different elements, occurring at or about the same time or as part of an uninterrupted continuum. However, thirdly, applying mutual corroboration, the mother's evidence about the final episode could corroborate the earlier episodes spoken to by the complainer, and vice versa. For a conviction of the whole charge, the jury would have to hold that each episode was a component part in a single course of conduct persistently pursued by the appellant. That in turn requires the jury to examine the similarities and dissimilarities in time, place and circumstances. It is important to recognise in all of this that the phrase "course of conduct" has no significance in relation to sufficiency of evidence other than in the context of mutual corroboration.*
>
> *[18]. The fundamental problem in this case is that the jury were not directed to the possibility of applying the principle of mutual corroboration in order to find the whole charge proved. They were directed to approach the charge as if it constituted a single crime in which the separate episodes did not require to be corroborated at all. This was a material misdirection which must result in the quashing of heads (a) and (b) of the conviction.*
>
> *[19]. Part of the confusion may arise from the dicta in Stephen v HM Advocate. Stephen has been interpreted (Jury Manual at para.15.3) as meaning that: "Where a charge is divided into sub-heads, each libelling conduct occurring at a specific place, it falls to be regarded as*

a single charge libelling a course of indecent conduct, and each element does not require corroboration. It is the course of conduct that requires corroboration."

[20]. The court in Stephen relied upon the passages from Hume and Allison, cited above, to hold that, where repeated crimes can be libelled as in a single charge (constituting a course of conduct), it is thereby legitimate for the purposes of corroboration to treat that charge as a single crime constituted by repeated similar acts. This approach was, the court held (at para.10) consistent with the "well established principle" that, where an omnibus charge is libelled, corroboration may be found in evidence of particular instances of it. This may be correct in relation to the application of the principle of mutual corroboration, but there is no other such principle, far less a well-established one. It is noticeable that the court in Stephen proffered no authority for its view. The passages relied upon from Hume and Allison, relative to the scope of the libel, date from a time when the now obsolete practice of libelling major and minor premises was current.

[21]. The principle of mutual corroboration is well understood. Corroboration of separate offences can, in defined circumstances, be provided by different complainers. The principle can apply to the evidence of a single complainer who speaks to separate offences, which are all committed against her, where there is a separate witness who speaks to one or more of these offences and the whole series constitutes the requisite course of conduct (HM Advocate v Taylor). In these circumstances, the route to verdict must include the conventional directions in a mutual corroboration case. There is no other route involving corroboration of a course of conduct."

13 The remarks made by the court in *Tait v HM Advocate* 2015 SCCR 308 at paragraphs 19 and 20 may require to be carefully considered in light of the remarks in *HM Advocate v Taylor*.

14 Where the charge is of a statutory crime involving a "course of conduct" or "course of behaviour", which is defined as conduct or behaviour on at least two occasions, some elements of which may constitute individual crimes and others which may not in themselves be criminal but become so because they are part of that course of conduct or behaviour, what is required is corroboration of the course of conduct or behaviour. This applies even though the phrase "course of conduct" or "course of behaviour" is not used in the charge as libelled, if the existence of such a course of conduct or behaviour is clearly implicit in how the libel is framed. What is required is corroboration of at least two elements of the behaviour libelled and a nexus or connection between all of the various elements, such that they demonstrate a "continuity of purpose" (see infra).

15 In *Finlay v HM Advocate* 2020 SCCR 317, at [14]. the court held that:

"where the alleged commission of the crime is by a course of conduct, there would require to be corroborating evidence of that course of conduct, i.e. evidence relating to two or more of the incidents referred to in the libel from which the jury could conclude that these were not isolated acts but truly part of a course of conduct. Corroboration of one incident alone might be sufficient for corroboration of the crime restricted to that one incident or a single act…but not for a course of conduct".

16 In a recent embargoed first instance decision dated 10 August 2021[251] in relation to section 1 of

the Domestic Abuse (Scotland) Act 2018 Lord Matthews opined that,

> *"in my opinion, the acceptance by the jury on corroborated evidence that two episodes of the abusive behaviour had been proved would suffice to warrant a conviction of the new offence, whether they could also convict of uncorroborated elements would depend on whether or not they were satisfied that those uncorroborated elements formed part of the same course of behaviour. There requires to be some sort of nexus or link between the various elements otherwise they would be simply separate incidents and not part of a course of behaviour. Whether or not that link exists will depend on the evidence in each case and may not be capable of delineating ab ante, although it might be found if the jury were satisfied, for example, that there was a continuity of purpose in that the accused intended or was reckless as to whether his behaviour, whatever it was, caused the complainer to suffer physical or psychological harm, in other words if the accused was pursuing the sort of campaign described inMcAskill [McAskill v HM Advocate 2016 SCCR 402]. In my opinion it is not necessary that the individual incidents require to be of the same kind or of a similar kind to the full extent required by Moorov. That is part of the law of evidence rather than a substantive requirement of an offence. It will always be open to an accused person to submit that there was no case to answer where the evidence did not support a course of conduct"*

[240] See also *Wilson v HM Advocate* 2019 SCCR 273 per LJG Lord Carloway @ para 40.

[241] *Rysamanowski v HM Advocate* 2020 JC 84 per LJG Lord Carloway @para 17

[242] *Afzal v HM Advocate* 2013 SCCR 703

[243] *Spinks v Harrower* 2018 SCCR 179

[244] *Dalton v HM Advocate* 2015 SCCR 125

[245] See the discussion in *Wilson v HM Advocate* 2019 SCCR 273.

[246] *Finlay v HM Advocate* 2020 SCCR 317

[247] *Rysamanowski v HM Advocate*2020 JC 84, per Lord Carloway, LJG @ para 21, referencing *HM Advocate v Taylor* 2019 JC 71 *(emphasis added).* See also *Wilson v HM Advocate* 2019 SCCR 273

[248] *Wilson v HM Advocate* 2017 JC 64

[249] *HM Advocate v Taylor* 2019 JC 71

[250] *HM Advocate v Taylor* paragraphs 18 and 20

[251] Judges can find this Opinion on the T:drive in the "Appeal Opinions – Pre Trial" folder. For public readers of the Jury Manual, a hyperlink to the opinion will be made available on this page once the opinion has been published on the scotcourts website.

De Recenti Statements

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1. Law

2. Possible form of direction on De Recenti statements

Law

Stair Encyclopaedia, Vol 10, para 707; *Walkers on Evidence*, 2nd ed, paras 8.3.1- 8.3.2.

1 An exception to the rule excluding hearsay evidence is allowed by admitting evidence of de recenti statements. This commonly occurs in the case of assaults, and in particular, sexual assaults upon women and children. In cases of that kind the court will allow the evidence of complaints or statements de recenti made by the injured party for the limited purpose of showing

a. that the conduct of the injured party has been consistent,
b. that the story is not an afterthought.[252]

2 A direction on the evidential effect of a de recenti statement should always be given. The content of any such direction depends very much on what the evidence was and the context in which the statement was made. Such a statement is commonly associated with a display of distress shortly after the incident occurred. At paragraph 22 of *Dyer v HM Advocate*,[253] Lord Justice General Hamilton, in delivering the opinion of the court, indicated that a direction would generally be required in such a case when he said:

> *"When a trial judge directs a jury that it is open to them to find corroboration of a complainer's testimony to the effect that she did not consent to sexual intercourse in evidence from an independent source that the complainer was displaying distress shortly after the event, it would also be for the trial judge to direct them that corroboration could not be found in anything that the complainer may have said at the time when she was distressed. If there was evidence as to what a complainer said to a confidante at the time, one would expect a trial judge to direct the jury on the evidential significance of de recenti statements".*

It is generally considered appropriate to explain to juries why distress displayed by a complainer, but recounted to the court by a witness, is evidence from a source independent of the complainer and can thus corroborate her evidence in certain respects. Similarly it is appropriate to explain the distinction between the fact that something was said and the manner in which it was said as part of the complainer's display of distress on the one hand, and the contents of the statement as evidence of the physical acts which gave rise to the distress on the other. The source of the contents of the statement is the complainer alone and cannot provide corroboration of her evidence.[254]

3 But the exception operates more widely, and may arise in the case of any type of crime.[255]

4 There is no logic in excluding as inadmissible a hearer's evidence about the make of a de recenti statement merely because its maker has not spoken to it. It is the fact that the statement was made which is evidentially significant.[256] Either the maker or the hearer [recipient] of the statement must give evidence of it having been made, and of its terms.[257]

Possible form of direction on De Recenti statements

"You have heard evidence of what the complainer/[insert name] said shortly after the incident. That is hearsay, evidence about what somebody else has been heard to say. Normally, that is not allowed in court. But, in a case like this, such a recent statement is allowed for a limited purpose, which is to help you assess the quality of the complainer's evidence. What the complainer is reported as having said is not evidence corroborating his/her/their evidence in court about what happened. It does not go to prove what happened. It is only a guide to credibility and reliability.

If that earlier account is substantially similar to the complainer's later evidence in court, that could point to consistency, and reflect favourably on the credibility and reliability of the complainer's evidence. But the longer the delay between the incident and the complainer's account of it, the less recent it is, and the less value it has in supporting credibility and reliability."

If the de recenti statement is inconsistent then give the appropriate direction in accordance with chapter on PRIOR STATEMENTS**.**

[252] *Morton v HM Advocate*, 1938 JC 50, 53 per LJ-C Aitchison, 1938 SLT 27, 28; approved in *Farooq v HM Advocate*, 1991 SCCR 889, 1993 SLT 1271.

[253] 2009 SCCR 194.

[254] *DS v HM Advocate* 2012 SCCR 319.

[255] *Stair Encyclopaedia*,Vol 10, para 707; *Walkers on Evidence*, 2nd ed, para 8.3.1; *Renton & Brown, Criminal Procedure*, para 24-136. In *HM Advocate v Stewart*, 2 Irv 166, 179, the statement of a child eye-witness to a murder, made within 48 hours of the event, was admitted.

[256] *Ahmed v HM Advocate* [2009] HCJAC 73, para [16].

[257] In so far as *MacDonald v HMA* 2004 SCCR 100 at paras [9] and [10] suggested that the complainer must give evidence that such a statement had been made, it is disapproved by *Ahmed*, at paras [16] and [17].

Diminished Responsibility

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1. Law

2. Possible form of direction on statutory diminished responsibility

Law

The law of diminished responsibility is now governed by section 51B of the Criminal Procedure (Scotland) Act 1995 for proceedings which commenced on or after 25 June 2012, subject to the following saving:

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012.

As set out in r.4 (2) the common law of diminished responsibility continues to have effect in relation to criminal proceedings commenced on or after 25th June 2012 **where the conduct giving rise to the proceedings took place before that date.**

Stair Encyclopaedia, Vol 7, paras 135-150; Gordon, *Criminal Law*, 3rd ed, Vol I, Chapter 11, but note that the law has been substantially revised in *Galbraith v HM Advocate* 2002 JC 1. That case overruled *Connelly v HM Advocate*, 1990 JC 349, and *Williamson v HM Advocate*, 1994 JC 149.

1 The position regarding the plea of diminished responsibility is now set out in section 51B of the Criminal Procedure (Scotland) Act 1995 which applies to proceedings commenced on or after 25 June 2012. It now only applies to a charge of murder unlike the common law which allowed it also on a charge of attempted murder. Under statute, the mental disorder could include complete lack of responsibility, because the legislation allows the accused to choose whether to plead lack of responsibility under section 51A or diminished responsibility under section 51B.

At common law, the condition required to fall short of insanity.

Diminished responsibility only applies where the accused raises it as a special defence. The principal change brought about by the legislation is that a personality disorder is not excluded from giving rise to diminished responsibility. However, the statute also clarified that whilst self-induced intoxication cannot by itself found a plea of diminished responsibility, its presence does not necessarily exclude diminished responsibility being made out on the basis of an underlying condition even where there is also intoxication.

That was always the position at common law.[258] This report contains the trial judge's directions (Lord Hamilton) which may be helpful to judges where the issue arises although part of his direction may have come close to amounting to what was later considered to be a misdirection in *Rodgers v HM Advocate* 2019 JC 150 where the court did not notice the case of *Lindsay*. In a case

of statutory diminished responsibility, guidance is given by Lord Justice General Carloway as to how a judge should direct the jury where both intoxication and an underlying condition may be in play.[259]

2 The statutory provision is in the following terms:

" 51B Diminished responsibility

1. *A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.*
2. *For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.*
3. *The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—*
    a. *constitute abnormality of mind for the purposes of subsection (1), or*
    b. *prevent such abnormality from being established for those purposes.*
4. *It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.*
5. *In this section, "conduct" includes acts and omissions."*

3 Diminished responsibility applies where some mental abnormality substantially impairs the accused's ability to determine and control his actings. In murder cases, his responsibility for the killing is correspondingly reduced, and he falls to be convicted of culpable homicide, not murder.[260] At common law in a case of attempted murder, diminished responsibility will lead to a verdict of "guilty of assault" [with aggravations held proved] under deletion of attempted murder on the ground of diminished responsibility.[261] Whether it was necessary that the criminal quality of an offence for which no fixed penalty is provided should have been modified may be questioned. [262]

4 The onus to establish diminished responsibility rests on the accused, who requires to establish the existence of diminished responsibility on a balance of probabilities.[263] The trial judge must decide whether evidence led in support of the plea discloses, at its highest, a basis on which the law could regard the accused's responsibility for his actions as being diminished. If it does not, in charging them the judge must withdraw the issue from the jury's consideration. If it does, the judge, in a murder case, must direct the jury that, in the event of convicting they accept the relevant evidence, their verdict must be guilty of culpable homicide; but, if they reject it, their verdict must be guilty of murder:[264] presumably this is on the basis that the jury considers that the crime would otherwise amount to murder. With the introduction of section 51B of the 1995 Act, diminished responsibility is only available in cases of murder.

5 Post 25 June 2012, a personality disorder, including psychopathic personality disorder can give rise to diminished responsibility but psychopathic personality disorders could not do so at common law.[265]

N.B. The specimen direction below is suitable for a case of statutory diminished responsibility but

may require to be tailored, according to the circumstances, for diminished responsibility at common law on the question of personality disorder, given that psychopathic personality disorder could not, at common law, give rise to the plea.

Both under statute and at common law, diminished responsibility cannot arise from any self-induced abnormality short of actual insanity, such as that caused by the taking of drink or drugs.[266] Neither do emotions such as anger, jealousy,[267] short temper, an unusually excitable nature, or lack of self-control.[268] Diminished responsibility requires some abnormality of the accused's mind, affecting it substantially,[269] permanently or temporarily, in such a way that it does not work like the mind of a normal adult, and substantially impairing his ability to determine and control his acts and omissions.[270] There must be something far wrong with him, which affects the way he acts.[267]

However, the fact that the ingestion of alcohol or drugs may have contributed to the impairment does not necessarily result in the exclusion of diminished responsibility. The live issue is whether the abnormality is an operative or substantial cause on any impairment of the ability of an accused to determine or control the conduct at the material time.[272].

The Lord Justice General put it this way in giving the opinion of the court in *Rodgers* at paras 33 and 34:

> *"…All that the jury had to be told in relation to the possible combination of causes, and once the standard Brennan direction was given, was that they could return a verdict of culpable homicide, based on the appellant's diminished responsibility, if they were satisfied on the balance of probabilities that "despite the drink, his mental abnormality substantially impaired" his ability to determine or control his conduct (R v Dietschmann, Lord Hutton at para.41).*
>
> *34... As R v Dietschmann correctly analyses matters, the proper approach is to discount the effect of the drink and drugs both on their own or by reason of their combination with the appellant's underlying mental disorder. This flows from the application of the principle in Brennan v HM Advocate. An accused person cannot rely on the effect of the voluntary ingestion of drink and/or drugs whether that effect operates on its own or as a result of its combination with the appellant's underlying mental disorder to impair his ability. The question in practical terms is whether, if this appellant had not ingested the alcohol/drugs which he did, would he have acted as he did and delivered the fatal blow as a consequence of his mental abnormality?*"

6 The abnormality can take many forms. A sufferer may perceive physical acts and matters differently from the normal person. He may have delusions. His ability to judge rationally as to whether an action is right or wrong, or to perform it, may be affected.[273] The abnormality can have many causes. For example, these may be congenital, or induced by illness, injury or shock.[274] Examples of such may be: - epileptic fits, low intelligence, brain tumours affecting the sufferer's consciousness and producing personality changes, strokes which result in aggressive tendencies, the consequences of some thyroid disorders, hypoglycaemia causing disinhibition and aggression, chronic drinking bringing on delirium tremens (DTs), or head injuries. Therapeutically administered drugs may induce drowsiness, confusion, euphoria or depression. Schizophrenia and some types of depression can also cause the relevant degree of mental abnormality.[275] Sexual or other abuse inflicted on an accused, resulting in some recognised mental abnormality, may also be a cause.[276] The abnormality must always be one which is recognised by the appropriate science.[277]

7 In giving directions to the jury, it is no longer appropriate simply to recite the formula in *HM Advocate v Savage*.[278] Instead, the judge must tailor the directions, so far as possible, to the facts of the particular case. [279] Thus, where a mother was convicted of culpable homicide by countenancing her cohabitee's murderous attack on her infant daughter, it was held in relation to both the issues of her diminished responsibility and her wilful failure to take such steps as reasonably could have been taken to protect the child, the jury should have been directed that:

> "*in the context of the question of whether a parent witnessing an assault on a child could reasonably have acted to protect the child, it is not appropriate to test the matter by reference to a hypothetical reasonable parent; rather the test is whether the particular parent, with all her personal characteristics and in the situation in which she found herself, could reasonably have intervened to prevent the assault*".[280]

8 In *Graham v HM Advocate* 2018 SCCR 347 observations were made on whether the evidence required to be given by psychiatrists in relation to certain medical issues. Lord Justice General Carloway observed at paragraph 124: -

> *"In terms of Galbraith v HM Advocate (supra), evidence from psychologists was regarded as admissible, even if the matter was not the subject of debate, for the purposes of establishing more than just a diagnosis of personality disorder but the impact of the abnormality on the accused at the time of the incident. It is for the court to determine, following Kennedy v Cordia (Services)(supra), whether a particular clinical psychologist has the appropriate qualifications, by training and experience, to give evidence on such matters, which are otherwise generally within the expert province of the consultant forensic psychiatrist. In that regard, although a clinical psychologist may well be able to diagnose a personality disorder, it might a different matter if the psychologist is being asked to give evidence about the interaction of alcohol, and more especially certain drugs, with the disorder. The same may apply where the psychologist purports to speak to organic changes in the person's brain."*

Whilst this is a cautionary note for judges hearing evidence from psychologists, it is not thought that there is any suggestion that a psychologist could not give opinion evidence about the existence of a disorder which he or she is competent to diagnose, and which may give rise to diminished responsibility.

See also chapter on INSANITY AT THE TIME OF THE OFFENCE below.

Possible form of direction on statutory diminished responsibility

"In this case the defence raise the issue of diminished responsibility. They say that, if he killed the deceased, the accused was not fully responsible for his actions because of his mental condition. So the criminal quality of his conduct is reduced.

The law presumes that if you are of sound mind, you are responsible for your actions. But sometimes your mind can be affected, permanently or temporarily, so that it works abnormally. The law recognises this and as a result your responsibility for what you have done is diminished. That can arise if your ability to control your behaviour is substantially impaired by reason of abnormality of mind.

The law sets out that if the ability of an accused to determine or control conduct for which he would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind, then that person is to be convicted of culpable homicide on the grounds of diminished responsibility.

Abnormality of mind includes mental illness, personality disorder and learning disability. However, it covers more than this. If you are afflicted, you might:

- perceive things differently from the normal person
- suffer from delusions
- lose the ability to judge rationally between right and wrong.

It can have many causes, epileptic fits, delirium tremens (DTs) brought on by chronic drinking, low intelligence, depressive illness, head injuries, brain tumours, strokes, thyroid disorders, hypoglycaemia, therapeutically administered drugs, schizophrenia, battered wife syndrome, or sexual or other abuse.

But some things do not give rise to diminished responsibility, such as:

- commonly experienced emotions like anger, jealousy, short temper,
- an unusually excitable nature,
- lack of self-control.

[Where appropriate]

Further the fact that a person who was under the influence of alcohol, drugs, or any other substance at the time of the alleged conduct does not of itself constitute abnormality of mind to substantially impair the ability to control or determine conduct.

[In a situation where both intoxicants and a relevant condition may be in play, an appropriate direction may be tailored according to guidance in Lindsay **where the directions were given at first instance and not subject of appeal and so long as care is taken to avoid falling into the error found to have been made by the trial judge in** Rodgers**. The safest course may be to adapt the decision in** Rodgers**, which applied** Graham **all referred to in para 1 of the LAW section, both appeal decisions where these issues were discussed. Para 34 of the opinion in** Rodgers**, quoted above, offers a useful model]**

While the Crown has to prove beyond reasonable doubt that the accused committed this crime, the burden of proving diminished responsibility is on the accused. He has to prove that only on a balance of probabilities. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. If, on balance, you thought it was more probable than not that he was suffering from diminished responsibility at the time the crime was committed, that would be enough. He does not need to prove that by corroborated evidence.

To establish diminished responsibility, the defence must prove four things:

1. That at the time of committing the crime the accused was suffering from a mental abnormality.
2. That mental abnormality is scientifically or medically recognised.
3. Whether permanently or temporarily, it must have affected his mind substantially, so that it did not work like the mind of a normal adult: i.e., there must have been something far wrong with him, which affected the way he acted.
4. As a result of that, his ability to determine and control his behaviour was substantially impaired."

- (Where evidence of diminished responsibility sufficient in law)

"In this case, there is enough evidence in law to show that the accused was of diminished responsibility at the time of the crime. But whether you decide that was so depends on how you view the evidence about this. The defence say you should hold diminished responsibility has been established. It relies on these factors ... If you decide that diminished responsibility has been established, the result is not an acquittal, but a reduction in the criminal quality of the act. Your verdict would be guilty of culpable homicide. On the other hand, the Crown says you should not reach that conclusion. It relies on these factors .... If you decide that the accused was not suffering from diminished responsibility, your verdict would be guilty of murder if you are otherwise satisfied that the crime amounts to murder as I have defined it."

- (Withdrawal of issue of diminished responsibility)

"I direct that, in law, diminished responsibility does not arise for your decision in this case and must play no part in your deliberations."

[258] *Lindsay v HM Advocate* 1997 SLT 67

[259] *Rodgers* applying the common law case of *Graham v HM Advocate* 2018 SCCR 347 discussed at para 5 below

[260] *Galbraith v HM Advocate* 2002 JC 1, paras [41] and [54]

[261] *HM Advocate v Kerr,* 2011 SCCR 192

[262] In *Galbraith,* at para [45], the court did not decide the matter because it had not heard detailed submissions

[263] *Lilburn v HM Advocate*, 2011 SCCR 326.

[264] Galbraith, supra, paras [41] and [54].

[265] *Carraher v HM Advocate*, 1946 JC 108Galbraith, supra, para [43].

[266] *Brennan v HM Advocate*, 1977 JC 38; Galbraith, supra, para [43]

[267] Galbraith, supra, para [51]

[268] *HM Advocate v Braithwaite*, 1945 JC 55, 57-58

[269] *Muir v HM Advocate*, 1933 JC 46, 49; Galbraith, supra, paras [46] and [50]

[270] Galbraith, supra, paras [44] and [54]

[271] Galbraith, supra, para [51]

[272] *Rodgers v HM Advocate* 2019 JC 150

[273] Galbraith, supra, paras [51] and [54].

[274] *HM Advocate v Ritchie*, 1926 JC 45, 49.

[275] Galbraith, supra, para [51].

[276] Galbraith, supra, para [53].

[277] Galbraith, supra, paras [53] and [54].

[278] 1923 JC 49, 50 per LJ-C Alness.

[279] Galbraith, supra, para [54](8).

[280] *Bone v HM Advocate* 2005 SCCR 829 at para [9], and see para [11].

Evidence of character of the accused

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1. Law

1.1. Sections 266 and 270 1995 Act

2. Specimen direction

Law

For specific cases of convictions for sexual offences, please refer to the case of *DS v HMA* [2017] HCJAC 12.

Sections 266 and 270 1995 Act

266 Accused as witness

(1)Subject to subsections (2) to (8) below, the accused shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused.

(2)The accused shall not be called as a witness in pursuance of this section except upon his own application or in accordance with subsection (9) or (10) below.

(3)An accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.

(4)An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

(a)the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b)the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer; or

(c)the accused has given evidence against any other person charged in the same proceedings.

(5)In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so.

(5A)Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act.**]**

(6)An application under subsection (5) above in proceedings on indictment shall be made in the course of the trial but in the absence of the jury.

(7)In subsection (4) above, references to the complainer include references to a victim who is deceased.

(8)Every person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence.

(9)The accused may—

(a)with the consent of a co-accused, call that other accused as a witness on the accused's behalf; or

(b)ask a co-accused any question in cross-examination if that co-accused gives evidence,

but he may not do both in relation to the same co-accused.

(10)The prosecutor or the accused may call as a witness a co-accused who has pleaded guilty to or been acquitted of all charges against him which remain before the court (whether or not, in a case where the co-accused has pleaded guilty to any charge, he has been sentenced) or in respect of whom the diet has been deserted; and the party calling such co-accused as a witness shall not require to give notice thereof, but the court may grant any other party such adjournment or postponement of the trial as may seem just.

(11)Where, in any trial, the accused is to be called as a witness he shall be so called as the first witness for the defence unless the court, on cause shown, otherwise directs.

270 Evidence of criminal record and character of accused.

(1)This section applies where—

(a)evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer; or

(b)the nature or conduct of the defence is such as to tend to establish the accused's good character or to involve imputations on the character of the prosecutor, of any witness for the prosecution or of the complainer.

(2)Where this section applies the court may, without prejudice to section 268 of this Act, on the application of the prosecutor, permit the prosecutor to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character, notwithstanding that, in proceedings on indictment, a witness or production concerned is not included in any list lodged by the prosecutor and that the notice required by sections 67(5) and 78(4) of this Act has not been given.

(3)In proceedings on indictment, an application under subsection (2) above shall be made in the course of the trial but in the absence of the jury.

(4)In subsection (1) above, references to the complainer include references to a victim who is deceased.

275A Disclosure of accused's previous convictions where court allows questioning or evidence under section 275

1. Where, under section 275 of this Act, a court [F2(or, in proceedings before a commissioner appointed under section 271I(1) or by virtue of section 272(1)(b) of this Act, a commissioner)] on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.
2. Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be—
    a. in proceedings on indictment, laid before the jury;
    b. in summary proceedings, taken into consideration by the judge.
3. An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.
4. An objection under subsection (2) above may be made only on one or more of the following grounds—
    a. where the conviction bears to be a relevant conviction by virtue only of paragraph (b) of subsection (10) below, that there was not a substantial sexual element present in the commission of the offence for which the accused has been convicted;
    b. that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;
    c. in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible;
    d. in summary proceedings, that the accused does not admit the conviction.
5. Where—
    a. an objection is made on one or more of the grounds mentioned in paragraphs (b) to (d) of subsection (4) above; and
    b. an extract of the conviction in respect of which the objection is made was not appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) above, which specified that conviction,

5A. the prosecutor may, notwithstanding subsection (3) above, place such an extract conviction before the judge.

6. In summary proceedings, the judge may, notwithstanding subsection (2)(b) above, take into consideration any extract placed before him under subsection (5) above for the purposes only of considering the objection in respect of which the extract is disclosed.
7. In entertaining an objection on the ground mentioned in paragraph (b) of subsection (4) above, the court shall, unless the contrary is shown, presume that the disclosure, or, as the case may be, the taking into consideration, of a conviction is in the interests of justice.
8. An objection on the ground mentioned in paragraph (c) of subsection (4) above shall not be entertained unless the accused has, under subsection (2) of section 69 of this Act, given intimation of the objection in accordance with subsection (3) of that section.
9. In entertaining an objection on the ground mentioned in paragraph (d) of subsection (4) above, the court shall require the prosecutor to withdraw the conviction or adduce evidence in proof thereof.
10. For the purposes of this section a "relevant conviction" is, subject to subsection (11) below—
    a. a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof; . .

(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or

which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.

See generally *Renton and Brown Criminal Procedure* paras 24-14 to 24-20.1

For a recent example of section 266 in operation see *Penman v HMA 2019 SCCR 41*. An attempt by the accused to put himself in a good light and create the impression that he has no prior involvement with the law engages section 266(4)(b). Thereafter in determining whether disclosure should take place and the extent of that disclosure regard has to be had both to the position of the accused and the public interest in the detection of crime and bringing wrongdoers to justice. Whether the approach taken by the accused is deliberate or simply in the nature of a casual remark is a factor to be considered. Further regard should be had to the extent of the intended disclosure. Whether it is necessary or appropriate for details of the prior convictions to be disclosed is always a question of circumstances. Directions to the jury referring to the nature and extent of the disclosure and its purpose should be given.

In relation to the provisions of section 266(4) its use is limited to those convictions which affect credibility and reliability. These may extend beyond convictions for dishonesty if they reflect directly upon the credibility of an accused in relation to a specific aspect of his evidence. In such circumstances the evidence given by an accused must very clearly and unequivocally conflict with the nature and terms of the prior conviction which is sought to be put to the accused. [281].

Section 270 paras 24-163 to 24-163.1

Section 275A paras 24-163.2 to 24-163.

Specimen direction

(Adapted from trial judge's charge in *Penman v HMA* 2019 SCCR 41 para 13)

The fact that the accused has previous convictions is not of itself evidence that he committed any of the charges on this this indictment. So far as these charges are concerned, his previous convictions are relevant only to his credibility. The only reason why his previous convictions were mentioned in the course of the trial is because the advocate depute required to refer to them to challenge the truthfulness of his evidence that he had never been in court. Reference was made to them only to test his credibility and when that was done, he admitted that he had lied when he had said he had never been in court. What effect that has on his evidence is for you to decide. The point which you must bear in mind is that the evidence of his previous convictions is not evidence against him on any of the charges on the indictment.

[281] *Wright v HMA* 2019 SCCR 252

Hearsay

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1. Law

Law

Walkers on Evidence, 5th ed, Chapter 8.

1 Hearsay is evidence of what one person (the witness) says that another person (the maker of the statement) has said orally, in writing or by conduct (the statement). A distinction is made between primary hearsay[282] and secondary hearsay.[283] Often, when hearsay or an exception to the "hearsay rule" is referred to, what is meant is secondary hearsay. The admission of hearsay per se does not breach article 6(1) of the European Convention on Human Rights.[284] The nature of hearsay evidence, and how it should be regarded, ought to be explained to the jury,[285] bearing in mind the following dictum of the Lord Justice General (Carloway) in *Wilson v HM Advocate* [2021] HCJAC 12, at paragraph [54]:

> *"When directing a jury on the value of hearsay and the reasons for its general exclusion, but occasional admission, a trial judge may be well advised to direct the jury on these reasons. As ever, when doing so the judge should bear two general matters in mind. First, in relation to the assessment of credibility and reliability, which is pre-eminently a matter for the jury to determine, it is important not to be condescending to the jury (see e.g.* Moynihan v HM Advocate, 2017 JC 71*, LJC (Carloway), delivering the opinion of the court, at para [22]), especially when the issues have already been extensively canvassed in the parties' speeches… ..Secondly, in ensuring that a fair trial takes place, the trial judge must have regard not only to the interests of the accused, but also to those of the public and the alleged victim in seeing that crime is properly and fairly prosecuted…. If a balanced view is to be maintained, a trial judge ought normally to point to those factors which might result in the hearsay being accepted as proof of fact as well as those pointing towards its rejection for that purpose. In this case, the judge's directions were heavily in favour of the latter and thus the appellant."*

If an explanation is not given, the appeal court might hold that the failure amounted to a miscarriage of justice.

2 Primary hearsay. "Primary hearsay" is evidence of the fact that the statement by the other person was made, irrespective of its truth or falsehood.[286] Evidence that a statement was made may be allowed, if relevant, for that limited purpose. Thus, evidence that a witness has previously made a statement differing from his evidence may be allowed.[287] Evidence of a de recenti statement may be admitted for the purpose of showing that the witness's version of events has been consistent.[288] The evidence goes only to enhance credibility.[289]

3 Secondary hearsay. The general rule is that any statement or assertion, other than one made by

a person while giving oral evidence, is inadmissible as evidence of any fact or opinion stated or asserted.[290] Thus, the rule against secondary hearsay evidence excludes indirect evidence of the truth of the facts alleged in the statement.

4 There are exceptions to the exclusion of secondary hearsay evidence. These are: evidence of admissions and certain statements of the accused,[291] evidence of a statement that is part of the res gestae,[292] evidence of a statement by a person which is admissible on the grounds in, and the procedures under, section 259 of the Criminal Procedure (Scotland) Act 1995 (statement by person who is dead, unfit, unable, out with the UK, cannot be found, etc.),[293] and evidence of certain prior statements adopted by the witness. [294]

5 Particular forms of hearsay. These are dealt with in more detail under the following headings in this manual:

De recenti statements above.

Prior statements below.

Statement by deceased or unascertainable witness, etc. below.

Res gestae statement below.

Exculpatory and mixed statements by accused – see the Morrison and McCutcheon Rules below.

Statements out with presence of accused below.

Statements made to police by suspect below.

6 Unattributable hearsay is not evidence.[295]

[282] See para 2 below.

[283] See para 3 below.

[284] *McKenna v HM Advocate*, 2000 JC 291; *HM Advocate v Nulty*, 2000 SLT 528

[285] *Higgins v HM Advocate*, 1993 SCCR 542, 552C.

[286] *Walkers on Evidence*, 5th ed, para 8.1.1.

[287] ibid, para 8.2.2; and see Prior Statements below.

[288] ibid, para 8.3.1; and see Corroboration: Special Knowledge Confession above.

[289] See *GDN v HM Advocate* 2003 JC 140; 2003 SLT 761 at para [38]

[290] *Morrison v HM Advocate*, 1990 JC 299, 312; see Report on Hearsay Evidence in Criminal Proceedings (Scot Law Com No 149, para 3.2) and *Walkers on Evidence*, 2nd ed, para 8.1.1.

[291] See Recent Possession of Stolen Property and Self-Defence below

[292] Macdonald, *Criminal Law*, 5th ed, p 316. The distinction between res gestae and de recenti statements may be difficult: see *Begg v Tudhope*, 1983 SCCR 32. See *Cinci v HM Advocate* 2004 SCCR 267 for a statement to be considered part of the res gestae, the words spoken should be part of the event itself. Paras [8] – [13] & [19] By contrast, the victim's statement in *Matthew v HM Advocate* 2006 GWD 21-452 was held on appeal to be de recenti, and not part of the res gestae, as the trial judge had directed. See also *Boyd v Heywood* 2002 GWD 36 – 1178.

[293] See Statements by Deceased or Unascertainable Witnesses, ETC. (Section 259) below

[294] See Necessity below.

[295] *Cook v HM Advocate* 2019 HCJAC 24

Identification - the Need to Take Care

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1. Law

2. Possible form of Direction on Eyewitness Identification: The need to take care

Law

StairEncyclopaedia, Vol 10, paras 657 – 667.

1 The prosecution in a criminal trial cannot succeed in the absence of corroborated evidence identifying the accused beyond reasonable doubt as the perpetrator of the crime libelled.[296] Murphy v HMA makes clear that there is a long- recognised rule of practice that a witness who speaks to the commission of a crime should be asked to make a dock identification.[297] But failure to follow that practice does not affect the admissibility of other evidence pointing to the accused as the perpetrator.[298] While dock identification is the best evidence that the accused was the perpetrator, other evidence inferring that he was is not inadmissible as contrary to the best evidence rule. It is indirect but not a substitute.[299] Such evidence is admissible even where a witness is not asked to make a dock identification, or does not give evidence of unwillingness or inability to do so.[300] There is no requirement for evidence to be led explaining why a dock identification has not been made before it can be admitted.[299] In assessing the significance to be attached to the fact that a witness has not made a dock identification, the jury can bear in mind, as matters of common human experience, without having heard evidence on these points, that peoples' appearances tend to change with the passage of time, and the clarity and reliability of their recollections may diminish with the passage of time.[302] For an example of the type of directions which may appropriately be given, see those of the trial judge at para [46], pp 537C – 538F.

Visual identification

2 "*It has been said before in a number of cases that where one starts with an emphatic positive identification by one witness then very little extra is required. That little else must of course be evidence which is consistent in all respects with the positive identification evidence which has been given.*"[303] An assertion by a witness that the accused does not look unlike the perpetrator is not a good identification.[304]

3 It is the duty of the trial judge to impress upon the jury the importance of assessing, with particular care, the weight which they should attach to visual identification evidence. Where appropriate, he should assist the jury by indicating the tests they might apply in measuring the quality and reliability of the identification.[305]

> "*When identification is in issue in a case, the trial judge may feel it desirable to remind the*

jury that errors can arise in identification and there have been cases of mistaken identity with the result that the jury must consider the evidence of identification with some care. A trial judge may go on to remind the jury (if this is the case) that the witnesses were not familiar with the person whom they identified prior to the occurrence of the alleged crime. That being so the jury may wish to ask themselves how long the witness had the person whom he identified in view – whether it was a mere fleeting glance or something more? Whether the person concerned was clearly visible? He may also suggest that the jury may wish to ask themselves how positive the identification was and whether the person identified was nondescript or had some distinctive features or characteristics. However, precisely what the trial judge says in this connection is a matter for his discretion".[306]

A trial judge is not under a duty to repeat all the criticisms by the defence of evidence founded on by the Crown. It is sufficient to point out that various criticisms had been made, and direct them that they required to consider them in their evaluation of the evidence.[307]

4 Where identification is a live issue at a trial it is necessary to give the jury careful directions on that matter. But the law does not require that, whenever the prosecution rely on identification evidence, the judge must warn the jury to take particular care in view of the risk of mistaken identity; the need for any such direction and its form and extent depend on the facts of the particular case.[308] Where there are no circumstances which might have made an eye-witness identification difficult, such as a fleeting glimpse of someone not seen before, and where no attack has been made on the reliability of the identification by the witness, a trial judge does not need to give particular directions that special care has to be taken in considering such evidence.[309]

5 Identification based on alleged recognition of the accused's voice is competent.[310] Asking a suspect to speak at an identification parade does not breach his right to silence, or his right not to incriminate himself. These rights relate to his right not to be compelled to answer substantive questions concerning the crime, such as where he was at the relevant time, whom he was with, what he was doing and what he heard or saw. The taking of a voice sample focuses on timbre, intonation, register, accent, pronunciation and identifying features similar to facial features, hair colour, height and build, fingerprints and DNA from blood, hair or skin samples.[311]

6 Where a witness speaks to a visual identification the proper practice is for him to be asked to identify the accused in court.[312] It is especially important to adhere to the proper practice when there is more than one accused on trial.[313]

7 The use of emulator sheets is not *per se* inadmissible. There may be issues which arise in relation to their use such as the lack of a written record of the identification from the sheets. The weight to be given to such evidence is for the jury who may well require a direction pointing to potential pitfalls as the case may require.[314]

8 It is necessary to distinguish between directions which a judge gives on the approach to be adopted in relation to eyewitness identification evidence in general and directions on the dangers of dock identification, in particular. The peculiar dangers of a dock identification where a witness previously failed to identify at an identification must be dealt with. Judges should give an appropriate and authoritative direction in all cases of this kind.[315] A trial judge should not invite the jury to speculate as to what might have occurred in the event of a parade having taken place, i.e. the failure to hold a parade has deprived the accused of the possibility of an inconclusive result from such a parade.[316]

9*Anderson v HMA*[317] demonstrates the sort of robust directions on identification which are appropriate where a witness accepts his identification has been affected by seeing the accused sitting in the dock beside a security officer and two other accused whom he recognised from the incident, and where an accused had been pointed out to the witness outside the court room.

Possible form of Direction on Eyewitness Identification: The need to take care

"In this case the Crown ask you to accept the eyewitness evidence as credible and reliable, and that it points to the accused as the perpetrator of the crime. The defence asks you not to accept these identifications as reliable, and to conclude that this is a case of mistaken identity. So, the quality of the identification evidence is a critical issue here.

You will have to decide if the Crown has proved that the accused has been identified as the perpetrator of the crime. The evidence for that would have to come from two independent sources, both credible and reliable. If you are not satisfied with that evidence, the Crown would have failed to prove one of the essential facts, and you would have to acquit the accused.

Our powers of observation can be fallible. Errors can occur in identification. Sometimes we think we recognise somebody we've seen before. Sometimes we are right, sometimes we're wrong. Some people are better at it than others. Mistakes about identification have been made in court cases in the past. These have to be guarded against. But it does not follow from that that any mistakes have been made here. You have to judge the soundness of the identifications in this case.

You will need to take special care in assessing quality of this evidence. You may want to consider:

1. What opportunity did the witnesses have to see the person concerned? Was it a fleeting glimpse, or a longer look? Was there time for reliable observations to be made? Was the person clearly visible, or was the sighting obscured in some way?
2. What was the state of the lighting?
3. Was the person previously known to the witness and recognised as such, or was he a total stranger?
4. Was the person someone with some easily distinguishable feature or not?
5. How positive have the identifications been, both in court and at the identification parade? What were the reasons why he was picked out?
6. Have the memories of the witnesses been affected in any way?

To regard the identification evidence as acceptable, you do not need to conclude that the witnesses have made 100% cast-iron certain identifications. But you would need to be satisfied that you can rely on the substance of what they said."

(Where dock identification made but there has been no prior opportunity of identification of the accused and no identification parade was held)

Reference is made to paragraph 19 of Brodie v HMA which should be adapted as appropriate.

In the present circumstances you will require to remember that there has been no prior opportunity for witness [X] to confirm that the accused was indeed the person responsible for what the Crown argue occurred. The witness says that he saw the incident and says that the accused was responsible. The incident is said to have occurred on (Insert the date). Since that time

the witness has not been given the opportunity to confirm whether the identification is indeed sound. There has been no identification (VIPER) parade held in this case. If such a parade had taken place, in addition to the accused there would have been a number of other persons images produced. These images would have borne a similarity to the accused. In such circumstances any identification of the accused by the witness would have taken place in more testing circumstances. When an accused person is in the dock he is between two custodial officers which may mean that the identification of the individual is not as difficult. In short it is a matter for you to decide whether these considerations cause you to question the identification made of the accused by witness [X].

(Where dock identification made, but no identification of accused at parade)

In addition to this general guidance on dealing with eye-witness identification, I want to draw attention to a particular feature in this case.

Here the witness [X] identified the accused in court as the perpetrator of this [attack]. But at the identification parade, on which the accused appeared, he failed to pick him out/ picked out a stand-in instead.

The defence say you should not regard [X's] identification as reliable, because:

- His recollection would be fresher at the parade than now. That was much closer in time to the incident that this trial.
- With stand-ins of similar appearance on the parade, the chance of [X] simply picking out someone who resembles the perpetrator is reduced. That's some check on the accuracy of his identification.
- There is a risk [X's] identification has been affected simply by seeing the accused sitting under guard in the dock.

So, in essence, the defence say a dock-only identification:

1. Lacks the safeguards given by an identification parade
2. The accused's presence in the dock positively increases the risk of a wrong identification.

On the other hand the Crown say:

- [X] has been cross-examined about his identification. These points were put to him.
- He did not accept his identification had been influenced in any way. He sticks by it.
- He gave an explanation for why he had identified the accused in court, and had failed to do so at the parade.
- This identification is backed up by other evidence in the case.

It asks you to accept this identification as sound.

It is for you to decide, whether you regard [X's] identification of the accused in these circumstances as reliable. This is not an easy task, and you will need to approach it with great care.

[296] *Morton v HMA*, 1938 JC 50, 54 per LJ-C Aitchison.

[297] 2007 SCCR 532, 2007 SLT 1079 at para [90(1)].

[298] supra at para [90(2)].

[299] supra at para [90(3)].

[300] *supra*at para [90(3)].

[301] supra at para [90(3)].

[302] supra at para [90(5)].

[303] *Ralston v HMA*, 1987 SCCR 467, 472 per LJ-G Emslie; explained and followed in *Murphy v HMA* 1995 SCCR 55, 60 per LJ-C Ross – "In that passage the Lord Justice General is simply making the point that evidence may afford corroboration even though it is small in amount provided it has the necessary character or quality, and it will have the necessary character and quality if it is consistent with the positive identification evidence which requires corroboration". See also *Mair v HMA*, 1997 SLT 817; *Kelly v HMA*, 1998 SCCR 660. In *Kearney v HMA* 2007 GWD 6-85; [2007] HCJAC 3 at para [31] and [28] the Appeal Court said "We do not consider that it is advisable or helpful for trial judges to use [expressions like "where you have evidence from an eye witness identifying someone whom the eyewitness knows as the assailant and you accept that evidence as credible and reliable, assuming you do, then not very much more is needed to corroborate that evidence"]. We consider that the general rules relating to the requirement of corroboration should not be diminished or devalued simply because there is one clear fundamental source of evidence against the accused for which corroboration is being sought. We consider it to be the wiser course for the trial judge simply to direct the jury that having identified the primary source of evidence against the [accused] to emphasise that there must be a secondary independent source of evidence confirmatory of the substance of the case. Whatever may be its quantity, it is its quality that the jury has to assess independently of the primary source."

[304] *MacDonald v HMA*, 1998 SLT 37.

[305] Practice Note issued by LJ-G Emslie on 18 February 1977. See Renton & Brown's *Criminal Legislation* Vol II Division C Para C1-O1 et soq. See also *Beaton v HMA* 2004 SCCR 467 paras [14] to [17] and *Farmer v HMA* 1991 SCCR 986.

[306] *McAvoy v HMA*, 1992 SLT 46, 50 and 51 per LJ-C Ross. See also *Chalmers v HMA*, 1994 SCCR 651 ; *Webb v HMA*, 1996 JC 166.

[307] *Dickson v HMA*, 2005 SCCR 344 at para [25].

[308] *Kearns v HMA*, 1999 SCCR 141

[309] *Scott v HMA* 2008 SCCR 110, [2007] HCJAC 68 at para [25], 2008 GWD 1-9.

[310] *Lees v Roy*, 1990 SCCR 310.

[311] *McFadden & Spark v HMA* 2009 SCCR 902 at para [35].

[312] *Bruce v HMA*, 1936 JC 93 – see however *Holland v HM Advocate* 2005 SCCR 417.

[313] *Reekie v Smith* 1987 SCCR 453, 455 per LJ-C Ross.

[314] Bell v HMA, 2014 HCJAC 127, paras 12 and 15

[315] *Holland v HMA*, 2005 SCCR 417 at para [58]. An interesting criticism of this decision is to be found in 2006 EdinLR Vol 10, p 102 by Fiona Raitt and Pamela Ferguson. The decision in *Brodie v HMA* 2013 SCCR 23 confirms this and provides guidance as to what should be said in such circumstances, which will vary from case to case - see paragraph 19.

[316] *Brodie v HMA*(supra) paras 24 and 25.

[317] 2010 SCCR 382, [2009] HCJAC 91

Incrimination

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1. Law

2. Possible form of direction on Incrimination

Law

1The Criminal Procedure (Scotland) Act 1995, s.78(1) provides:

"It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless –

(a) a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated …"

2 *Collins v HM Advocate*;

> *"A notice of intention to lead evidence incriminating a co-accused is different from a special defence and does not require to be read out or to be referred to in the judge's charge (McShane v HMA, 1989 SCCR 687) …. In our experience it is not the practice for such notices of intention to incriminate to be read unless counsel specifically requests that that should be done. It is in any event clear that there is no requirement for such a notice to be read to the jury or referred to by the trial judge in his charge."*[318]

3 *Henvey v HM Advocate*;

> *"It is for the Crown to meet the defence and satisfy you beyond reasonable doubt that it should be rejected."*[319]

4 There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[320] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position out with the presence of the jury before parties address the jury.[321]

Possible form of direction on Incrimination

"In this case the accused has lodged a special defence of incrimination. That was read out to you at the start of the trial, and you have a copy of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It does not take away from the accused's stance that he's not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence do not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it is believed, or if it raises a reasonable doubt, an acquittal must result.

In this case the accused is saying that, if this crime was committed, it was not committed by him, but by [X]. Hence he is not the perpetrator. It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

To support that the defence rely on:

On the other hand the Crown challenges that evidence and says:

You should look at all the evidence, consider the points made for and against the incrimination, and then decide if the Crown has proved guilt beyond reasonable doubt."

(where incriminee declines to answer)

"The defence ask you to take account of the evidence of [X], who has been incriminated.

You will remember that at the start of his evidence I warned him that he need not answer any questions, the answers to which might incriminate him. He heeded that warning, and was astute to avoid answering certain questions.

[X] has not said if he was responsible for committing this crime, or if he was not. The fact that he chose not to answer does not necessarily support an inference that he was involved. He could have chosen not to answer for several different reasons.

Whether his evidence has any bearing on the involvement of the accused is for you to decide."

[318] *Collins v HM Advocate*, 1991 SCCR 898, 910 per LJ-C Ross.

[319] *Henvey v HM Advocate* 2005 SCCR 282; 2005 SLT 384 para [11].5

[320] *Carr v HM Advocate* [2013] HCJAC 87

[321] *Lucas v HM Advocate* 2009 SCCR 892.

Insanity at The Time of the Offence

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1. Law

1.1. Section 51A (Criminal responsibility of persons with mental disorder)

1.2. Section 328 (Meaning of "mental disorder")

2. Possible form of direction on insanity at the time of the offence

Law

Stair Encyclopaedia,Vol 7, paras 113-124; *Gordon*, 3rd ed, Vol I, Chapter 10.

1 Under the common law it was for the accused to prove on a balance of probabilities that he was insane when the offence with which he is charged was committed.[322] The onus of proving the special defence of insanity at the time of the offence charged rests upon the accused because proof of insanity is required before the presumption of sanity can be displaced.[323]

2 The following *dicta* summarised the principles which applied.

> *"[I]nsanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or unsoundness of mind."*[324] *"Where ... the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be said to be suffering from the total alienation of reason in regard to the crime with which he is charged which the defence requires ... [An] inability to exert self-control ... must be distinguished from the essential requirement that there should be a total alienation of the accused's mental faculties of reasoning and of understanding what he is doing".*[325]

3 The position is now set out in section 51A of the Criminal Procedure (Scotland) Act 1995. The statutory provision is in the following terms:-

Section 51A (Criminal responsibility of persons with mental disorder)

This section provides as follows:

1. A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.
2. But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

3. The defence set out in subsection 1 is a special defence.
4. The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.
5. In this section, "conduct" includes acts and omissions.

For a discussion of section 51A, see *Mackay v HM Advocate* 2017 HCJAC 44.

Mental disorder is defined by reference to section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 in the following terms:-

Section 328 (Meaning of "mental disorder")

This section provides as follows:

1. Subject to subsection (2) below, in this Act "mental disorder" means any
    a. mental illness;
    b. personality disorder; or
    c. learning disability, however caused or manifested; and cognate expressions shall be construed accordingly.
2. A person is not mentally disordered by reason only of any of the following—
    a. sexual orientation;
    b. sexual deviancy;
    c. transsexualism;
    d. transvestism;
    e. dependence on, or use of, alcohol or drugs;
    f. behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;
    g. acting as no prudent person would act.

The defence has two elements which require to be established:-

1. The presence of a mental disorder suffered by the accused at the time of the conduct which forms the subject matter of the charge.
2. The mental disorder requires to have a specific effect upon the accused, namely to be unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

See also chapter on Diminished Responsibility above.

4 There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[326] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the

presence of the jury before parties address the jury.[327]

Possible form of direction on insanity at the time of the offence

"The first thing you have to decide is this. Has the Crown proved beyond reasonable doubt that the accused committed the crime set out in the charge?

If you are not satisfied about that, you give him or her the benefit of that doubt and acquit him or her of the charge. Although there has been little challenge by the defence of the evidence about this, you cannot take it for granted it has been proved. But, looking at the evidence; the contents of the joint minute, which you must treat as facts proved in the case; and what has been said by the defence in closing submission, maybe you will have little difficulty in deciding this.

[It is recommended that judges refer to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.]

If you are satisfied that the accused committed the crime charged, that raises the only other issue in this case, the special defence of mental disorder at the material time. That was read out to you at the start of the trial, and you have a copy of it. The defence say that, if he or she committed this crime, the accused was not responsible for his or her actions by reason of mental disorder. Hence he or she should be acquitted.

The law presumes that you are of sane and sound mind, and responsible for your actions. The accused here challenges that presumption. So, he or she has the burden of proving he or she was not responsible for his or her actions by reason of his or her suffering a mental disorder at the time. While the Crown has to prove beyond reasonable doubt that the accused committed this crime, a lesser standard applies to the defence, proof on a balance of probabilities. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. If, on balance, you thought that it is more probable that the accused was not responsible for his actions at the material time by reason of his suffering a mental disorder when the conduct which would constitute the crime charged was carried out, you would hold the special defence proved. If not, you would reject it.

Therefore, a person is not to be found criminally responsible if, at the time, and because of a mental disorder, he was unable to appreciate the nature or wrongfulness of his conduct. That is the statutory test. It has two parts.

1. First, there is the requirement that the person was suffering from a mental disorder at the time. You will have to consider all the evidence, including that of the psychiatrists on that matter.
2. If you are satisfied that he was suffering from such a disorder, you require to consider, secondly, whether, because of that disorder he was unable to appreciate the nature or wrongfulness of his actions.

The words of the statutory test speak for themselves. However, it may be of assistance if I explain that the phrase 'appreciate the nature or wrongfulness of his conduct' is not limited to a lack of knowledge of these matters. It can also cover an inability to conduct oneself in accordance with a rational and normal understanding of them. Bear in mind that this lack of

reasoning must be caused by the mental disorder, and not some other factor, such as the voluntary consumption of an excessive amount of alcohol.

Personal responsibility for our actions is the norm. This is because we are all presumed to enjoy functioning reasoning faculties and a normal understanding of the world around us and how we should behave. But if the accused's conduct is attributable to a mental disorder which deprived him of that kind of appreciation of the nature of what he did, or of its wrongfulness, or indeed both, that presumption is displaced, and our law says that he is not to be convicted of an offence arising out of that conduct.

How do you decide if the defence has discharged the onus of proof on it? You look at all the circumstances of the case, you use your common sense and your collective experience of life in general, and you judge this by the ordinary rules by which people act in daily life. Whether the accused was at the time of the alleged offence unable by reason of mental disorder to appreciate the nature and wrongfulness of that alleged conduct is a question of fact you have to decide, not the doctors. You will obviously give very careful consideration to their opinions. Their qualifications, areas of expertise, and the time they have worked in those areas have been detailed in evidence. However, their opinions are not conclusive. You should consider also the nature of the acts proved, the accused's conduct around the time of their commission, and his past history. (If appropriate because of a dispute between Crown and defence experts give directions as to how to deal with competing evidence - refer to chapter 31).

The question comes down to this. Have the defence proved on a balance of probabilities that at the time the crime was committed the accused was suffering from (specify condition) which resulted in his being unable by reason of that mental disorder to appreciate the nature or wrongfulness of the alleged conduct? You will remember the various opinions expressed by the psychiatrists. On the one hand the defence say … On the other the Crown says … The decision is yours.

A word about your verdict.

There are three verdicts you can return, not guilty, or not proven, or guilty. Not guilty and not proven have the same effect, acquittal. It is not necessary that your verdict is unanimous, it can be by a majority. But for any verdict of guilty there must be at least eight of you, an absolute majority of your whole number, in favour of that.

The special defence of insanity in this case complicates things a little bit. It might be helpful to approach your verdict in stages:

1. Decide if the Crown has proved that the accused committed this crime. If that has not been proved, your verdict should be not guilty or not proven.
2. If you decide it is proved that the accused committed the crime, you then decide if the defence has established the special defence.
3. If you consider that the special defence has been established, the law requires your verdict to be in a special form. That is because the court has to know if you decided that the accused committed the acts charged. So, if the special defence has been established, I have to direct you find that the accused was at the time of doing the acts charged unable by

reason of mental disorder to appreciate the nature or wrongfulness of the conduct and therefore the accused would be acquitted on the ground of suffering from mental disorder at that time. In practical terms, in that case your verdict should be "*We find the accused was not guilty as a result of suffering from mental disorder at the time of doing the acts charged*".

4. If you think the defence has failed, you convict the accused of the charge. You could delete from any verdict of guilty any part of the charge which has not been proved to your satisfaction, but what is left must define the crime and describe how it was carried out."

[322] *Ross v HM Advocate*, 1991 JC 210, 218 per LJ-G Hope.

[323] *Lambie v HM Advocate*, 1973 JC 53, 57 per LJ-G Emslie.

[324] Brennan v HM Advocate, 1977 JC 38, 45 per LJ-G Emslie.

[325] Cardle v Mulrainey, 1992 SLT 1152, 1160 (opinion of the court).

[326] *Carr v HMA* [2013] HCJAC 87.

[327] *Lucas v HMA* 2009 SCCR 892

Intoxication

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1. Law

2. Possible form of direction on intoxication

Law

Stair Encyclopaedia, Vol 7, paras 126 – 134.

> **1** *"In the law of Scotland a person who voluntarily and deliberately consumes known intoxicants, including drink or drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of insanity at the time nor, indeed can he plead diminished responsibility."*[328]
>
> *"If a man is not shown by the evidence to be within the category of one with a diminished responsibility when sober, he cannot place himself within the category of diminished responsibility by taking drink."*[329]
>
> 2 *"There is nothing unethical or unfair or contrary to the general principle of our law that self-induced intoxication is not by itself a defence to any criminal charge including in particular the charge of murder. Self-induced intoxication is itself a continuing element and therefore an integral part of any crime of violence, including murder, the other part being evidence of the actings of the accused who uses force against his victim. Together they add up or may add up to that criminal recklessness which it is the purpose of the criminal law to restrain in the interests of all the citizens of this country."*[330]

See also the chapter on Automatism above.

Possible form of direction on intoxication

"In this case there has been evidence that the accused was under the influence of drink/drugs at the time of the incident.

Being intoxicated is not a defence to committing a crime. If you commit a crime after knowingly taking drink or drugs, you are just as accountable for your actions as the sober person.

So, you cannot acquit the accused just because he was intoxicated by drink or drugs."

[328] Brennan v HMA, 1977 JC 38, 46 (court of seven judges).

[329] HMA v McLeod, 1956 JC 20, 21 per Lord Hill Watson; approved in Brennan, supra, at 21.

[330] *Brennan*, supra, at 51; explained in *Donaldson v Normand*, 1997 JC 200, 202 (opinion of the court) – "... where the absence or apparent absence of mens rea is attributable to the self-induced intoxication, that cannot produce any kind of defence."

Judicial Examination

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1. Law

2. Possible form of direction on judicial examination

2.1. (where accused's evidence is consistent with his account at JE)

2.2. (where accused silent at JE, but gives exculpatory evidence in court)

Law

The statutory provisions regulating judicial examination are set out in sections 35 to 39 of the Criminal Procedure (Scotland) Act 1995. The proceedings at a judicial examination may be canvassed at the subsequent trial. If they are, the trial judge will have to explain to the jury the nature of a judicial examination. See also Renton & Brown, *Criminal Procedure*, 6th ed, paras 12-10 to 12-31; 24-32.

1 The following passage, taken from the judgment of Lord Justice Clerk Ross in *McEwan v HMA*, 1990 SCCR 401, 407, sets out what a trial judge may do when explaining the functions of a judicial examination at the point when the transcript is read to the jury. There is thought to be no difference in principle between what is said at that stage and at the stage of charging the jury.

> *"If a trial judge considers that it is desirable to give some explanation to a jury as to what a judicial examination is before the transcript of it is read to them, he should confine himself to explaining that the purpose of a judicial examination is to give an accused an opportunity to state his position at an early stage; the object is to elicit the accused's defence, including any special defence such as alibi or incrimination. The judicial examination also gives an accused the opportunity of admitting, denying or explaining any statements which the police allege that he has made to them."*

2 The trial judge is not obliged to give the jury a detailed explanation of the provisions of sections 35 to 39 of the 1995 Act.[331]

3 If the accused remains silent at judicial examination, but gives an exculpatory account in evidence containing matters which could appropriately have been mentioned in answer to a question put at judicial examination, the trial judge may draw the attention of the jury to the accused's failure to mention the matter at the examination, and suggest that it is an afterthought, a possibility, rather than an inevitable conclusion.[332] It is, however, incompetent for the trial judge to draw attention to the accused's silence at judicial examination unless he has given evidence.[333]

4 If a trial judge comments, as he is entitled to do, on an accused's failure to give an explanation at his judicial examination, he should do so with restraint, and in moderate language.[334] It is

inappropriate for him to say that the advantage of stating a special defence at the stage of judicial examination is that it is more difficult to conclude that it had been fabricated later.[335] Where an accused's position at judicial examination has been that on the advice of his solicitor he was making no comment, it is inappropriate for the trial judge to say that it would be astonishing that an experienced solicitor would have advised him to make no comment had the accused told him he was pleading self-defence.[336]

Possible form of direction on judicial examination

"In this case a statement made by the accused at judicial examination has been read out. You can treat that as part of the evidence.

A judicial examination gives an accused a chance to make any admission, denial, explanation, justification, or comment about the charges against him, and about any statement he has given to the police, that he wants to make. It also gives him a chance to state a defence, like alibi, or incrimination or self-defence. It takes place as soon as practicable after he has been charged. Beforehand, he has given copies of the charges, and of any statement he has made, and can see his solicitor in private. At the examination the sheriff advises him that he is not obliged to answer any questions. If he does, his answers will be recorded and may be used in evidence at his trial. If he does not, that may go against him at his trial, because if he puts forward an explanation then which could have been given earlier, it may be suggested that his defence is an after-thought.

(where accused's evidence is consistent with his account at JE)

At the examination the accused answered (some of) the questions. You will have noticed that what he said then and what he has now said in court are broadly consistent. The defence say that reflects favourably on his credibility and reliability. Whether you take that view is something you will have to decide.

But be clear on this, that is the only thing you could take out of the judicial examination. It only goes to the accused's credibility and reliability. What is in the judicial examination is not evidence of the truth of what he said. Only evidence in court can be evidence of the facts.

(where accused silent at JE, but gives exculpatory evidence in court)

At the examination, the accused was asked about the charges and he declined to answer/said that on the advice of his solicitor he was making no comment. He was, of course, entitled to take that line. But he had also been advised by the sheriff of what the effect of his not answering the questions might be, that if he put forward an exculpatory account later which could have been stated earlier, that could go against him.

Now, in court he has given his account of events. The defence say you should regard that as credible and reliable. The Crown say that what he said in court is just an untruthful made-up afterthought. You have to decide between these views. In doing that you will have to decide what significance, if any, you attach to the fact that what has now been said by way of defence could have been said earlier on."

[331] *Thomson v HMA*, 1992 SCCR 648.

[332] *Thomson v HMA*, supra; *Hoekstra v HMA (No 6),* 2002 SCCR 135 at para [110].

[333] *Dempsey v HMA*, 1995 SCCR 431.

[334] *McEwan v HMA*, 1990 SCCR 401, 1992 SLT 317; *Hicks v HMA*, 2002 SCCR 398 at para [18].

[335] Hicks, supra, at para [19].

[336] *Hicks*, supra, at para [20].

The Morrison and McCutcheon Rules (Exculpatory and Mixed Statements)

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2.4. Statements made to the police after 25 January 2018

Law

The rules on the evidential value of statements made by accused persons differ according to

a. whether they were made before or after the commencement of section 261ZA on 25 January 2018 and, if after that date,
b. to whom they were made.

From 25 January 2018, with the commencement of section 261ZA of the Criminal Procedure (Scotland) Act 1995, statements made by accused persons to police officers or investigating officials, are admissible in all circumstances as evidence of any facts contained therein.

The section provides as follows:

1. Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence's being hearsay.
2. Subsection (1) applies to a statement made by the accused in the course of the accused's being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.
3. Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused.

See generally *Stair Encyclopaedia*, Vol 10, para 720.

1 Exceptions to the hearsay rule[337] relate to evidence of what the accused person has said other than when giving oral evidence at the trial. Statements made outwith the accused's presence, are

dealt with in the chapter on Statements outwith presence of accused.

Statements made to the police by a suspect (including admissions of guilt) are dealt with in the chapter on Statements made to police/investigators by suspect.

Please note that the general rule is that a statement against interest by an accused is admissible as evidence to prove guilt. LJG Cullen explained in *McCutcheon v HM Advocate* 2002 S.C.C.R. 101 at para 9;

> *"Thus the prosecutor is entitled to found on evidence of an admission by an accused in proof of his guilt,"*

This chapter is primarily concerned with the rules concerning the evidential value of admissible prior statements made by accused persons that are either exculpatory statements or statements in part exculpatory and in part incriminatory made by an accused in other circumstances.

2 The rules on these statements, before the enactment of the above section, were set out in *McCutcheon* by LJG Cullen at para 16, thus:

> "
>
> i. *It is a general rule that hearsay, that is evidence of what another person has said, is not admissible as evidence of the truth of what was said.*
> ii. *Thus evidence of what an accused has been heard to say is, in general, not admissible in his exculpation, and accordingly the defence are not entitled to rely on it for this purpose. Such evidence can be relied on by the defence only for the purpose of proving that the statement was made, or of showing his attitude or reaction at the time when it was made, as part of the general picture which the jury have to consider.*
> iii. *There is, however, an exception where the Crown have led evidence of a statement, part of which is capable of incriminating the accused. The defence are entitled to elicit and rely upon any part of that statement as qualifying, explaining or excusing the admission against interest."*[338]

Note - The effect of the above section changes that rule insofar as statements made by suspects to the police after 25 January 2018 are concerned – see below. Paragraphs 3-13 apply to statements made to the police/investigators before 25 January 2018 and to statements made to other parties either before or after that date.

3 The admissibility of evidence, in light of the rules in Morrison and McCutcheon, is a question of law, the answer to which cannot be affected by inaction on the part of the Crown.[339]

4 Whether a statement is a mixed statement does not depend on the accused's purpose in making the statement, or on the Crown's purpose in leading evidence of it. The test is whether the statement, considered objectively, is in any way incriminatory in its effect.[340] If the statement contains an admission against interest in relation to a matter which is relevant to the proof of the offence, even although the statement may contain exculpatory material, it is to be treated as a mixed statement.[341] Whether or not a statement is a mixed statement, and the use to which any

statement can be put, are matters for the judge. It is not for the jury to decide how the statement should be classified.[342]

5 What the defence may found upon as turning an incriminatory statement into a mixed statement, (i.e. being part incriminatory and part exculpatory) has been referred to as a qualification, excuse or explanation of the admission against interest. A broad approach should be taken to the question whether a part of a statement is so connected to the admission as to form a qualification, excuse or explanation.[343] A statement containing an admission which has significance relevant to proof of a charge, and also an alternative explanation inconsistent with guilt, is a mixed statement.[344] The incriminatory effect of the statement may take a variety of forms, e.g. a factual statement by the accused placing himself at the locus at the relevant time, or it may coincide with what other witnesses said, or it may contradict earlier accounts by the accused.[345]

6 Where the defence seeks, however, to lead evidence of a statement by the accused which has a close connection in time, place and circumstances to a statement led in evidence by the Crown, the two statements may be regarded as so interconnected that they require to be looked as parts of a single (mixed) statement.[346]

7 There is no duty on the Crown to lead evidence of a mixed statement or to refrain from objecting to it if the defence seeks to do so.[347] If the Crown leads evidence of a mixed statement they should be taken as relying on it to incriminate the accused.[348]

8 It will normally be appropriate for the trial judge to remind the jury that the "mixed" statement was not made on oath, and was not subject to cross- examination, leaving it to the jury to determine what weight should be attached to the statement in such circumstances.[349] Where an accused does not give evidence, but relies on the exculpatory part of a mixed statement led by the Crown, to invite the jury to regard that "with a pinch of salt" is "not felicitous". A simple cautionary direction to bear in mind when considering the statement that it had not been given on oath and had not been subject to cross-examination would have been preferable.[350]

9 Where the Crown leads evidence of such a [mixed] statement, the trial judge must direct the jury that its contents are available as evidence for or against the accused, whether or not the accused gives evidence (*Jones v HM Advocate* 2003 SCCR 94); and that they must determine whether the whole or any part of the statement is to be accepted by them as the truth. He should also specifically direct them that if they believe the exculpatory part or parts of the statement, or if the statement creates in their minds a reasonable doubt as to the guilt of the accused, they must acquit (cf *Scaife v HM Advocate*, 1992 SCCR 845, at p.848).[351]

10 Where the defence lead evidence of a statement which is wholly or partly exculpatory and the Crown does not object, the trial judge should direct the jury that evidence of the statement is admissible solely for the purpose of proving that the statement was made or of showing the accused's attitude or reaction at the time it was made.[352]

11 The jury should be directed that they must determine whether the whole or any part of a statement is accepted by them as the truth. The jury should also be specifically directed that if they believe the evidence of the accused they must acquit them. In addition, it must also appear from the charge as a whole that the jury were directed that if this evidence created in their minds a reasonable doubt as to whether the accused was guilty of the charge libelled, they must acquit

them of that charge.[353]

12 None of the rules described in Morrison applies to the use of a statement made by one accused against another accused in their absence. Such statements cannot be used to incriminate or exculpate a co-accused, nor are they admissible even for the limited purpose of showing that the co-accused's story has been consistent.[354]

13 It is not the law that if an admission is accepted as true the qualification attached to it must also be accepted as true: the jury must consider both the admission and the qualification and decide which to accept and which to reject, bearing in mind the burden of proof. It is open to a jury to accept an incriminating admission and reject a qualification. They may find the qualification inconsistent with other evidence they accept; or they may find it inherently unconvincing; or, if the accused gives evidence, their demeanour may belie their account of events.[355]

Statements made to the Police on or after 25 January 2018

14 The impact of the commencement of section 261ZA above on 25 January 2018 is that, where a statement was made to the police by an accused on or after that date, it is admissible as evidence of any fact contained therein, whether it is exculpatory, incriminating or mixed. Thus the rules set out in paragraphs 3-13 above do not apply to such statements.

Possible forms of direction on Morrison and McCutcheon rules

Exculpatory statements

(where led by Crown and where accused has not given evidence)

"This statement to witness (specify) could point to the accused's innocence. Where, as here, the accused has not given evidence, this statement is evidence only to show that it was made, and the accused's attitude or reaction at that time, that is part of the general picture which you have to consider. But it is not evidence of the truth of what he said."

(where led by Crown and where accused has given evidence or where led by accused whose credibility has been challenged)

"This statement could point to the accused's innocence. Where, as here, the accused has given evidence, this statement is evidence only to show that he has been consistent in his account from an early stage. But it is not evidence of the truth of what he said."

(where brought out in cross by defence, and accused does not give evidence)

"This statement could point to the accused's innocence. Where, as here, the accused has not given evidence, this statement is not evidence of the truth of what he said. If he wishes to establish the truth of what is in his statement, he can go into the witness box and give evidence. He is not obliged to do so, but if he does, that evidence can be tested by cross-examination. That can reinforce or undermine a witness's evidence. This statement is no substitute for the accused giving evidence. He cannot rely on evidence of what he said on an earlier occasion as evidence of what occurred."

Incriminatory Statements

“This statement could point to the accused’s involvement in the crime charged. It contains things which could be taken as admissions of guilt or which help the Crown to prove the accused's guilt. This is evidence against him, because it is a statement against his interest.”

Mixed statements

(where led by Crown, whether relied on by Crown or not)

“In this statement the accused said some things that could point to innocence (e.g. he acted in self defence, he denied the critical allegations) and some which could point to his guilt (e.g. he placed himself at the scene of the crime, he admitted use of a weapon, he admitted he was in the children’s company at the relevant time).

You can look at the whole of it. You then have to decide if what was said was true, in whole or part. You can prefer one part of the statement to another.

You could disbelieve the part pointing to innocence if there is other evidence in the case you think points to guilt, or if you thought that part was inherently unconvincing, or if the accused, by his body language at interview or in giving evidence, gives the lie to his account of events.

If you believe the part pointing to innocence, or if it raises a reasonable doubt in your mind about the accused’s guilt, you must acquit him. But remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine a witness’s evidence. So, you decide what you make of it, and what weight you give it.”

(where led by defence, or brought out in cross of Crown witness by defence)

“In this statement the accused said some things that could be taken as pointing to innocence (e.g. he acted in self defence, he denied the critical allegations) and some which could point to his guilt (e.g. he placed himself at the scene, he admitted the use of a weapon, he admitted he was in the children’s company at the relevant time).

(Where accused has not given evidence)

Where, as here, the accused has not given evidence, this statement is evidence only to show that it was made, and the accused’s attitude or reaction at that time, that is part of the general picture you have to consider. But it is not evidence of the truth of what he said.

(Where accused has given evidence)

Where, as here, the accused has given evidence, this statement is evidence only to show that he has been consistent in his account from an early stage. But it is not evidence of the truth of what he said.”

Statements made to the police after 25 January 2018

[*Note: this applies to all such statements,- whether exculpatory, incriminating or mixed, or introduced by the Crown or defence; and whether or not the accused has given evidence*.]

[Select as appropriate]

"This statement to the police could point to the accused's innocence /

This statement to the police could point to the accused's involvement in the crime charged. It contains things which could be taken as admissions of guilt or which help the Crown to prove the accused's guilt. /

In this statement to the police the accused said some things that could point to innocence (e.g. they acted in self-defence / denied the critical allegations) and some which could point to guilt (e.g. s/he placed him/herself at the scene of the crime, admitted use of a weapon, admitted being in the children's company at the relevant time, etc).

You can consider this statement to the police as evidence of any fact contained in the statement.

However, remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So you can decide what you make of it and what weight you give it. As with any other evidence you can accept all of it, none of it, or you can accept some parts and reject other parts."

[337] See chapter on Hearsay above.

[338] *McCutcheon v HM Advocate*, 2002 SCCR 101, 2002 SLT 27.

[339] McCutcheon v HM Advocate, *supra* at para [14] in opinion of LJG Cullen.

[340] *McIntosh v HM Advocate*, 2003 SLT 545, 548F, para. [18], 2003 SCCR 137, 142E per LJ-C Gill.

[341] *Jamieson v HM Advocate* 2011 HCJAC 58

[342] *Jones v HM Advocate*, 2003 SCCR 94, *McGirr v HM Advocate*, 2007 SCCR 80 at para [13].

[343] *McCutcheon*, supra, para [11] of opinion of LJ-G Cullen.

[344] *Lennox v HM Advocate*, 2002 SCCR 954.

[345] *McIntosh v HM Advocate*, (supra) at para [18]. *Robinson v HM Advocate* 2007 GWD 9 – 161

[346] *McCutcheon*, supra, para [13] of opinion of LJ-G Cullen.

[347] *McCutcheon*, supra, para [14] of opinion of LJ-G Cullen.

[348] *McCutcheon*, supra, at para [11] of opinion of LJ–G Cullen.

[349] *McCutcheon*, supra, at para [17] of opinion of LJ–G Cullen referring to *Morrison v HM Advocate*, 1990 JC 299, 313, 1990 SCCR 235, 1991 SLT 57.

[350] *Murphy v HM Advocate* 2006 SCCR 407 at para [8].

[351] *McGirr v HM Advocate* 2007 SCCR 80 para [12]

[352] *McCutcheon*, supra, para [18] of opinion of LJ–G Cullen.

[353] *Scaife v HM Advocate*, 1992 SCCR 845, 848 (opinion of the court).

[354] *Mathieson v HM Advocate*, 1996 SCCR 388, 398 (opinion of the court).

[355] *McInally v HM Advocate* 2006 SCCR 391 at para [8].

Necessity

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1. Law

2. Possible form of Direction on Necessity

Law

Stair Encyclopaedia,Vol 7, paras 198-201.

1 Where an accused commits a crime in an endeavour to escape an immediate danger of death or great bodily harm, it makes no difference to the possible availability of any defence that the danger arises from some contingency such as a natural disaster or illness rather than from the deliberate threats of another.[356] Immediate danger of sexual assault may trigger this defence, if circumstances merit it.[357]

“ ”.[358]

2 For the defence of necessity to operate, the coercion or duress must have dominated the mind of the accused at the time of the act and the act must have been committed by reason of that domination; the defence only arises where there is a conscious dilemma faced by a person who has to decide between saving life or avoiding serious bodily harm on the one hand and breaking the law on the other hand.[359] But the matter cannot, and should not, be weighed in too fine a scale.[360]

3 It is for the accused to put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence of necessity. If that is the case, the Crown require to meet that defence and to satisfy the jury beyond reasonable doubt that it should be rejected.[361]

5 The defence of necessity is available only where there is so pressing a need for action that the accused has no alternative but to do what would otherwise be a criminal act under compulsion of the circumstances in which he finds himself.[363] The requirements of the defence are that:

1. the accused must have good cause to fear that death or serious injury would result unless he acted;

2. that cause must have resulted from a reasonable belief as to the circumstances;

3. the accused must have been impelled to act as he did by those considerations; and

4. the defence would only be available if a sober person of reasonable firmness, sharing the characteristics of the accused, would have acted as he did.[364]

6 The defence is not restricted to protecting persons already known to and having a relationship with the accused at the moment of the response to the other's danger, although proportionality of response might be a function of relationship.[365] The defence cannot be excluded solely on the ground that those at risk were remote from the locus of the alleged malicious damage, provided they were within the reasonably foreseeable area of risk.[366] The accused must, at the material time, have reason to think that his act would remove the perceived danger. If all it could achieve was no more than averting it for a time or lessening its likelihood without removing it even temporarily, assessing necessity is more difficult and issues of proportionality would arise. Merely making a danger less likely might not be regarded as justified by necessity at all.[367] As a general principle the accused's conduct must be broadly proportional to the risk, and that is always a question of fact, to be determined in the circumstances of the particular case.[368]

See also chapter on Coercion above.

Possible form of Direction on Necessity

"In this case the defence say the accused was forced into doing what he did by reason of the circumstances in which he found himself. Hence he should be acquitted. It's for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

Normally the law regards your actions as being the result of your own free will, and holds you responsible for what you do. But if the exercise your free will has been compromised or undermined by the circumstances in which you find yourself, your choice of action has been limited. If the choice you have is self-sacrifice or breaking the law, that is an unacceptable dilemma for anyone to be in. The law says it is unfair that you should be held responsible for your actions in that situation. Necessity is really coercion by force of circumstances. The sort of circumstances to which this would apply would be things like medical emergencies or natural disasters.

But that could happen if, and only if, these four conditions are met:

1. If you had reason to believe, and did believe, you were in danger of death or serious injury to yourself. That danger must be immediate. If it is not, there would be time to take another course of action.
2. Committing the crime must be the only way of escaping the danger. The danger must be unavoidable, and committing the crime must be the only way out. If you could have escaped, or taken some other non-criminal course of action, that's what you should have done. Committing the crime must remove the danger, not simply lessen it.
3. This compulsion must have taken over your mind at the time. If you acted simply without thinking, that will not do.
4. It must have been the cause of your doing what you did.
5. Your conduct must have been broadly proportional to the risk.

You have to judge the accused's actions objectively. Ask "*Would the ordinary sober person of reasonable firmness, sharing the accused's characteristics, have responded to the danger as he did?*" If you thought the accused was more vulnerable, or timid than your normal person, you

must ignore that. The only exception would be where his state results from a mental illness, mental impairment, or a recognised psychiatric condition. But in the ordinary case, abnormal susceptibilities aren't relevant to deciding if the accused should be acquitted on the grounds of necessity, although they might be relevant to matters I would have to consider at a later stage in this case.

There is sufficient evidence for you to consider this defence, but the assessment of its quality, strength and effect is for you to decide.

You should approach the issue of necessity with some caution. Matters cannot, and should not, be weighed in too fine a scale. But there have to be very strict limits on the availability of necessity as a defence. It is the sort of claim that is easy to make, and it could be an easy way out for someone charged to say circumstances compelled him to do what he did. It would make life simple for criminals, and very difficult for those who enforce the law. It cannot be allowed to become an easy answer for those with no real excuse for their actions.

If you accept the evidence that

1. the accused was placed in a situation of danger he had good grounds to believe,
2. and did believe, he was in immediate danger of death or serious harm if he did not take the action he did
3. committing the crime was his only way out of the dilemma

then you could hold his actions excusable, and acquit him."

[356] *Moss v Howdle*, 1997 JC 123, 128 (opinion of the court).

[357] *MD v PF (Falkirk)* 2009 SLT 476, [2009] HCJAC 37 at para [4].

[358] Moss, *supra*, at 129.

[359] *Dawson v Dickson*, 1999 SCCR 698, 703.

[360] MD v PF (Falkirk) (supra) at para [4].

[361]

[362] *Cochrane v HMA* 2001 SCCR 655 at paras [19] and [20] See also Coercion (*supra*) where an objective test is used in cases where coercion may apply.

[363] *Lord Advocate's Reference (No 1 of 2000)*, 2001 JC 143, 2001 SCCR 296, 2001 SLT 507, at para [39]; MD v PF (Falkirk) (supra) at para [4].

[364] *Lord Advocate's Reference*, supra, at para [42].

[365] Supra, at para [44].

[366] Supra, at para [45].

[367] Supra, at para [46].

[368] Supra, at para [47].

Prior Statements

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Law

**** Please note, should the matter of prior statements arise in relation to Section 259 of the 1995 Act (statements by deceased or unascertainable witnesses etc) please see chapter on Section 259. ****

See generally *Walkers on Evidence*, 2nd ed, paras 12.10.1 – 12.10.4.

1 There is no requirement that a statement to be put to the witness in terms of section 263(4) must have been recorded in writing, or that it must be put to the witness in its entirety. [369] It follows that it is not necessary for a written statement to be signed before it can be put to a witness. What constitutes a statement for the purposes of the relevant provisions of the Criminal Procedure (Scotland) Act 1995 was extended in *Beurskens v HM Advocate* 2014 HCJAC 99 and now at 2015 JC 91.- Whilst the case was concerned with section 259 hearsay, the court enlarged the scope of what may be considered to be a statement to include what might otherwise appear to be a precognition if the precognition is signed by the witness or if the statement was recorded electronically.

The court explained at paras 28 and 29:

> *"[28] ...Where there is such a signature, or indeed where what was said has been recorded electronically, the fact that the process in which the statement was emitted was one of precognition is of less significance than previously, so far as the competency of the statement as evidence is concerned. Even if what was taken was originally a precognition, it takes on a different character altogether once it is read over to the witness and the witness acknowledges its truth by signing it (see, in the civil context, Highland Venison Marketing Ltd v Allwild GmbH , Lord Cullen, p 1129). The reliability and credibility of the*

content of the statement will, of course, remain challengeable by reference to the circumstances in which it was given or otherwise.

[29] For these reasons, whatever stage statements are taken, the addition of the witness's signature to a document containing an account of events attributable to his knowledge, will normally result in that document being classified as a 'statement' by, and not a precognition of, that witness for the purposes of the provisions of the 1995 Act..."

2 The increasing practice of putting the terms of statements previously made by witnesses in the course of the police investigation to these witnesses during examination or cross-examination has coincided with the extension of the purposes for which reference may be made to witness statements.[370]

3 It is important to keep in mind the following observations made by Lord Justice General Carloway in *Al Megrahi v HMA* 2021 SCCR 64 paras 57 to 63 regarding the content of statements. The Lord Justice General commented as follows:-

- Accused persons are tried on the basis of evidence and not on the content of police statements.
- Written statements are not evidence unless and until they are adopted by the witness.
- The significance of the oath may not be as strong as it once was, but it is not entirely devoid of importance especially when combined with the solemnity of the trial setting. There may be a difference between what a witness may say, and even sign, outwith the courtroom and what he or she may be prepared to swear in a public forum in which he or she knows that the testimony given may be the subject of close scrutiny and any falsity prosecuted as perjury.
- A written statement may not, and in many occasions does not, wholly or accurately, reflect the words spoken by the witness. Rather they are, generally, a prose narrative of what the police officer, who is interviewing the witness, has interpreted as the witness's account from a question and answer session.... Such statements are in a different category from pre-trial statements which are video/audio recorded and where there can be little doubt that the words of the witness were as replayed digitally in court.
- For a witness statement to have any value as proof of fact, the witness must agree that what is recorded is what was said and that it was the truth. Even then, the court may not be prepared to accept exactly what is recorded as truth, given that its adoption by the witness in court may have been during what is effectively a leading of the witness and where the language used does not reflect that which the witness might normally employ.
- The fact finder may prefer what is said in court rather than what has been said on earlier occasions.
- The next reason to be careful in relation to reliance being placed on a written statement as proof of fact, or as a contradictor of testimony given, is the limited scope within which a statement is normally made. It will have been circumscribed by the nature of the questions asked. That in turn will depend on the police officer's knowledge of the facts at the material time.....By the time of an examination in chief, a considerable portion of what is in a witness's statement will have ceased to have relevance or importance. Focus can be given, both at precognition and in court, on that which is relevant and important. These areas can then be the subject of cross examination. It is sometimes only then that the true meaning of what the witness was recorded earlier as saying comes to light.

Misunderstandings may be uncovered and ironed out.

- With a witness who is accepted as credible, it is primarily on a consideration of what he or she says in the witness box that the judge or jury can gauge his or her credibility.
- All of this is intended to sound a cautionary note to those who might seek to place undue importance on the content of a written statement in comparison to, and its value as a testing tool of, testimony in the courtroom.

4 A witness can be examined about the terms of a statement apparently inconsistent with his evidence in court with a view to eliciting the truth or discrediting him [371]. At common law it was recognised that there were certain circumstances in which a prior statement might fill a gap in the evidence and amount to acceptable evidence of the truth of its contents. Finally, section 260 of the 1995 Act contains provisions in respect of admissibility of prior statements of witnesses.

5 Before any statement is put to the witness, the purpose of doing so should be clear to the court, and the appropriate evidential foundation set up, whether it be a challenge under section 263(4) or reliance on *Jamieson (No 2)* or reliance on the provisions of section 260.[372] Practice Note 1 of 2017 states:

> *"...Practitioners are reminded that they must be clear, before embarking on questioning of this nature, about the legal basis for any reference to a previous statement. They must be in a position, if required, to advise the trial judge or sheriff of the purpose of the proposed line. This is important because, amongst other things, the trial judge or sheriff will require to consider what, if any, directions are to be given to the jury in the event that a prior statement is introduced into the evidence. Notably, directions may be required on whether the content of a statement, which is accepted or adopted as truth, may be used as proof of fact or whether, in the case of a different statement, which is proved to have been made but which is not so accepted or adopted, it may be used only to test the witness's credibility or reliability..."*

6 In all cases where legitimate reference is made to a witness's prior statement, the trial judge in directions should refer the jury to the evidence of the witness and his statement, and give a specific direction as to the Crown's purpose in relying on it, and as to its evidential significance.[373] However this should be read subject to the pragmatic observations of the court in *Rehman v HM Advocate* 2014 SCCR 166 at paras 51 and 52

Previous consistent statements

7 As a general rule evidence that a witness made a previous consistent statement is inadmissible unless it is a de recenti statement or forms part of the res gestae.[374] However, if the evidence of a witness is subject to challenge on the ground that the witness made a prior inconsistent statement then it is open to lead evidence to show that the previous statement is consistent with the account given in evidence.[375]

8 In *Whorlton v HM Advocate* [2020] HCJAC 36, a complainer in a rape case was subject to cross-examination to the effect that she had only told the police about it many years after the event and it was proposed that this suggested that her evidence was false. The judge allowed hearsay to be admitted from another witness, who was not able to give a precise indication of timing so that it could not be established that the statement was recent, but certainly some years before the police became involved, of the complainer's account of the incident which amounted to rape. The appeal

court determined that the trial judge did not err in directing that the witnesses' evidence, if accepted, might tend to negate any notion that the complainer first made an allegation when speaking to the police in 2018, but it could not go towards proof of the events spoken to by the complainer. In these circumstances, since the evidence was led to show that the complainer had made an earlier report of the rape, not that the report was true, it was admissible primary hearsay.

Previous inconsistent statements

9 A witness may be examined as to whether he has on any specified occasion made a statement on any matter pertinent to the issue at trial different from the evidence given by him in the trial; and evidence may be led to prove that the witness made the different statement.[376] This rule does not apply to precognitions (subject to what is said in *Beurskens v HM Advocate* as to what constitutes a statement supra) unless they are precognitions on oath.[377] For the avoidance of doubt a simple denial by a witness of events amounts to a prior inconsistent statement.[378] Where a witness said that he could not remember what happened in a certain period and had earlier given an account of what happened, he was effectively giving two different statements and the earlier statement was accordingly admissible under section 263(4).[379]

10 For evidence to be led that the witness made the previous different statement, the witness must be asked whether he made the statement,[380] and whether it was made on a specified occasion.[381] There is no requirement that the statement to be put to the witness must have been recorded in writing, or that it must be put to the witness in its entirety.[382]

11 Such a statement is admissible only to prove that the different statement was made: that a different statement was made goes only to credibility and reliability. It is essential that in such circumstances specific directions are given to a jury as to how they should deal with such a statement in their deliberations.[383] It is essential that the jury are directed that the prior statement could not be used as proof of fact, when the witness denies the truth of the statement.[384] If, however, the witness departs from her original testimony and accepts the contents of the prior statement as accurate, no specific direction is generally required aside from the general directions as to credibility and reliability.[385]

Acceptance by a witness of a previous statement

12 Where a witness to whom a prior inconsistent statement is put in terms of section 263(4) accepts that the statement contains the truth, the statement insofar as accepted becomes part of the witness's evidence and falls to be assessed on that basis. As it was put by the Lord Justice Clerk in what is now the leading case on adoption of a statement, *Rehman*, at para 49:

> *"put simply, if a witness accepts that 'his statement contains the truth ... [it] becomes part of his evidence"*

13 The position at common law begins with *Jamieson v HM Advocate (No.2)* 1994 SCCR 610 at 618 but should be understood subject to *Rehman*. In *Jamieson*, where a witness could not remember what happened in the incident, but could remember giving a statement to the police, and accepted that she had told the truth in the statement, the statement became evidence. In that case the witness was not able to confirm exactly what she had said and that gap was later filled by a police officer speaking to the terms of her statement. Under section 260 of the Criminal

Procedure (Scotland) Act 1995 a prior statement, which would not otherwise be admissible as evidence, made by a witness is admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of those proceedings.[386] The statement is not admissible unless:

a. the statement is contained in a document;
b. the witness, in the course of his evidence, indicates that the statement was made by him and that he adopts it as his evidence; and
c. at the time the statement was made, the person who made it would have been a competent witness in the proceedings.

The restrictions on admissibility noted above do not apply to a precognition on oath or a statement made in other civil or criminal proceedings in the UK or elsewhere.

14 In *Rehman and another v HM Advocate* 2014 SCCR 166 the opinion was expressed that if a witness accepts that he did make a truthful statement to the police and that the record put to him is an accurate reflection of what he had said to the police, no more is required for the content of that statement to be "adopted" and thus available as proof of fact. There is no need to prove that that a witness's apparent failure to recall events is genuine nor for independent proof of the statement if the witness says, by reference (for example) to a signature, that it is what it bears to be.[387]

15 In all these cases the prior statement is not itself evidence. If the witness accepts that he made the prior statement and that it was true, or perhaps even that if he made the prior statement it was or must have been true, it becomes part of his oral evidence. If he also gives evidence which is contrary to what is contained in the prior statement, the position is the same as if he had made two contrary statements in the course of his oral evidence without any question of prior statements being involved, and it is for the jury to determine which of the statements, if any, they accept. If, on the other hand, the witness does not accept the truth of what is contained in the prior statement, it does not become evidence against the accused, but is relevant only as an aid to assessing the credibility of the witness, if it is proved that the statement was made. Such proof could come from the witness accepting it, a witness speaking to taking it or by joint minute.[388]

16 The admissibility of prior statements under section 260 of the 1995 Act does not apply to a prior statement by an accused person.[389]

17 Unattributable hearsay is not evidence.[390]

Possible form of direction on Prior Statements

In making use of the following directions the observations made by Lord Justice General Carloway in Al Megrahi will require to be considered and the directions tailored to the particular circumstances in each instance.

Adoption of a statement

"Where a witness cannot entirely remember an event or some details of an event, but gave a statement about it at an earlier stage, that statement can become part of their evidence if the witness adopts it and the making of the statement is proved.

[Where appropriate The making of the police statements which were put to witnesses are conclusively proved in the joint minute, but]

it is only if the witness accepts that they were telling the truth that the statement becomes evidence.

Adoption requires that the witness accepts that they made the statement and the witness confirms that they were telling the truth when they made the statement. So that part of a statement which is adopted is evidence in the case to prove facts. It would then be for you the jury to assess it as evidence and decide what to make of it.

Adoption of evidence of the sort I have been telling you about usually arises where the witness cannot remember the event.

If on hearing part of an earlier statement the witness has their memory jogged and says that they now remember that that is what happened, then that would simply be evidence in the case.

If a witness gives evidence directly to one effect and adopts a statement to different effect then you have two versions of events from the witness and it is for you the jury to decide if you accept one or other or neither version of events.

Unless a witness adopts part of a prior statement, it is not part of the evidence in the case to prove facts, it is simply material which is available to undermine the account given in court, if you accept that the prior statement was made by the witness.

Section 263 (4) - Prior inconsistent statements

"I am going to say something now about prior inconsistent statements.

What a witness said closer in time to the events spoken of in court, where it is different to what the witness says in court, may have a bearing on your assessment of the evidence given in court by that witness.

If the making of an earlier statement has been proved,

[by joint minute, by the police officer who noted it or by the witness accepting they said it]

you would have to decide if you think that there were differences between what the witness said in the statement and what they said in court.

Differences, if you judge them important, may tend to undermine the credibility or reliability of what a witness says in court. You will bear in mind that no one is likely to give precisely the same account of events on different occasions separated by many months. Powers of memory rarely improve over time.

There may be a good explanation for someone who is questioned by a different person, in different circumstances, providing different details about traumatic events to the evidence which is given on oath in court months or even years later, perhaps after further reflection. So there may be an acceptable explanation why someone says something contradictory in different circumstances, or there may not be.

It is very much for you to decide if any differences which have been highlighted are important and what impact, if any, that has on your assessment of the evidence of witnesses in court.

These are matters for you the jury to assess and evaluate.

[369] *Leckie v HM Advocate* 2002 SCCR 493; 2002 SLT 595

[370] *A v HM Advocate* 2012 SCCR 384.

[371] section 263(4) of the Criminal Procedure (Scotland) Act 1995

[372] *Hughes v HM Advocate* [2009] HCJAC 35; 2009 SLT 325.

[373] *Niblock v HM Advocate* 2010 SCCR 337 at paras [14 to 16].

[374] *C v HM Advocate* 1994 SCCR 560 at 564B. For de recenti statements see the relevant chapter.

[375] ibid at 565A-B.

[376] 1995 Act, s.263(4);*Lumsden v HM Advocate* 2011 SCCR 648.

[377] *Kerr v HM Advocate* 1958 JC 14; *KJC v HM Advocate* 1994 SCCR 560.

[378] *Lumsden v HM Advocate* 2011 SCCR 648

[379] *HM Advocate v Hislop* 1994 SLT 333

[380] *McTaggart v HM Advocate* 1934 JC 33

[381] *Paterson v HM Advocate* 1995 SLT 117; *Cochrane v HM Advocate* [2006] HCJAC 88; 2007 GWD 2-25.

[382] *Leckie v HM Advocate* 2002 SCCR 493; 2002 SLT 595.

[383] *HM Advocate v Khan* 2010 SCCR 514.

[384] *Lumsden v HM Advocate* 2011 SCCR 648 para 4, *Clark v HM Advocate* supra para 7, *Masocha v HM Advocate* 2016 HCJAC 15 para 22

[385] *DS v HM Advocate* 2012 SCCR 319.

[386] This provision may have been influenced by *Jamieson v HM Advocate (No.2)* 1994 SCCR 610; 1995 SLT 666.

[387] See also *Matulewicz v PF Alloa* 2014 SCCR 154 para 15, *Croal v HM Advocate* 2014 HCJAC 34

paras 7 and 8.

[388] *A v HM Advocate*(supra); Renton & Brown 24-142.1

[389] 1995 Act, s. 260(1)

[390] *Cook v HM Advocate* 2019 HCJAC 24

Provocation

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Gordon, Criminal Law, 3rd ed, Vol II, paras 25.09 – 25.38 and 29.44 – 29.46.

Introduction

Provocation and self-defence are often coupled in a special defence, and often confused; but provocation is *not* a special defence, and is always available to an accused person without a special plea. The facts relied upon to support a plea of self-defence usually contain a strong element of provocation, and the lesser plea may succeed where the greater fails; but when in such a case murder is reduced to culpable homicide, or a person accused of assault is found guilty subject to provocation, it is not the special defence of self-defence which is sustained but the plea of provocation.[391]

It is important to distinguish for the jury the different legal tests applicable to self-defence and provocation. The application of judicial initiative to the standard directions for self-defence and provocation by expanding upon the content of these directions is discouraged.[392]

When both self-defence and provocation arise, the jury should be directed to consider self-defence and, if they reject it, to consider the evidence again on the issue of provocation.[393]

Provocation may be accepted by the Crown, such as where a reduced charge of culpable homicide is brought, accepting provocation to be a factor.[394] It may be raised by the defence in evidence

and / or speeches. In some cases it may be necessary for the judge to consider directing a jury on provocation even where it has not been so raised.

Generally and with particular reference to cases of murder

1 There are 4 elements required for provocation:

1. Physical attack; For murder, the only exception to the requirement for a physical attack relates to discovery of infidelity.[395]
2. Immediate loss of self-control;
3. Immediate retaliation in "hot blood"; and
4. No grossly disproportionate violence.

2 Macdonald expressed it thus:

> *"The defence of provocation is of this sort – "Being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing".*[396]

It is still quite proper to direct a jury on provocation in accordance with the foregoing classic definition in Macdonald. Evidence that the accused was in control of his temper at the time of the retaliation rules out a finding that he had lost his self-control by any form of provocation.[397]

3 As a rule provocation by physical violence, actual or anticipated,[398] is required. The appeal court has more recently reiterated the established position that words, however abusive or insulting, cannot found a plea of provocation in cases of murder.[399] In *Elsherkisi*, threats were of no relevance. In *Donnelly v HM Advocate* 2017 SCCR 571, the court explained at para 41:

> *"…There was no assault by the deceased on Ferguson, nor even any threatening gesture towards him, and the highest the case amounted to was an allegation that verbal threats had been made. It is abundantly clear on the authorities (Hume i.247; Drury ; Elsherkisi) that such conduct would not be sufficient foundation for a plea of provocation in homicide…"*

In all cases, for provocation to succeed, the actions said to amount to such must be substantial.

It has, however, long been recognised that a person who finds their spouse in the act of adultery, and kills them in the heat of the moment, is guilty only of culpable homicide.[400] It has also been recognised that the heat of sudden and overwhelming indignation may be just as powerful in the case of couples who are cohabiting as in the case of those who are married to each other.[401] This exception to the rule has been gradually extended to include provocation of a husband by a confession of adultery,[402] suspicion of a sexual association between the victim and a female with whom the accused had been living as husband and wife,[403] and a female accused who had been informed that the male deceased had been sharing her lesbian partner's bed.[404] How the jury evaluates such provocation is explained at para 9 below.

The existence of this exception has been subject to judicial criticism as anachronistic[405] and seems unlikely to survive the aftermath of the Scottish Law Commission's review of homicide and

associated defences.

4 *"Provocation, although great, will not palliate guilt if an interval has elapsed between the provocation and the retaliation"*. There must be a degree of immediacy between the provocation and the blows struck by the accused, because as time passes tempers cool and there is the opportunity for rational thought to return.[406]

5

> *"[W]here a plea of provocation is taken, there must be some equivalence between the retaliation and the provocation so that the violence used by the accused is not grossly disproportionate to the evidence constituting the provocation. Accordingly we feel that the words 'cruel excess' should be confined to cases of self defence"*.[407]

The proportionality test involves a comparison between the violence constituting the provocation and the violence used in retaliation which caused death, and the fact that the latter violence had caused death does not necessarily mean that the violence was disproportionate to the violence used.[408]

6 In general an objective test is applied to the facts relied upon in support of a plea of provocation; in particular, individual characteristics of an accused are not taken into account. On the other hand, the subjective element has to be considered. If, for example, an accused makes a reasonable mistake about the seriousness of the provocation offered, they are not necessarily precluded from pleading the defence because, from an objective standpoint, their retaliation is held to have been disproportionate.[409]

7 When the charge is one of attempted murder, if the plea of provocation succeeds, the verdict should be one of guilty of assault to severe injury under provocation and under deletion of the words "and did attempt to murder (him/her)".[410]

8 Historically, verbal abuse was recognised as a provoking factor where an assault has ensued but not in cases of murder. Hume, at Volume 1 333-334 and Macdonald at page 116 suggested that for lesser assaults, verbal insults may amount to provocation. The most recent edition of the Criminal Law of Scotland suggests at para 33.44 that provocation by words alone may be available for assault, but the editor observes that there has been no reported appeal case on this since 1837 and that the requirements are not clear.

Whether verbal provocation alone can ever be a live issue in assaults involving the level of violence of those which are prosecuted on indictment may be questionable.

In any event, as the Lord Justice General pointed out in McAulay, at para 20, except in cases of murder and attempted murder the presence of provocation does not alter the verdict to be returned. Its relevance arises at the stage of sentencing. Since sentencing is very much a matter for judges forming their own view of the evidence, a judge would be entitled to have regard to provocative conduct in passing sentence without requiring the jury to adjudicate on the matter:

> *"20. There was no need for the trial judge to direct the jury on provocation. Although a judge has a general obligation to direct a jury on obvious alternative verdicts reasonably available on the evidence, a finding of provocation could not have had any material bearing*

on the form of the jury's verdict in this case. Provocation had already been demonstrated and accepted by the Crown. It had led to a reduction in the charge to culpable homicide. Thereafter, its only relevance was in relation to sentence. A judge may in certain circumstances, if he or she chooses to do so, put the matter of provocation to the jury and advise them that a rider could be added to any verdict of guilty. This may be useful where there are several reasons for a verdict of culpable homicide, as distinct from murder, being returned, but the judge wishes the jury to adjudicate on the issue of provocation. In this case, it was not disputed that the deceased had confronted the appellant and had at least threatened to attack him with a lump of concrete or a stone, and perhaps thrown it at him. The defence would ultimately be able to raise the issue of provocation at the sentencing diet and the judge would be able to apply his own assessment of the evidence in determining the appropriate sentence. There was no need for a rider on provocation to feature in the jury's verdict to enable it to be considered in the sentencing equation."

That a judge may interpret the evidence when passing sentence was again explained by the Lord Justice General in Elliott v HM Advocate [2020] HCJAC 41, at para 19;

> *"In selecting comparative sentences for the appellants, the trial judge was entitled to take into account his own interpretation of the evidence given, in so far as consistent with the jury's verdict..."*

For these reasons, we have not included a specimen direction for provocation by words alone but, should a judge be persuaded that such a direction is required, adopting the specimen direction given for provocation by discovery of infidelity would seem appropriate.

Cases of partner-killing on discovery of sexual infidelity.

9 In the case of homicide stemming from the discovery of sexual infidelity by a partner, a direction that the jury should consider whether or not the degree of violence used by the accused was, or was not, grossly disproportionate to the provocation, is inappropriate. For a plea of provocation supporting a verdict of guilty of culpable homicide to be sustained, there must have been a relationship between the accused and the deceased in which sexual fidelity was to be expected, that the killing must have been as a result of immediate loss of self-control on discovery of the infidelity, and that the accused's actings were to be tested against the reactions of the ordinary person faced with that situation.[411]

Provocative behaviour towards a third party

10 Whether provocative behaviour towards a third party might in limited circumstances permit a plea of provocation by an accused was discussed in *Donnelly v HM Advocate* 2017 HCJAC 571 but not resolved. Any extension of the principle is met by the formidable obstacle of the explanation by Lord Rodger in giving the leading opinion of a full bench in *Drury* that the accused must have suffered an assault, or as Hume put it "*bodily smart*". The court in *Donnelly* did not determine that there can be third party provocation. If allowed, it would almost certainly be limited to instances in which the third party stands in a very close relation to the accused. Difficult questions may arise as to the categories of behaviour towards a third party which might suffice to cause substantial provocation of an accused. The issue is being considered by the Scottish Law Commission as part of its review of the law of homicide and associated defences.

In his commentary on *Donnelly*, Sheriff Gordon observed:

"It might be said that this case decided nothing, other than that the facts did not amount to provocation, or perhaps that it was not a suitable case to consider whether or not the law of provocation should be changed. The opinion, however, does contain a useful review of the authorities and will doubtless be relied on as authority for the view that the law does not accept the concept of third-party provocation."

Charging the Jury on provocation

11 As indicated, it may be necessary to consider providing directions on provocation even although it has not been raised by the defence, if there is evidence from which a jury might reasonably conclude that the four elements of provocation are present, albeit that *"may be out of kilter with the principle that a trial judge ought not normally to canvass alternative verdicts which have not been raised or addressed by the parties"*[412] Where it is appropriate to do so, the jury should be directed on the option available of returning a verdict with a "rider" of "under provocation".

Conversely, it may be necessary to remove provocation from the Jury where it has been raised by the defence, where it is clear that there is no such evidence in relation to one or more of the essential elements[413].

12 In *Duffy v HM Advocate* 2015 HCJAC 29, where there was evidence of violence which could have been considered to be provocative, the court commented that only if a court were able to conclude that no reasonable jury could, on the evidence, reach the view that there was provocation, should directions on provocation be omitted. In that case the trial judge was held to have erred in omitting such directions on the view *inter alia* that to do so would be prejudicial to the defence.

13 On the other hand, in *McAulay* (*supra*) the Court commented that there was no need for the trial judge to direct the jury on provocation, where the Court held that "*provocation had already been demonstrated and accepted by the Crown. It had led to a reduction in the charge to culpable homicide, Thereafter its only relevance was in relation to sentence*" (per Lord Carloway at para 20).

14 When considering charging the jury on provocation, in particular where it has not been raised by the defence, or, indeed, where it has been so raised and there is not evidence to support it, it may be good practice for the judge first to raise the issue with parties before speeches and hear any submissions they wish to make thereon.

15 In any case in which the court is directing on provocation, it would seem appropriate to direct the jury that their guilty verdict should specify that there was provocation[414] In cases of murder and attempted murder they could be invited to add the words "by reason of provocation" to the verdict if they have found provocation. In non-murderous assaults, they could be invited to add the words "under provocation" if they have found provocation.

See also chapter on SELF-DEFENCE below.

Possible form of direction on provocation in assault

(in all cases)

Provocation has been mentioned. Its essence is that the accused has acted in hot blood, while suffering from a loss of control provoked by an assault.[415]

Provocation does not excuse an assault and lead to an acquittal. It only reduces the quality of the criminal act. If you thought the accused had assaulted the complainer, but had been provoked, your verdict should be "guilty under provocation". But if you thought the charge had been proved, but there had been no provocation, your verdict should be "guilty as libelled".

(where self-defence pleaded)

Provocation is quite distinct from self-defence, and should not be considered along with it. I have already told you about self-defence, so first you decide if the accused acted in self-defence. Only if you thought he/she had not, would you again look at the evidence, and decide if he had acted under provocation.

Provocation by violence

(which is usually the basis advanced on a charge of murder)

There is provocation when each one of these four circumstances exists:

1. where the accused has been attacked physically, or where he believed he was about to be attacked, and reacted to that. The danger of attack must be immediate, not in the future. The belief must have been held on reasonable grounds, even though they might turn out to have been mistaken. A mistaken belief must have had an objective background. It can't be purely subjective or of the nature of a hallucination.
2. where he has lost his temper and self control immediately,
3. where he has retaliated instantly and in hot blood. If he had time to think, and then acted, that would be revenge, not acting under provocation,
4. where the violence of his retaliation was broadly equivalent to the violence he faced. There must be no gross disproportion between the accused's violence and the violence which prompted it. It's the degrees of violence you compare. The fact that the effect of the retaliating violence was more serious than that of the provoking violence doesn't necessarily mean that it was grossly disproportionate.

Provocation arising from sexual infidelity

Provocation recognises human frailty, that some people cannot control their passions, and act through weakness, not wickedness. Learning of another's sexual infidelity may cause loss of self-control, and a violent reaction, leading to killing in hot blood. That could deprive a killing of the wickedness that is essential for murder.

That could arise only where:

1. Faithfulness in sexual matters was to be expected in the relationship between the accused and the deceased. Whether such a bond existed depends on the nature of their relationship, its history, whether it had ended or still continued. Without a mutual expectation of sexual fidelity there can be no provocation.
2. The deceased's sexual conduct broke, and was seen by the accused as breaking, that bond

of sexual fidelity. It must have been improper, otherwise there can be no provocation.
3. Discovering the deceased's behaviour caused the accused immediately to lose his self-control, and he killed in the heat of the moment. He must have reacted in hot blood, otherwise there can be no provocation.
4. An ordinary person would have acted as the accused did. If you thought his reaction was more extreme than what would be expected of the ordinary person facing that situation, there can be no provocation.

(in cases of attempted murder and murder)

see under these subject heads sexual infidelity

[391] *Jones v HM Advocate* 1989 SCCR 726, 1990 JC 160 at page 173, 1990 SLT 517; *Crawford v HM Advocate*, 1950 JC 67, per LJ-G Cooper.

[392] *Dearie v HM Advocate* 2011 SCCR 727.

[393] *Fenning v HM Advocate* 1985 JC 76.

[394] *McAulay v HM Advocate* 2018 SCCR 338.

[395] The issue of provocation by words alone in lesser assaults is discussed at para 8 infra.

[396] Macdonald, *Criminal Law*, 5th ed, p 94; approved in *Cosgrove v HM Advocate*, 1990 JC 333, 339 (opinion of the court); *Low v HM Advocate*, 1994 SLT 277, 285, (opinion of the court).

[397] *Chawner v HM Advocate* 2009 GWD 33-560.

[398] *Lieser v HM Advocate*, 2008 SCCR 797 at paras [7] and [9].

[399] See *Smith v HM Advocate* 2021 SCCR 238, *Gillon v HM Advocate* 2006 SCCR 561 and *Elsherkisi v HM Advocate* 2011 SCCR 735 cf. *Anderson v HM Advocate* 2010 SCCR 270 at para [18].

[400] *McKay v HM Advocate*, 1991 JC 91, 93 per LJ-G Hope.

[401] *McKay*, supra, at 95 per LJ-G Hope.

[402] *HM Advocate v Hill*, 1941 JC 59, 61 per Lord Patrick.

[403] *McDermott v HM Advocate*, 1973 JC 8, 9 per Lord Cameron.

[404] *HM Advocate v McKean*, 1996 SCCR 402 per Lord MacLean.

[405] *Donnelly v HM Advocate* 2017 SCCR 571 at para 40

[406] *Parr v HM Advocate*, 1991 JC 39, 46 per LJ-G Hope, quoting with approval statement in

Macdonald, *Criminal Law*, 5th ed, at p 94.

[407] *Gillon v HM Advocate*,2006 SCCR 561, p.572-573 para [19], which refers to *Low v HM Advocate* 1993 SCCR 493, 507 (opinion of the court); followed in *McCormack v HM Advocate*, 1993 JC 170, 174 per LJ-C Ross

[408] *Gillon v HM Advocate*,2006 SCCR 561 at para [22].

[409] *Jones v HM Advocate*, 1990 JC 160, 173 per LJ-C Ross. 'Cases of attempted murder'.

[410] *Brady v HM Advocate*, 1986 JC 68, 76 and 77 per LJ-C Ross. 'Cases of assault'.

[411] *Drury v HM Advocate*, 2001 SCCR 583, 2001 SLT 1013 (court of five judges). See also *HM Advocate v Hill*, 1941 JC 59; *HM Advocate v Callander*, 1958 SLT 24.

[412] Smith v HM Advocate 2021 SCCR 238, per LGJ Carloway @ para 23, and see *Duncan v HM Advocate* 2019 JC 9.

[413] see Smith v HM Advocate 2021 SCCR 238

[414] *McAulay v HM Advocate* 2018 SCCR 338 at para 20 and *HM Advocate v Tracey* 2008 SCCR 93.

[415] if the judge is directing on provocation by words alone then the words "or insulting behaviour" could be added here.

Recent Possession of Stolen Property

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1. Law

2. Possible form of Direction on recent possession of stolen property

Law

Stair Encyclopaedia,Vol 10, para 754(5).

1 The 'doctrine of recent possession' is no more than a presumption of fact. It imposes no burden on the accused to prove his innocence.[416]

2 In the absence of any explanation from the accused the jury may be entitled to draw an inference of guilt if:

a. stolen goods are found in the possession of the accused,
b. the interval between the theft and discovery of the goods is short and
c. there are other criminative circumstances over and above the fact of possession.[417]

3 The proposition set out in paragraph 2 above applies also to proof of reset and aggravated theft.[418]

4 In relation to paragraph 2(a) above;

> *"... it is always a question of circumstances what degree of possession is necessary or sufficient to create a duty on the accused to explain that possession. Possession may be constructive, and it does not necessarily follow that possession which has been parted with does not need to be explained"*.[419]

5 Failure of the accused to make any reply when cautioned and charged, and failure to give evidence on his own behalf do not constitute criminative circumstances for the purposes of paragraph 2(c) above.[420]

6 Avoid the use of the word *"suspicious"* instead of *"criminative"* circumstances. The Appeal Court held that they were not synonyms.[421]

Possible form of Direction on recent possession of stolen property

"In this case, the Crown say recently stolen property was found in the accused's possession in criminative circumstances for which there's been no acceptable explanation. They say you can

infer that the accused was the thief.

In a case like this, there is no burden of proof on the accused, but if stolen property is found in his possession shortly after the theft in criminative circumstances, and there is no explanation for that which you believe or which raises a reasonable doubt in your minds about his guilt, you could infer that he is the thief.

That depends on the accused being in possession of the stolen property soon after the theft. What interval of time is acceptable depends on the circumstances, and the nature of the property, how easily moveable or disposable it is.

It also depends on there being criminative circumstances associated with that possession. What amounts to criminative circumstances depends on the facts of the case. An example might be the goods not fitting in with their surroundings, like an original French Impressionist picture, or several TVs, or a bag with someone else's bank card or driving licence found in a room in a Social Security hostel. It might also be aroused by the accused's actions, eg trying to hide the property or to get rid of it.

So, in this case you could find the charge proved if you're satisfied that:

1. the accused was in possession of the stolen property
2. the interval between the theft and the discovery of the property was short, having regard to how easily transportable it is
3. there were criminative circumstances in the sense I've described.

[416] *Stair Encyclopaedia*, supra, at para 754(5).

[417] *Fox v Patterson*, 1948 JC 104. But see G H Gordon "*The Burden of Proof on the Accused*", 1968 SLT (News) 29, 37 at 40-43; *McDonald v HM Advocate*, 1990 JC 40, 44 (opinion of the court).

[418] *Cameron v HM Advocate*, 1959 JC 59, 65 per LJ-G Clyde.

[419] *Brannan v HM Advocate*, 1954 JC 87, 89 per LJ-G Cooper.

[420] *Wightman v HM Advocate*, 1959 JC 44.

[421] *McDonald v HM Advocate* 1989 SCCR 559, 562 A-B

Res Gestae Statement

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1. Law

2. Possible form of direction on Res Gestae Statement

Law

Walkers on Evidence, 3rd ed, paras 8.5.1 – 8.5.3, Davidson, *Evidence* paras 12.20ff, Raitt, *Evidence* 4th ed, paras 11.17 – 11.23

A res gestae statement may be viewed either as secondary hearsay or as a part of the relevant incident itself. Either way it is evidence of the truth of its contents.[422] That much is quite clear, and the appropriate direction is simple. However care requires to be taken in determining whether a statement is res gestae or de recenti, and the observations in *Cinci v HM Advocate*[423] cast doubt on the soundness of the observations made in *O'Hara v Central SMT Co*.[424] Res gestae contemplates the events occurring up to and including the crime libelled, but not reports by persons made after the event has ceased.The current fluid state of the law is well described by Professor Fraser P. Davidson, *Evidence* (2007) 12.13 et seq.

Possible form of direction on Res Gestae Statement

"There has been evidence from the witness [X] who heard……

That is something said as part of the events which were happening at the time of this incident.

In assessing its significance you may want to bear in mind that it is a report of what was said. You did not hear from the person who said it. While the evidence of the witness who heard it can be tested by cross-examination, the maker of the statement has not been cross-examined. So, what significance you want to give this piece of evidence is for you to decide.

If you decide that what was heard was the truth, you can regard what was said as part of the case against the accused.

If that is your view, this piece of evidence is actual evidence. It is an independent piece of evidence in the case against the accused. It can corroborate other evidence against him, or be corroborated by other evidence."

[422] eg *Hamill v HM Advocate* 1999 SCCR 384, 1999 JC 190, 1999 SLT 963

[423] 2004 SCCR 267, 2004 JC 103, 2004 SLT 748. For a more recent examination of the legal position

see *O'Shea v HM Advocate* 2014 HCJAC 137

[424] 1941 SC 363, 1941 SLT 202

Section 275A: Disclosure of Previous Convictions to Jury when Complainer's Character Attached in Sexual Case

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1. Law

2. Possible form of direction on section 275A

2.1. So how do you deal with them?

2.2. If the accused gives evidence or evidence of a mixed statement has been given:

Law

Renton & Brown *Criminal Procedure Legislation* Vol I A4- 535.1-535.1.1 Renton & Brown *Criminal Procedure* 24-163.2.

1Section 275A of the Criminal Procedure (Scotland) Act 1995 was introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2004, section 10(4) with effect from 1 November 2002. When an accused has made a successful application under section 275 of the Act to allow the questioning of the complainer as to her character or sexual behaviour, the prosecutor is required to place before the judge any previous relevant conviction of the accused.[425]

2 A relevant conviction is one to which section 288 of the Act applies or where a substantial sexual element was present in the commission of the offence of which the accused was convicted.[426] Any such conviction has to have been served on the accused by the customary notice at the time the indictment was served.[427]

3 The background to the development of section 275 procedure is to be found in *MM v HMA* 2004 SCCR 658 which also held the provisions to be ECHR compliant. In the case of *HMA v DS* 2005 SCCR 655 and [2007] UKPC 36 it was held that the section 275A provisions did not offend against article 6 of the ECHR.

4 An accused whose application under section 275 has been granted by the court can still argue that disclosure of his relevant previous convictions should not follow automatically. The accused would have to demonstrate that such disclosure would be disproportionately harmful to his fair trial when set against the limited purpose of his application.[428] Previous convictions may point to a propensity on the accused's part to commit crimes of the sort charged, and that may be taken into account by the jury in deciding if the Crown case is proved,[429] but they cannot supply corroboration.

5 Where there is no objection to the conviction by the accused and/or the judge decides

disclosure of such a conviction is in the interests of justice, then it should be laid before the jury as and when the accused leads evidence in term of the section 275 notice or puts questions which had been allowed on his application.[430]

Possible form of direction on section 275A

In this case certain previous convictions relating to the accused have been put before you. I want to say something about how that comes about, and how you should deal with them.

The defence have asked questions aimed at showing, or tending to show, that the complainer: (where appropriate)

- is not of good character in relation to sexual matters, or otherwise;
- has been involved in sexual conduct apart from that charged;
- has engaged in behaviour from which it might be inferred that she is likely to have consented to what took place, or is not a credible and reliable witness.

In that situation Parliament has legislated that it is right and fair you should be made aware of the accused's relevant previous convictions. Those you have just seen are relevant convictions; they all have a sexual element. Parliament says, in a case like this, these convictions "shall be laid before the jury". That is done to provide a balanced picture.

On the one hand the defence may say, in the past the complainer has shown certain tendencies in sexual conduct and is therefore likely to have consented to what happened, or likely to be untruthful in what she has said about this particular matter.

On the other hand the Crown may say the accused's previous convictions point to his propensity to commit crimes of the sort charged here, which increases the likelihood of his having committed this one, or makes it likely he is being untruthful in what he has said about this particular matter.

So how do you deal with them?

The accused's record cannot be used to bolster up a weak prosecution case; it cannot be used to create prejudice against him. You cannot conclude he is guilty of this crime just because he has these previous convictions. They may show his propensity to commit crimes of this sort, but they do not mean that he has committed the crime charged here. They are not proof of his guilt of the crime charged, or corroboration of other evidence pointing to his guilt. They only point to propensity. Whether they do show that is something you have to decide. In doing that you will have to take into account what the accused has said about them. If your view is they do show that propensity, you can take that into account in deciding if you accept the Crown case. But remember, it is only one relevant factor, and its significance has to be looked at in light of the other evidence in the case.

If the accused gives evidence or evidence of a mixed statement has been given:

In addition, you can take these previous convictions into consideration in judging the accused's credibility. On the one hand you maybe think because he has got these convictions already, it is not likely he is telling the truth about the crime now charged. On the other hand you might think it does not follow that just because he has got these previous convictions he is not telling the truth

now. So, in assessing the accused's evidence, what you will have to decide is whether or not the existence of these previous convictions has a bearing on the credibility of his version of events.

[425] s.275A(1) of Criminal Procedure (Scotland) Act 1995.

[426] see s.275A(10)

[427] see s275A(11)

[428] HMA v DS *supra*. para [21

[429] *DS v HMA* [2007] UKPC 36 at paras [53], [86] and [104]; *HMA v DS* 2007 SCCR 222

[430] HMA v DS *supra*. P.663F; para [9];

Section 288BA- Dockets

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1. Law

2. Possible form of direction in relation to S.288BA: Dockets

Law

Section 288BA of the Criminal Procedure (Scotland) Act 1995 provides for dockets to be appended to the indictment in Sexual Offences. The section should be referred to.

Practice Note No.2 of 2016 has been issued by the Lord Justice General. It provides that the docket should be given to the jury and that it should be read out to the jury at the same time as the charge is read to them.

The act or omission connected with the offence charged must relate to the same event, or series of events, as the offence charged. It must also be "*specifiable by way of reference to a sexual offence*". This means that the act can be described as a sexual offence.[431]

In *AD v HM Advocate* 2018 SCCR 42 the following observations were made in relation to the operation of section 288BA:

- It can cover alleged criminal conduct occurring outwith the jurisdiction if it formed part of a sequence of events thus providing or assisting in providing corroboration of the offence(s) libelled in the indictment through the operation of *Moorov*. (*See* Corroboration: the Moorov Doctrine chapter)
- Conduct which had been ruled as having been time barred can still be included in a docket if it forms part of a sequence of events capable of providing corroboration as a result of the operation of *Moorov*.
- Similarly, conduct upon which the Crown renounced the right to prosecute or has resulted in an acquittal may be included.

The docket may include conduct which has resulted in a prior conviction. See *HM Advocate v- Moynihan* 2019 SCCR 61. There is no reason for the jury or the judge to be made aware or have reason to suspect that the accused has already been convicted (para.20) and there should not be any difficulty for the trial judge in formulating appropriate directions suitable to the circumstances (para.21).

In this instance the prosecution is not relying upon the conviction but rather the evidence of the complainer as to matters referred to in the docket. The information in the docket is background material which may, or may not, assist in establishing facts relevant to the proof of one or more of the charges.

In *HM Advocate v Adams* [2021] HCJAC 19 the court determined on appeal by the Crown that the Crown is entitled to libel, in the form of a docket, the occurrence of a penetrative sexual assault and rape in circumstances where the respondent had previously pled guilty in another jurisdiction to part of the docket charge. It is the evidence which would be allowed and not the conviction to which no reference should be made unless the accused chose to do so.

In *Fisher v HM Advocate* [2022] HCJAC 43 it was determined that although a docket referred to sexual conduct involving another complainer of which the accused had been acquitted, the docket was not incompetent, oppressive, did not impugn the presumption of innocence in article 6.2 ECHR and was not in breach of article 8 ECHR. The court did require that references to "sexual assault" and to the 2009 Act should be deleted. The docket should state simply the facts, evidence of which is potentially corroborative of that of the complainer in the two charges on the indictment.

For further guidance in relation to directions to be given regarding dockets see *HM Advocate v Moynihan* 2018 SCCR 61 para 15 :

> *"It would be a matter for the trial judge in each case to determine whether any explanation need be given, but as a generality we would not have thought it desirable to explain, for example, that the matter in the docket is time barred, or that the Lord Advocate had renounced the right to prosecute in respect of it. All the jury need be told is that the docket is not a charge, that they need not return a verdict on it, that the purpose of it is to give notice that evidence of the matter there referred to may be led, with further directions as to the use they may make of it. Any danger of speculation about the reason for the matter appearing in the docket, whatever that reason might be, would be guarded against by giving standard directions that jurors must not indulge in speculation, supplemented by any additional directions which the trial judge might think necessary. There are many circumstances in which a Trial Judge feels it necessary to warn the jury strongly against speculation of any kind."*

Possible form of direction in relation to S.288BA: Dockets

"Before turning to the charges themselves, I just wish to say something about the last part of the indictment, the part beginning "Take notice" etc. The sole purpose of such a docket is to give notice to the defence that certain evidence will be led which might suggest that such actions took place. You can of course consider the evidence led as it is evidence in the case. Normally evidence is not allowed to be led by the Crown which suggests an accused might have been responsible for a criminal act which is not charged on the indictment. However legislation has been enacted which allows such evidence to be led in certain limited instances. Firstly the alleged criminal act must be connected with a sexual offence charged on the indictment in that it relates to the same event as the offence charged or a series of events which includes the charge on the indictment. In this instance the Crown (specify the purpose detailed by the Crown). The defence say that the evidence led as a result of this notice is of no significance to the charges which you have to consider."

"As I said to you at the start of the trial the notice does not comprise a separate charge and you do not have to consider returning a verdict upon the accused of the matters mentioned in the notice. The evidence led in relation to the notice is however evidence in the case and you will have to assess it when considering your verdict on the charges on the indictment to which it is connected assuming you accept there is such a connection. The only matter for you to consider is whether

you are satisfied that the witness(es) speaking to matters specified in the docket can be treated by you as credible and reliable (specify how that is done)."

[431] see *RKS v HM Advocate* 2020 HCJAC 19 at paragraph 23

Section 288DA /DB- MANDATORY DIRECTIONS on abusive behaviour and sexual harm

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1. Directions regarding lack of communication about the offence and absence of physical resistance or physical force

2. Possible form of direction in relation to s.288DA: Lack of communication about offence

3. Possible form of direction in relation to s.288DB(1) and s.288DB(4): Absence of physical resistance or physical force

Directions regarding lack of communication about the offence and absence of physical resistance or physical force

Directions as to a failure to report or disclose, and the absence of resistance by the complainer or force by the accused, are required in circumstances where these issues are raised during the trial.[432] The relevant sections should be consulted. Possible forms of directions are set out below.

Possible form of direction in relation to s.288DA: Lack of communication about offence

Section 288DA: Lack of communication about offence

“Members of the jury, you heard [adapt as appropriate] evidence suggesting that the complainer did not tell, or delayed in telling, anyone/a particular person about an offence, or did not report, or delayed in reporting it to the police. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature.

When you come to consider your verdict, you will have to consider these matters. But you will need to bear in mind that there can be good reasons why a person against whom a sexual offence is committed may not tell anyone about it, may not report it or may delay in doing so. This does not, therefore, necessarily mean that the allegation is false.

[if appropriate] You will also have to consider the explanations given for this.”

Bear in mind the 'material' exception in section 288DA(3).

Possible form of direction in relation to s.288DB(1) and s.288DB(4): Absence of physical resistance or physical force

Section 288DB(1) and s.288DB(4): Absence of physical resistance or physical force

“Members of the jury, you heard [adapt as appropriate] evidence suggesting that sexual activity took place without physical force being used to overcome the will of the complainer or without physical resistance on the part of the complainer. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature. When you come to consider your verdict, you will have to consider these matters. But you will need to bear in mind that there can be good reasons why sexual activity can take place without someone using physical force to overcome the will of the complainer or without physical resistance from the complainer. The fact that a person has not used physical force or that the complainer has not physically resisted does not necessarily mean that the allegation is false. [If appropriate] You will also have to consider the explanations given as to why there was no physical force or resistance.“

Bear in mind the 'material' exception in section 288DB(3) and section 288DB(6).

[432] *MacDonald v HMA* 2020 SCCR 251 para 46

Self-Defence

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON SELF-DEFENCE

LAW

1 Self-defence will be made out if the accused believed on reasonable grounds that the danger was imminent, even although that belief was founded on a mistake of fact.[433] Any mistaken belief must have had an objective background and cannot be purely subjective, or of the nature of a hallucination.[434]

2 The danger anticipated must be personal danger, not material loss,[435] and the assault giving rise to the danger must have started or be on the point of starting.[436]

No cruel excess

3 There must be no cruel excess of violence in the accused's retaliation. The protection which the law affords to the victim of an attack is not a licence to use force grossly in excess of that necessary to defend himself. That is the foundation on which the plea itself is based.[437] In illustrating the meaning of "cruel excess" to the jury the trial judge may use phrases such as "*not to weigh in too fine scales*" and "*making allowance for the excitement or state of fear or heat of blood at the moment of attack*". Such phrases are not, however, statements of the law to be applied, and it is not mandatory to use them, provided that the language of the charge is precise and positive, and the degree of excess which will elide the defence is stated to be "cruel".[438]

No reasonable means of escape

4 The means of escape or retreat must be of a kind the accused can reasonably be expected to adopt,[439] it is more precise when charging a jury to use the qualification "reasonable" when referring to the means of escape and explain its meaning to the jury.[440]

4a Where an accused alleges that he had acted in defence of a third party, no question of avoiding the attack by escaping the scene can arise, since that is inconsistent with intervention on another's behalf. In such a case the direction should focus on whether the violence had been used only as a

last resort. That may take the form of a direction that any violence used by the accused must have been necessary to prevent or stop the violence being offered to the third party. The direction must make clear how the principles and conditions of self defence apply to the particular circumstances of the case.[441]

Miscellaneous points

5 A private individual will be justified in killing in defence of his life against imminent danger, of the lives of others connected with him from similar peril, or a woman or her friends in resisting an attempt at rape.[442] A defence of self-defence is competent in answer to a charge of murder, culpable homicide or assault.

6 Where at trial the competing versions of the facts given by the prosecution and defence respectively raise a simple issue of credibility, the accused's version plainly putting self-defence in issue, there is no need to explain to the jury the legal requirements of the defence.[443]

7 It is not accurate to say that a person who kills someone in a quarrel which he himself started, by provoking it or entering into it willingly, cannot plead self-defence if his victim then retaliates. The question whether the plea of self defence is available depends, in a case of that kind, on whether the retaliation is such that the accused is entitled then to protect himself. That depends upon whether the violence offered by the victim was so out of proportion to the accused's own actings as to give rise to the reasonable apprehension that he was in immediate danger from which he had no other means of escape, and whether the violence was no more that was necessary to preserve his own life or protect himself from serious injury.[444]

8 In order to succeed the Crown must negative the special defence. "*All that requires to be said of the special defence, where any evidence in support of it has been given, either in the course of the Crown case or by the accused himself or by any witness led for the defence, is that if that evidence, whether from one or more witnesses, is believed, or creates in the minds of the jury reasonable doubt as to the guilt of the accused in the matters libelled, the Crown case must fail and that they must acquit*".[445]

9 If an accused lodges and thereafter withdraws a special defence of self-defence, it is competent to cross-examine him as to why he lodged it where he subsequently gives evidence which would be inconsistent with such a defence.[446]

10 A special defence of self-defence should be left with the jury to consider if there was some evidence, however slight, on which a jury might come to the view that the Crown had not discharged the onus of proof resting upon it.[447]

11 Where the Crown's case was that the accused's account involving self- defence was untruthful, and where no mention of provocation was made in the jury speeches, the court may still require to give directions on provocation.[448]

12 "*It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.*"[449]

13 The directions given should be restricted to the terms of the notice lodged. Thus criticism of a direction which did not deal with the defence of another person may not be justified, where the

notice simply referred to the defence of the accused.[450]

See also chapter on PROVOCATION above.

POSSIBLE FORM OF DIRECTION ON SELF-DEFENCE

"In this case the accused has lodged a special defence of self-defence. That was read out to you at the start of the trial, and you have a copy of it.

The only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. It doesn't take away from the accused's stance that he is not guilty. It does not take away from the requirement on the Crown to prove the case against the accused beyond reasonable doubt. The defence do not need to lead evidence in support of it. They do not need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it is believed, or if it raises a reasonable doubt, an acquittal must result. In this case the accused is saying that at the time the crime was committed he was acting in self- defence. Hence he should be acquitted of the charge. It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

In our law, if a person is attacked, or is in reasonable fear of attack, he is entitled deliberately to use such force as is needed to ward off that attack. (That applies also if it is a friend or relative who is in danger.) So, the accused would not be guilty of the crime now charged if he acted in self-defence. He would be acquitted.

That would happen if, and only if, each of these three circumstances exist:

(1) The accused must have been attacked, or had reason to believe he (or his companion) was in imminent danger of (in homicide case) death or serious injury/(in assault case) attack, and acted in that belief. The danger must be immediate, not in the future. The belief must have been based on reasonable grounds, even though they turn out to have been mistaken. A mistaken belief must have an objective background. It can't be purely subjective, or of the nature of a hallucination.

(2) The accused can only use violence as a last resort. If there were other ways he could reasonably have avoided the attack, he should have taken them.

(In case of defence of one's self)

If there was a safe means of escape, that is the course he should have taken.

(In case of defence of another)

If intervention short of violence would have been adequate to protect the [third party], that is the course he should have taken.

(3) It was necessary for the accused to use force, and he used no more than a reasonable amount of force. Self-defence is simply to stop an attack. It is not a licence to use force grossly in excess of what is needed for his defence. There must be no cruel excess. If he went beyond what you thought was reasonable force, if a defensive act became an offensive one, he would be guilty of assault. Similarly, he cannot, for example, use fatal force in response to an attack that's obviously not life-threatening. Again, if he acted in revenge, retaliation or anger, that would be a criminal

assault, not self-defence. For example, if he was under attack himself, if there was a safe means of escape that is the course he should have taken.

(In a case where defence of another arises)

If he was defending a friend was there any other way the attack or continuation of the attack could have been avoided?

I want to say a little more to you about the third circumstance, that only a reasonable amount of force is permissible in self-defence.

Here, according to the defence, a threat of attack was met by the use of a knife. How does the law view that? Normally striking someone with a fist would not justify retaliating with a knife because there is no real proportion between a blow with a fist and retaliation with a knife. Essentially, I am saying the retaliation has to be proportionate to the attack. But it may be there are some very exceptional circumstances where a blunt-force attack, actual or anticipated, may be met by the use of a knife. But whether these exist in this case, and whether that is a reasonable response, are matters to be decided, not by the law, but by your view of the facts. That is something you will have to consider with care in this case.

In applying these tests, you have to allow for fear, and the heat of the moment. Do not judge the accused's actions too finely. Take a broad and reasonable approach to the type and degree of violence he faced, and the type and scale of force in his response.

If you think that each one of these three circumstances exist, you would hold the accused had acted in self defence, and acquit him of this charge."

(self-defence in a quarrel)

"Because an accused has been involved in a breach of the peace/started an argument/ joined in a fight does not mean that he cannot claim self-defence.

If, say, someone insulted or abused another person verbally, and that person attacked physically or threatened him with a weapon, the first person would be entitled to defend himself. Similarly, if, say, someone started a fight by punching another person, and that person responded with a disproportionate degree of violence, the first person could then use equal force to protect himself.

So, self-defence can be claimed by the original attacker or the person attacked. Whether or not it can be claimed successfully depends on the circumstances."

(where self-defence applies to only part of the charge)

This charge raises an issue that requires careful consideration. It alleges that the accused assaulted (refer to the person mentioned in the charge by name) by

pushing him on the body,

punching him on the head,

striking him on the head with a bottle.

The accused appears to accept that he pushed and punched (refer to person mentioned in the charge by name), but says he did that in self-defence. As to the bottle, the Crown witnesses say the accused struck (refer to the person mentioned in the charge by name) on the head with it, and he says he did not.

So, on the bottle part of the charge the defence is not self-defence. The defence is "*It didn't happen*". In deciding this matter remember that the onus of proof is always on the Crown. It has to prove by acceptable corroborated evidence that the accused used the bottle on (refer to the person mentioned in the charge by name). If you think that has been proved, you would find the accused guilty of assault by use of the bottle. If you think that has not been proved, you simply delete that part of the charge.

That leaves the remainder of the charge. It is really only in the context of the pushing and punching that the issue of self-defence arises.

(Give definition of self-defence)

There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury.[451] It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position out-with the presence of the jury before parties address the jury.[452]

[433] *Owens v HMA*, 1946 JC 119, 126 per LJ-G Normand; *Crawford v HMA*, 1950 JC 67; *Jones v HMA*, 1990 JC 160, 171 per LJ-C Ross; *Jamieson v HMA*, 1994 SLT 537, 541 (opinion of the court); *Lieser v HMA* 2008 SCCR 797 at paras [7] and [10].

[434] Crawford, supra, p71.

[435] Macdonald, *Criminal Law*, p 107.

[436] Gordon, *supra*, para 24-11

[437] *Fenning v HMA*, 1985 JC 76, 81 per Lord Cameron.

[438] Fenning v HMA, *supra,* approved in *Friel v HMA*, 1998 SCCR 47.

[439] Gordon, supra, para, 24-12.

[440] *McBrearty v HMA*, 1999 SCCR 122.

[441] *Dewar v HMA* 2009 SCCR 548, 2009 JC 260, 2009 SLT 670 at para [12].

[442] Alison, *Criminal Law*,Vol 1, p 132, approved in *McCluskey v HMA*, 1959 JC 39, 42-43 per LJ-G Clyde.

[443] *Reid v HMA*, 1996 SLT 469, 470 (opinion of the court), approved in Friel v HMA, *supra*.

[444] *Burns v HMA*, 1995 JC 154, 158F-H (the opinion of the court).

[445] *Lambie v HMA*, 1973 JC 53, 59 (opinion of court of five judges). See also *HMA v Brogan*, 1964 SLT 204 per Lord Cameron.

[446] *Williamson v HMA*, 1980 JC 22 (opinion of the court).

[447] *White v HMA*, 1996 JC 187.

[448] *Ferguson v HMA* 2009 SCCR 78, 2009 SLT 67 and *Hopkinson v HMA* 2009 SCCR 225, 2009 SLT 292.

[449] *Henvey v HM Advocate* 2005 SCCR 282; 2005 SLT 384 Para [11].5

[450] *Hughes v HMA* [2009] HCJAC 35; 2009 SLT 325.

[451] *Carr v HMA* [2013] HCJAC 87.

[452] *Lucas v HMA* 2009 SCCR 892.

Skilled Witnesses and Expert Evidence

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Law

See generally; *Renton & Brown: Criminal Procedure*, para 24-162.1; *Walkers on Evidence* (3rd edn) chapter 16; Field & Raitt: *Evidence*, chapter 16; Davidson, *Evidence*; Sheldon: *Evidence*, chapter 10; *Stair Memorial Encyclopedia Reissue*: Evidence, paras 170 to 179.

1 For expert evidence to be admissible, its subject matter must fall outwith matters/areas of understanding that are within normal human knowledge and experience and be based on a recognised branch of knowledge. The evidence must not usurp the function of the jury.

The evidence of a skilled or expert witness must also, to be admissible, be necessary for the proper resolution of the matter at issue, such that the jury would be unable to reach a sound verdict without it. That will occur only where there are special features relating to the witness or their evidence that are likely to be outwith the jury's knowledge or experience. [453]

2 It is essential that expert witnesses have the relevant qualifications, competence, expertise and experience to speak to the matters they have been invited to give evidence on. These matters require to be clearly defined so that the competence of the witness to speak to that matter is readily identified and confirmed. The court requires to be satisfied that the expert witness has sufficient relevant expertise to assist the court. If such expertise is not established then the evidence of the expert witness is inadmissible whether or not any objection is taken. Questions of competence and experience of an expert witness are for the judge to determine. Accordingly, in the event that during the course of a trial it becomes apparent that an expert witness does not have the prerequisite competence and experience, the jury requires to be directed to disregard the evidence from the expert on matters upon which the witness does not have the necessary competence and expertise. However, provided the witness has such competence and expertise, issues as to whether the evidence from such a witness is discredited is a matter for the jury to determine.[454] Care should be taken to avoid placing too much emphasis on the notion that science is “developing”. The jury must reach a decision on the current state of scientific knowledge, and to consider how matters might develop in future is mere speculation. The most that can be said is that, if rapid developments have taken place, the certainty of current knowledge is perhaps

lessened.[455]

3 Expert evidence must be relevant to that issue (and so not concerned solely with collateral issues[456]), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue. The court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it.[457] Jury trials proceed on the basis that jurors, as persons of ordinary intelligence and experience, are capable of assessing the credibility and reliability of witnesses without expert assistance.

4 A handy conspectus of the general law applicable to expert witnesses is to be found in *McTear v Imperial Tobacco Ltd* 2005 2 SC 1 at pp 136 to 142. Reference should also be made to Fiona Raitt: Credibility and the Limits of Expert Evidence in Scots Law, 2003 JR 29 and Lisa Gillespie: Expert Evidence and Credibility, 2005 SLT (News) 53. See also the analysis by Lord Macphail in *HM Advocate v A* 2005 SLT 975; 2005 SCCR 593.

Although the decision of the Supreme Court in *Kennedy v Cordia (Services) LLP* 2016 SLT 209, 2016 SCLR 203 was delivered in the context of civil litigation, nonetheless the decision requires consideration. The Supreme Court emphasized four qualifications which expert evidence must satisfy. Firstly, would the skilled evidence assist the court? Secondly, did the witness have the necessary knowledge and experience? Thirdly, did the witness display impartiality in presentation and assessment? Finally, did a reliable body of knowledge or experience underpin the evidence of the expert? The most up to date observations made in a criminal context are those in *Young v HM Advocate* 2014 SLT 21 paras 54 and 55:

> *"54. Evidence about relevant matters which are not within the knowledge of everyday life reasonably to be imputed to a jury or other finder of fact may be admissible if it is likely to assist the jury or finder of fact in the proper determination of the issue before it. The expert evidence must be relevant to that issue (and so not concerned solely with collateral issues), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue; rather, it will risk confusing or distracting the finder of fact, or, worse still, cause the finder of fact to determine the crucial issue on the basis of unreliable or erroneous evidence. For this reason, the court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it. We agree with, and adopt, the general observations of the court with regard to evidence from a person claiming specialist knowledge and expertise which were made by the court in* Hainey v HM Advocate [2013] HCJAC 47*, particularly at paragraph [49].*

55. There are countless examples of evidence about such matters which are routinely regarded as based on sufficiently developed theories, which have sufficiently developed and certifiable methodologies, and produce results which have a practical effect and which may be weighed and assessed by a finder of fact that such evidence is admissible in court. So, scientific evidence about DNA comparisons, fingerprint evidence, evidence of medical practitioners or pathologists is evidence based on a sufficiently clear and reliable basis that it may assist the finder of fact, and will be admitted as evidence for the finder of fact to consider. It does not of course follow that the finder of fact will accept the evidence, in whole or in part —there may be conflicting evidence, or the finder of fact may not be satisfied by the evidence. But in order to be admissible, the evidence must have a sufficiently reliable foundation to be capable of assisting the finder of fact in the proper determination of the issue before it."

In the subsequent decision of *Jones v HM Advocate* 2016 HCJAC 65 paras 7 and 12, comment was made concerning the admissibility of the evidence from STOP officers in drugs trials under reference to the decision in *Kennedy v Cordia (Services)LLP*. The function of such a witness is to help the jury consider the situation as presented in the evidence by explaining matters which were within the experience of the witness but which were unlikely to be outwith the experience of the jury. By doing so the witness enables the jury to form their own independent judgment by an application of that explanation to the facts proved in evidence. It is not for the witness to consider matters and provide a concluded judgment. Accordingly, a jury requires to be directed that it is their decision to make and not the witness. The content of such a direction will depend upon the nature of the expert evidence, the extent and basis of any challenge, the issues to which the evidence is relevant, and the ways in which the parties seek to use it to address such issues. This is likely to involve an explanation of the witness' special knowledge and experience upon matters of which the jury may be unfamiliar in order to assist the jury in assessing the primary evidence led. Further the expert should be treated in the same way as any other witness. It was for the jury to assess the credibility and reliability of that witness. The directions will normally explain that because of that experience, the witness could be asked for an opinion but that the jury were free to accept or reject that opinion. The jury should be reminded that the decision was ultimately theirs to make. [458]

5 Because it is for the jury to decide, the general rule is that evidence affecting the credibility of a witness is not admissible, unless it is also relevant to a fact in issue.[459] Such evidence is also admissible where there is evidence that the witness suffered from a relevant mental illness. Thus in *Green v HM Advocate*,[460] additional evidence was allowed, at appeal, which showed inter alia that the complainer in a rape case was suffering from a psychiatric disorder which caused her to fantasise and have delusions. In *Grimmond v HM Advocate*,[461] general evidence from a psychologist about disclosure of information in stages by sex abuse victims, designed to support the credibility of the two complainers in a sodomy case, was excluded, in the absence of any psychiatric evidence of mental illness on their part. But it might have been admitted had there been such evidence.

6 Section 275C of the Criminal Procedure (Scotland) Act 1995 introduced by the Vulnerable Witnesses (Scotland) Act 2004 Section 5, now allows expert psychiatric or psychological evidence relating to any post-incident behaviour or statement of a complainer to be led, presumably by the Crown, in relevant sexual cases, for the purpose of rebutting any adverse inference on credibility or reliability of the complainer that might otherwise be drawn from that behaviour or statement.

This supercedes the decision in *Grimmond*. This provision is not limited in its application to cases where the complainer suffers from a mental disorder. It permits the leading of evidence showing why, in sex abuse cases for example, victims may behave in a particular way.

7 There are also certain circumstances in which expert evidence may competently be led by the defence. Its purpose is to assist the jury in assessing the quality of witness's evidence. Thus, in a child abuse case evidence can be led as to the general behaviour, reliability and susceptibility to manipulation of young children giving accounts of such abuse.[462] Where there is evidence of the complainer suffering from a medical condition evidence about the truthfulness or otherwise of statements by that particular witness would have been admissible.[463] But it is not competent to lead evidence from someone, who is not an expert, to the effect that a child complainer has a tendency to tell lies.[464]

8 Expert evidence may also competently be led about the unlikelihood of police officers remembering an accused's statement *verbatim*, in virtually the same terms, in the absence of any comparison of their notes.[465]

9 Particular care is required in cases in which the determination of guilt turns on complex scientific or medical evidence. For example, in cases involving the deaths of infants at the hands of a carer, in many instances there is no direct evidence as to alleged criminal conduct. The case is largely founded upon inferences to be drawn from medical evidence. If guilt is to be established, it is necessary for the jury to exclude not only any natural explanations for the death suggested in the evidence, but also any realistic possibility of there being an unknown cause for the death of the child. If there is evidence of a realistic possibility of the death being caused by an unknown cause, the jury should be reminded that such a possibility requires to be excluded before they can convict. Likewise they would require to be reminded that a conviction can only follow the exclusion of any natural cause of death suggested in evidence. This requires to be undertaken even although the defence may have declined to do so.[466]The trial judge requires to provide a succinct balanced review of the central factual matters for the jury's determination, not a summary of the evidence given.[467] The trial judge does not, however, require to conduct an independent audit of the evidence in order to extract all the main points which he considers might be regarded by the jury as favouring one verdict or another.[468] Where natural causes for the death are suggested in evidence, it is recommended to remind the jury of these including a brief explanation of the evidential basis for each. Thereafter the jury should be directed that if they consider such to be a cause of the death or it raises a reasonable doubt, then the accused requires to be acquitted. Where it is relevant to do so, the jury should be reminded that today's scientific orthodoxy may become tomorrow's outdated learning and in cases where developing medical science is relevant they should be instructed that special caution is needed where expert opinion evidence is fundamental to the prosecution. To leave the technical evidence at large for the jury is likely to amount to a misdirection. Rather they must be directed as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon and that which should be rejected. Where relevant, the jury should be asked to consider whether the expert has, in the course of his evidence, assumed the role of an advocate, whether he has stepped outside his area of expertise, whether he was able to point to a recognised peer-reviewed source for his opinion, and whether his clinical experience is up to date and equal to that of others whose opinions he seeks to contradict.[469] However, care must be taken to avoid being condescending or patronising to juries by rehearsing evidence they have heard and require to assess, particularly in circumstances in which, albeit there is considerable expert evidence, the case does not have the intricacy or complexity of *Liehne* or *Hainey.*[470] It is important that not only the judge but also the

parties attempt to restrict their expositions of the issues within such bounds as the jury might reasonably be expected to operate. The jury must be able to grasp the issues and take an informed decision upon them without being overloaded with repetitive technical detail.[471]

Possible form of Direction on expert evidence as to credibility and reliability

"The defence say this statement by (X)/evidence from (X) should be disregarded by you. It relies on the views of Dr (Y). Put shortly, he said (outline general findings). So the defence are saying for these reasons (X's) interview/evidence/ statement cannot be relied on.

I want to say something about the role of the expert witness in a matter of this sort, and how you should deal with an expert's evidence. It is important to have this in context. Depending on what you think of it, Dr (Y's) evidence may have a bearing on how you view (X's) evidence.

As I have already said, you should treat an expert's evidence in the same way that you treat the evidence of any other witness in the case. Put generally, the expert's function is simply to guide you through a specialist area which lies outwith our normal day-to-day experience. That specialist knowledge is simply offered to you for your consideration, in your assessment of (X's) evidence. You can apply it to that assessment, or not. That is a matter for you.

In this case Dr (Y's) function is to inform you generally:

- about what the effects of this psychiatric disorder/mental condition/ personality disorder may be on a person's abilities to recall and recount/to tell the truth
- about the effects that being exposed to the sort of conduct said to have happened in this case may have on how information about it is disclosed
- about the susceptibilities of persons exposed to the sort of conduct said to have happened in this case to being influenced or manipulated
- about the capacities and capabilities or otherwise of those with learning difficulties
- about his examination of the accused/witness
- about his views on the interview and the basis for his conclusions.

If you do not accept the information Dr (Y) has given you, you disregard it in assessing the interview evidence/statement of (X). If you accept it, you can take it into consideration in assessing (X's) interview/evidence/statement, but you are not bound by his conclusions. You can use this information to form your own conclusions about (X's) evidence. You can use his evidence to help you:

- to assess conflicting pieces of evidence
- to decide whether or not the interview was fair
- to decide whether the statement/the witness is a reliable or an unreliable source of evidence.

If you thought (X's) interview/evidence/statement is unreliable you should exclude it from your consideration. On the other hand, if you thought it was credible and reliable, you then have to assess its significance."

Possible form of Direction where conflicting expert opinion has been given

"In this case you've heard evidence from experts called by each side, (X) on behalf of the Crown, and (Y) on behalf of the defence. It's quite common to have evidence of that sort in cases like this. We often encounter expert evidence on the effects of physical injuries, of poisons, of explosions, of mental disabilities, or about engineering, accountancy, or handwriting.

I want to say something about the role of the expert witness in a matter of this sort, and how you should deal with experts' evidence. It's important you see this evidence in its proper perspective, and place it in its correct context. Put generally, the expert's function is to guide you through a specialist area which lies outwith our normal day-to-day experience. Remember the expert's evidence relates only to one aspect of the case. You still have to consider the rest of the evidence.

Evidence like this is led to help you to decide on one particular aspect of this case, namely (X). It's been led to enable you to form your own judgment about that particular matter, and the conclusions you should draw from it.

You should treat an expert's evidence in the same way as you treat the evidence of any other witness in the case. His specialist knowledge is simply offered for your consideration. You can choose to accept it, or not. If there are reasons that persuade you it should be accepted, you can take it into account. If there are reasons that persuade you not to accept it, you can ignore it.

Here there are two experts putting forward contrary views. It's for you to decide whose opinion, if any, you accept."

With handwriting cases in particular

"One particular word of warning. I've already said you have to decide this case on the basis of the evidence you've heard from the witnesses. You don't make any investigations of your own. So you don't make any comparisons of the handwriting yourselves. You have to decide the issue that arises about the handwriting on the basis of the expert evidence you accept."

In infant death cases

"In this case you have heard no direct evidence of any alleged criminal actions on the part of the accused. Your verdict depends largely upon what inferences you can draw from the evidence you have heard from the various doctors who have been called as witnesses. (The trial judge requires to provide a succinct balanced review of the central factual matters for the jury's determination.) If you are to convict the accused you require to exclude not only any natural explanations for the death which have been suggested in the evidence, but also any realistic possibility of there being an unknown cause for the death of the child. If you cannot do that then you require to acquit the accused. (Where natural causes for the death are suggested in evidence, it is recommended to remind the jury of these including a brief explanation of the evidential basis for each.) If you consider such to be a cause of the death or it raises a reasonable doubt, then the accused requires to be acquitted."

[453] *Gage v HM Advocate* 2012 SCCR 161; *Wilson v HM Advocate* [2021] HCJAC 12, at para [49]

[454] For more detail see para [49] of *Hainey v HM Advocate* [2013] HCJAC 47. See also *Graham v HM Advocate* 2018 SCCR 347, at para 124

[455] *Carroll v HM Advocate* 2015 HCJAC 75

[456] *Wilson v HM Advocate* [2021] HCJAC 12 at paras [49] and [50]

[457] *Young v HM Advocate* 2014 SCCR 78. See also the commentary to the decision in 2014 SCL 98.

[458] *Mitchell v HM Advocate* 2017 HCJAC 60

[459] *Walkers on Evidence* (2nd edn) at para 1.6.2.

[460] 1983 SCCR 42

[461] 2002 SLT 508 at para [11]

[462] *F v HM Advocate*, 2002 SCCR 341 at para [23] of Lord McCluskey's opinion. In that case the absence of such evidence at trial supported a successful appeal based on defective representation.

[463] *McBrearty v HM Advocate* 2004 SCCR 337 at para [49], where evidence that the complainer was a pathological liar, was held to be relevant and admissible to the question of the complainer's ability to give truthful and reliable evidence. This case seems to widen the scope of circumstances in which such evidence is competent from what was contemplated by the trial judge in *Grimmond*, to the extent of applying to a personality disorder as distinct from a mental illness.

[464] *MacKay v HM Advocate*, 2004 SCCR 478 at para [9].

[465] *Campbell v HM Advocate*, 2004 SCCR 220 at para [51].

[466] *Younas v HM Advocate* 2014 SLT 1043, SCCR 628 at para 59

[467] *Younas v HM Advocate* at para 59

[468] *Younas v HM Advocate* at para 56, see also *Ramzan v HM Advocate* 2015 HCJAC 9

[469] *Liehne v HM Advocate*, 2011 SCCR 419; *Hainey v HM Advocate* [2013] HCJAC 47 para [52].

[470] *Younas v HM Advocate*at para 67

[471] *Geddes v HM Advocate* 2015 HCJAC 10 at para 99

Statements by Deceased or Unascertainable Witnesses, ETC. (Section 259)

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Law

See generally Criminal Procedure (Scotland) Act 1995, section 259; *Walkers on Evidence*, 2nd ed, paras 8.6.2 – 8.6.4; *Renton & Brown, Criminal Procedure*, paras 24-122/1 – 24-131.

1 What constitutes a statement for the purposes of the relevant provisions of the 1995 Act is determined in *Beurskens v HM Advocate* 2014 HCJAC 99. Any statement taken from a person which has been signed by that person or where what was said by a person has been recorded electronically will constitute a statement for the purposes of the relevant statutory provisions. The fact that the process in which the statement was made was one of precognition is of less significance insofar as the competency of the statement as evidence is concerned. A precognition was held to take on a different character once it was read over to the maker and that person acknowledged the truth of its contents by signing the document. Provided the maker of the statement signs the document containing an account of events attributable to that person's knowledge, then in normal circumstances that will result in the document being classified as a statement for the purposes of the relevant statutory provisions.

2 Section 259(1) of the Criminal Procedure (Scotland) Act 1995 provides that evidence of statements of certain persons may be admissible as evidence of any matter contained in them. For such a statement to be admissible the judge must be satisfied that:

a. the person will not give evidence for one of the reasons mentioned in section 259(2);
b. the evidence would be admissible if that person gave direct oral evidence of it;[472]
c. that person would have been a competent witness in the proceedings at the time the statement was made; and
d. there is evidence which would entitle the judge to find that the statement was made and
    i. is in a document or
    ii. the person giving oral evidence about it has personal knowledge of the making of it.

3 The reasons for which such hearsay evidence may be permitted are that the person who made the statement:

a. is dead or is, by reason of bodily or mental condition, unfit or unable to give evidence in

any competent manner;

b. is outwith the UK and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;
c. cannot be found and all reasonable steps, which could have been taken, have been taken;
d. having been authorised by the court that he is entitled to refuse to give evidence on the ground that such evidence might incriminate him, refuses to give such evidence; or
e. is called as a witness and either
    i. refuses to take the oath or affirmation or
    ii. having been sworn and directed to give evidence, refuses to do so.[473]

Section 259 does not cover cases where an oral witness has forgotten their evidence. [474]

4 Section 259(1) of the 1995 Act provides that evidence of a statement made by a person otherwise than while giving oral evidence in court in criminal proceedings is admissible in those proceedings as evidence of a matter contained in the statement. This is merely a general provision that hearsay evidence, as so described, is admissible in criminal proceedings. Evidence of a statement given in evidence in a previous trial could, therefore, be admissible in a subsequent trial.[475] In Human Rights jurisprudence there is no absolute rule that the defence must have some opportunity to question the maker of the statement at some stage in the proceedings. The defence could precognose and cross-examine the taker of the statement as to matters which might undermine its maker's credibility, and could lead evidence which might challenge that, including evidence from the accused.[476] A fair trial may take place although not every witness against the accused has been made available to the defence for questioning. A violation of the right to a fair trial may arise if the conviction is based solely or to a decisive degree on statements by persons whom the accused has never had the opportunity to have examined.[477]

The issue is whether there is supporting evidence which adds sufficiently to the weight of the hearsay account in order that the hearsay evidence would not be understood as being decisive. The fact that the statement may provide the underlying foundation for a charge does not necessarily mean that it constitutes decisive evidence. The existence of supporting evidence may mean that the hearsay statement is not decisive.[478]

The trial judge must address the significance of any hearsay evidence and take appropriate steps to ensure that the accused's entitlement to a fair trial is not violated. In a jury trial that will involve giving appropriate directions to protect the accused against the disadvantage of the lack of opportunity to cross-examine.[479]

If the statement is decisive, consideration requires to be given to factors which may counter the effect of the absence of the witness. These can include whether the statements were signed by the witness, the use of this evidence is approached with caution, the directions given, the requirement of corroboration, the opportunity of the accused to give his account, and the opportunity to cast doubt on the credibility and reliability of the hearsay statement.[480]

5 The court has no discretion to disallow evidence under section 259 if the conditions of the section are satisfied.[481] Section 259 is not designed to deal with the situation where, for whatever reason, the witness, whilst capable of giving evidence generally, has forgotten about a particular event. In that situation, the witness can be asked, in terms of section 260, whether he "adopts" the statement bearing his signature. [482]

In a case where the wrong statement was appended to a section 259(5) notice, and in the course of the trial the Crown sought to lodge the correct statement relying on section 259(6)(b), the test to be applied is not whether there was good reason for allowing the evidence to be led, but whether there was good reason why the proper notice was not given.[483]

6 It is the continuing duty of the trial judge under Article 6 of ECHR to consider carefully the fairness of evidence admitted under section 259 as the trial progresses.[484] If it becomes clear that the hearsay evidence is unfair, the trial judge – (a) where the evidence has been led by the defence, will be entitled to direct the jury to disregard it; (b) where the evidence has been led by the Crown, may uphold a submission of no case to answer, desert the diet at his own hand, direct the jury to disregard it or direct the jury to acquit.[485]

7 Subject to exceptions, application has to be made to the court, by the party seeking to rely on the statement, before the trial diet.[486]

8 It is necessary to explain to the jury, in the course of the charge the nature of hearsay evidence and how it should be regarded. If the trial judges fails to give such explanation, there is a likelihood that the appeal court will hold that the failure amounts to a miscarriage of justice.[487]

9 Where it is appropriate for the hearsay evidence to go to the jury, fairness requires that the trial judge give explicit directions about the dangers inherent in such evidence. The trial judge should–

a. remind the jury that they may not have had the opportunity to assess the credibility and reliability of the maker of the statement;
b. point out that the truth of the statement has not been tested by cross- examination, or by the witness's demeanour;
c. if the statement was not made under oath or affirmation, comment on that fact;
d. direct the jury to assess the weight of such evidence with care; and (e) if there are dangers special to the facts of the case, such as the age or state of mind of the maker of the statement, any interest in the outcome, any improper motive, or any factor bearing on credibility and reliability, give explicit directions on that.[488]

10 That said, the Judge should be careful to ensure that such directions are appropriately balanced and that the issues are not unduly laboured, to the point of being condescending to the jury, bearing in mind the following dictum of the Lord Justice General (Carloway) in Wilson *(supra)*, at paragraph [54]:

> *"When directing a jury on the value of hearsay and the reasons for its general exclusion, but occasional admission, a trial judge may be well advised to direct the jury on these reasons. As ever, when doing so the judge should bear two general matters in mind. First, in relation to the assessment of credibility and reliability, which is pre-eminently a matter for the jury to determine, it is important not to be condescending to the jury (se eg Moynihan v HM Advocate, 2017 JC71, LJC (Carloway), delivering the opinion of the court, at para [22]), especially when the issues have already been extensively canvassed in the parties' speeches. There will seldom be any cause for the level of repetition which is prevalent in the trial judge's charge, following the cum nota warning already given at the time of the admission of the statements. A judge should take care not to impress upon a jury his or her*

views on what evidence ought, or ought not, to be accepted. Secondly, in ensuring that a fair trial takes place, the trial judge must have regard not only to the interests of the accused, but also to those of the public and the alleged victim in seeing that crime is properly and fairly prosecuted…. If a balanced view is to be maintained, a trial judge ought normally to point to those factors which might result in the hearsay being accepted as proof of fact as well as those pointing towards its rejection for that purpose. In this case, the judge's directions were heavily in favour of the latter and thus the appellant."

11 Section 259 of the 1995 Act does not apply to a statement by the accused.[489] Evidence of a statement by an accused may, however, be admissible under section 259 at the instance of another accused in the same proceedings as evidence in relation to that other accused.[490] Notice of intention to use such a statement must be given. Evidence of a statement by one accused, while not evidence against another accused, in so far as it relates to other matters such as his own involvement, may be used legitimately to support the credibility of the statement of a deceased witness, and may be used to support the credibility of that witness's evidence against the co-accused.[491]

12 Section 262(1) of the 1995 Act provides that a statement does not include a precognition. A statement taken from a witness by a police officer who is pursuing a line of inquiry suggested by earlier inquiries, which had not been taken on the instruction of the procurator fiscal, which used the words of the witness, and which had been checked and approved by the witness is not a precognition.[492]

Possible form of direction on hearsay statement by deceased witness, etc.

"You have heard a statement made to the police by [X] read out. That is hearsay, what somebody else has been heard to say. Normally that is not allowed as evidence in court. But there are exceptions to that rule and this is one of them because [x] is dead. And the circumstances which arise in this case allow evidence to be given about what [X] said to the police on [date].

If you are satisfied that [X] made that statement, and that it was accurately recorded and has been accurately reported to you by the police, you can regard its contents as part of the evidence in the case. It is evidence of facts you can take into account.

But you also have to decide if what [X] himself said is credible and reliable. His statement being read out is different from [X] giving evidence himself in court about these matters, because it is evidence at second-hand. You have to decide what weight to attach to it. So you should remember this in judging the credibility and reliability of what he said. It has not been given on oath in court. It has not been the subject of cross-examination. Cross-examination can reinforce or undermine the evidence of a witness. You have not seen [X] give it, so you have not had the sort of opportunity to assess him as a witness that you would have had, if had he given evidence. You have not seen his body language or how he responded to questioning by either side.

(If appropriate refer to any of the matters listed in the chapter on Statements outwith presence of accused - Possible Form of Direction.)

As with any piece of evidence, directly or indirectly given, you can compare [X's] statement with other evidence in the case, and judge whether it fits in with that or not. You can decide what effect consistencies and inconsistencies have.

You can also take into account what other evidence may tell you about the sort of person [X] was. That may bear on the credibility and reliability of his account.

If you decide [X's] statement is credible and reliable, it is then part of the evidence in the case. You have then to consider its significance.

So you will have to take care in assessing this evidence, and these are factors you may want to bear in mind."

NB

Another, more elaborate example of suitable direction is to be found in *Harkins v HMA* *supra* at para [19].

[472] *HM Advocate v Beggs (No 3),* 2001 SCCR 891 at para [8], 2002 SLT 153.

[473] See 1995 Act, s.259(2).

[474] *Glass* v HM Advocate 2018 SCCR 379

[475] *Nulty v HM Advocate*, 2003 SCCR 378, 2003 SLT 761.

[476] *HM Advocatev Bain,* 2001 SCCR 461 at paras [19] and [31], 2002 SLT 340.

[477] *Campbell v HM Advocate, Hill v HM Advocate*, 2003 SCCR 779 at paras [15] and [16], reported as *Campbell v HM Advocate*, at 2004 SLT 135.

[478] *Graham v HM Advocate* 2019 SCCR 19

[479] *Campbell*, supra, at para [17].

[480] see *Graham v HM Advocate* 2019 SCCR 19 and *Wilson v HM Advocate* [2021] HCJAC 12

[481] *Nulty v HM Advocate*, *supra*, at paras [22] and [23].

[482] *Glass v HM Advocate* 2018 SCCR 379.

[483] *McPhee v HM Advocate*, 2001 SCCR 674, 2002 SLT 90.

[484] *Nulty v HM Advocate*, supra, para [35]; *HM Advocate v Beggs (No 3),*supra, at para [30]; *Campbell v HM Advocate, Hill v HM Advocate*, supra; *Harkins v HM Advocate* [2008] HCJAC 69; 2008 GWD 39-583.

[485] *Nulty v HM Advocate*, *supra*, at para [36].

[486] See 1995 Act, s259(5) and (6).

[487] *Higgins v HM Advocate*, 1993 SCCR 542.

[488] *Nulty v HMA*, *supra,* at para [37]; *HMA v Bain*, supra; HM Advocate v Beggs (No 3), *supra*, at para [29]; *Daly v HM Advocate*, 2003 SCCR 393 at para [12], 2003 SLT 773; *McKenna v HM Advocate*, 2003 SCCR 399, 2003 SLT 769; Campbell v HM Advocate, Hill v HM Advocate*, supra*.

[489] See 1995 Act, s261(1). For admissibility of statements by an accused, see Statements Made to Police by Suspect below.

[490] 1995 Act, s261(2).

[491] *Potter v HM Advocate*, 2002 SCCR 980.

[492] *HM Advocate v Beggs (No 3),supra*, at para [24].

Statements made to police/investigators by suspect

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Introduction

The rules on the evidential value of statements made by accused persons differ according to:

a. whether they were made **before** or **after** the commencement of section 261ZA on **25 January 2018** and, if after that date,
b. (b) to whom they were made.

From 25 January 2018, with the commencement of section 261ZA of the Criminal Procedure (Scotland) Act 1995, statements made by accused persons to police officers or investigating officials, are no longer deemed to be hearsay as governed by the Morrison and McCutcheon rules and, subject to the general criterion of fairness which governs admissibility of such statements, generally admissible as evidence of any facts contained therein.

Section 261ZA provides as follows:

1. *"Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence's being*

hearsay.

2. *Subsection (1) applies to a statement made by the accused in the course of the accused's being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.*
3. *Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused."*

The Morrison and McCutcheon Rules in relation to admissibility of exculpatory and mixed statements are disapplied to statements made on or after 25 January 2018 which meet the foregoing criteria.

The law as explained in Morrison and McCutcheon continues to apply to all statements made before 25 January 2018 and to statements made to persons other than a constable, or another official, investigating an offence and this chapter should be read in conjunction with the guidance in the chapter on Morrison and McCutcheon.

In short, pre-25 January 2018 and for any statement made to someone other than a police officer/investigating official, statements against interest are evidence to prove facts, wholly exculpatory statements are not evidence to prove facts and
there are special rules relating to mixed statements.

Law

Stair Encyclopaedia, Evidence (Reissue) paras 244-245, 254-260, 271;

Renton and Brown *Criminal Procedure* (6th edition), Chapter 24.38-24.45.

1 Prior to 25 January 2018, the general rule was that the content of answers to police questioning about the alleged offence is admissible in evidence *against their maker* unless it was extracted by unfair means.

The content of any answers to police questioning on or after 25 January 2018 is admissible as evidence of any facts contained therein, whether against their maker, exculpatory of them or mixed – see below.

This chapter deals with the evidential value of such statements. In terms of section 79 of the 1995 Act, questions of admissibility relating to the manner in which such statements were obtained ought to have been raised and disposed of as a preliminary issue in advance of the trial diet. Where a party seeks to raise any objection to the admissibility of any evidence, including such statements at the trial diet, then the Court, in terms of section 79A (4) "…shall not, under section 79(1) of this Act, grant leave for the objection to be raised unless it considers that *it could not reasonably have been raised before that time".*

In the case of Bhowmick v HM Advocate 2018 SCCR 35the High Court underlined that the judge has a legal requirement to apply that test and only that test in relation to late objections of this nature, noting that "*there is no dispensing provision attached to the mandatory requirement provided for by section 79A(4).*" In that case, the trial judge had erred in making a conscious decision not to comply with the section on the basis that to do so might have, in the judge's view, jeopardised

the accused person's right to a fair trial.

With that in mind, it may be helpful to recap the law on admissibility against the remote possibility that it is raised competently at trial.

If a statement is challenged on the grounds of fairness, the issue of admissibility is determined in accordance with the following test:

> *"In each case where the admissibility of answers by a suspect to police questioning becomes an issue it will be necessary to consider the whole relevant circumstances in order to discover whether or not there has been unfairness on the part of the police ... unfairness may take many forms but "if answers are to be excluded they must be seen to have been extracted by unfair means which place cross examination, pressure and deception in close company" .... [W]here in the opinions [in] the decided cases the word 'interrogation' or the expression 'cross examination' are used in discussing unfair tactics on the part of the police they are to be understood to refer only to improper forms of questioning tainted with an element of bullying or pressure designed to break the will of the suspect or to force from him a confession against his will."*[493]

2 At the early stages of investigations, when a number of persons have to be eliminated from an inquiry and no individual is under suspicion, statements taken by the police are admissible, generally, even although no caution has been administered.[494]

3 Once suspicion has centred upon an individual, further police questioning has to be carried out with special care. Similar care is required in questioning a person who is questioned under the provisions of section 14 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act) (before 25 January 2018) or the provisions of the Criminal Justice (Scotland) Act 2016 ("the 2016 Act") (on or after 25 January 2018). Even if a suspect is informed of being under no obligation to say anything in terms of section 14 (9) of the 1995 Act (before 25 January 2018) or 31(2)(b) of the 2016 Act (after 25 January 2018), an incriminating statement made by him without a full common law caution having been administered is likely to be held inadmissible.[495]

4 Since a person may be arrested on grounds less strong than those required to bring a charge, there is no justification for a general rule that by arresting a person the police debar themselves from ordinary questioning thereafter fairly conducted.[496] This remains the position following the introduction of the 2016 Act.[497]

5 Statements obtained by threats or inducements are inadmissible.[498]

6 An accused person who, after having been charged, asks particularly to make a statement to the police officer in charge of their case, cannot object to that statement being admitted.[499]

7 A judge who has heard the evidence regarding the circumstances in which a statement was made must her/himself determine whether or not the evidence is admissible, even if that decision involves questions of fact: *Thompson v Crowe* 1999 SCCR 1003. At the conclusion of his opinion in that case, the Lord Justice General summarises the salient points of the decision as follows:

1. "Balloch *should be overruled. In all cases it is for the trial judge to decide whether*

any evidence, including evidence of a statement by the accused, is legally competent and can be led.

2. *The judge must decide any issues of fact which are necessary to enable that legal decision to be taken.*
3. *Since the trial judge has to determine any issue of fact before ruling on admissibility, if the facts are disputed, the judge must first hear all the relevant evidence, including any evidence which the accused wishes to give on the point.*
4. *If the defence ask for the evidence on admissibility to be heard in the absence of the jury, the judge should ordinarily grant that motion.*
5. *The Crown cannot use any evidence given by the accused in the trial within a trial as proof of his guilt. There may, however, be circumstances in which the accused can be cross-examined about that evidence if he subsequently gives evidence in the substantive trial which is materially different (cf.* Wong Kam-ming*). Other witnesses can, of course, be cross-examined on any differences in their evidence.*
6. *Where an issue arises on the evidence, it is for the Crown to satisfy the judge that the statement is admissible. The appropriate standard of proof would appear to be the balance of probabilities, as the defence conceded in this case.*
7. *The judge will exclude evidence of a statement if it was taken in circumstances which render it inadmissible under any rule laid down by the law. In other cases the judge will admit the statement if the Crown satisfy the judge that it would be fair to do so, by proving that the statement was made freely and voluntarily and was not extracted by unfair or improper means.*
8. *Any ruling on the admissibility of the evidence of a statement should be given, in both solemn and summary proceedings, after the evidence of the circumstances has been led and any submissions on the evidence have been heard. In this way, any defence submission that there is no case to answer will fall to be made on the basis of the legally admissible evidence led by the Crown.*
9. *Where the judge admits the evidence of a statement, evidence of the circumstances in which it was taken remains relevant to any determination of the weight which should be attached to it.*
10. *If the judge admits the evidence of a statement and fresh circumstances emerge in subsequent evidence which cast doubt on that ruling, the defence may renew their objection and invite the judge to reconsider the ruling. On reconsideration the judge may confirm or reverse the original ruling in the light of the new evidence. If the evidence of the statement has not yet been led, the judge may exclude it. If it has been led, the judge may direct the jury to disregard it or, if, because of its likely impact, the judge considers that the jury could not realistically be expected to put the evidence out of their minds, then, depending on the circumstances, the judge may desert the diet pro loco et tempore. In the case of a summary trial, the judge will disregard the evidence in reaching a verdict; only rarely would it be appropriate for the judge in a summary trial to desert the diet on the ground that it would be impossible to disregard the evidence in reaching a verdict*

8 In a trial within a trial to determine whether or not evidence has been fairly obtained, the judge should decide the relative strengths of the cases for and against admissibility on the balance of probabilities.[500] If they decide the evidence is admissible, they should not direct the jury that it must hold that the evidence was fairly obtained. The jury can decide for themselves, on the basis of the whole evidence, and in the light of considerations of fairness, what weight, if any, to give to that evidence.[501]

Appropriate directions tailored to the particular circumstances may have to be given.

9 Where the accuracy of what the accused is alleged to have said to the police is in issue the judge must give express directions that it is for the jury to decide whether the statement was made, to consider the reliability of what was allegedly said, to determine what this evidence amounts to and what if anything it establishes.[502]

The fact that the defence did not seek to have the statement ruled inadmissible in law and so excluded from consideration by the jury, did not obviate the need, in the particular circumstances of that case, where the evidence was critical to the Crown case and there were considerations bearing on the accuracy of the evidence and the weight to be given to it, for such a direction.[503]

10 Where an accused who has been cautioned replies "no comment" to questions put at interview , care should be taken to avoid leaving it open to the jury to draw an adverse inference about e.g. their knowledge of the existence of items recovered at search, about which they have been asked for an explanation. That is because any accused enjoys a right to silence at common law and in terms of s.14(9) of the 1995 Act (pre 25 January 2108) or s34 of 2016 Act (on or after 25 January 2018). For cases before 25 January 2018 reference should be made to s14(9) of the 1995 Act. A detained / arrested accused is under no obligation to answer any question other than to give their name, address, date and place of birth and nationality.[504] Likewise it is improper to leave it to the jury to draw an adverse inference about the credibility of an accused person in such circumstances. It is advisable to direct the jury specifically that no such adverse inference can be drawn.

This is essential if the prosecution suggests to the jury that such an inference could be drawn.[505]

Possible forms of Direction on Statements made to police by suspect

"In this case there has been evidence about what the accused said to the police when they voluntarily attended the police station/were detained[506]/ were taken into police custody in terms of the relevant legislation.

"As background, generally nobody is obliged to speak to the police or answer their questions when crimes are being investigated. But a person can voluntarily attend a police station which may occur if that person learns that officers wish to speak to them."

In cases involving detention pre 25 January 2018

"If a person is detained by police officers, during that period of detention they can be questioned. In those circumstances they are entitled to have their solicitor told of their detention. In addition they are entitled to have a private consultation with their solicitor before being interviewed by the officers and during questioning (if applicable) although, as in this case, the accused is perfectly entitled to decide against having such a consultation. Before the interview starts the suspect should be cautioned that they are not obliged to answer any questions, but if they do, the answers may be noted, tape recorded, and may be used in evidence"

In cases involving attending voluntarily or being taken into police custody on or after 25 January

"When a person is interviewed by police officers about an offence after attending voluntarily or being **taken into police custody,** that person has certain rights including being told about the general nature of the offence and the right to have a solicitor present during the interview. The accused, as here, can consent to being interviewed without a solicitor being present. Before the interview starts the suspect should be cautioned that they are not obliged to answer any questions, but if they do, the answers may be noted, tape recorded, and may be used in evidence."

(If applicable)

"In this case you have heard evidence that the accused refused to answer/answered the questions put to him/her by police officers (as appropriate) with the phrase 'no comment'. You cannot read anything adverse against the accused from their acting in this way in the interview. The fact that s/he did so cannot be held against him/her. The accused, in so acting, was simply exercising his/her rights."

Where the accused is recorded as answering questions

"Before you could take account of what the accused said you have to decide if s/he did say anything, if it has been accurately recorded, and in circumstances in which you can rely on the answers given."

Where no challenge

"Here there has been no challenge about there being any irregularity in the procedure followed *(on any of these grounds)*, and what was said is part of the evidence in the case.[507]

Where the statement was made before 25 January 2018*, the judge should select an appropriate direction from those within the* Morrison and McCutcheon chapter *and augment it as required according to whether there is any denial that the statement was made; any challenge to the accuracy of its recording; or any suggestion that the accused was lying to the police. If so, the following directions provide a starting point.*

If interview was on or after 25 January 2018

"Evidence of these answers to questions can be considered by you as evidence of any fact contained in those answers.

However, remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So, you decide what you make of it, and what weight you give it. As with any other evidence you can accept all of it, none of it, or you can accept some parts and reject other parts."

Where challenge on basis of denial that statement was made

"The defence say these things were never said by the accused. You have heard evidence from the police and from the accused about this. You decide who is telling the truth.

If you thought the accused had not said anything, exclude that part of the police evidence from your consideration. If you thought s/he had said what the police say s/he did, that is part of the evidence in the case and is evidence of any fact contained in the answer you decide was given).

However, remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So, you decide what you make of it, and what weight you give it. You have then to consider its significance."

Where challenge to accuracy of recording

"The defence maintains the accused said something different from what the police say s/he did. You have heard evidence of the two versions. You decide which is correct. You then have to consider its significance.[507]

Once you have reached your decision as to which version is the accurate one then that version becomes part of the evidence in the case of any fact contained in the answer you decide was given.

However remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So, you decide what you make of it, and what weight you give it. You have then to consider its significance."

Where alleged that statement to police was lies

"The accused has said that parts of what s/he said to the police are not true. If you believe s/he lied to the police, disregard those parts of what s/he said. If you disbelieve his/her evidence that s/he lied to the police, and if you think s/he told the police the truth, all s/he said is part of the evidence in the case of any fact contained in the answer)).[509] Always remember that what was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So, you decide what you make of it, and what weight you give it. You have then to consider its significance."

Where there are circumstances such as those in Chatham v HMA **bearing on the reliability of what was said and the weight to be attached to it by the jury it may be appropriate to direct along the following lines)**

"In this case the defence say that although the evidence of what the accused said to the police in interview is evidence in the case for you to consider, the circumstances in which the accused gave the answers are such that you cannot rely on what was said to the police. The Crown say that is not the case. Now you have to look at the circumstances in which these answers were given. It is for you to decide whether you can rely on the answers given and if so to what extent. What weight can you attach to them?"

[Note - It is suggested that any further directions in this regard are tailored to the point which the defence is making. Depending on the circumstances, it might be useful to refer to one or more of the following considerations, but unless they have possible relevance it will be unhelpful to mention them all or any which is plainly not in issue. If the defence do not take issue with the circumstances of the statement, then ordinarily such further directions would be superfluous and inappropriate.]

For example:

- What was the state of understanding on the part of the accused when the questions were asked?
- Were the questions clear or ambiguous?
- Was the information given to the accused accurate?
- Was there such inducement offered or pressure applied to the accused to answer the questions, such as bail not being opposed at any appearance from custody, [*or other circumstances as may arise in the particular case]*

that you cannot rely on the answers as being truthful?

If you decide that the answers were given in circumstances such that you cannot rely on them you ignore them. If you decide that you can rely on them then evidence of these answers to questioning can be considered by you as evidence.

[Depending upon the content of the answers the appropriate direction will be required as set out in the Morrison and McCutcheon Rules (Exculpatory and Mixed Statements) chapter**]**

[493] *Lord Advocate's Reference (No 1 of 1983),* 1984 JC 52, 58, 1984 SCCR 62, 69, per LJ-G Emslie.

[494] *Chalmers v HM Advocate*, 1954 JC 66, 78 per LJ-G Cooper.

[495] *Tonge v HM Advocate*, 1982 JC 130, 145 and 146 per LJ-G Emslie.

[496] *Johnston v HM Advocate*, 1993 SCCR 693, 702 per LJ-C Ross.

[497] see section 35 of the Criminal Justice Scotland Act 2016.

[498] *Harley v HM Advocate*, 1995 SCCR 595, 602 per LJ-C Ross.

[499] *Cordiner v HM Advocate*, 1991 SCCR 652.

[500] *Platt v HM Advocate*, 2004 SCCR 209, 212 at para [10], 2004 SLT 333, 335.

[501] *Platt, supra*, at 335G-H para [9].

[502] *Chatham v HM Advocate* 2005 SCCR 373 paras [13] to [15].

[503] *ibid*, at para [11].

[504] *Larkin v HM Advocate* 2005 SCCR 302 at para [10].

[505] *Dick v HM Advocate*2013 SCCR 96

[506] pre- 25 January 2018

[507] see below re Morrison and McCutcheon chapter re rules / directions on evidential status of exculpatory/mixed statements pre and post 25 January 2018.

[508] see below re Morrison and McCutcheon chapter re rules / directions on evidential status of exculpatory/mixed statements pre and post 25 January 2018.

[509] see below re Morrison and McCutcheon chapter re rules on evidential status of exculpatory/mixed statements pre and post 25 January 2018.

Statements outwith presence of accused

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON STATEMENTS OUTWITH PRESENCE OF THE ACCUSED

LAW

Legal Principles

1 Unless part of the res gestae, an extra-judicial statement made by one accused incriminating a co-accused in the absence of the latter is not generally admissible and a failure to direct the jury accordingly is likely to amount to a misdirection.[510] What amounts to such a statement depends on the circumstances. Accordingly when other evidence indicates that two persons were involved in the offence and the co accused mentions in the statement that 'some other boy' was involved, such a statement is not incriminatory.[511] Nor are such statements admissible for the purpose of assisting the co-accused in his defence.[512] This is subject to the following exception set out in section 261 of the Criminal Procedure (Scotland) Act 1995:-

(1) Subject to the following provisions of this section, nothing in sections 259 and 260 of this Act shall apply to a statement made by the accused.

(2) Evidence of a statement made by an accused shall be admissible by virtue of the said section 259 at the instance of another accused in the same proceedings as evidence in relation to that other accused.

(3) For the purposes of subsection (2) above, the first mentioned accused shall be deemed—

(a) where he does not give evidence in the proceedings, to be a witness refusing to give evidence in connection with the subject matter of the statement as mentioned in paragraph (e) of subsection (2) of the said section 259; and

(b) to have been, at the time the statement was made, a competent witness in the proceedings.

(4) Evidence of a statement shall not be admissible as mentioned in subsection (2) above unless the accused at whose instance it is sought to be admitted has given notice of his intention to do so as mentioned in subsection (5) of the said section 259; but subsection (6) of that section shall not apply in the case of notice required to be given by virtue of this subsection.

2 "A statement by another person, whether or not that person is a co-accused, made in the presence of an accused, is not in itself evidence against that accused. The accused's reaction to that statement, or indeed his failure to react to it where it is incriminative is, however, evidence against him in the same way as a statement made by him, silence in the face of accusation being

capable of being construed as an admission of guilt. The evidence of the other person's statement is therefore admissible for the limited purpose of explaining the accused's reaction."[513] This must be read subject to the general admissibility of statements forming part of the res gestae discussed immediately below.

3 Anything spoken or written by one accused (or indeed anybody) relevant to proof of the commission of the crime and/or its perpetrators and forming part of the res gestae is admissible in evidence against all of them.[514] This is confined to evidence of things said in furtherance of the common purpose and does not apply to statements, claims, or allegations made after the common purpose has been achieved or failed. [515] Unless forming part of the res gestae, the statement is evidence only against the accused who made it. [516] If, after the crime has been committed, a statement is made to the police, or anyone else, outwith the presence of another accused, it is inadmissible against that other accused. [517]

4 Where there is evidence of written communications such as text, Facebook or WhatsApp messages which were part of the commission of the offence and form part of the *res gestae*, the contents are capable of incriminating all the accused, whether or not a particular accused sent or received the communication, since they are pieces of evidence capable of showing what was going on and who was involved. There is no need for the crown to prove concert in advance or that the accused whose case is under consideration was at that time acting in concert. The content of, for example, messages may themselves ultimately prove that the accused were acting in concert and so guilty of the crime. [518]

Where a co-accused is not ultimately proved to have been acting in concert, his statements, if part of the res gestae, are nonetheless available in the case against other accused. [519]

5 Where a co-accused tenders a plea of guilty and then gives evidence for the Crown in the same matter, it does not follow that some direction or advice from the trial judge, effectively amounting to a cum nota warning, is required. Provided the issue has been properly focused by each side, the proper course is not to mention the matter, and leave it to the jury. [520]

6 Evidence of incriminating statements made by a co-accused, who has been incriminated, is admissible against the co-accused while he remains a co-accused. But if he is acquitted that evidence, unless part of the res gestae (see paragraph 5 above), becomes hearsay, and is not available to the remaining accused for any purpose. The jury should be told to ignore it.[521]

7 An accused, in the course of his evidence. may be asked about a self-serving prior statement to the police for the purpose of supporting his credibility, even if it may incriminate a co-accused by implication. In such circumstances the trial judge should simply give the usual directions that the statement may assert or support the accused's credibility, but that it is not evidence against the co-accused. [522]

8 An accused wishing to elicit evidence about a statement made by a co-accused outwith his presence can proceed in one of two ways:

(1) If the co-accused gives evidence on his own behalf, s 266 of the 1995 Act makes him a competent witness for the defence. S 266(9)(b) allows another accused, and s 266(3) allows the Crown, to ask him any question in cross-examination. That includes questions about the

statement. Under s 263(4) he may be cross-examined by the accused, or the Crown, about differences between his statement and his evidence in court.

(2) If the co-accused does not give evidence, the accused can lead evidence of the content of the co-accused's statement, provided the requirements of s 259 and s 261 of the 1995 Act are met, and the appropriate notice under s 259(5) and (5A) has been given. These provisions have no application until the co-accused has decided not to give evidence. [523]

POSSIBLE FORM OF DIRECTION ON STATEMENTS OUTWITH PRESENCE OF THE ACCUSED

1. Statements forming part of the res gestae

What is said or written by an accused or anyone else which is part of the preparation for or commission of the crime is available as evidence to implicate the accused in the commission of the crime itself or as acting in concert with others in its commission. If those statements/messages were made/sent prior to or at the time of the events giving rise to the charge, they are available as evidence against each accused. That is so whether the accused whose case you are considering was present at the time or not or whether the particular accused received the message or not.

The directions proposed in the four scenarios which follow will almost certainly require to be adjusted to the particular circumstances of the case, given the large number of possible permutations in such situations.

(i) Verbal Statements by co-accused

In what the accused X said to [Z], assuming you are satisfied he did say it, the accused [X] mentioned [EITHER] his co-accused [Y] OR matters which you could conclude form part of the preparation for and/or commission of the offence.

Even though what he said then was said outwith [Y's] presence, these statements are evidence against (each of) the accused.

(ii) Verbal Statements by others

In what [X] said to [Z], assuming you are satisfied he did say it, [X] mentioned (either) the accused (or one of them) or matters which you could conclude form part of the preparation for or and/or commission of the crime of the offence.

Even though what he said then was said outwith the accused's presence, these statements are evidence against (each of) the accused.

(iii) Statements in Writing by co-accused

In what the accused A wrote in (for example) text/WhatsApp messages to accused B (or as appropriate) to X, assuming you are satisfied that that is what happened, the accused A mentioned [EITHER] his co-accused [Y] OR matters which you could hold form part of the preparation for and/or commission of the offence.

Even though those messages were not sent to the accused [Y] they are evidence against (each of) the accused.

(iv) Statements in Writing by others

In what X wrote in (for example) text/WhatsApp messages to accused B (or as appropriate) to Y, assuming you are satisfied that that is what happened, X mentioned [EITHER] the accused B OR matters which you could hold form part of the preparation for and/or commission of the offence.

Even though those messages were not sent to the accused C these messages are evidence against (each of) the accused.

[In any of these scenarios]

However, after a crime has been committed, what one accused said about a co-accused outwith that co-accused's presence OR what one accused said in messages to other accused is not evidence against the co-accused.

2. Statements made after the commission of a crime.

where co-accused present at time

"You will remember evidence from the police that the accused [A] made a statement in the presence and in the hearing of his co-accused [B]. What he said incriminated [B], and [B] did not deny or dissociate himself from what was said. [X's] statement of itself is not evidence against [B].

But you can take account of it in this context. You can look at [B's] reaction, or lack of reaction, on hearing what [A] said. That is admissible evidence against him. It is for you to decide, but if he made no response to what he heard, you might infer from his silence that he was impliedly admitting what was said about him."

where co-accused absent at time.

"In his statement to the police the accused [A] mentioned his co-accused [B]. What he said then was said outwith [B's] presence.

What [A] said to the police can be evidence for or against him, as I have already explained, but it is not evidence for or against [B]. Also, it is not evidence that can be used to show [B] has been consistent in his account of events. The reason why is because [B] was not present when the statement was made. He did not have the chance to admit, deny or comment on it. It would not be right to take that into account as part of the evidence for or against him.

So, you can take account of that statement only so far as concerns its maker [A]."

Section 261(2)

In the event of the provisions of this subsection being used, the specimen charge for section 259 will require to be adapted to the particular circumstances.

[510] *Muirhead v HM Advocate* 1999 S.L.T. 1231

[511] *Callaghan v HMA* 2021 HCJAC 4

[512] *Mathieson v HMA*, 1996 SCCR 388, 398 (opinion of the court).

[513] Renton & Brown, *Criminal Procedure*, 6th ed, para 24-56, equivalent passage in 5th ed, para 18-41a approved in *Buchan v HMA*, 1993 SCCR 1076, 1081 (opinion of the court); see also *McDonnell v HMA*, 1997 SCCR 760.

[514] *McGaw and Reid v HMA* 2019 HCJAC 78 at paragraphs 36-37; *Bennett and Moyes v HMA* 2020 JC 191 paragraphs 12-14 and *Representatives of Megrahi v HMA* 2021 HCJAC 3 at para [72]

[515] *Johnston v HMA*, 2011 SCCR 369.

[516] Dickson, *The Law of Evidence in Scotland*, (1887), para 363.

[517] *Jones v HMA*, 1981 SCCR 192; Macphail*, Evidence*, paras. 20-33 and S20-33; Walkers on *Evidence*, 2nd ed, para 9.9.1.

[518] See *McGaw and Reid* v HMA 2019 HCJAC 78 at paragraphs 36-37 and *Bennett and Moyes v HMA* 2020 JC 191 paragraphs 12-14.

[519] See *Representatives of Megrahi v HMA* 2021 HCJAC 3 at paragraphs 27-29 and 72.

[520] *Cook v HMA* 2006 SCCR 687 at para [11]. In this case it was observed that although it might have been preferable for the sheriff to remind the jury of the apparent conflict between the co-accused's plea and his evidence, he was under no obligation to do so.

[521] *McArthur v HMA* 2007 GWD 12-242, [2006] HCJAC 83 at para [33].

[522] *Mackay v HMA* 2008 SCCR 371, 2008 GWD 10 - 182 at para [1].

[523] *McIntyre v HMA* 2009 SCCR 406, 2009 SLT 716.

Video-Tape Evidence

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON VIDEO-TAPE EVIDENCE

LAW

General References

Renton & Brown *Criminal Procedure*, paras 18-87.

Legal Principles

1 The use of footage from security cameras is becoming an increasingly common element in prosecution evidence. It may be led for the purposes of proving the involvement of the accused in the crime charged, or proving the commission of the crime itself. The terms in which the jury are to be directed as to how they should treat such evidence is now set out in *Gubinas and Another v HMA* [2017] HCJAC 59, particularly paragraphs 53 to 67.

2"[E]vidence will almost always be required [from someone] to speak to such essential details as place and time and the identity of persons or things shown on the recording. In this respect the position is no different from that which applies where other audio or visual evidence is produced." Section 283 of the Criminal Procedure (Scotland) Act 1995 is one method. A person who has downloaded images may provide the necessary evidence. The content of the images may allow the necessary inference to be drawn as to what is shown. The person who recorded the incident or another witness may confirm what is shown is the incident. [524] Once the provenance of the recording is proved by corroborated evidence or is otherwise properly established, the content of the recording becomes proof of fact of the events shown. [525] Once the provenance is established, the recording becomes real evidence. Evidence of the location of the camera is beneficial to orientate the jury.

3 Once the recording is proved to show the relevant time and place, the content of the recording is available as proof of fact. The jury is free to make their own minds up about the events depicted and whether accused is the person responsible. It may be advantageous to hear evidence from witnesses who were present as to comment on the recording particularly if the witness comments on a matter not apparent from the footage or denies something apparently shown in the footage. In relation to identification of the perpetrator, the footage showing a person resembling the accused can corroborate a single eye witness identification or circumstantial evidence as to identity. The jury are entitled to compare the image with a photograph of the accused taken around the time of the incident and/or his appearance in court. The provenance of the photograph must also be established. [525] Witnesses present at the incident can be questioned

about the footage as an aide memoire or contradiction. An investigating police officer can be asked to provide a commentary upon the footage. Such a witness who was not present at the incident should not be asked for an interpretation of what is shown beyond what is physically obvious. [527] Evidence provided by a photograph of the accused and the recorded images will be corroborated if the provenance of both is spoken to by two witnesses.[528]

4 For the purposes of identification, it is unlikely that any warning similar to that occasionally required in cases of dock identification as the jury can analyse the relevant images at their leisure including the replaying of the recording.[529]

Quality of Recording

5 The assessment of the quality will normally be a matter for the jury. If there exists a concern as to the inferences to be drawn from the images, that can be explored in a submission on sufficiency of evidence.[530]

6 It is clear from the decision in Gubinas that the viewing of a recording by the jury is permissible.[531]

POSSIBLE FORM OF DIRECTION ON VIDEO-TAPE EVIDENCE

"You have seen the video tape being played.

There is no dispute that that recording shows images taken at XXXX place on YYYY day at or between ZZZZ time. [UNLESS THERE IS A DISPUTE, IN WHICH CASE MORE MIGHT REQUIRE TO BE SAID]

That is part of the evidence in the case. How do you deal with it?

You may think there are three aspects to what you might draw from the recording:-

What is happening in the recording?
Who is shown in the recording?
What inferences might you be prepared to draw from what you are satisfied you see people doing?

(Where no witness has given evidence about the footage)

In this case no witness in the witness box has given evidence about the events apparently depicted in the video images (or about who is said to be depicted). You are entitled to form your own judgement about what and who the video images show, just as you form a judgement about eye-witnesses' descriptions of what happened.

Where such evidence has been given

In this case witnesses have testified about what they say is happening in the video images and who is shown in them. You have to consider which, if any, of the witnesses is credible and reliable. You may find the testimony of a witness helpful in interpreting what is shown in the images. You are not bound by what each witness says. You can take into account, in determining the facts, what and who you consider to be shown in the images. You can have regard to the images when deciding who did what.

You are entitled to form your own judgement about what and who the video images show, just as you form a judgement about eye-witnesses' descriptions of what happened and this is so even if a witness has given evidence contradicting or inconsistent with the judgement you form about what and who the video images show.

[**NOTE:** The video images may or may not be key to there being a sufficiency of evidence to establish that the crime was committed and/or that the accused committed it. So it may be necessary in a given case to direct the jury whether their acceptance of what the images show is crucial or whether there is a sufficiency without a judgment being formed to the effect that the video shows the crime being committed and/or the accused committing it.]

[524] *Gubinas* para 53 and 54

[525] *Shuttleton v PF Glasgow* 2019 HCJAC 12

[526] *Shuttleton v PF Glasgow* 2019 HCJAC 12

[527] *Gubinas* paras 56 to 67

[528] *Gubinas* para 68

[529] *Gubinas* para 73

[530] *Gubinas* para 69

[531] *Gubinas* Para 73

Abduction

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1. Law

2. Posssible form of direction on abduction

Law

See *Gordon, Criminal Law* 3rd edn, paras 29.52 and 36.33 ff; Jones & Christie, *Criminal Law*, 3rd edn, para 9.02; *Macdonald, Criminal Law* 5th edn, p 124; *Stair Encyclopedia*, Crim Law Reissue, paras 209, 311.

1. Formerly abduction was linked to the objectives of marriage, or possibly rape,[532] but it is a crime at common law to abduct any person forcibly, and for any purpose.[533] It should be noted that there are a number of unresolved associated legal issues.[534] In framing appropriate directions care should be taken to ensure that they are related directly to the tenors of the charge. The circumstances in which a citizen's arrest may be justified are discussed in *Wightman v Lees*.[535]
2. The abduction must be against the victim's will.[536] Proof of force is unnecessary. Where the victim is a young child, absence of consent may be implied, and the absence of parental consent is irrelevant.[537]
3. Should the accused raise the issue of lawful authority in a case of this type it will be necessary to direct the jury that the onus remains on the Crown and to explain this. The Crown may also require to satisfy the jury that the accused had no reasonable belief that he had lawful authority. See the case of *Wightman v Lees* 1999 SCCR 664 for an example of authorities regarding citizen's arrest.

Posssible form of direction on abduction

"Charge is a charge of abduction. It is a crime deliberately to carry off somebody against that person's will and without lawful authority, or to detain somebody against that person's will and without lawful authority. It can be done for any purpose. In this case no issue of lawful authority arises.

There are several points to be noted:

1. The essence of this crime is deliberately depriving the person named in the charge of his personal freedom.
2. A stranger does not have the legal right to do that to anyone else.
3. Sometimes this crime involves the use of physical force, but that is not essential. It can be

carried out without force, such as by threats, inducements or fraud.
4. What happened must have been against the person named in the charge's wishes.
5. It must have been clear to the accused that the person named in the charge was not consenting to what took place. (*Where person named in the charge is a child ADD*: Because the person named in the charge in this case was a young child, who was not in a position to give consent legally, you can take it that what took place was against his wishes.)

So, for the Crown to prove this charge, you would need to be satisfied that:

1. The accused carried off or detained (*the person named in the charge*)
2. That was a deliberate act
3. He knew that was against the wishes of (*the person named in the charge*).

"If defence of lawful authority raised "

In this case the accused says he had lawful authority to act as he did. If you are satisfied about that you must acquit him.

Having 'lawful authority' refers to powers given or authorised by law which permit action which would otherwise be illegal. Police officers have such powers, social workers have certain powers, and so might someone with a court order for parental rights."

[532] Hume i, 310, Alison i, 226

[533] *Elliot v Tudhope* 1987 SCCR 85, 1988 SLT 721, *Anderson v HM Advocate* 2001 SCCR 738, 2001 SLT 1265

[534] *Bruillard v HM Advocate* 2004 SCCR 410 at para [20], 2004 JC 176, 2004 SLT 726

[535] 1999 SCCR 664, 2000 SLT 111

[536] *M v HM Advocate* 1980 SCCR Supp. 250.

[537] *Bruillard* (supra)

Assault

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON ASSAULT

2.1. Assault

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2.6.1. Cases pre 27 October 2003

2.6.2. Cases between 27 October 2003 and 6 November 2020

2.7. Assault with intent to rape

LAW

Stair Encyclopaedia,Vol 7, paras 211-236, 305-307; Gordon's, Criminal Law, 3rd ed, Vol II, Chapter 29; Macdonald, *Criminal Law*, 5th ed, pp 115-119.

1 "*An assault is an attack on the person of another*".[538] Evil intention is essential for proof of assault. "*What that means is that assault cannot be committed accidentally or recklessly or negligently*".[539]

2 If there is evidence of an attack by the accused on the person of another, it is no defence to plead that the accused was acting in fun.[540] It is not essential for the prosecution to prove that the attack caused physical injury to the victim. Physical conduct of the accused which causes the victim to be afraid for his safety may be sufficient to constitute the crime of assault. Whether or not it does so depends on a consideration of all the surrounding facts.[541]

3 "*Under an indictment or complaint which charges an offence involving personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that the assault or other injurious act was committed with intent to commit such*

offence".[542]

4 A jury is entitled to convict of assault to the danger of life even where there is evidence that the complainer's life was not put at risk, and is entitled to consider what the appropriate inference should be drawn from the acts of the assailant.[543]

5 In 1975, the court said this:

> *"[I]n sporting activities governed by rules, then, even although some form of violence may be involved within the rules, there is no assault because the intention is to engage in the sporting activity and not evilly to do harm to the opponent."*[544]

This cannot now be a considered a correct statement of the law now that is has been clarified that "evil intent" means deliberate. Nevertheless, the principle must remain sound, but lack of evil intent cannot be the basis. It may simply be a matter of policy that violence that is within the rules of sporting activities is not criminal.

See also chapter on **CAUSATION**.

See also chapter on **CULPABLE AND RECKLESS CONDUCT** below.

See also chapter on ROBBERY below.

For **INDECENT ASSAULT**, please refer to separate chapter.

POSSIBLE FORM OF DIRECTION ON ASSAULT

Assault

"Charge is a charge of assault.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result.[So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word "repeatedly" in the charge just means "more than once".

Injuries

An assault can be made more serious by any resulting injury

(If appropriate) In this case it is alleged by the Crown that injury was caused. There is evidence indicating [that the complainer was forced/fell against] (as appropriate) and the injuries alleged

were caused as a result. If you are satisfied that the accused was responsible for the act which caused the complainer [to come against] (specify) then the accused is also responsible for the resultant injury.[545]

A feature which makes a crime more serious is called an aggravation. What I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation[s] of the charge by causing [injury/severe injury/permanent disfigurement/permanent impairment/danger of life].

This charge contains the expressions:

- “to his/her injury
- “to his/her severe injury”
- “permanent disfigurement”
- “permanent impairment”
- “to the danger of life”

Examples of injury are:

- minor lacerations
- scratches
- bruises
- small cuts

Examples of severe injury are:

- multiple lacerations
- deep wounds
- ones causing much loss of blood
- broken bones

If you are satisfied there has been some degree of permanent impairment/disfigurement, that is enough.

Danger to life may involve no actual injury. To throw somebody out of a moving vehicle would be an assault to the danger of life, even if the other person escaped injury. The Crown does not need to show the other person's life was actually put at risk. The potential is enough.

Whether the assault caused that/any of these is a question of fact for you to decide. The Crown does not need to prove the accused intended that result. Looking at the evidence objectively, you decide if the assault had the result the charge alleges.

For the Crown to prove this charge, you would have to be satisfied:

a. that the accused attacked (*name of complainer*) in the way described in the charge

b. that the attack was deliberate (c) (if aggravation libelled) that attack resulted in:

- injury
- severe injury
- permanent disfigurement
- permanent impairment to (*name of complainer*)
- risk to the life of (*name of complainer*)."

Assault with intent to rob or Assault and attempted robbery

"Charge is a charge of

assault with intent to rob

or

assault and attempted robbery.

[Assault]

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result.[So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word "repeatedly" in the charge just means "more than once".

(where injury to any extent is libelled see ASSAULT)

[With intent to rob]

Robbery is the crime of stealing another person's property by violence or intimidation. Essentially, it is the intentional and violent taking of another's property without their consent, to deprive them of it. The accused is not charged with actual robbery here, but it is alleged that he assaulted the other person with the intention of robbing them.

If the other person was deliberately threatened, menaced or attacked, with the intention of seizing property in their possession, that is the crime of assault with intent to rob.

An intention to rob the other person makes the assault more serious. A feature which makes a crime more serious is called an aggravation. What I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is

sufficient to prove the aggravation of the charge. Whether the accused has the necessary intent to rob is a matter which can only be inferred from what he has proved to have said or done and the circumstances in which it happened.

For the Crown to prove this charge, you would have to be satisfied:

1. that the accused threatened, menaced or attacked (*name of complainer*) in the way described in the charge
2. that was a deliberate act
3. that it can be inferred from what has been proved to have been said and/or done that the accused had the intent to rob (*name of complainer*).

[and attempted robbery]

Robbery is the crime of stealing another person's property by violence or intimidation. Essentially, it is the intentional and violent taking of another's property without their consent, to deprive them of it.

The violence must come before, or happen at the same time as, the taking of the property. It is the means of carrying out the theft. The other person need not be actually physically assaulted. The threat of violence causing reasonable fear of immediate injury is enough.

The property stolen can be on the other person, like a wallet, or goods under that person's control, like stock in a shop or money in the till.

An attempted robbery is committed if the accused had made a positive move towards committing robbery, but had not yet completed it. In other words, the accused had got beyond preparation for the robbery to the stage of having begun to commit it: the accused was engaged in some action directed towards the intended result. That may be by laying hands on property in the possession of the complainer or it may be by making a demand that the property be handed over, accompanied by violence or intimidation. [see Assault and Robbery, below for other examples which may be drawn upon]

Intention can only be inferred or deduced from what has been proved to have been said and/or done.

The crime of assault and attempted robbery is committed if the accused threatened, menaced or attacked the other person, and was engaged in the process of attempting to rob the other person of property, but did not actually complete that by getting hold of the property or taking it away.

For the Crown to prove this charge, you would have to be satisfied:

1. that the accused threatened, menaced or attacked (*name of complainer*) in the way described in the charge
2. that was a deliberate act
3. that the accused also intended to seize property in (*name of complainer*)'s possession; and
4. that the accused was in the act of seizing property in the (*name of complainer*)'s

possession, or had made a positive move towards doing so and had begun to commit robbery

Assault & robbery

Charge is a charge of assault and robbery.

In this case the charge says the other person was assaulted **and** robbed.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result. [So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word “repeatedly” in the charge just means “more than once”.

(where injury to any extent is libelled see ASSAULT)

Robbery is the crime of stealing another person’s property by violence or intimidation. Essentially, it is the intentional and violent taking of another’s property without their consent, to deprive them of it.

Intention is a state of mind, to be inferred or deduced from what has been proved to have been said and/or done.

The violence must come before, or happen at the same time as, the taking of the property. It is the means of carrying out the theft. The other person need not be actually physically assaulted. The threat of violence causing reasonable fear of immediate injury is enough.

The property stolen can be on the other person, like a wallet, or goods under that person’s control, like stock in a shop or money in the till.

The taking of property must be against the other person's wishes.

[SELECT APPROPRIATE EXAMPLES] It can involve snatching physically. It also covers the case of another person who is so intimidated that he or she hands over the goods, or stands by while the accused helps himself/herself. It also covers the case of the other person who drops them in the struggle, and the accused picks them up.

For the Crown to prove this charge, you would need to be satisfied that:-

1. the accused deliberately attacked (*name of complainer*) in the way described in the charge

2. the accused did so with the object of taking property in (*name of complainer*)'s possession
3. the accused took the (name of complainer)'s property.

(where injury to any extent is libelled see ASSAULT)

[It may be appropriate for the jury to convict of the assault element only if they find the stealing not proved in which case they should be directed accordingly, including as regards the requirements of corroboration.]

Alternative verdict of theft

In this case the defence have argued that this was a case of theft by snatching, or theft by surprise rather than robbery.

Theft is the dishonest taking of another person's property without the owner's consent. The difference between theft and robbery lies in the use of violence or threats. Sometimes it can be hard to draw a line between these two offences, it depends on the circumstances. But remember this, the violence or threats used in robbery can fall short of the violence used in assault. Any degree of violence or threats used to effect the taking of the property makes the crime robbery, not theft.

Whether your verdict is theft or robbery will depend on the view you take of the violence involved. If you thought the violence which occurred was very minor and not used to overcome the other person's wishes, you could convict the accused only of theft. But if you thought it was because of violence or threats that the goods were taken, you could convict the accused of robbery.

Historic Abuse Assault / Reasonable chastisement

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults. Weapons may or may not be involved. Injury may or may not result. So, menaces or threats producing fear or alarm in the other person are assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word "repeatedly" in the charge just means "more than once".

(where injury to any extent is libelled see ASSAULT)

The offences the accused is facing are alleged to have been committed a number of years ago. The accused's position regarding these allegations is that if they did occur, they were carried out as a result of requiring to discipline the complainer(s). Now, in the context of disciplining a child in the past actions which otherwise would amount to an assault were not assaults in law if what was done amounted to reasonable chastisement, or were what is sometimes described as justifiable assaults. That is quite different now – there is no such defence to such acts of violence which take place on or after 7 November 2020 [546] but that does not affect what happened in the past, when it was not a crime of assault if a parent or carer's actions amounted to reasonable chastisement.

Cases pre 27 October 2003

Parents, guardians, and other persons in charge of children were at that time entitled to use force for the purpose of disciplining them, but that force had to be moderate, and not inspired by vindictiveness.

If you find that what was done amounted to reasonable chastisement in that sense or you have a reasonable doubt as to that then your verdict would be one of acquittal. Now in considering this issue of reasonable chastisement you have to exercise care. What might not have amounted to reasonable chastisement in recent times (and would now simply be illegal) might well have constituted reasonable chastisement in the past. The approach to discipline in schools is different today. Now there would be no question of subjecting a child to corporal punishment in the context of discipline. [where appropriate:] However, at the time of the alleged offences corporal punishment was allowed in that context.

Cases between 27 October 2003 and 6 November 2020

[see Criminal Justice (Scotland) Act 2003, section 51]

Parents, guardians, and other persons in charge of children were at that time entitled to use force for the purpose of disciplining them. When you are considering whether that force amounted to reasonable chastisement you must consider

a. the nature of what was done, the reason for it and the circumstances in which it took place;
b. its duration and frequency;
c. any effect (whether physical or mental) which it has been shown to have had on the child;
d. the child's age; and
e. the child's personal characteristics (including, the child's sex and state of health) at the time the thing was done.

There is no defence of reasonable chastisement or justifiable assault if what was done included or consisted of:

a. a blow to the head;
b. shaking; or
c. the use of an implement.

Accordingly in considering this issue, firstly consider whether you are satisfied that the accused deliberately acted in the manner alleged, and if it constituted an attack. If the intent was only to punish then there is no assault unless the Crown have proved beyond reasonable doubt that it went beyond what was reasonable chastisement in the sense that I have described.

Now if there was a deliberate attack and some physical act was carried out which was merely gratuitous and was not designed to punish anything, then that would be an assault and could not be justified as reasonable chastisement. However, if the physical act was administered as a

punishment, you have to consider whether the Crown have proved it went beyond what was reasonable and as I have already said you judge that not by reference to today's standards but rather by reference to the standards at the time the offences were allegedly carried out.

Teachers nowadays [at the relevant time] have no right to inflict corporal punishment on children but can use moderate and reasonable force to control a child, particularly where that is necessary for the purposes of maintaining general discipline in the classroom.[547] It is a matter for you whether you consider that the accused's actions involved moderate and reasonable force or went beyond that.

Assault with intent to rape

See chapter on the Sexual Offences (Scotland) Act 2009 - contains reference to assault with intent to rape an adult (section 1) or young child (section 18)

[538] *Smart v HMA*, 1975 JC 30, 32 (opinion of the court)

[539] *Lord Advocate's Reference (No 2 of 1992)*, 1993 JC 43, 48 per LJ-C Ross.

[540] *Lord Advocate's Reference, (No 2 of 1992*), supra, at 48 per LJ-C Ross.

[541] *Mackenzie v HMA*, 1983 SLT 220, 223 per LJ-C Wheatley; *Atkinson v HMA*, 1987 SCCR 534.

[542] Criminal Procedure (Scotland) Act 1995, Sch 3, para 10(3)

[543] *Kerr (Stephen) v HMA* 1986 SCCR 91

[544] *Smart v HMA, supra*, at 33 per LJ-C Wheatley. see also *R v Burns* [2005] 2 ALL ER 113

[545] *Dennie v HM Advocate* 2019 SCCR 16, para 7

[546] Children (Equal Protection from Assault) (Scotland) Act 2019) section 1

[547] *Barile v Griffths* 2010 SLT 164

Indecent Assault

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1. Law

2. Possible form of Direction on Indecent Assault

Law

1 Indecent assault is essentially an assault aggravated by indecency in the manner of its commission. Whether or not an assault is aggravated in that way is to be judged by an objective standard. An assault may have the quality of indecency irrespective of the accused's intention or motive. Accordingly it is not essential that the Crown should prove that the offence was committed for the purpose of sexual gratification. [548] Indecent assault requires a wrongful invasion of the victim's physical integrity. An assault on a part of the victim's body which has particular sexual significance may be indecent. An assault on other parts of the victim's body may be indecent if accompanied by words, actions or gestures of a sexual nature. [549] Whether or not an assault is aggravated in this way is to be judged, in our view, by an objective standard. An assault may have the quality of indecency, irrespective of the accused's intention or motive. [550]

2 Provided that the assailant does not intend to inflict substantial bodily harm on the victim, consent of the latter to sexual contact may be sufficient to negative indecent assault. [551] The court has reserved its opinion on whether there might be circumstances in such a case where an intention to cause pain may mean that the conduct is an assault. [552]

3 However if any question of consent or honest belief in consent is to be raised by the defence, a special defence is required.

4 Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances.[553] A more recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no "free agreement" in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T:drive, "Appeal opinions, pre-trial" folder.

Possible form of Direction on Indecent Assault

"Charge [ ] is a charge of indecent assault.

That is an assault made more serious by indecency in the way it was committed.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate.

For indecent assault it would be enough if there was a deliberate attack on, or interference with, the body of the complainer, and:

1. The part of the body involved has sexual significance, or;
2. It involved a part of the accused's body which has sexual significance or
3. The attack was accompanied by words, actions or gestures of a sexual nature.

You decide if something is sexual or not by applying common sense: it is sexual if a reasonable person would think it is sexual.

You can only decide that a person has acted deliberately from what they are proved to have said or done.

[Where consent is a live issue]

A person may consent to being [specify modus], and if so, there is no assault (see chapter on Consent for more elaborate directions)

[In circumstances where the accused might have honestly believed the complainer was consenting]

In this case the defence say that the accused honestly believed that the complainer consented to what happened. They say that because of [X]. If you accept that, or if you are left with any reasonable doubt about that, you must acquit the accused."

Consider whether to give a direction under section 288DA (delay in reporting)

Consider whether to give a direction under section 288DB (lack of physical resistance or physical force)

[548] *Grainger v HMA* 2005 SCCR 175; per LJ-C Gill at para [17].

[549] Stair Encyclopaedia supra, paras 305-306

[550] *Grainger v HMA, supra*

[551] *Smart v HMA*, 1975 JC 30.

[552] *McDonald v HMA*, 2004 SCCR 161, 170F at para [23].

[553] *HM Advocate v SM* (No 1) 2019 JC 176, *Briggs v HM Advocate* 2019 SCCR 323

Attempt to Defeat the Ends, or Attempt to Pervert the Course, of Justice

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1. Law

2. Possible form of direction on Attempt to defeat the ends, or attempt to pervert the course, of justice

Law

See generally Stair Encyclopaedia, Criminal Law section 19 and paras 435 ; *Gordon, The Criminal Law of Scotland*, paras 1.32-1.36.

1 There are a number of nominate crimes against the administration of justice such as false accusation of a crime, perjury, subornation of perjury, resisting or obstructing a police officer or prison breaking. In *Hanley v HM Advocate* 2018 JC 169, at para 11, in giving the opinion of the court, the Lord Justice Clerk observed that within the class of offences against the course of justice Hume included at vol 1, 384:

> *" any evil practice, tending to mislead, constrain, or corrupt the witnesses, or to destroy, suppress, or alter evidence of any kind' in the course of any criminal trial, as examples of 'an interference with the course of justice."*

2 Where the course of justice has been interfered with but where the actings do not amount to one of the nominate crimes, it became a practice to charge a person with attempt to defeat the ends, or pervert the course, of justice. Historically, it was not clear whether this was an independent crime, an element in a number of separate crimes or a number of previously nominate crimes joined under one description.[554] It may not matter: *Hanley v HM Advocate* 2018 JC 169; at para 12. In *HM Advocate v Harris* (No. 2) 2011 JC 125, paragraph [28]) Lord Justice General Hamilton explained:

> *"[28] It is thus clear that by not later than 1961 it had been authoritatively recognised that attempting to pervert (or to defeat) the ends of justice was a crime according to the common law of Scotland and that the commission of that crime might take various forms."*

The circumstances which have been charged as attempts to pervert the course of justice are legion.[555] Escaping from legal custody is usually charged as an attempt to defeat the ends of justice.[556]

3 The essence of such a crime is as much obstructing or hindering the course of justice as it is in actually defeating or perverting it. It is the interference with what would otherwise be expected to have happened in the ordinary and uninterrupted course of justice in the particular case (*Hanley v HM Advocate* 2018 JC 169, paragraph [12]). The fact that an accused gives an account which is inconsistent with the case brought against him by the Crown does not constitute interference with

that ordinary and uninterrupted course of justice.[557] The overt assistance of third parties in furtherance of the interference in the ordinary and uninterrupted course of justice is of no significance.[558]

4 It is very common to find charges which aver that the accused has attempted to pervert the course, or defeat the ends, of justice by hiding, destroying or arranging items of real evidence, consistent with the passages from Hume quoted in *Hanley* and referred to above, albeit Hume was referring to events at the time of a trial. In *Dalton v HM Advocate* 1951 JC 76, in giving the leading opinion in an appeal advanced on the proposition that it was not a crime for the appellant, who was charged with attempting to pervert the course of justice, to have sought to persuade a witness to refrain from identifying a suspect in a crime of robbery committed by others, LJC Thomson explained:

> "*I have not the slightest hesitation in saying that these facts do constitute a crime. What he was charged with and what he was found guilty of was taking steps to destroy in advance evidence which might lead to the detection of a serious crime and the conviction of those responsible for it.*"

Lord Patrick agreed, explaining that it:

> "*…amounted to an attempt to eliminate evidence which might tend to incriminate a person in a future criminal charge, and that is quite clearly a crime, and a serious crime, in the law of Scotland.*"

Mannion v HM Advocate 1961 JC 79, involved a charge of attempting to defeat the ends of justice against a witness, who had not been cited, who went into hiding in order to avoid appearing at trial. In repelling a plea to relevancy at first instance, Lord Justice Clerk Thomson stated:

> "*It seems to me to be clear that if a man, with the evil intention of defeating the ends of justice, takes steps to prevent evidence being available, that is a crime by the law of Scotland*."

In *HM Advocate v Harris* (No2) 2011 JC 125 at para 30 LJG Hamilton explained that attempting to pervert (or defeat) the ends of justice is a crime known to the law of Scotland extending wider than attempts to destroy evidence. That passage was approved by the Lord Justice Clerk in *Hanley.*

5 Whilst in some cases it will be clear that a recognisable course of justice has commenced, for example where the police are investigating, the offence can be committed as soon as a crime has been committed and before it has been detected. In Dalton, LJG Thomson referred to "*taking steps to destroy in advance evidence which might lead to the detection of a serious crime*" and Lord Patrick referred to "*a future criminal charge*." In *Harris v HM Advocate* (No 2) at para 31 the LJG described, with reference to charge 12, conduct which occurred following the accused having exceeded the speed limit, in circumstances in which it may be inferred that his speeding may later be detected, as constituting an attempt to pervert a course of justice. As the Lord Justice Clerk explained in *Hanley*, at paragraph 12:

> "[12] *In all cases, the essence of the charge is the interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case….*"

The offence must be committed intentionally.[559]

6 Whether the Crown requires to prove that the accused committed, or bears criminal responsibility for, the substantive charge to which the alleged attempt to pervert/defeat relates, will depend on the circumstances of the case and, in particular, the terms in which the charge is libelled.

It might be open to a jury to convict of attempting to pervert the course of justice even if they were acquitting of the substantive offence. In those circumstances a judge may consider it necessary to direct that the jury should delete a phrase such as "*having committed the offence*…" where it appears in the charge.

Possible form of direction on Attempt to defeat the ends, or attempt to pervert the course, of justice

The following are commonly encountered
examples of circumstances in which the crime is said to have occurred. Thus:

Charge [ ] is a charge of
attempting to defeat the ends of justice/pervert the course of justice.

This crime can be committed in
very many ways, but the essence of it lies in the intentional interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case.

The existence of a course of
justice can arise even before the crime is detected because investigation and detection of a crime is what would be expected. When the obstruction takes place the crime is complete, whether or not the obstruction is effective. Intention is inferred from what is proved to have been said or done.

• **Threatening witnesses**

The charge alleges that the
accused [threatened witness (X) with violence etc].

The proper administration of justice depends on witnesses and potential witnesses giving statements to the Crown and the defence, and giving evidence in court. To interfere with that could impede the course of justice. That is a serious matter, and it is a crime.

For the Crown to prove this charge, you would have to be satisfied:

(1) that the witness (X) was

• due to give a statement to the police about a criminal enquiry/

• due to give evidence in court about the charge against (Y) and so the justice process was running its course;

(2) that the accused threatened that witness with violence if he were to give a statement to the police/evidence against him; and

(3) that the accused did that, intending to prevent the witness from giving a statement/evidence, and so to pervert the course of justice.

• **Giving false particulars**

The charge alleges that the
accused [gave false particulars to the police].

When a crime has been
committed, or suspected, our system of criminal justice is set into operation to have those responsible brought before the courts. Part of that involves police investigation.

To conceal your true identity
from, or to give false information about your identity to, the police is an attempt to pervert the course of justice. It is a crime. That is because, to an extent, the administration of justice depends on people giving true and accurate information to the police.

For the Crown to prove this
charge, you would have to be satisfied:

(1) that the crime mentioned in
the charge had been committed or was suspected to have been committed;

(2) that the justice process
was running its course, and the police were investigating the circumstances with a view to taking criminal proceedings;

(3) that the accused gave the
police certain particulars about his identity;

(4) that these were false; and

(5) that he did so to conceal
his identity, and so to pervert the course of justice.

• **Escape from police custody:**

The charge alleges that the
accused escaped from the lawful custody of the police.

When a crime has been committed, or suspected, our system of criminal justice is set into operation to have those responsible brought before the courts. One important part of that involves the police. They have the duty of detecting crime, and arresting those responsible. That is as much a part of the course of justice as these proceedings in court today. To escape from lawful custody after arrest is to defeat the ends/ pervert the course of justice. It is a crime.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the justice process was running its course, that the accused had been arrested in connection with the investigation of a crime, and was in lawful custody;

(2) that he escaped from the arresting officers, and

(3) that he did so, intending to thwart the process of justice.

Destroying, hiding and manipulating evidence.

Charge X is a charge of attempting to defeat the ends of justice [*or* attempting to pervert the course of justice] by destroying the car used in the commission of the crime of [eg murder].

This crime can be committed in very many ways. One way involves the hiding, destruction or manipulation of items which may form evidence in the investigation of a crime. The essence of this crime is intentionally obstructing or hindering the course of justice. When the obstruction takes place the crime is complete, whether or not the obstruction is effective. Intention is inferred from what is proved to have been done.

When a crime has been committed our system of criminal justice operates to have those responsible brought before the courts. Part of that involves police investigation to find evidence.

To hide, destroy or manipulate evidence, or to seek to do so, is an attempt to pervert the course of justice. It is a crime. That is because, to an extent, the administration of justice depends on the police being able to find and secure evidence.

For the Crown to prove this charge, you would have to be satisfied:

(1) if appropriate – that the accused committed the crime in charge X;

(2) that the accused started the fire [or bears criminal responsibility for] setting fire to the car;

(3) and that the fire was started with the intention of obstructing or hindering the course of justice.

[554] *Stair Encyclopaedia*, para 435-437.

[555] *ibid*, para 442.

[556] *HM Advocate v Martin*, 1956 JC 1, 1956 SLT 193; *Salmon v HM Advocate*, 1991 SCCR 628.

[557] *HM Advocate v Turner* 2021 SLT 66

[558] *Hanley v HM Advocate*, supra., paragraph [16]

[559] *HM Advocate v Mannion*, 1961 JC 79; *Kenny v HM Advocate*, 1951 JC 104, 1951 SLT 363.

Breach of the Peace

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON BREACH OF THE PEACE

LAW

General References

Stair Encyclopaedia,Vol 7, paras 442-460; Gordon, *Criminal Law*, 3rd ed,Vol II, paras 41.01-41.11; Macdonald, *Criminal Law,* 5th ed, pp 137-138.

Legal Principles

1 "Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges, not necessarily alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace."[560] "Breach of the peace means breach of public order and decorum, accompanied always by the qualification that it is to the alarm and annoyance of the public. It is not necessary that those who hear it should be alarmed for themselves. It is enough that [the conduct]… cause reasonable apprehension … that some mischief may result to the public peace."[561] "Where something is done in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset or tempted to make reprisals at their own hand, the circumstances are such as to amount to breach of the peace."[562] "What is required to constitute the crime is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community… conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person."[563] For examples of cases where there was an insufficient factual basis for objectively drawing an inference that the conduct complained of had the required potential for further upset, alarm and disorder, see *McMillan v Higson*,[564] *Borwick v Urquhart*[565] and *Walls v Brown*.[566]

2 The requirement for the offending conduct to have a public element by way of threatening serious disturbance to the community is emphasised in *Harris v HMA*,[567] over-ruling *Young v Heatly* 1959 JC 66. An interaction between relative strangers at the initiative of only one in a public street has the necessary public element.[568] "Positive evidence of actual alarm, upset, annoyance or disturbance created by reprisal is not a prerequisite of conviction."[569] Any conduct which can reasonably be regarded as likely to provoke violence must be regarded as serious. What is involved is a balanced judgement as to how a reasonable person would have been likely to react to the conduct, having regard to its own nature and to the circumstances and context in which it took place.[570] The notional reasonable person requires to be taken as being aware of the whole circumstances.[571]

3 "It is not the law that if upon the evidence it appears that the only persons present at the immediate scene were police officers, there can be no breach of the peace, nor is it the law that a police officer is not to be regarded as a person liable to be affected by disorderly conduct."[572] But conversing with police officers in offensive terms has been held not to constitute a breach of the peace.[573] Aggressive and threatening behaviour towards a police constable who has reasonable grounds to suspect that the accused had been involved in a disturbance may constitute a breach of the peace.[574]

4 Breach of the peace requires conduct which presents as genuinely alarming and seriously disturbing in its context to any reasonable person. Proof of both elements is required. The former highlights the objective character of the relevant alarm, while the latter highlights the community aspect of the offence.[575] Where there is no evidence of actual harm the conduct must be flagrant.[576] But to concentrate on the word "flagrant" may risk narrowing the focus of attention too much. Where there is no evidence of actual alarm or distress caused to others, something more than evidence about swearing and obscene gestures is likely to be required before the conduct in question can properly be characterised as amounting to a breach of the peace.[577] Where the conduct complained of took place in private there must be evidence that there was a realistic risk of it being discovered.[578] This refers to the risk of the conduct of the accused being come upon, that is to say being seen or heard, by a third party (or parties) or being brought to their attention, whilst that conduct continues or in the immediate aftermath of the conduct having come to an end. The risk of third parties at some remote location being informed of the conduct subsequently will not, at least ordinarily, suffice.[579] If the conduct complained of occurs in private it must raise a realistic risk of the public peace being disturbed.[580]

5 Where there is evidence that the accused formed part of a clearly definable (amorphous) group which was committing a breach of the peace and there is no evidence that he did anything to dissociate himself from the group he may be convicted of breach of the peace even if there is no evidence that he engaged in any specific conduct.[581]

6 While there can only be racial aggravation once a breach of the peace has been established, that does not mean that racist elements in the conduct are to be ignored in determining whether or not the conduct amounts to a breach of the peace.[582]

7 In determining whether or not there has been a breach of the peace, regard must be had both to the nature and quality of the conduct complained of and also to the likely consequences of that conduct. Regard must also be had to the context in which the conduct in question took place.[583]

8 For an example of a protest demonstration which did not amount to a breach of the peace see *Dyer v Brady* *supra.*

POSSIBLE FORM OF DIRECTION ON BREACH OF THE PEACE

"Charge is a charge of breach of the peace. Often, that's a relatively minor crime; sometimes it's not. It covers many types of anti-social behaviour.

[It can be committed in public or in private. For conduct in private to be considered a breach of the peace there must be a realistic risk of it being discovered.]

The conduct must be severe enough to cause alarm to ordinary people, and threaten serious disturbance to the community. It involves causing substantially more than mere irritation. It's conduct which, in the particular circumstances in which it has occurred, is genuinely alarming and seriously disturbing to any reasonable person. It must also threaten public safety or serious disturbance to the community.

There doesn't need to be evidence of the conduct having that result, it's enough if you decide that that result reasonably could be expected. Its enough if a reasonable person would be likely to be distressed or alarmed, and that the public peace would be compromised having regard to the nature of the conduct, and the circumstances and context in which it took place. There doesn't need to be evidence that the accused intended that result. Again, it's enough if you decide such a result was likely. It's the potential of the conduct you look at.

So, in deciding whether or not there has been a breach of the peace, you'll have to look both at the nature and the quality of the conduct proved, and also at its likely consequences. You'll also have to look at the context in which that conduct took place.

For the Crown to prove this charge, you would have to be satisfied:

(1) that the accused behaved in the way described in the charge

(2) that in the circumstances in which it took place, that conduct was, or was likely to be, genuinely alarming and seriously disturbing to the ordinary reasonable person.

(3) That the conduct threatened public safety or serious disturbance to the community."

[560] *Ferguson v Carnochan*, (1889) 16 R (J) 93, 94 per LJ-C Macdonald.

[561] *ibid*.

[562] *Raffaelli v Heatly*, 1949 JC 101, 104 per LJ-C Thomson.

[563] *Smith v Donnelly*, 2002 JC 65 at para [17], 2001 SLT 1008, 2001 SCCR 800; *Paterson v HMA* 2008 SCCR 605 at para [23], 2008 JC 327, 2008 SLT 465.

[564] 2003 SCCR 125, 2003 SLT 573

[565] 2003 SCCR 243

[566] 2009 SCCR 711, 2009 JC 375, 2009 SLT 774.

[567] 2010 SCCR 15, 2009 SLT 1078; see also Findlay Stark: Breach of the Peace Revisited (Again) 2010 14 Edin LR 134.

[568] *Angus v Nisbet*, 2010 SCCR 873.

[569] *Wilson v Brown*, 1982 SCCR 49, 51 (opinion of the court)

[570] *Dyer v Hutchison, Dyer v Bell, Dyer v Johnstone* 2006 SCCR 377 at paras [26] and [30].

[571] *Angus v Nisbet supra*.

[572] *Saltman v Allan*, 1988 SCCR 640, 644 (opinion of the court); see also *Mackay v Heywood*, 1998 SCCR 210.

[573] *Kinnaird v Higson*, 2001 SCCR 427; *Miller v Thomson* [2009] HCJAC 4; 2009 SLT 59; 2009 SCCR 179 at para [14], where police officers sought particulars from the appellant's group without explanation.

[574] *McDonald v Heywood*, 2002 SCCR 92.

[575] *Paterson v HMA* 2008 SCCR 605 at para [23], 2008 JC 327.

[576] *Jones v Carnegie*, 2004 SCCR 361 at para [2], 2004 JC 136, 2004 SLT 609. See also *Owens v Donaldson*, 2005 GWD 24-437, Appeal Court 14 June 2005.

[577] *Dyer v Hutchison, Dyer v Bell, Dyer v Johnston* 2006 SCCR 377 at para [25].

[578] Jones v Carnegie, *supra* at para [12].

[579] *WM v HMA*, 2010 HCJAC 75 at para 15

[580] *Hatcher v Harrower*, 2010 SCCR 903.

[581] *Tudhope v O'Neill* 1983 SCCR 443.

[582] Dyer v Hutchison, Dyer Bell and Dyer Johnston, *supra* at para [27].

[583] *Dyer v Brady*2006 SCCR 629 at para [16]. *Macdonald v HMA*2008 SCCR 181 to the accused's conduct when being interviewed by two female psychologists.

Conspiracy

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CONSPIRACY

LAW

General References

Stair Encyclopaedia,Vol 7, paras 171-174; Gordon, *Criminal Law*, 3rd ed, Vol I, paras 6-57 to 6-80.

Legal Principles

1 "Conspiracy when regarded as a crime is the agreement of two or more persons to effect any criminal purpose whether as their ultimate aim or only as a means to it, and the crime is complete if there is such agreement even though nothing is done in pursuance of it. The crime consists of the agreement, though in most cases overt acts done in pursuance of the combination are available as proof of the fact that they have agreed."[584] Conspiracy to break into a house is not a crime.[585]

2 Evidence of overt acts done can be used to prove an antecedent agreement, but in considering the case against each accused regard can be had only to the individual acts in which that accused is alleged to have been involved.[586]

3 It is necessary to define the scope of the conspiracy in relation to each alleged conspirator. Evidence may indicate that the various conspirators joined and left the conspiracy at different times.[586]

4 It is competent to frame the indictment so as to convict the accused, or at least two of them, both of conspiracy and of criminal acts proved to have been done in pursuance of that conspiracy.[586]

5 "[A]ll words uttered or documents issued by one conspirator in furtherance of the common design, and those which accompany acts of that description, and so form part of the res gestae, may be used against all the other prisoners, provided there be prima facie proof that they engaged in the plot."[589]

POSSIBLE FORM OF DIRECTION ON CONSPIRACY

"Charge is a charge of conspiracy.

It takes more than one person to form a conspiracy. The essence of conspiracy is the agreement of two or more people to commit a crime. That can be their ultimate aim, or simply the means to it. In conspiracy, the crime consists in making the actual agreement. Matters must have got beyond the stage of merely discussing a suggestion. But if agreement is reached, the crime is complete, even though nothing more happens. Actings of some sort often follow on an agreement, but their absence doesn't mean that no conspiracy has been formed.

Where there are more than two conspirators, it's not necessary that all of them should have reached agreement at the same time, or at the same place. Others may be recruited and join at a later stage.

A word about the form of the charge. It's in two parts. The first part defines the conspiracy. That's covered in the opening paragraph, down to the words "and in pursuance of said conspiracy did". The second part then goes on to narrate certain things which, it's said, were done in pursuance of that conspiracy. These are the matters referred to in the sub-heads (a) to (x).

You'll have to decide if the Crown has proved there was a conspiracy among all the accused, or between any two of them. That's something you may have to infer from their actings, for conspiracy implies stealth and secrecy, and it's not often you get eye-witness evidence about the agreement being reached.

It may be helpful to do this in stages.

(1) Decide if what's set out in the sub-heads of the charge, and said to have been done in pursuance of the conspiracy, has been proved.

(2) Look at any general evidence about the actings of the accused, even though it's not directed specifically to any of these sub-heads.

(3) Then decide if you can infer the existence of an agreement or conspiracy from all that.

(4) Then look at the case against each accused separately. If a particular accused wasn't involved in the actings in any one sub-head, you ignore those in deciding whether or not he has been proved to have been involved in the conspiracy.

If you find the conspiracy proved, a particular type of criminal liability arises. Normally you're held criminally responsible for your own actions only, but if you're involved in a conspiracy, you're responsible not just for what you've done yourself, but for what your fellow conspirators have also done. So, you would convict each accused of whatever has been proved to have happened in pursuance of the conspiracy.

If you find no conspiracy involving any of the accused proved, that isn't necessarily an end of the case against them. Each accused could be found criminally liable for what he himself did. Some of the sub-heads in the second part of the indictment, if proved, constitute crimes. They are [specify]. You would have to consider, in relation to each accused, whether it's been proved that he committed any of these particular crimes. So, even if no conspiracy is proved, you could still find an accused guilty of the crime in a sub-head, if he committed it.

Let me summarise. If conspiracy isn't proved, you could only convict each accused of those sub-heads which amount to crimes and of which he's guilty. If conspiracy is proved, you could convict

each accused of all of the sub-heads which have been proved.

An example or two may help.

• Suppose you find it proved that one accused was involved in the conspiracy, and that all the sub-heads have been proved, your verdict in his case would be guilty as libelled.

• Again, suppose it's proved another accused had been involved in the conspiracy, but not in all the sub-heads, you would find him guilty under deletion of the sub-heads he wasn't involved in.

• Again, if you found the conspiracy hadn't been proved, but an accused was guilty of some of the sub-heads which amount to crimes, you would simply find him guilty of those sub-heads.

• Lastly, if neither the conspiracy nor any of the sub-heads has been proved, then an acquittal would be the verdict in relation to each of the accused.

For the Crown to prove this charge against each accused, you would need to be satisfied:

(1) That there was an agreement to commit a crime

(2) That each accused was, or became, party to that agreement

(3) That each accused was involved in all, or some, of the actings in the sub-heads of the charge."

[584] *Sayers v HMA*, 1981 SCCR 312, 316 per Lord Ross.

[585] *Cochrane v HMA*, 2002 SCCR 1051 at para [15], 2002 SLT 1424.

[586] *Sayers, supra*.

[587] *Sayers, supra*.

[588] *Sayers, supra*.

[589] Dickson, *Law of Evidence*, (1887), para 363.

Culpable Homicide

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CULPABLE HOMICIDE

LAW

General References

Stair Encyclopaedia,Vol 7, paras 271-282; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapters 25 and 26.

Legal Principles

1 Culpable homicide is the killing of a person in circumstances which are neither accidental nor justified, but where the wicked[590] intent to kill or wicked recklessness required for murder is absent. The test for distinguishing murder and culpable homicide is objective. Accordingly, in some cases the trial judge may be justified in withdrawing the issue of culpable homicide from the jury.[591]

2 Culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills. For instance, it covers cases where a person who is suffering from diminished responsibility intends to kill someone and does so. It also covers the case where a person who is suffering from diminished responsibility fails to take action which he could reasonably have taken.[592] Similarly, where the deceased has provoked the accused and the accused, under the influence of that provocation, kills him, the accused will be guilty of culpable homicide.[593]

3 As well as proof of actus reus, the crime of involuntary or "lawful act" culpable homicide requires proof of mens rea.[594]That cannot be determined solely by proving that the conduct complained of fell below an objectively set standard. It might be proved by inferences from external facts.[595]

4 A company may be guilty of culpable homicide[596] if responsibility relevant to the act or omission can be attributed to the company itself, through a person or group of persons with delegated authority to act, not for or in the name of the company, but as the embodiment of the company, and speak and act as the company or as its controlling mind.[597]

See also chapters on **MURDER and ATTEMPTED MURDER** and **CAUSATION**.

POSSIBLE FORM OF DIRECTION ON CULPABLE HOMICIDE

"Charge is a charge of culpable homicide. That is a less serious crime than murder, but it is a crime nonetheless.

Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy.

In assault cases:

It is killing someone where the accused assaulted the person but did not have the wicked intention to kill, and did not act with such wicked recklessness as to make him guilty of murder. A deliberate and not a reckless or grossly careless act is required before there can be an assault.

In other cases:

The unlawful act must be intentional or at least reckless or grossly careless. Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against or acting in a way which shows a complete disregard for any potential dangers which might arise. It's immaterial whether death was a foreseeable result or not.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused committed an assault

[or as appropriate] an unlawful act

(2) that act must have been intentional

[or as as appropriate] that act must have been reckless or grossly careless in the sense I've defined it

(3) that death was a direct result of the unlawful act."

_____

See *Green and others* [2019] HCJAC 76 paragraph 66:

"[66] The trial judge adopted the Jury Manual directions which define culpable homicide. Although these directions may be correct as a generality, they are not apt to cover the situation, such as that which existed in this case, where what is under consideration is a death which was brought about by an assault; ie a deliberate attack. Concepts such as recklessness or carelessness have no relevance in such a situation and ought to form no part of the jury directions. Culpable homicide is simply defined, in the circumstances of this case, as occurring when an assault, which is not classified as murderous, causes death. A deliberate, and not a reckless or grossly careless act, is required before there can be an assault. However, the jury did not convict any of the appellants of culpable homicide. The misdirection was not a material one in a situation in which the jury considered that each accused was responsible, art and part, for the murder."

[590] *Drury v HMA*, 2001 SCCR 583, 2001 SLT 1013 (court of five judges).

[591] *Broadley v HMA*, 1991 JC 108, 114 (opinion of the court).

[592] *Bone v HMA*, 2005 SCCR 829

[593] Drury v HMA, *supra*.

[594] *Transco v HMA*, 2004 SCCR 1: page 36 at para [8] and page 51 at para [45], 2004 JC 29, 2004 SLT 41.

[595] (supra) page 49 at para [38].

[596] *Transco v HMA*, (supra) page 43 at para [21] and page 55 at para [56].

[597] (supra) page 58 at para [62].

Culpable and Reckless Conduct

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CULPABLE AND RECKLESS CONDUCT

LAW

General References

Stair Encyclopaedia,Vol 7, paras 82, 246-249; Gordon, *Criminal Law*, 3rd ed, Vol II, paras 29-57 – 29-60; Macdonald, *Criminal Law*, 5th ed, pp 141 -142.

Legal Principles

1 "[T]here are two ways in which reckless conduct may become criminal. Reckless conduct to the danger of the lieges will constitute a crime in Scotland and so too will reckless conduct which has caused actual injury."[598]

2 "Assault is a crime of intent and cannot be committed recklessly or negligently."[599] The standard of recklessness appears to be the same in both statutory and common law crimes.[600] The test is entirely objective. It is open to the trial judge, in charging the jury to adapt the judicial test for reckless driving in terms of the former section 2 of the Road Traffic Act 1972, viz whether at the material time the accused's performance fell far below the standard to be expected of a careful and competent exponent of the skill in question when faced with the obvious and material dangers described in evidence or, alternatively, whether the conduct or activity was such as to betray an utter indifference for the safety of the victim or the public.[601] Where the accused is charged with a common law offence involving recklessness, the Crown requires to prove "an utter disregard of what the consequences of the act in question may be as far as the public is concerned" or, "a recklessness so high as to involve an indifference to the consequences for the public generally".[602] A detainee under section 14 of the 1995 Act who, when asked if he had needles, had given an ambiguous reply, was not guilty of culpable and reckless conduct, because he was not under a positive duty to disclose his possession of a used syringe.[603] But a detainee under section 23(2) of the Misuse of Drugs Act 1971 who, when asked, denied he had needles, would be guilty of culpable and reckless conduct.[604] Buying alcohol for a 13-year-old girl who became seriously incapacitated by consuming it is culpable and reckless conduct.[605]

See also chapter on **ASSAULT** above.

POSSIBLE FORM OF DIRECTION ON CULPABLE AND RECKLESS CONDUCT

"Charge is a charge of culpable and reckless conduct.

It's a crime to endanger others by reckless conduct. This crime can be committed in many different ways. Its essence is this. It involves exposing an individual, or particular individuals, or the public generally, to a significant risk to life or health.

A high degree of recklessness is needed, more than carelessness or negligence. The accused must have acted with an utter disregard of the consequences of his conduct on the public, with total indifference to their safety.

It's not necessary for actual injury to have been caused, it's enough if there was the potential for injury or exposure to risk. It's not necessary to prove that the accused intended to endanger anyone, or to have been alive to that possibility and disregarded it recklessly. That's because the test you've to apply is an objective one. You've to look at the conduct involved, and decide objectively if it amounts to reckless disregard of public safety. You've to decide, using your collective common sense, if the risks would have been obvious to a reasonable person.

For the Crown to prove this charge, you would need to be satisfied: (1) that the accused behaved in the way described in the charge (2) that such conduct showed utter indifference to the safety of others."

[Thereafter give an example]

[598] *HMA v Harris*, 1993 JC 150, 153 per LJ-C Ross.

[599] Gordon, supra, at paras [29]-[30], quoted with approval by LJ-C Ross in Harris, *supra*, at 154.

[600] *Gizzi v Tudhope*, 1983 SLT 214.

[601] See *Allan v Patterson*, 1980 JC 57.

[602] *Cameron v Maguire*, 1999 JC 63, 65 (opinion of the court).

[603] *Mallin v Clark*, 2002 SCCR 901, 2002 SLT 1202.

[604] *Kimmins v Normand*, 1993 SCCR 476, 1993 SLT 1260.

[605] *Borwick v Urquhart*, 2003 SCCR 243.

Embezzlement

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON EMBEZZLEMENT

LAW

General References

Stair Encyclopaedia,Vol 7, paras 350-356; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 17; Macdonald, *Criminal Law*, 5th ed, pp 45-48.

Legal Principles

1 Embezzlement is the dishonest appropriation of property which is in the possession of the accused as trustee, agent, factor, or other administrator; or which is in his possession with a view to his becoming beneficial owner in certain circumstances, as under a contract of pledge, or of sale or return, or for a purpose left unspecific.[606]

2 Embezzlement may also be defined as the dishonest appropriation of money, goods or the proceeds thereof by a person who holds them on behalf of another person to whom he owes a duty to account, and on whose behalf he is in the process of carrying out a course of dealing with the money.[607]

3 For completion of the crime there must be some act of appropriation. In some cases a failure to account when called upon to do so may amount to appropriation when it can be inferred that the accused is withholding the money dishonestly.[608]

4 In some cases it has been difficult to distinguish embezzlement from theft. A charge of embezzlement rather than theft is appropriate where the accused is entrusted with a power of administration over a fund, and is liable to account for the proceeds at the end of the period of administration. If the mandate granted to the accused is exceeded, any appropriation is theft.[609] Some observations on the mens rea of embezzlement are to be found in *Moore v HMA*.[610]

5 The crime is completed where transactions are made which place monies held in trust at risk – for example “borrowing” clients’ funds to temporarily shore up losses elsewhere or using funds held in trust for unauthorised purposes even if the money is later replaced.[611]

POSSIBLE FORM OF DIRECTION ON EMBEZZLEMENT

“Charge is a charge of embezzlement.

The essence of the crime of embezzlement is the dishonest appropriation by the accused of another's money or goods, entrusted to him, to be dealt with and accounted for to the owner. In other words, where the accused came into possession of money for which he's bound to account, and appropriates that to his own uses, he's guilty of embezzlement. It's the fraudulent appropriation of entrusted property.

There needn't be any actual loss. To "borrow" for your own purposes funds entrusted to you is embezzlement, even if you pay them back later.

For the Crown to prove this charge, you would need to be satisfied that:

(1) The accused was in permitted possession of another's money or property.

(2) He was bound to account to the owner for what he did with it.

(3) He appropriated it to his own purposes, i.e. he made unauthorised use of it.

(4) That appropriation was dishonest, i.e. an act in bad faith, or from some corrupt motive."

• **Possible alternative verdict** (if raised)

"If you're not satisfied that the accused was in a position of trust with an obligation to account, but are otherwise satisfied that he had dishonestly appropriated the money you could convict him of theft. Theft is simply the dishonest appropriation of another's property without the owner's consent."

[606] Macdonald, *supra*, p 45; see also *Allenby v HMA*, 1938 JC 55, 59 per Lord Wark.

[607] *Stair Encyclopaedia*, supra, para 351.

[608] Macdonald, supra, p 47.

[609] Gordon, supra, paras 17-24 to 17-29.

[610] 2010 SCCR 451, [2010] HCJAC 26.

[611] *HMA v Wishart* (1975) SCCR Supp. 78

Extortion

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON EXTORTION

LAW

General References

Stair Encyclopaedia,Vol 7, paras 396-401; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 21; Macdonald, *Criminal Law*, 5th ed, pp 127-128.

Legal Principles

1 "The crime consists in using [a] threat to concuss a person into paying a demand which he intends to resist; and the crime, the use of the threat for that purpose, is the same, whether the party using the threat thinks his demand good or bad".[612] "The offence is complete so soon as the party attempts to force either legal or illegal demands by illegal means."[613] "It is no defence that the threat was made in order to compel performance of something justly due, no one being entitled to concuss another."[614]

2 "It is not a necessary element in the crime of extortion that the person who makes the threat or issues the demand should be alleged to have been seeking an advantage for himself."[615]

POSSIBLE FORM OF DIRECTION ON EXTORTION

"Charge is a charge of extortion.

Extortion is the crime of demanding money, or property or an advantage from somebody by threats of future harm. The word "blackmail" really gives you the sense of it. The essence is that the victim is made to feel that unless he gives in, he will suffer.

A threat of future harm must actually be made, to back up the demand. It can be express or implied. It may be a threat of violence, such as to kill or injure someone, or to damage property. It may be a threat to make some damaging revelation about a person, eg alleging dishonesty, criminal conduct or immorality. It doesn't matter if the allegation was true or false. The threat must cause the victim to give in to the demand made.

Of course, some threats are legitimate; so threatening court action for repayment of a debt isn't extortion. There both the threat and the demand are legitimate. However, if the demand was legitimate, but the threat was illegitimate, such as a threat of violence, that would be extortion. Likewise, if the threat was legitimate, but the demand was illegitimate, such as claiming an

unjustified benefit, that would also be extortion.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused made both a threat and a demand to (*name of complainer*)

(2) that threat involved harm in the future

(3) that (*name of complainer*) gave into the accused's demand because of that."

[612] *HMA v Crawford*, (1850) Shaw 309, 322 per LJ-C Hope; approved in *Black v Carmichael*, 1992 SCCR 709, 716 per LJ-G Hope.

[613] Crawford, *supra*, at 329, per Lord Moncrieff; approved in Black, *supra*, at 716.

[614] Macdonald, *supra*, at 128; approved in Black, *supra*, at 717.

[615] *Crawford, supra*, at 718 per LJ-C Hope

Fire-Raising

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON FIRE-RAISING

LAW

General References

See *Byrne v HMA*, 2000 SCCR 77, 2000 SLT 233. The passages in the *Stair Encyclopaedia*,Vol. 7, paras 415-419 and Gordon, *Criminal Law*, 3rd ed, Vol II, paras 22-26 to 22-34 must now be read subject to what is said in *Byrne*.

Legal Principles

1 At the conclusion of its opinion in *Byrne*,[616] the court recapitulated its conclusions on the law as follows:

"There are two distinct crimes of fire-raising: wilful fire-raising and culpable and reckless fire-raising.

The crime of wilful fire-raising may be committed in respect of any form of property. Before an accused can be convicted of wilful fire-raising in respect of any particular item of property in the charge, the Crown must establish beyond reasonable doubt that he intended to set fire to that item of property. Where the jury are not so satisfied in respect of any of several items averred in the charge, they should delete it. The jury may infer the necessary intention from all the relevant circumstances, but there is no room for any doctrine of transferred intent. Nor can any form of recklessness be treated as equivalent to intent.

The crime of culpable and reckless fire-raising can also be committed in respect of any form of property. In that respect it is similar to wilful fire-raising. The difference from wilful fire-raising lies in the mens rea. Mere negligence is not enough: the property must have been set on fire due to an act of the accused displaying a reckless disregard as to what the result of his act would be.

Contrary to what has sometimes been suggested, the distinction between the crimes remains important since the degree of blameworthiness will be relevant to penalty. A charge of wilful fire-raising does not contain an implied alternative charge of culpable and reckless fire-raising. So, where the only charge is one of wilful fire- raising, the judge may not direct the jury that they can return a verdict of culpable and reckless fire-raising. Nor may this court substitute a verdict of culpable and reckless fire-raising in an appeal against a conviction of wilful fire-raising.

On the other hand it is open to the Crown to aver wilful fire-raising and, in the alternative,

culpable and reckless fire-raising. On an indictment so framed, it will, of course, be open to the jury either to convict of wilful fire-raising or to convict of culpable and reckless fire-raising. We note that the alternatives were averred in short compass in the minor premise in the indictments in *Macbean*, (1847) Ark 262 and *HMA v. Smillie*, (1883) 5 Coup. 287. In neither case do the trial judges seem to have had undue difficulty in charging the jury. Of course, there may be cases in which an accused deliberately sets fire to paper, rubbish or discarded property of no value, but the fire spreads and burns down premises and their contents. In such cases, the lighting of the paper or rubbish may really only be the source of the fire which constitutes the substance of the charge. In such cases, care may be required in framing the indictment to avoid the unwelcome complexity which might arise if the indictment were so framed that, for instance, a jury might have to convict the accused of wilful fire-raising in respect of the rubbish but of the alternative of culpable and reckless fire-raising in respect of the premises and contents. The Lord Advocate indicated that, in the light of our decision, Crown counsel would reflect on how indictments might be framed in future."

2 The crime of culpable and reckless fire-raising is not committed solely by reason of the fact that the starting of the fire occurred when the accused was "engaged in some illegal act".[617] Fire-raising which is merely accidental does not demonstrate the necessary mens rea for the crime of culpable and reckless fire- raising, and is not a crime, and cannot become so on account of subsequent behaviour on the part of the accused.[618] Mens rea must be determined by reference to the act of starting the fire and not by reference to something which took place thereafter.[619]

POSSIBLE FORM OF DIRECTION ON FIRE-RAISING

Introduction

The first 3 charges relate to the crime of fire-raising. There are two different types of fire-raising, depending on the accused's intentions. There's wilful fire-raising, and culpable and reckless fire-raising. I'll define these in a moment.

But remember this. Where the charge is of wilful fire-raising, you couldn't convict the accused of culpable and reckless fire-raising, and where the charge is of culpable and reckless fire-raising, you couldn't convict the accused of wilful fire-raising. That's because the intention needed for wilful fire-raising is different from the intention needed for culpable and reckless fire-raising. I'll deal the different intentions in a moment.

Charge is a charge of wilful fire-raising. So, if you find the accused guilty of that, it would be of wilful fire-raising.

Charge is a charge of culpable and reckless fire-raising. So, if you find the accused guilty of that, it would be of culpable and reckless fire-raising.

Charge covers both crimes as alternatives. So, depending on the view you took of the accused's intention, you could convict him of one or other of these alternatives, either wilful fire-raising or culpable and reckless fire-raising.

Culpable and reckless fire-raising

Charge is a charge of culpable and reckless fire-raising. It's a crime culpably and recklessly to set

fire to another person's property without his permission. Any type of property can be involved; factories, houses, motor cars, bedding, clothes, to give you a few examples.

The fire is "raised" when the property starts to burn. The fire must have taken hold. It doesn't matter how little of it is consumed or damaged, or how quickly the fire is put out or dies out. When the fire has taken effect the crime is complete. The fire can be set directly or indirectly. It can spread from what it had been applied to originally, eg from paper ignited with a match, to the curtains, and then to the building itself.

The accused's state of mind at the time he started the fire is critically important. The key words in the charge describing his state of mind are "culpably and recklessly".

That means showing a complete disregard for any potential resulting dangers, and in particular the danger of the fire spreading and taking effect more widely. Starting a fire carelessly or accidentally isn't enough. There's got to be recklessness as to the consequences. If, with that attitude, the accused sets fire to one thing and the fire spread to other things, he would be guilty of damaging these other things by culpable and reckless fire-raising.

For the Crown to prove this charge, you would need to be satisfied:-

(1) that the accused set fire to someone else's property

(2) that he did so, with reckless disregard of the dangers of doing so

(3) that the fire took effect.

Wilful fire-raising

Charge is a charge of wilful fire-raising. It's a crime wilfully to set fire to another person's property without his permission. Any type of property can be involved; factories, houses, motor cars, bedding, clothes, to give you a few examples.

The fire is "raised" when the property starts to burn. It doesn't matter how little of it is consumed or damaged, or how quickly the fire is put out or dies out. When the fire has taken effect the crime is complete. The fire can be set directly or indirectly. It can spread from what it had been applied to originally, eg from paper ignited with a match, to curtains, and then to the building itself.

The accused's state of mind at the time he started the fire is critically important. The key word in the charge describing his state of mind is "wilfully". That means "intentionally" or "deliberately". This crime can't be committed recklessly, carelessly or accidentally. With each item of property alleged in the charge to have been damaged by fire, it must have been the accused's actual intention to set it on fire. Eg if the accused set fire intentionally to the paper, and then the fire happened to spread to the curtains, and then to the fabric of the building, that's not enough for him to be guilty of damaging the curtains or the building by wilful fire-raising. That's because his intention was only to set fire to the paper. But if it can be inferred from all the circumstances that he intended to set fire to the building by setting fire to the paper, which would then spread the fire to the fabric of the building, that would be wilful fire-raising of the building.

If you decide the accused intended to set fire to some, but not all, of the items listed in the charge, you just delete any reference to those items where his intention had not been proved, from any

verdict of guilty you may reach.

Intention is a state of mind, something to be inferred or deduced from what's been proved to have been said or done. But don't confuse motive and intent. Motive is irrelevant to criminal responsibility, and needn't be proved.

For the Crown to prove this charge, you would need to be satisfied:-

(1) that the accused set fire to someone else's property

(2) that the fire took effect

(3) that the accused intended to set fire to what was actually damaged by fire."

[616] *Supra*, at pp 91 G-92E.

[617] *McCue v Currie*, 2004 SCCR 200, 206 at para [22], disapproving of charge in *HMA v Smillie*, (1883) 5 Coup 287

[618] *Supra*, at para [25].

[619] *Supra*, at para [23].

Fraud

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1. FRAUD

2. POSSIBLE FORM OF DIRECTION ON FRAUD

FRAUD

General References

Stair Encyclopaedia,Vol 7, paras 365-371; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 18; Macdonald, *Criminal Law*, 5th ed, pp 52-58.

Legal Principles

1 Fraud is the bringing about of some practical result by means of a false pretence. The requirement that the pretence has to be made "falsely and fraudulently" means that the accused must know that the representation is false and that he intends it to take effect.[620] Recklessness regarding the act or statement complained of is insufficient to constitute mens rea.

2 It is not necessary that the accused should gain or another person lose economically. As well as being practical, the result must involve some legally significant prejudice to the other person.[621] It is essential for the Crown to prove a causal link between the false pretence and the result.

3 A statement of present intention as to future conduct can be the basis of a charge of fraud. "... a man's present intention is just as much a fact as his name or his occupation or the size of his bank balance".[622]

4 Difficulties can arise in cases where the accused obtains something without having any intention of paying for it, representing to the victim that he intends to pay at some given future date. In such a case the Crown must prove that from the outset the accused had no intention of paying, irrespective of whether he was at any relevant time able to pay, or whether any reasonable man in his position would have expected that he could pay.[623]

5 Proof of fraud can also be difficult in cases where the accused intends to pay for goods at the time when he acquires them on the understanding that payment is to be deferred. If during the interval the accused changes his mind about payment he cannot be charged with fraud, since he did not acquire the goods as a result of a false statement.[624]

POSSIBLE FORM OF DIRECTION ON FRAUD

"Charge is a charge of fraud. That's a crime which can be committed in many different ways, but its legal essentials can be put very shortly.

Fraud involves making a dishonest and false pretence to bring about some definite practical result. Expanding that a bit, fraud involves (1) the accused making a false pretence to another person, expressly or impliedly, and acting with a dishonest intention, (2) the accused knowing the pretence was false at the time he made it. It's not enough if he was simply reckless or careless about being truthful. And, if he honestly believed it was true there wouldn't be a fraudulent intention on his part, (3) the accused intending that that person should be deceived by the false pretence into doing something he wouldn't otherwise have done, and (4) as a result, that person was deceived and that deception caused him to act as he did.

Intention is a state of mind, something to be inferred or deduced from what's been proved to have been said or done.

There must be a definite practical result, but that needn't involve actual gain to the accused, or actual loss to that person.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused made a false pretence to (name of complainer)

(2) that there was a definite practical result

(3) that the false pretence caused the result."

[620] Macdonald, *supra*, at p 52.

[621] Gordon, *supra*, at para 18-17.

[622] *Richards v HMA*, 1971 JC 29, 32 per LJ-C Grant.

[623] Gordon, *supra*, at para 18-12.

[624] Gordon, *supra,* at para 18-12.

Lewd and Libidinous Practices

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON LEWD AND LIBIDINOUS PRACTICES

LAW

General References

Stair Encyclopaedia, Vol 7, paras 309-310; Gordon, *Criminal Law*, 3rd ed, Vol II, para 36-09; Gane, Sexual Offences (1992), pp 74-77.

Legal Principles

1 It is an offence at common law to engage in indecent practices and behaviour towards children below the age of puberty, with or without their consent.[625]

1A Criminal Procedure (Scotland) Act 1995 s255A

Proof of Age

Where the age of any person is specified in an indictment or a complaint, it shall, unless challenged –

(a) in the case of proceedings on indictment by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of this Act; or

(b) in summary proceedings –

(i) by preliminary objection before the plea of the accused is recorded; or

(ii) by objection at such later time as the court may in special circumstances allow, be held as admitted.

2 There is no need for any physical contact between the parties and knowingly to engage in indecent conduct in the presence of a child may constitute lewd and libidinous practices.[626] A man appearing in front of a 9-year-old boy clad only in boxer shorts is not guilty of the crime.[627]

3 Lewd and libidinous practices are constituted by indecent conduct against a specific victim who is within the class of persons whom the law protects. It can be committed by indecent physical contact with the victim, but it need not. It can be committed by taking indecent photographs of the victim, or by indecent exposure to the victim, or by showing the victim indecent photographs

or videos, or by indecent conduct in the victim's presence, or by lewd conversation, face to face, by phone, or by Internet chat line. In each case the essence of the offence is the tendency to corrupt the victim's innocence.[628] A single "French kiss" of a 15-year-old girl by her 45-year-old teacher exemplifies such a tendency.[629] There is no requirement to prove an intention to corrupt the innocence of the complainer or to obtain sexual gratification[630]

4 It has been said that "the balance of authority is now in favour of the view that the age of the complainer is not of the essence of the crime", but the Appeal Court did not express a concluded opinion on the issue of whether the crime is limited to cases where the complainer is under the age of puberty.[631] However, in a case dealing with a contravention of section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 another Appeal Court "inclined to the view that" in a prosecution at common law for lewd, libidinous and indecent behaviour the Crown must establish the accused's mens rea as to the victim's age.[632] Note should be taken of para 2 of Sir Gerald Gordon's commentary on this case,[633] and of the comments on the unsettled state of the law by Michael Christie in Gordon: *Criminal Law* (3rd edn) para 36.09 fn 16, and in his own Criminal Law (Christie) (3rd edn) para 9-20. If a "post-puberty" libel is not challenged the proposed direction can be altered to suit the circumstances.

See also **SEXUAL OFFENCES (SCOTLAND) ACT 2009 and CRIMINAL LAW (CONSOLIDATION) (SCOTLAND) ACT 1995: INDECENT BEHAVIOUR TOWARDS GIRL BETWEEN 12 AND 16,** found at chapters on Sexual Offences (Scotland) Act 2009 and Indecent Behaviour Towards Girls Between 12 and 16 below.

POSSIBLE FORM OF DIRECTION ON LEWD AND LIBIDINOUS PRACTICES

"The charge is of using lewd, indecent and libidinous practices.

It is a crime to behave in this way towards children under the age of puberty, whether they consent or not. The age of puberty is 12 for a girl and 14 for a boy. The aim is to protect these young children from sexual abuse.

The accused's behaviour must involve indecent conduct. The behaviour must be deliberate."

[WHERE APPROPRIATE IT MAY BE SUFFICIENT TO SAY]

"The conduct alleged on this charge is obviously indecent. That is not in dispute."

[OTHERWISE]

"Whether conduct is indecent is to be judged by the social standards that would be applied by reasonable people in contemporary society.

The conduct can be conduct against the child directly, or it can be conduct in the child's presence.

This sexual abuse can take many forms, and includes:

[SELECT AS APPROPRIATE]

- indecent physical contact with the child
- showing indecent photographs to the child
- indecent conduct in the presence of the child
- indecent conversation with the child, directly, by phone or electronically

Applying your common sense as reasonable people, you decide whether the conduct was indecent. The Crown does not need to prove what the accused's motivation was.

So, for the Crown to prove this charge, you would need to be satisfied:

1. that the accused behaved in the way described in the charge
2. that that behaviour was deliberate
3. that that behaviour amounted to indecent conduct
4. that the child was under the age of puberty, (which is admitted in this case)"

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

"There is no dispute that the complainer had not reached the age of 12 / 14 [as appropriate] on/between the date(s) set out in the charge and so you can take that fact as having been established

[WHERE APPROPRIATE]

"Which is not in dispute"

OR

[IF DISPUTED]

"Which
can be inferred in this case [SPECIFY REASON].

If,
of course, he had reasonable grounds for believing that the child was over the age of puberty, then it must follow that he lacked the intention to behave in the way charged with someone who was under the age of puberty."

Consider whether to give a direction under section 288DA (delay in reporting)

[625] Gordon, *supra*, para 36-09.

[626] *Robertson v HMA*, 1987 SCCR 385

[627] *Anderson v HMA*, 2001 SCCR 738, 2001 SLT 1265.

[628] *Webster v Dominick*, 2003 SCCR 525 at para [49], *Heggie v HMA* 2010 SCCR 185, [2009] HCJAC 96,*Sommerville v HMA*, 2010 SCCR 299, [2009] HCJAC 14, *Casey v HMA* 2010 SCCR 467, [2010] HCJAC 40.

[629] *Moynagh v Spiers*, 2003 SCCR 765, 2003 SLT 1337

[630] *Sommerville v HMA, supra*.

[631] *Batty v HMA* 1995 SCCR 525, p.528[F].

[632] *H v Griffiths* [2009] HCJAC 15; 2009 SLT 199; 2009 SCCR 312.

[633] *Batty, supra*at 530.

Malicious Mischief or Damage

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON MALICIOUS MISCHIEF

LAW

General References

Stair Encyclopaedia, Vol 7, paras 410-412; Gordon, *Criminal Law*, 3rd ed, Vol II, paras 22-01-22-13; Macdonald, *Criminal Law*, 5th ed, pp 84-85.

Legal Principles

1 The crime of malicious mischief is that of destroying or damaging the property of another, or interfering with it to the detriment of the owner or lawful possessor.[634] The modern crime of malicious damage is the intentional or reckless destruction of or damage to the property of another, whether by destroying crops, killing or injuring animals, knocking down walls or fences, or in any other way. The mens rea of the crime in the case of intentional damage consists in the knowledge that the destructive conduct complained of was carried out with complete disregard for, or indifference to, the property or possessory rights of another.[635]

2 "It is not essential to the offence of malicious mischief that there should be a deliberate wicked intent to injure another in his property ... [I]t is enough if the damage is done by a person who shows a deliberate disregard of, or even indifference to, the property or possessory rights of others".[636] Malice does not require proof of spite or of any other form of motive.[637]

3 What is required in a charge of malicious mischief is a wilful intent to cause injury to the owner or possessor of the property. This injury may be either in the form of physical damage or in the form of patrimonial loss.[638]

4 The constituent parts of the crime are few. The property in question must have belonged to or been in the possession of another. That property must have been damaged intentionally or recklessly. There must have been knowledge, or facts from which knowledge can be inferred, that the conduct complained of would cause damage to a third party's patrimonial rights in the property in question.[637]

5 It is doubtful whether a defence that the accused was entitled to act as he did in order to vindicate his own rights can succeed unless his actings were in accordance with the general principles of self-defence.[640]

6 The offence of vandalism contrary to section 52 of the Criminal Law (Consolidation) (Scotland)

Act 1995 stands on its own terms, and is not merely an echo of malicious mischief. In particular, the former raises an issue of recklessness as defined in Allan v Patterson, 1980 JC 57, whereas the mens rea requirement for malicious mischief is that defined by LJ-C Aitchison in *Ward, supra*, quoted in paragraph 2 above.[641]

See also CRIMINAL LAW (CONSOLIDATION) (SCOTLAND) ACT 1995: VANDALISM below.

POSSIBLE FORM OF DIRECTION ON MALICIOUS MISCHIEF

"Charge is a charge of malicious mischief.

That's the crime of intentionally or recklessly damaging or destroying another person's property, without permission. It can take many forms. It can result in physical damage or economic loss.

It's a crime of commission, not omission. The resulting damage must have been caused by a positive act on the accused's part.

That positive act can be intentional or reckless. Whether the accused's intention was to cause damage or loss is something to be inferred or deduced from what's proved to have been said or done. A reckless act involves conduct carried out with utter disregard of the consequences, when looked at objectively.

For the Crown to prove this charge, you would have to be satisfied that:

(1) the accused acted in the way set out in the charge

(2) he did so intentionally or recklessly

(3) his actions caused loss or damage to property

(4) that property belonged to or was in the possession of another person."

[634] *Stair Encyclopaedia, supra*, para 410.

[635] *Lord Advocate's Reference (No 1 of 2000),* 2001 SCCR 296 at para [30], 2001 JC 143, 2001 SLT 507.

[636] *Ward v Robertson*, 1938 JC 32, 36 per LJ-C Aitchison.

[637] *Lord Advocate's Reference (No 1 of 2000), supra*, at para [31].

[638] *Bett v Hamilton*, 1998 JC 1, 3 (opinion of the court), explaining the use of the word "detriment" by LJ-C Wheatley in *HMA v Wilson*, 1984 SLT 117, 119.

[639] *Lord Advocate's Reference (No 1 of 2000), supra*, at para [31].

[640] Gordon, *supra*, at para 22-12.

[641] *Black v Allan*, 1985 SCCR 11.

Mobbing

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON MOBBING

LAW

General References

Stair Encyclopaedia,Vol 7, paras 424-441; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 40; Macdonald, *Criminal Law*, 5th ed, pp 131-136.

Legal Principles

1 "A mob is essentially a combination of persons sharing a common criminal purpose which proceeds to carry out that purpose either by violence, or by intimidation by sheer force of numbers. A mob has, therefore, a will and a purpose of its own, and all members of the mob contribute by their presence to the achievement of the mob's purpose, and to the terror of its victims, even where only a few directly engage in the commission of the specific unlawful acts which it is the mob's common purpose to commit."[642]

2 The minimum number of persons required to constitute a mob has not yet been judicially determined. It is, however, necessary that the minimum qualifying number should assemble in order to put their common purpose into effect. The common purpose may be a general one, eg "indiscriminate and random rampage and riot".[643] The evidence may entitle the jury to infer antecedent formation of a common purpose or of such community arising upon the events themselves.[644]

3 "Membership of a mob is not to be inferred from proof of mere presence at the scene of its activities. The inference of membership is, however, legitimate if there is evidence that an individual's .... presence is for the purpose of countenancing or contributing to the achievement of the mob's unlawful objectives."[645] Voluntary withdrawal from the mob while it is still continuing to riot may bring an individual's liability to an end, but withdrawal does not necessarily have this consequence. By parity of reasoning, a failure to withdraw may not automatically make an individual a member of the mob.[646]

4 If there is evidence that part of the mob's purpose initially included the commission of a specific crime, each member of the mob is liable to be charged with mobbing and with the specific crime. The judge must give precise directions that, where the purpose of the mob was not explicit from the outset but evolved as the mob went on, the jury are bound to identify the time when the purpose first included the specific crime, and then determine whether at that time a particular accused was present in a supporting capacity.[647]

POSSIBLE FORM OF DIRECTION ON MOBBING

"Charge is a charge of mobbing.

It's a crime to form part of a mob. As the word itself implies, it takes a number of people to form a mob. Just how many depends on the circumstances, and its behaviour. The essence of mobbing is their acting together to achieve a commonly- shared purpose, either by violence or by intimidation by sheer force of numbers. The mob's conduct must cause significant alarm to the community, and disturbance of the public peace.

It's not a crime to be part of a crowd engaged in lawful and peaceful protest. For mobbing, the shared purpose has to be criminal, or to become criminal. That purpose may have been well-known in advance, but it needn't have been. A peaceful demonstration might turn nasty, and become a mob.

If there's a mob, a particular type of criminal liability arises. Normally you're held criminally responsible for your own actions only, but if you're part of a mob, and if your presence and behaviour contribute to achieving its shared criminal purpose, you would be guilty of what was done by the mob, as a mob, while you were part of it. That's so, even if only some of the mob were involved in what happened. Mere presence at the scene, eg out of idle curiosity, doesn't make you part of a mob. But if your presence is to support or encourage the mob in its known objectives, then you're part of it, and responsible for what it did.

• Where sub-heads libelled in pursuance of mob's purpose

A word about the form of the charge. It's in two parts. The first part describes the formation of the mob. That's covered in the opening paragraph, down to the words "alarm of the public and in breach of the public peace and did". First, you should decide if there was a mob. If it's not been proved that there was a mob all the accused would have to be acquitted of the first part of the charge. If there was a mob, you would then have to decide if each accused was part of it, in the sense I've described. If he was, you could find him guilty of mobbing, as set out in the first part of the charge. If he wasn't he should be acquitted of mobbing.

The second part of the charge then goes on to narrate certain things which, it's said, were done by the mob. These are the matters referred to in sub-heads (a) to ( ). These, of course, are crimes in themselves.

With each one of these crimes, if it's proved to have been committed, you'll have to decide if that was part of the initial purpose of the mob, or the natural consequence of that purpose. If it was, each of the accused who was part of the mob is guilty of mobbing and that specific crime, if he remained in support of the mob while that crime was committed.

But if that crime wasn't part of the initial purpose of the mob, or the natural consequence of that purpose, but was the responsibility of only a few members of the mob, other issues arise. You'll then have to decide if each of the accused can be shown to have either been directly responsible for the crime, or jointly responsible for it. If he was directly involved in committing it, he would be guilty of that particular crime. He would also be guilty of it if he was engaged with others as part of the group who carried it out, knowing what had happened and continuing his participation.

(Take in appropriate directions on concert.)

So, even if an accused is not guilty of mobbing, but it's proved he was directly or jointly responsible for a crime in a subhead, you could find him but guilty of that crime. If that hasn't been proved, you would acquit him of it.

For the Crown to prove the first part of this charge against each accused, you would need to be satisfied that:

(1) there was a sufficient number of people together to form a mob

(2) the mob had a common purpose, which was criminal or became criminal

(3) the conduct of the mob caused significant alarm and disturbance to the public

(4) the accused knew what that common criminal purpose was

(5) the accused was part of that mob, in the sense of sharing its objectives.

For the Crown to prove the second part of this charge against each accused, you would need to be satisfied:

(1) about which sub-heads are proved to have been committed

(2) that the particular crime described in the sub-head was part of the mob's initial purpose, or the natural consequence of that

(3) that the accused was active in his support of the mob while that crime was being committed or

(4) if that crime wasn't part of the mob's initial purpose or its natural consequence, that the accused was directly or jointly responsible for it."

[642] *Hancock v HMA*, 1981 JC 74, 86 per LJ-G Emslie.

[643] *Hancock, supra*, at 83 per Lord Cameron.

[644] *Hancock, supra*, at 84 per Lord Cameron.

[645] *Hancock, supra*, at 86 per LJ-G Emslie.

[646] *Hancock, supra*.

[647] *Coleman v HMA*, 1999 SCCR 87, 111 per Lord Coulsfield.

Murder and Attempted Murder

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1. LAW

2. POSSIBLE FORMS OF DIRECTION ON MURDER AND ATTEMPTED MURDER

LAW

General References

Stair Encyclopaedia,Vol 7, paras 266-270; Gordon, *Criminal Law,* 3rd ed, Vol II, paras 23-01-23-33.

Legal Principles

1 "Murder is constituted by any wilful act causing the destruction of life, whether wickedly[648] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."[649]

2 The murderous intention of the accused may be ascertained from his own admissions, or it may be inferred from the normal interpretation which is placed on human conduct and its motivation. Even if wicked intention[650] to kill is not proved, an accused may still be found guilty of murder if his actions demonstrate a wicked recklessness. Depending on the precise evidence of the accused's actings, wicked recklessness may be inferred from the nature of the assault or the severity of the injuries inflicted, or the surrounding circumstances.[651] "Wicked recklessness is recklessness so gross that it indicates a state of mind which falls to be treated as wicked and depraved as the state of mind of a deliberate killer."[652] Wicked recklessness is determined objectively.[653]

3 It follows from the definition of murder quoted in paragraph 1 above that the Crown does not require to prove that the accused had a motive to murder or that the killing was premeditated.[654]

4 An act of wicked recklessness which causes loss of life may give rise to a charge of murder, although it is not directed against any particular person. This statement of the law is consistent with wicked recklessness being objectively determined.[655]

5 Since the test for distinguishing murder and culpable homicide is objective, in certain circumstances at a murder trial, the judge has a duty to withdraw the is sue of culpable homicide from the jury.[656]

6 Attempted murder is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been brought off and the victim of the attack has escaped with his life.[657]

7 In a charge of attempted murder if the jury wish to return a verdict of guilty under provocation the correct verdict is guilty of assault under provocation.[658] In a case alleging attempted murder where diminished responsibility is established, the appropriate verdict is guilty of assault, with or without aggravations, by reason of diminished responsibility.[659]

8 While defining "assault" where that term appears in a murder charge may introduce an unnecessary complication[660] there are circumstances in which it is necessary to do so. These would arise where it would be open to the jury on the evidence to delete all reference to homicide and to convict of an assault.[661]

9 Where a conviction for murder is sought against more than one accused on the basis of concert, the trial judge must direct the jury on the possibility of their convicting any of them of culpable homicide, if, in the circumstances, such a verdict could reasonably be returned.[662]

10 In most cases of homicide it is unnecessary to give the jury any directions on causation, because how the victim came by his death is usually not in dispute. But where an issue of causation is raised, such as a novus actus interveniens, it is sufficient to say that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death. It is enough if his act contributed significantly or materially to it.[663]

See also chapters on CULPABLE HOMICIDE and CAUSATION.

POSSIBLE FORMS OF DIRECTION ON MURDER AND ATTEMPTED MURDER

Murder

[Where appropriate] In this case, you will see the charge begins with the word 'assault.' An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults. The assault is said to have caused the death of the deceased and is said to amount to the crime of murder.

The crime of murder involves the unlawful killing of another person, either wickedly intending to kill him, or acting in a way that shows wicked recklessness as to whether the other person lives or dies. In the second formulation, wicked recklessness, there must have been an assault which was intended to injure.

Proof of motive is not necessary, but it must be shown that the accused either had a wicked intention of killing the other person, or that he intended to cause physical injury and acted with wicked recklessness as to whether the other person lived or died.

A word about each of these requirements.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. "Wicked" in the context of intention has no particular legal significance. It just has its ordinary meaning. Intending to kill someone is obviously wicked.

"Wicked recklessness" is also something to be inferred from what's been proved to have been said and done, and from the nature of the attack and the severity of the injuries inflicted, and the surrounding circumstances. It's acting in such a way as to show total indifference as to whether or

not the other person's death results. It involves committing an attack of such severity that it could easily have led to death and being completely indifferent to whether that might result. It's a wicked disregard for the consequences. There must also have been an intention to cause injury.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused killed (the person named in the charge)

(2) in doing so he acted either:

• with a wicked intention to cause death, or

• in a way which showed wicked recklessness as to (the person named in the charge)'s fate.

• Where mitigatory factor pleaded

• Provocation

In this case the defence have argued that the accused was provoked into acting as he did, and this negates the "wicked" element in his conduct. They say that excludes the wicked intent or the wicked recklessness of the consequences required for murder. They say the accused should be convicted of culpable homicide.

Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy. It's killing someone where the accused didn't have the wicked intention to kill, and didn't act with such wicked recklessness as to make him guilty of murder. The unlawful act must be intentional or reckless. But the recklessness is less extreme than what's required for murder.

Provocation may be an excuse for killing someone, but it never justifies it. It doesn't lead to an acquittal, but to a conviction of culpable homicide. If there's provocation, that excludes the element of wickedness in the accused's intention or reckless conduct. So, whether your verdict is one of murder or of culpable homicide will depend on whether you thought the accused was acting under provocation.

Provocation can arise in certain circumstances only, broadly where the accused has been the subject of a physical attack, or where he's learned of another person's infidelity, where fidelity is to be expected. There are also rules about what amounts to provocation. I want to explain these now.

[Take in relevant parts of rules on provocation]

• (in cases of disclosed sexual impropriety)

Provocation recognises human frailty, that some people can't control their passions, and act through weakness, not wickedness. Learning of another's sexual infidelity may cause loss of self-control, and a violent reaction, leading to killing in hot blood. That could deprive a killing of the wickedness that's essential for murder.

That could arise only where:

(1) Faithfulness in sexual matters was to be expected in the relationship between the accused and the deceased. Whether such a bond existed depends on the nature of their relationship, its history, whether it had ended or still continued. Without a mutual expectation of sexual fidelity there can be no provocation.

(2) The deceased's sexual conduct broke, and was seen by the accused as breaking, that bond of sexual fidelity. It must have been improper, otherwise there can be no provocation.

(3) Discovering the deceased's behaviour caused the accused immediately to lose his self-control, and he killed in the heat of the moment. He must have reacted in hot blood, otherwise there can be no provocation.

(4) An ordinary person would have acted as the accused did. If you thought his reaction was more extreme than what would be expected of the ordinary person facing that situation, there can be no provocation.

Remember this, in such cases of partner-killing, culpable homicide isn't the only verdict available. There can be a verdict of murder. If the answer to any of these four issues is "no", your verdict should be guilty of murder. But if you thought the answer to each was "yes", or if your left with a reasonable doubt about whether the Crown has excluded provocation, your verdict should be guilty of culpable homicide.

• **Diminished responsibility**

In this case the defence have argued that at the time of the incident the accused was of diminished responsibility, and this negates the "wicked" element in his conduct. They say that excludes the wicked intent or the wicked recklessness of the consequences required for murder. They say the accused should be convicted of culpable homicide.

Diminished responsibility may be an excuse for killing someone, it never justifies it. It doesn't lead to an acquittal, but to a conviction of culpable homicide. If there's diminished responsibility that excludes the element of wickedness in the accused's intention or reckless conduct. So, whether your verdict is one of murder or of culpable homicide will depend on whether you thought the accused was of diminished responsibility."

[Take in directions on diminished responsibility]

Attempted Murder

"Charge is a charge of attempted murder. To define attempted murder I've first to define murder.

The crime of murder involves the unlawful killing of another person, wickedly intending to kill him, or acting in such a way as to show wicked recklessness as to whether the other person lives or dies. In the second formulation, wicked recklessness, there must have been an assault which was intended to injure.

Proof of motive isn't necessary, but it must be shown that the accused either had a wicked intention of killing the other person, or that he intended to cause physical injury and acted with wicked recklessness as to whether the other person lived or died.

A word about each of these requirements.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. "Wicked" in the context of intention has no particular significance. It just has its ordinary meaning. Intending to kill someone is obviously wicked.

"Wicked recklessness" is also something to be inferred from what's been proved to have been said and done, and from the nature of the attack and the severity of the injuries inflicted, and the surrounding circumstances. It's acting in such a way as to show total indifference as to whether or not the other person's death results. It involves committing an attack of such severity that it could easily have led to death, being completely indifferent to whether that might result. It's a wicked disregard for the consequences. There must also have been an intention to cause injury.

The only difference between murder and attempted murder is that death did not result.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused attacked (the person named in the charge)

(2) in doing so he acted either:

• with a wicked intention to cause death, or

• in a way which showed wicked recklessness as to the (the person named in the charge's) fate.

(3) (the person named in the charge) survived the attack.

(4) (if aggravation libelled) the attack resulted in

• a severe injury (to the person named in the charge)

• permanent disfigurement (to the person named in the charge)

• permanent impairment (to the person named in the charge)

• peril to life of (the person named in the charge)

• Where mitigatory factor pleaded

• Provocation

In this case the defence have argued that the accused was provoked into acting as he did, and this negates the "wicked" element in his conduct. They say that excludes the wicked intent or the wicked recklessness of the consequences required for attempted murder. They say the accused should be convicted of assault.

[Take in relevant portions of directions on assault]

Provocation may be an excuse for attempting to kill someone, but it never justifies it. It doesn't lead to an acquittal, but to a conviction of assault. If there's provocation that excludes the element

of wickedness in the accused's intention or reckless conduct. In that case your verdict would be guilty of assault (under provocation). So, whether your verdict is one of attempted murder or of assault will depend on whether you thought the accused was acting under provocation.

Provocation can arise in certain circumstances only, broadly where the accused has been the subject of an physical attack, or where he's learned of another person's infidelity, where fidelity is expected. There are also rules about what amounts to provocation. I want to explain these now.

[Take in relevant directions on provocation]

Disclosed sexual impropriety

• Diminished responsibility

In this case the defence have argued that at the time of the incident the accused was of diminished responsibility, and this negates the "wicked" element in his conduct. They say that excludes the wicked intent or the wicked recklessness of the consequences required for attempted murder. They say the accused should be convicted of assault.

Diminished responsibility may be an excuse for attempting to kill someone, but it never justifies it. It doesn't lead to an acquittal, but to a conviction of assault. If there's diminished responsibility that excludes the element of wickedness in the accused's intention or reckless conduct. In that case your verdict would be guilty of assault (by reason of diminished responsibility). So, whether your verdict is one of attempted murder or of assault will depend on whether you thought the accused was of diminished responsibility."

[Take in directions on diminished responsibility]

[648] *Drury v HMA*, 2001 SCCR 583, 2001 SLT 1013 (court of five judges).

[649] Macdonald, *Criminal Law*, 5th ed, p 89; cf Broadley v HMA, 1991 JC 108, 111 (opinion of the court). *HMA v Purcell*, 2008 JC 131, 2008 SLT 44;*Petto v HMA*, 2011 SCCR 519.

[650] *Drury v HMA, supra*(court of five judges).

[651] *Stair Encyclopaedia, supra*, at paras 267-268. HMA v Purcell *supra;* Petto v HMA *supra*.

[652] *Scott v HMA*, 1996 JC 1, 5 (opinion of the court). HMA v Purcell *supra*; Petto v HMA *supra*

[653] *Broadley v HMA*, 1991 JC 108, 114 per LJ-C Ross.

[654] *HMA v Rutherford*, 1947 JC 1, 6 per LJ-G Cooper.

[655] *Stair Encyclopaedia, supra*, para 269.

[656] Broadley, *supra*.

[657] *Cawthorne v HMA*, 1968 JC 32, 36 per LJ-G Clyde.

[658] *Brady v HMA*, 1986 SCCR 191; 200 per LJ-C Ross.

[659] *HMA v Kerr*, 2011 SCCR 192.

[660] *Drury v HMA, supra*, at p 588, para [10] and para [10]

[661] *Touati & Gilfillan v HMA*, 2008 SCCR 211 where defence counsel had invited the jury to return a verdict of guilty of assault.

[662] *McKinnon v HMA*, 2003 SCCR 224, 2003 JC 29, 2003 SLT 281, Touati & Gilfillan v HMA *(supra)*, *Ferguson v HMA*, 2009 SCCR 78, 2009 SLT 67, *Hopkinson v HMA* 2009 SCCR 225, 2009 SLT 292, *Woodside v HMA* 2009 SCCR 350, 2009 SLT 371.

[663] *Finlayson v HMA*, 1979 JC 33, *Malone v HMA*, 1988 SCCR 498, *Johnston & Woolard v HMA*, 2009 SCCR 518, 2009 SLT 535 at para [55].

Perjury

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON PERJURY

LAW

General References

Stair Encyclopaedia, Vol 7, paras 503-523; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 47; Macdonald, *Criminal* Law, 5th ed, pp 164-168.

Legal Principles

1 A person commits perjury who willfully and unequivocally makes a false statement on oath, or by affirmation, in any judicial proceedings.[664] An accused may be prosecuted for giving false evidence at his own trial. "It is identity of the charges and not of the evidence that is the crucial factor."[665] If a plea of guilty tendered by the accused at his own trial supports a subsequent charge of perjury, it is competent for the prosecutor to lead evidence of that plea.[666]

2 If the accused in a perjury trial was not an accused in the previous trial, it is irrelevant that a statement made by him and falsely denied on oath was obtained unfairly. The evidence relied upon for conviction of perjury should have been competent and relevant at the previous trial either in the proof of the libel or in relation to the credibility of the witness, but need not be material in the sense of having a material bearing on the result. The relevance of the evidence led in the earlier trial is a question of law which is not to be decided by the jury.[667] Evidence is relevant if it bears directly on a fact in issue or indirectly because it relates to a fact which makes a fact in issue more or less probable. For evidence relating to credibility to be relevant in a charge of perjury, there requires to be a connection or link between the evidence said to go to credibility and the facts in issue spoken to by the witness.[668]

3 As a general rule, in a trial for perjury evidence of what a witness previously said on precognition is inadmissible. It is normally the function of the trial judge to determine whether words attributed to a witness were part of a statement or of a precognition.[669]

4 The jury cannot convict of perjury unless the statement is false, definite and unequivocal. The true facts must be precisely set out in the charge and must be incompatible with the statement.[670] The prosecutor must prove that the accused knew that what he stated upon oath was untrue.[671]

POSSIBLE FORM OF DIRECTION ON PERJURY

“Charge is a charge of perjury.

The crime of perjury involves wilfully giving false evidence under oath or affirmation in judicial proceedings.

Giving evidence on oath or affirmation binds a witness to tell the truth. If he gives evidence that’s relevant to the case which he knows is untrue, he’s guilty of perjury.

He must have done so wilfully, that is, deliberately or intentionally. That’s something to be inferred or deduced from what’s been proved to have been said or done. Saying you couldn’t remember if something happened when plainly you could, is just as much perjury as saying, e.g. “X didn’t punch Y” when in fact he did.

Perjured evidence can relate to what has to be proved in the case, or it can relate only to a witness’s credibility. If it’s relevant, it doesn’t matter how trivial the falsehood was. It doesn’t matter how slight is the effect of the perjured evidence on the outcome of the case.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused gave evidence in court in the case of (X)

(2) he gave evidence under oath or affirmation

(3) he knew that that evidence was false at the time he gave it”

[664] Macdonald, *supra*, p 164.

[665] *HMA v Cairns*, 1967 JC 37, 41 per LJ-C Grant

[666] *Milne v HMA*, 1995 SCCR 751.

[667] *Lord Advocate’s Reference (No 1 of 1985)*, 1986 JC 137.

[668] *HMA v Coulson* 2015 HCJ 49

[669] *Low v HMA*, 1987 SCCR 541; see also *Thompson v Crowe*, 1999 SLT 1434.

[670] Macdonald, supra, at p164.

[671] *Lord Advocate’s Reference, supra*, at 142 per LJ-G Emslie.

Public Indecency

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON PUBLIC INDECENCY

LAW

General References

Webster v Dominick, 2003 SCCR 525, 2003 SLT 975 (court of five judges).

Legal Principles

1 There is no crime of shameless indecency. It has been held by a bench of five judges that *Watt v Annan*[672] was wrongly decided. That case and the cases that followed the ratio of that case have been over-ruled.[673]

2 It was held in Webster v Dominick that, following *McKenzie v Whyte*, there is a distinction between lewd, indecent and libidinous practices, whether committed in public or in private,[674] which is a crime against an individual victim, and indecent conduct, where it causes public offence, which is a crime against public morals.[675]

3 The crime of public indecency is committed where there is indecent conduct, involving no individual victim, which affronts public sensibility. It is a public order offence.[676]

4 The actus reus of the offence has two elements (1) the act itself and (2) the effect on the minds of the public.[677]

(1) Examples of the act itself include indecent exposure, sexual intercourse in public view or making indecent actions or gestures in a stage show. Whether the indecency is committed for sexual gratification is irrelevant.

(2) The test for the public element is not whether the conduct occurs in a public place. Conduct could take place on a private occasion in the presence of unwilling witnesses or on private premises visible to the public. In short, if the conduct occurs in private, there requires to be a likelihood that the conduct would be observed by other persons.[678]

5 The crime does not extend to consensual sexual conduct committed in private, to the private showing of indecent films and videos, to the selling of indecent publications, or to conduct witnessed only by persons who wish to see it, such as performances by strippers or plays with nude scenes, except perhaps where the conduct is such as to offend even members of a

consenting audience.[679]

6 Shameless is not a definitional element in the crime.[680]

7 The mens rea for the offence is that the accused is recklessly indifferent as to whether the conduct is observed.[681]

POSSIBLE FORM OF DIRECTION ON PUBLIC INDECENCY

"Charge [ ] is a charge of public indecency.

This crime deals with conduct which offends public sensibilities, such as indecent exposure, sexual intercourse in public, or indecent acts or gestures.

It need not involve conduct towards an individual.

It does not need to have been done for the purpose of sexual gratification but it must be indecent which you judge by applying the standards of the average person in contemporary society.

The conduct must be committed in public, or be seen by the public. That covers conduct in a public street or park. It also covers conduct in private in front of unwilling witnesses, or which is visible to the public. It does not apply to conduct in private which is seen only by those who want to see it. So consensual sexual behaviour in private, or private shows of indecent films or videos to a willing audience are not criminal.

The conduct must affront public sensibilities. You should look at what happened and decide if it caused public offence.

The accused must have intended to commit the act in public, or to be seen by the public, or must have been reckless, not caring whether it was seen by the public or not. That is something to be inferred or deduced from what has been proved to have been said or done.

What is described in this charge can amount to the crime of public indecency.

For the Crown to prove this charge, you would need to be satisfied of all of the following:

1. That the accused behaved in the way set out in the charge
2. That his conduct was committed in public or was seen by the public
3. That his conduct was indecent
4. That it was an affront to public sensibilities
5. That the accused acted intentionally or was reckless as to whether or not his conduct was seen by the public."

[672] 1978 JC 84.

[673] *Webster v Dominick, supra*, at para [46].

[674] (1864) Irv 570.

[675] *Webster v Dominick, supra*, at para [48].

[676] *Webster v Dominick, supra*at para [50].

[677] *Webster v Dominick, supra*, at paras [53] – [55].

[678] *Usai v Russell*, 2000 SCCR 57; 2000 JC 144.

[679] Webster v Dominick, supra, at para [56].

[680] *Webster v Dominick, supra*, at para [57].

[681] *F v Griffiths*, 2011 SCCR 41

Rape

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2.4. Summary

Note: *the standard directions for sexual offences are presently under review, in light of recent case law and the desirability of simplification and use of plain English and will be reissued shortly. In the meantime and under reference to the discussion of Autonomy, which introduces this section of the Manual, judges may wish to preface their remarks by the following statement, adapted where necessary to the particular offence:*

> "The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that

no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice."

If there are multiple charges on which consent is in issue, it would not always be necessary to state this on each charge and it is a matter of judgement on which charge, or charges or where else in the judge's charge such a direction might be given. Some judges solve the problem by giving a generic direction before defining the individual charges.

Law

See generally *Lord Advocate's Reference (No.1 of 2001),* 2002 SCCR 435, 2002 SLT 466; *HM Advocate v Fraser*, (1847) Ark 280.

Autonomy

1 Particularly where consent is in issue, it is important that judges explain to juries that sexual offences, both at common law and under the 2009 Act, are intended to criminalise conduct which interferes with another person's sexual autonomy. Such a direction has two benefits:

1. It will ensure that juries understand the nature of the offence they are considering;
2. It should prevent erroneously held conventional wisdom about the nature of crimes of rape and sexual assault and "rape myths" intruding on decision making.

2 In *PF Edinburgh v Aziz* 2022 HCJAC 46 the appeal court examined the issue of autonomy in considering an offence of communicating indecently, section 7 of the 2009 Act, and noted that it underpinned the common law on sexual offences just as it underpins the Act. In para 20 of the opinion of the court, the Lord Justice General categorised the different ways in which the law has sought to protect the sexual autonomy of adults, children and the vulnerable.

In its analysis of the development of the common law and the 2009 Act, at paras 20-24, it is clear that the court was not innovating but drawing on long-established principles.

Common law

3 In *Dickie v HM Advocate* 1897 2 Adam 331 LJC MacDonald observed in an appeal arising from a charge of indecent assault that:

> *"Every woman is entitled to protection from attack upon her person."*

4 In giving the leading opinion of a bench of seven judges in *Lord Advocate's Reference(No 1 of 2001)* 2002 SCCR 435 LJG Cullen explained, at para 40:

> *"….The criminal law exists in order to protect commonly accepted values against socially unacceptable conduct. What does the law of rape seek to protect in the modern world? It may be said with considerable force that it should seek to protect a woman against the invasion of her privacy by sexual intercourse, that is to say where that takes place without her consent. What happens with her consent on one occasion should not determine what is acceptable on another. In the present day, in which there is considerable sexual freedom, both in and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever*

and whenever she pleases?"

5 The Lord Justice General (Carloway) referred to autonomy as an important principle in *GW v HM Advocate* 2019 JC 109 in which he quoted, at para 31, remarks made by Lady Hale in *R v Cooper* [2009] 1 WLR 1786 at para 27:

> *'….[I]t is difficult to think of an activity which is more person - and situation - specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place, autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention… '*

Sexual offences at common law

6 Given the overlap in the meaning of consent under the 2009 Act and at common law as explained by Lord Brodie, with whom the Lord Justice General and Lord Turnbull expressed agreement in *HM Advocate v SM (No 1)* 2019 JC 176, comparable directions may **sometimes** be appropriate at common law.

Lord Brodie explained that, at common law, when "acquiescence in intercourse is so reluctant by reason of the force or external circumstances… it does not amount to consent in any real sense." He agreed with reasoning from New Zealand in *R v Daniels* [1986] 2 NZLR 106 that:

> *"…submission to the inevitable or out of despair when trapped is not real consent, even if the submission involves the degree of physical assistance given here by the girl."*

He concluded, at para 16:

> *"…In making their proposals which led to the enactment of the 2009 Act the Scottish Law Commission saw a need to provide a definition for consent but there is no suggestion that in what they described as refining the law that they were departing from what was understood to be meant by consent as a matter of the pre-existing common law.* An agreement is not free if it only arises as the result of very pressing circumstances brought about by the acts of the other party, just as consent is not real if it is only the result of such circumstances.*"*
>
> **[Emphasis added]**

7 Definition:

> "*(i) The general rule is that the actus reus of rape is constituted by the man having sexual intercourse with the woman without her consent;*
> *(ii) in the case of females who are under the age of 12 or who for any other reason are incapable of giving such consent, the absence of consent should, as at present, be presumed; and*
> *(iii) mens rea on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting."*[682]

'Reckless' should be understood "*in the subjective sense*" as describing "*the man who failed to think about or was indifferent as to whether the woman was consenting*".[683]

A convenient short hand for the intent described in para (iii) used in many opinions, is "absence of honest belief" e.g. *Briggs v HM Advocate* 2019 SCCR 323, *HM Advocate v SM (No 1)* 2019 JC 176.

8 It is not normally necessary to define consent at common law but if an issue arises, there is guidance in *HM Advocate v SM*. Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances.[684] A more recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no "free agreement" in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T:drive, "Appeal opinions, pre-trial" folder.

9 However the law may previously have appeared to be understood, following *Maqsood*, a 2009 Act case, the position is now clear, namely that whether an accused had, or did not have, the requisite belief was an inference to be drawn from proven fact. The accused's mental element did not require to be supported by corroborated testimony.

As the court explained in *Spendiff* and *Maqsood*, in cases of rape, as with every other crime, where the issue of the accused's state of mind arises, it is an inferential fact to be drawn from the primary facts and it does not require proof by corroborated evidence.

This is explicitly confirmed for cases of rape at common law by the opinion of the court given by Lord Glennie in Briggs where in para 17, he explained that the complainer's account of her behaviour was sufficient to permit the inference that the appellant was aware that she was not consenting. The opinion of the Lord Justice General (Carloway) in *HM Advocate v SM (No 1)* at paras 9 and 10 is to the same effect.

10 In *RKS v HM Advocate* 2020 JC 235 the court refused to refer the decision in *Maqsood* to a full bench on the basis that it did not require reconsideration.

11 Whilst *RKS* contained certain obiter dicta which were per incuriam, as the Lord Justice Clerk (Dorrian) explained in *AA v HM Advocate* [2021] HCJAC 9, she also affirmed in *AA* that the actual decision in *RKS* on the corroboration question was set out in para 35 of *RKS*:

> *"Nothing which has been advanced on the appellant's behalf causes us to think that what the court said in either of the cases of Graham or Maqsood ought to be reconsidered."*

In *AA*, the court went onto explain that:

> *"The law continues to be as stated clearly in Maqsood paragraph 16."*

In the relevant part of para 16 of his opinion in *Maqsood* the Lord Justice General stated:

> *"[16] In* Graham v HM Advocate *the court (Lord Justice-General (Carloway), para 23) explained that, although an absence of belief was an essential element of the crime of rape, it did not require formal proof'. This latter expression was intended to mean that it did not*

require to be established by corroborated evidence. Whether an accused had, or did not have, a reasonable belief was an inference to be drawn from proven fact (eg the use of force or, in this case, signs of obvious intoxication). The accused's mental element did not require to be supported by corroborated testimony..."

The Lord Justice General continued:

"[17] Putting matters in reverse order, first, although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding.

[18] Secondly, it is only intentional penetration and lack of consent that require to be proved by corroborated evidence."

12 In examining issues relating to mutual corroboration, in *Duthie v HM Advocate* 2021 SCCR 100, a full bench confirmed, at para 18 of the opinion of the court given by the Lord Justice General, that absence of honest or reasonable belief is not a fact which requires to be proved by corroborated evidence.

13 The passage from *Maqsood* where the court considers when an honest belief in consent is a live issue so as to require direction thereon, is consistent with *Doris v HM Advocate* 1996 S.C.C.R. 854. In the absence of any foundation in the evidence for any defence of honest belief the court would be entitled to instruct the jury to disregard that issue, and to refrain from giving them any directions on it. A contemporary endorsement of this principle, in a case of rape under the 2009 Act, is found in *AA v HM Advocate* at paras 5-7. A direction on honest belief is unnecessary where there is evidence that intercourse was obtained by force. [685] As was pointed out in *Doris,*[686] a direction of honest belief in rape cases should only be given when an issue about honest belief has been raised in evidence.[687]

14 The decision in Briggs suggests that in most if not all cases where the defence is denial that sex took place, the question of whether the accused lacked honest belief in consent does not arise.

Possible form of direction on rape

"Charge [ ] is a charge of rape.

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

In most cases:

The crime of rape is committed when a man has sexual intercourse with, that is when he penetrates the vagina of a woman with his penis without her consent.

ALTERNATIVELY - In a case in which honest belief is a live issue:

The crime of rape is committed when a man has sexual intercourse with, that is when he penetrates the vagina of a woman with his penis without her consent, where he has no honest belief that she is consenting.

There are several matters you have to be satisfied about.

Penetration

First, there must be deliberate penetration of the woman's vagina by the accused's penis. Any degree of penetration is enough. Ejaculation of semen is not necessary.

Lack of consent

Second, the intercourse must have been without the woman's consent.

A woman does not consent to a sexual act just because she did not protest or did not physically resist or did not suffer physical injury. There is no need for violence or force to be used although it may be.

There must be consent specific to the occasion on which sexual activity took place.

There is no activity which is more person—and situation—specific than sexual relations. A person does not consent to sex in general but consents to this act of sex with this person at this time and in this place. Any person has a freedom to make a choice of whether or not to do so.

Relationships, similar cases or where there is said to be other consensual sexual activity

The law is that a woman who is in a sexual relationship with a man can be raped/sexually assaulted by him. It does not matter that she consented to sexual activity on an earlier or later occasion.

It will be for judges to formulate an appropriate direction on consent depending upon the particular evidence in the case. In some cases it may be appropriate to illustrate what is meant by lack of consent. Some specimen directions are given below. Judges may wish to refer to the specimen directions on lack of consent for statutory rape and consider whether these could be adapted for common law rape.

Withdrawal of consent

Only where appropriate:

Consent must be present throughout sexual conduct for it to be consensual. Consent may be withdrawn and, if it is, then conduct which takes place after that occurs without consent. If consent is withdrawn during intercourse and intercourse continues that is rape.

If complainer asleep/unconscious/so intoxicated

Only where appropriate:

The complainer must be in a position to give or refuse consent.

So, to have sexual intercourse with a woman who is asleep, or unconscious, is rape.

To have sexual intercourse with a woman who is so intoxicated that she cannot give consent is rape. It makes no difference whether the complainer took the alcohol or drugs herself or was plied them by another.

Honest Belief

Only where appropriate:

This direction will only be required in the rare situations where, although the jury accepts evidence apt to prove that the complainer was not consenting, there is evidence which allows that the accused honestly believed that she was. The following directions are designed to deal with that sort of situation in a charge of common law rape.

If you accept that the complainer was not consenting to sexual intercourse, but you consider that the accused nevertheless honestly believed that she was consenting, or you were left in reasonable doubt about that, you would acquit him. That is because a man who has sexual intercourse with a woman honestly believing that she was consenting, although in fact she was not, is not guilty of rape. Whether the accused had or did not have an honest belief is an inference to be drawn from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused held such an honest belief.

(**Here that evidence could be summarised**).

On the other hand the Crown remind you that...

(**Here the Crown position could be summarised**)

If you accept any evidence that the accused honestly believed that the complainer was consenting, or if you are left in reasonable doubt, you would acquit.

If complainer under 12

Only where appropriate:

In law, a girl under the age of 12 cannot give consent, so intercourse with her, even if she agrees, is rape.

Corroboration

The essential elements of the charge are the act of penetration and the lack of consent by the complainer. These must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed.

Where the complainer is an essential witness

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard her evidence as credible and reliable in its essentials: namely that the accused penetrated her vagina with his penis and that she did not consent.
In deciding whether you accept her evidence about this you should have regard to the other evidence in the case.

Please note in cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused the complainer, may not be an essential witness, in which case the foregoing direction may not be necessary, or may need to be adapted.

Only where appropriate:

Distress

If there was evidence of distress:

*If anything more elaborate is required, reference can be made to "*Corroboration: Evidence of Distress*" in Part II of the Manual.*

Corroboration for the complainer's lack of consent can come from the evidence of others that she was distressed afterwards, provided her distress was genuine, was caused at least in part by what she said happened, and was not wholly due to other extraneous factors like shame or remorse.

If evidence of injury

Corroboration can also come from evidence of any injuries she sustained. Signs of violence may be the consequence of, and evidence of, her lack of consent.

Summary

NB In many cases it may be unnecessary to narrate para 1 in which case para 2 may require slight elaboration.

For the Crown to prove this charge, you must be satisfied that:

1. the accused penetrated the complainer's vagina with his penis and
2. that was without her consent

Only where appropriate:

3. the accused had no honest belief that she was consenting.

[682] Lord Advocate's Reference (No. 1 of 2001), per LJ-G Cullen at para [44].

[683] *Lord Advocate's Reference, supra*, per LJ-G Cullen at paras [29] and [44].

[684] *HM Advocate v SM* (No 1) 2019 JC 176, *Briggs v HM Advocate* 2019 SCCR 323

[685] *Blyth v HM Advocate* 2005 SCCR 710 at para [10].

[686] 1996 SCCR 854 at p 857E

[687] *Kim v HM Advocate* 2005 SLT 1119 at para [10]. The cases of *Blyth* and *Kim* suggest that evidence from the accused alone that he believed the complainer was consenting is insufficient to raise the matter as a discrete issue.

Reset

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON RESET

LAW

General References

Stair Encyclopaedia,Vol 7, paras 389-395; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapter 20; Macdonald, *Criminal Law*, 5th ed, pp 67-69.

Legal Principles

1 The crime of reset is committed when one person possesses goods obtained from another by theft, robbery, fraud or embezzlement, knowing that they have been so acquired and intending to retain them.[688] A thief cannot be guilty of resetting the goods which he has stolen, nor can a person who is resetting the goods which he has stolen, nor can a person who is art and part in the theft be guilty of reset.[689] A person may be guilty of reset even if he has at no time made physical contact with the goods. In some cases reset may be proved even if the goods were under the control of the accused only for a moment of time.[690] Reset may also be proved if the accused connives at the possession or retention of stolen goods by a third party.[691]

2 A person who innocently receives stolen goods, but subsequently finds out the true position, is guilty of reset if he continues in possession.[690]

3 "A wife is not in the ordinary case held guilty of reset if she conceals property to screen her husband, without proof of active participation."[690] The doctrine quoted is rooted in the idea that the wife handled or hid the goods in an attempt to screen her husband and to protect him from detection and punishment. For the doctrine to apply it must be shown that the stolen goods were brought into the matrimonial home by the husband. The court is averse to extending the doctrine.[694]

4 Avoid the use of the word "suspicious" instead of "criminative" circumstances. The Appeal Court held that they were not synonyms.[695]

5 Goods cease to be stolen when they are recovered by anyone acting on behalf of the owner, including the police.[696]

6 Reset only covers goods that have been stolen. If stolen goods have been sold or exchanged for other articles, no charge of reset lies in respect of the surrogatum.[690]

7 The mens rea of reset comprises elements of guilty knowledge and an intention to detain the goods from their owner.[698] The presence or absence or guilty knowledge is ascertained objectively. Although knowledge, as distinct from suspicion, must be proved, the Crown may be assisted by the doctrine of recent possession.[699]

See also chapter on **RECENT POSSESSION** above.

POSSIBLE FORM OF DIRECTION ON RESET

"Charge is a charge of reset.

This is the crime of possessing property knowingly acquired by theft, (robbery, fraud or embezzlement,) and intending to retain it. The idea behind this is to make it difficult for dishonestly come-by goods to be passed on.

The property has to be dishonestly taken from its owner by someone other than the accused. The accused must have taken possession of it. He must intend to keep it from its owner. It doesn't matter how long he's had it in his possession, or whether he got it directly from the thief or from an intermediary. "Possessing" covers having physical control of something, "handling" it, as it's sometimes called, or having practical control over it, such as having it in your house, or your car, or your garden shed, or being able to give directions about its disposal.

Suspicion that the property was stolen isn't enough. The accused must have guilty knowledge. He must have known that the property was dishonestly come-by, but he needn't know the details of how. It's also enough if he simply turns a blind eye to the obvious. He needn't have known that the property was stolen when it first came into his possession, but if he becomes aware of that, and still intends to deprive the owner of it, he's guilty of reset.

Whether or not there was guilty knowledge is something you'll have to judge objectively by making common-sense deductions from what has been proved to have been said or done. You might infer guilty knowledge from eg:

• the goods being hidden in an unusual place, like a grandfather clock under the bed

• the accused being in possession of recently stolen goods in criminative circumstances. How recent depends on their nature. What amounts to criminative circumstances depends on the facts of the case. An example might be the goods not fitting in with their surroundings, like a French Impressionist picture, or several TVs, or a bag with someone else's bank card or driving licence found in a room in a Social Security hostel

• the accused giving an "awkward" or implausible explanation of the acquisition, like having got it from someone who just happens now to be dead, or some expensive item of state-of-the-art electronic equipment, or a cement mixer, bought from a stranger in a pub

• the accused falsely denying having the goods, or changing his accounts of why he has them

• where attempts had been made to remove serial numbers or deface identification marks

• payment of a ridiculously low price for something known to be worth much more

• the accused being in the company of known thieves.

For the Crown to prove this charge, you would need to be satisfied that:

(1) some third party dishonestly acquired the property from its owner in one of the ways I've mentioned

(2) the accused subsequently came into possession of it

(3) he must have known it was dishonestly come by

(4) he intended to keep it from its owner."

Macdonald reset

"It's reset to be privy to the retention of property dishonestly come by, even though you've never had possession of it. A simple example gives you the idea. Suppose you saw me steal a video recorder, and you suggested I hide it away in an empty house. If you subsequently pretended ignorance of that, you would be guilty of reset.

The property has to be dishonestly taken from its owner by someone other than the accused. The accused needn't have had possession of it. Being "privy" simply means being in the know about what has happened. But connivance can't be inferred from mere inaction.

For the Crown to prove this charge, you would need to be satisfied that:

(1) some third party dishonestly acquired the property from its owner

(2) the accused must have known it was dishonestly come by

(3) he connived at that in the sense I've indicated."

[688] Gordon, *supra*, para 20-01.

[689] *Druce v Friel*, 1994 JC 182

[690] Macdonald, *supra*, p 68.

[691] *Friel v Docherty*, 1990 SCCR 351.

[692] Macdonald, *supra*, p 68.

[693] Macdonald, *supra*, p 68.

[694] *Smith v Watson*, 1982 JC 34 (opinion of the court).

[695] *McDonald v HMA* 1989 SCCR 559; 562 A-B

[696] Gordon, *supra*, para 20-08.

[697] Macdonald, *supra*, p 68.

[698] Gordon, *supra*, para 20-09.

[699] *McDonald v HMA*, 1990 JC 40.

Robbery

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON ROBBERY

LAW

General References

Stair Encyclopaedia, Vol 7, paras 357-364; Gordon, *Criminal Law*, Chapter 16; Macdonald, *Criminal Law*, 5th ed, pp 39-43.

Legal Principles

1 "Robbery is the felonious taking and appropriation of property in opposition to the will of another under whose personal charge it is."[700] "Any violence, which is gathered from the mode and circumstances of the demand, being such as are attended with awe and alarm, and may naturally induce a man to surrender his property for the safety of his person, is sufficient to make a taking against the will of the sufferer, which is the essence of a robbery."[701]

2 If the victim is induced to yield to the demand through fear for the safety of his person, a charge of robbery will fail unless it is proved that the threat was of immediate injury. If the threat is one of future harm, the crime is extortion.[702]

3 In some cases where the Crown charges a specific act of assault preceding the robbery, and that act is not proved, the jury are entitled to convict of theft, but not of robbery.[703] Although the evidence may be insufficient to prove the specific assault libelled, the jury may still be able to find in other evidence of violence grounds for returning a verdict of robbery.[704] To break into domestic premises in the middle of the night when the occupant must be expected to be present, violence must be contemplated in the minds of the perpetrators.

4 It is competent to convict of theft on a charge of robbery. On a charge of theft a conviction may follow for theft alone even although in law the circumstances amount to robbery.[705]

See also chapter on **ASSAULT** above; Chapter on **THEFT** below.

For directions on **ASSAULT & ROBBERY** rather than robbery *per se* see chapter on **ASSAULT** above.

POSSIBLE FORM OF DIRECTION ON ROBBERY

"Charge is a charge of robbery.

Robbery is the crime of stealing another person's property by violence or intimidation. Essentially, it's the intentional and violent taking of another's property without his consent, to deprive him of it. Intention, of course, is a state of mind, to be inferred or deduced from what's proved to have been said or done.

The property stolen can be on the other person, like a wallet, or goods under his control, like stock in a shop or money in the till.

The violence must precede, or occur at the same time as, the taking of the property. It's the means of effecting the theft. The other person needn't be actually physically assaulted. Intimidation causing reasonable fear of immediate injury is enough.

The taking must be against the other person's wishes. It can involve snatching physically. It also covers the case of a person who is so intimidated that he hands over the goods, or stands by while the accused helps himself. It also covers the case of the person who drops them in a struggle, and the accused picks them up.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused threatened, menaced or used violence on (name of complainer) in the way described in the charge

(2) that was intended to cause fear or injury with the object of taking property in the (name of complainer)'s possession

(3) the accused took (name of complainer)'s property"

• **Alternative verdict of theft**

"In this case the defence have argued that this was a case of theft by snatching, or theft by surprise rather than robbery.

Theft is the dishonest taking of another person's property without the owner's consent. The difference between theft and robbery lies in the use of violence or threats. Sometimes it can be hard to draw a line between these two offences, it depends on the circumstances. But remember this, the violence or threats used in robbery can fall short of the violence used in assault. Any degree of violence or threats used to effect the taking of the property makes the crime robbery, not theft.

Whether your verdict is theft or robbery will depend on the view you take of the violence involved. If you thought the violence which occurred was very minor and not used to overcome the other person's wishes, you could convict the accused only of theft. But if you thought it was because of violence or threats that the goods were taken, you could convict him of robbery."

[700] Macdonald, *supra*, at p 39, quoted with approval in *Harrison v Jessop*, 1991 SCCR 329, 331 (opinion of the court).

[701] Hume, Vol 1, p 107, quoted with approval in *Harrison v Jessop, supra*, at 331 (opinion of the

court).

[702] Gordon, *supra*, para 16-14.

[703] *Flynn v HMA*, 1995 SCCR 590.

[704] *O'Neill v HMA*, 1934 JC 98; *MacKay v HMA*, 1997 SCCR 743, 1998 JC 47, *Morrison v HMA* 2010 SCCR 328, [2009] HCJAC 16.

[705] Criminal Procedure (Scotland) Act 1995, ss 64(6), 138(4), Sch 3, para 8(1)

Theft and Related Offences

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1. LAW

2. POSSIBLE FORMS OF DIRECTION ON THEFT AND RELATED OFFENCES

LAW

General References

Stair Encyclopaedia,Vol 7, paras 321-348; Gordon, *Criminal Law*, 3rd ed, Vol II, Chapters 14 and 15; Macdonald, *Criminal Law*, 5th ed, pp 16-51.

Legal Principles

1 "Theft is the felonious taking and appropriation of property without the consent of the owner or custodier."[706] Macdonald's "addition of the word 'appropriation' might seem to be mere surplusage, as the taking of the thing is the means by which it is appropriated. But it helps to show that the essential feature of the physical act necessary to constitute theft is the appropriation, by which control and possession of the thing is taken from its owner or custodier. In principle, therefore, the removal of the thing does not seem to be necessary, if the effect of the act which is done to it is its appropriation by the accused".[707]

2 "In certain exceptional cases an intention to deprive temporarily will suffice."[708] The foregoing dictum was uttered in a case where goods had been taken away and were in effect being held to ransom. The deliberate nature of the act of appropriation, the accused knowing what its consequences will be, may be sufficient to justify the inference of mens rea.[709]

3 Housebreaking by itself is not a crime, but a charge of housebreaking with intent to steal is relevant. There can be no relevant charge of housebreaking with intent to commit assault or rape.[710]

4 Theft by housebreaking is committed if the security of the building is overcome by any means.[711]

5 Theft is aggravated if it is achieved by opening a lockfast place. Buildings are excluded from the category of lockfast places, and the lockfast place must be opened before the theft is committed.[712]

POSSIBLE FORMS OF DIRECTION ON THEFT AND RELATED OFFENCES

"Charge is a charge of theft. Theft is the dishonest appropriation of another person's goods without his consent, with the intention of depriving him of them.

The goods stolen must belong to somebody else, and they must have been appropriated, taken into the thief's control or possession, without the owner's consent. This can take a number of forms. It can cover taking away or removing the property; or finding it and simply keeping it; or preventing the owner from using his property, like unauthorised wheel-clamping; or using for your own purposes goods in your possession for some other purpose.

What's stolen must be moved from its customary place. It needn't have been removed from the premises completely. If an item has been moved to the back door to await loading into a van, it's still theft.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. The accused's intention must have been to deprive the owner of the goods permanently or indefinitely or temporarily. Permanent deprivation means what it says. Hiding something you've stolen where the owner is unlikely to find it is enough for indefinite deprivation. It's also enough if you deprive someone of his property for a nefarious or illegitimate purpose, like holding it to ransom until some demand is met, or hiding it to make a false insurance claim. It's the loss to the owner that's important, not the gain to the thief.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused appropriated (name of complainer)'s property, in the sense I've described

(2) that was without (name of complainer)'s consent

(3) the accused intended to deprive him of it."

•Theft by housebreaking

"Charge is a charge of theft by housebreaking. It alleges that the accused broke into [X] and stole the property referred to. Theft by housebreaking is a more serious form of theft.

[Take in definition of theft as appropriate]

Housebreaking involves overcoming the security of any premises, not just dwelling houses. Examples are by forcing a door, smashing a window, or picking a lock. But violent entry or damaging the building isn't necessary. Its security can also be overcome by using an unexpected means of entry like climbing up a drainpipe to an upstairs window, or using a stolen key or a skeleton key. Whatever its form, the unauthorised entry must come before the theft is committed. It's the means of committing the theft.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused overcame the security of the premises

(2) the accused then appropriated (name of complainer)'s property, in the sense I've described

(3) that was without (name of complainer)'s consent

(4) the accused intended to deprive him of it."

• Theft by opening lockfast places

“Charge is a charge of theft by opening lockfast places. It alleges that the accused broke open [X] and stole the property referred to. Theft by opening lockfast places is a more serious form of theft.

[Take in definition of theft as appropriate]

Opening lockfast places involves overcoming the security of anything other than a building. Examples are breaking into a locked car, forcing open a safe, or a storage chest, or a cupboard in a house. The unauthorised entry must come before the theft is committed. It’s the means of committing the theft.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused overcame the security of the (object)

(2) the accused then appropriated the victim’s property, in the sense I’ve described

(3) that was without the other person's consent

(4) the accused intended to deprive him of it.”

• Housebreaking with intent to steal

“Charge is a charge of housebreaking with intent to steal.

It alleges that the accused broke into [X] with intent to steal. Housebreaking with intent to steal is a more serious form of theft.

[Take in definition of theft as appropriate]

Housebreaking involves overcoming the security of any premises, not just dwelling houses. Examples are by forcing a door, smashing a window, or picking a lock. But violent entry or damaging the building isn’t necessary. Its security can also be overcome by using an unexpected means of entry like climbing up a drainpipe to an upstairs window, or using a stolen key or a skeleton key.

The housebreaking must be with the intention of stealing, not for some other purpose, such as finding a place to sleep. But it’s not necessary for the Crown to prove what it was the accused intended to steal. Intention is a state of mind, to be inferred or deduced from what’s been proved to have been said or done.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused overcame the security of the premises

(2) the accused did so with the intention of stealing.”

• Opening lockfast places with intent to steal

“Charge is a charge of opening a lockfast place with intent to steal.

It alleges that the accused broke open [X] with intent to steal. Theft by opening lockfast places is a more serious form of theft.

[Take in definition of theft as appropriate]

Opening lockfast premises involves overcoming the security of anything other than a building. Examples are breaking into a locked car, forcing open a safe, or a storage chest, or a cupboard in a house.

The overcoming of security must be with the intention of stealing, not for some other purpose. But it’s not necessary for the Crown to prove what it was the accused intended to steal. Intention is a state of mind, to be inferred or deduced from what’s been proved to have been said or done.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused overcame the security of the (object)

(2) he did so with the intention of stealing.”

[706] Macdonald, supra, para 16.

[707] *Black v Carmichael*, 1992 SCCR 709, 719 per LJ-G Hope.

[708] *Milne v Tudhope*, 1981 JC 53, 57 per LJ-C Wheatley, approving sheriff’s statement of the law.

[709] *Black v Carmichael, supra*, at 719-720 per LJ-G Hope.

[710] *HMA v Forbes*, 1994 SCCR 163.

[711] Macdonald, *supra*, at p 25.

[712] Gordon, *supra*, paras 15-15 to 15-17.

Threats

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON THREATS

LAW

General References

Gordon, *Criminal Law* 3rd edn Vol II, para 29.62 ff; SME Reissue, *Criminal Law* para 245; Jones & Christie *Criminal Law* 4th edn, paras 9.84, 9.85; McDonald 128-129

POSSIBLE FORM OF DIRECTION ON THREATS

"Charge… is a charge of uttering threats. Threats can be made orally, electronically or in writing. It's the effect on the other person that matters, not how the threat was made. There are different sorts of threat.

• Some threats are criminal of themselves, obviously to the other person's detriment, eg:

threatening to kill someone

threatening to cause someone serious bodily injury

threatening to damage someone's property, like burning down a house

That's the sort of threat we're dealing with here.

The crime is committed as soon as the words are spoken, the message sent, or the letter posted. Why the threat was made, and the accused's purpose in making it is irrelevant. It doesn't matter that the accused never intended to carry it out. It's no defence that it was meant to be a joke.

So, for the accused to be convicted of this crime the Crown must satisfy you that:

1) a threat of the sort described in the charge was made

2) it was the accused who made it

3) he intended to cause the other person fear and alarm by communicating the threat. That is something to be inferred from the nature of the threat.

• Some threats are not criminal of themselves. But if there's a motive or intention behind it with

an illegal purpose, that makes them criminal, eg:

You can threaten a debtor with court action. That's not criminal. But it would be a crime for a creditor to couple a demand for payment with a threat of minor violence, or exposure of the debtor's past sexual conduct, or criminal record, or financial irregularities. That's enforcing a legal demand by illegal means.

That gives you the flavour of this crime. That's the sort of threat we're dealing with here.

The crime is committed when the accused attempts to enforce his demand by some illegal means. It doesn't matter if the demand itself is legitimate, or if the threatened allegation is true or false. It's trying to enforce it by illegal means that makes it criminal.

So, for the accused to be convicted of this crime the Crown must satisfy you that:

1) a threat of the sort described in the charge was made

2) it was the accused who made it

3) he intended to get the other person's compliance. That is something to be inferred from the nature of the threat."

Abusive Behaviour and Sexual Harm (Scotland) Act 2016

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON S.2: DISCLOSURE OF AN INTIMATE PHOTOGRAPH OR FILM

LAW

Statutory Provisions

2 Disclosing, or threatening to disclose, an intimate photograph or film

(1) A person ("A") commits an offence if—

(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,

(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and

(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.

(2) For the purposes of this section, a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B.

(3) In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—

(a) B consented to the photograph or film being disclosed,

(b) A reasonably believed that B consented to the photograph or film being disclosed,

(c) A reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or

(d) A reasonably believed that disclosure of the photograph or film was in the public interest.

(4) For the purposes of subsection (3), consent to the photograph or film being disclosed may be—

(a) consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or

(b) consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.

(5) In proceedings for an offence under subsection (1), A has a defence if the following matter is established—

(a) B was in the intimate situation shown in the photograph or film,

(b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and

(c) when B was in the intimate situation—

(i) B was in a place to which members of the public had access (whether or not on payment of a fee), and

(ii) members of the public were present.

(6) For the purposes of subsection (3), a fact is established, and for the purposes of subsection (5), the matter is established, if—

(a) sufficient evidence is adduced to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

3 Interpretation of section 2

(1) For the purposes of section 2, a person is in an "intimate situation" if—

(a) the person is engaging or participating in, or present during, an act which—

(i) a reasonable person would consider to be a sexual act, and

(ii) is not of a kind ordinarily done in public, or

(b) the person's genitals, buttocks or breasts are exposed or covered only with underwear.

(2) In section 2—

"film" means a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image,

"photograph" means a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

POSSIBLE FORM OF DIRECTION ON S.2: DISCLOSURE OF AN INTIMATE PHOTOGRAPH OR FILM

The charge involves disclosure of an intimate photograph or film. An offence is committed if a person discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person in an intimate situation, by doing so, that person intends to cause the other fear, alarm or distress or is reckless as to whether the other will be caused fear, alarm or distress, and the photograph or film has not previously been disclosed to the public at large, or any section of the public, by other or with his/her consent. So in this case the charge is in the following terms (detail the charge).

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. A person is reckless as to whether the disclosure would cause fear, alarm or distress if he/she failed to think about or was indifferent as to whether the disclosure would have that result.

No actual fear, alarm, or distress requires to have been caused to (name the complainer).

In considering whether (name the complainer) consented to the previous disclosure of the photograph or film to the public at large or a section thereof, consent simply means free agreement to the previous disclosure. That means willing, freely chosen agreement. If this is not present there has been no consent to the previous disclosure.

Disclosure of a photograph or film occurs if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than (name the subject of the photograph/film).

A person is in an "intimate situation" if—

(a) he/she is engaging or participating in, or present during, an act which—

(i) a reasonable person would consider to be a sexual act, and

(ii) is not of a kind ordinarily done in public, or

(b) his/her genitals, buttocks or her breasts are exposed or covered only with underwear.

Film is defined as a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image.

Photograph is defined as a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

In order to prove the offence the Crown must establish—

1. The accused has disclosed or threatened to disclose the photograph or film which shows or apparently shows the complainer in an intimate situation.

2. The accused did so with the intention of causing the person named in the charge fear, alarm or distress or alternatively is reckless as to whether that person will be caused fear, alarm or distress.

3. The photograph or film has not previously been disclosed to the public at large, or any section of the public, by complainer or with his/her consent.

Defences (if applicable)

Section 2(3)

The accused has raised the defence provided in the legislation creating the offence he faces. (as appropriate)

He contends that the complainer consented to the photograph or film being disclosed,

He reasonably believed that the complainer consented to the photograph or film being disclosed,

He reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or

He reasonably believed that disclosure of the photograph or film was in the public interest.

Consent to the photograph or film being disclosed may be either consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.

In considering reasonable belief, the first thing to say is that honest belief on the part of the accused is not enough. The accused requires to hold the necessary belief and he must have reasonable grounds for so doing. To decide this issue you can look objectively at what the facts tell you. To decide if the accused's belief was reasonable, you might have regard to for example

1. whether he/she took any steps to find out if the complainer was consenting (for example), and

2. what steps these were.

Evidence to support his position doesn't need to be corroborated. The defence having been raised, the burden falls on the Crown to prove beyond reasonable doubt that this defence does not apply in this case.

Section 2(5)

The accused has raised the defence provided in the legislation creating the offence he faces. He contends that the complainer was in the intimate situation shown in the photograph or film, that was not the result of a deliberate act of another to which he/she did not agree, and that when in the intimate situation the complainer he/she was in a place to which members of the public had access (whether or not on payment of a fee), and members of the public were present.

Evidence to support his position doesn't need to be corroborated. The defence having been raised, the burden falls on the Crown to prove beyond reasonable doubt that this defence does not apply in this case.

Anti-social Behaviour, Crime and Policing Act 2014: Forced Marriage

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1. LAW

2. POSSIBLE FORM OF DIRECTIONS IN RELATION TO SECTION 122(1)

3. POSSIBLE FORM OF DIRECTIONS IN RELATION TO SECTION 122(3)

LAW

Statutory Provisions: Section 122

Offence of forced marriage: Scotland

Section 122

"(1) A person commits an offence under the law of Scotland if he or she—

(a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and

(b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.

(2) In relation to a victim who is incapable of consenting to marriage by reason of mental disorder, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form coercion).

(3) A person commits an offence under the law of Scotland if he or she—

(a) practises any form of deception with the intention of causing another person to leave the United Kingdom, and

(b) intends the other person to be subjected to conduct outside the United Kingdom that is an offence under subsection (1) or would be an offence under that subsection if the victim were in Scotland.

(4) *"Marriage"* means any religious or civil ceremony of marriage (whether or not legally binding).

(5) *"Mental disorder"*has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

(6) It is irrelevant whether the conduct mentioned in paragraph (a) of subsection (1) is directed at the victim of the offence under that subsection or another person.

(7) A person commits an offence under subsection (1) or (3) only if, at the time of the conduct or deception—

(a) the person or the victim or both of them are in Scotland,

(b) neither the person nor the victim is in Scotland but at least one of them is habitually resident in Scotland, or

(c) neither the person nor the victim is in the United Kingdom but at least one of them is a UK national.

(8) *"UK national"* means an individual who is—

(a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen;

(b) a person who under the British Nationality Act 1981 is a British subject; or

(c) a British protected person within the meaning of that Act."

POSSIBLE FORM OF DIRECTIONS IN RELATION TO SECTION 122(1)

The charge faced by the accused relates to an allegation that he forced (name the complainer) to enter a marriage without consent. In terms of the terms of the legislation an accused commits an offence if he/she uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.

Marriage means any religious or civil ceremony.

The violence, threats, or other coercion may be directed at the complainer or another person. Such conduct requires to be carried out for the purpose of causing the complainer to enter a marriage and not for any other purpose. You require to look at all the circumstances to determine what the purpose was behind the conduct.

What's to be understood without free and full consent? It means free agreement. That means willing, freely chosen, active, co-operative involvement on the part of the complainer. It's continuing, active agreement. Where these features are absent, there's no free and full consent.

When considering whether a person believed something you are looking at the state of mind of a person. That state of mind is to be inferred or deduced from what's been proved to have been said or done. If you are not satisfied that the accused had the necessary belief, then you still require to consider whether he ought reasonably to have believed in all the circumstances that the conduct might cause (name the complainer) to enter a marriage without free and full consent. This is an objective test. You require to consider all the circumstances and decide whether in light of those the accused should reasonably to have believed this to be the case.

(if appropriate)(and tailor as appropriate)

In this case (Name the complainer) is alleged to be incapable of consenting to marriage by reason of mental disorder. Mental disorder means “mental disorder” means any—

(a) mental illness;

(b) personality disorder; or

(c) learning disability,

however caused or manifested.

A person is not mentally disordered by reason only of any of the following—

(a) sexual orientation;

(b) sexual deviancy;

(c) transsexualism;

(d) transvestism;

(e) dependence on, or use of, alcohol or drugs;

(f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;

(g) acting as no prudent person would act.

If you are satisfied that the complainer was suffering at the relevant times from such a mental disorder and by reason of that he/she was incapable of consenting to marriage, the offence is capable of being committed by any conduct carried out for the purpose of causing (name the complainer) to enter into a marriage. The conduct does not require to amount to violence, threats or any other form coercion.

So to convict the accused you have to be satisfied that the Crown has proved the following by corroborated evidence:-

1 The accused used violence, threats, or any other form of coercion for the purpose of causing (name the person) to enter into a marriage and

2. The accused believed or ought reasonably to have believed that that conduct might cause (name the person) to enter into the marriage without free and full consent.

Section 122(3)

“A person commits an offence under the law of Scotland if he or she—

(a)practises any form of deception with the intention of causing another person to leave the

United Kingdom, and

(b)intends the other person to be subjected to conduct outside the United Kingdom that is an offence under subsection (1) or would be an offence under that subsection if the victim were in Scotland."

POSSIBLE FORM OF DIRECTIONS IN RELATION TO SECTION 122(3)

The charge faced by the accused relates to an allegation that he deceived (name the complainer) to leave the United Kingdom intending that he/she will be forced to enter a marriage without consent. In terms of the terms of the legislation an accused commits an offence if he or she practises any form of deception with the intention of causing another person to leave the United Kingdom, and intends that person to be subjected to violence, threats or any other form of coercion outside the United Kingdom for the purpose of causing him/her to enter into a marriage and believes, or ought reasonably to believe, that the conduct may cause him/her to enter into the marriage without free and full consent.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. The deception requires to be carried out with the intention of causing the complainer to leave the United Kingdom. It also requires to be proved that the accused intends that the complainer will be subjected to violence, threats, or other coercion once outside the United Kingdom for the purpose specified or in that belief. When considering whether a person believed something you again are looking at the state of mind of a person. If you are not satisfied that the accused had the necessary belief, then you still require to consider whether he ought reasonably to have believed in all the circumstances that the conduct might cause (name the complainer) to enter a marriage without free and full consent. This is an objective test. You require to consider all the circumstances and decide whether in light of those the accused should have believed this to be the case.

[Thereafter take in and adapt the charge for section 122(1)] Does conduct in section 122(3) involve both arms of section 122(1) or simply 122(1)(a)?

So to convict the accused you have to be satisfied that the Crown has proved the following by corroborated evidence:-

1 The accused practised some form of deception with the intention of causing (name the person) to leave the United Kingdom and

2. The accused intended (name the person) to be subjected outside the United Kingdom to violence, threats, or any other form of coercion for the purpose of causing (name the person) to enter into a marriage

3 The accused believed or ought reasonably to have believed that that conduct might cause (name the person) to enter into the marriage without free and full consent.

Assaulting an Immigration Officer

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON IMMIGRATION OFFICER ASSAULT

LAW

Statutory Provisions - UK Borders Act 2007

Section 22 Assaulting an immigration officer: offence

"(1) A person who assaults an immigration officer commits an offence.

(2) A person guilty of an offence under this section shall be liable on summary conviction to-

(a) imprisonment for a period not exceeding 51 weeks,

(b) a fine not exceeding level 5 on the standard scale, or

(c) both.

(3) In the application of this section to Northern Ireland the reference in subsection (2)(a) to 51 weeks shall be treated as a reference to 6 months.

(4) In the application of this section to Scotland the reference in subsection (2) (a) to 51 weeks shall be treated as a reference to 12 months.

(5) In relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003 (c. 44) (51 week maximum term of sentences) the reference in subsection (2)(a) to 51 weeks shall be treated as a reference to 6 months."

POSSIBLE FORM OF DIRECTION ON IMMIGRATION OFFICER ASSAULT

Charge
[ ] is brought under section 22 of the UK Borders Act 2007 which makes it a crime for someone to assault an immigration
officer.

An assault involves a deliberate
attack on another person, with evil intent, which simply means that the attack was deliberate. Accidental or
careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE
APPROPRIATE]

Weapons may or may not be
involved. Injury may or may not result.[So,] menaces or threats producing fear
or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person
has acted deliberately can only be inferred or deduced from what has been
proved to have been said and/or done.

(If appropriate)
The word “repeatedly” in the charge just means “more than once”.

Where any degree
of injury is alleged see ASSAULT.

An
“immigration officer” is a person appointed by the Home Secretary to exercise
functions of control over persons arriving in the UK by ship or aircraft. An immigration officer can examine them to
determine if they are native-born, or have a right to stay, and whether they
should be allowed or refused leave to enter the country.

So, for
the Crown to prove this charge, it has to show that:

1. the accused attacked (*name of complainer*) in the way
   described in the charge
2. the attack was
   deliberate
3. the attack was
   directed against an immigration officer, as I have defined the functions of
   that office.
4. the accused knew that the person
   named in the charge was an immigration officer.
5. (if aggravation libelled) the attack resulted in
   injury [as described].

Bribery Act 2010

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON BRIBING ANOTHER

3. LAW (2)

4. POSSIBLE FORM OF DIRECTION RELATING TO RECEIVING BRIBES

LAW

Statutory Provisions

Section 1 Bribing another

Offences of bribing another person

"(1) A person ('P') is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party."

Section 3: Function or activity to which bribe relates

“(1) For the purposes of this Act a function or activity is a relevant function or activity if—

(a) it falls within subsection (2), and

(b) meets one or more of conditions A to C.

(2) The following functions and activities fall within this subsection—

(a) any function of a public nature,

(b) any activity connected with a business,

(c) any activity performed in the course of a person’s employment,

(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

(3) Condition A is that a person performing the function or activity is expected to perform it in good faith.

(4) Condition B is that a person performing the function or activity is expected to perform it impartially.

(5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

(6) A function or activity is a relevant function or activity even if it— (a) has no connection with the United Kingdom, and (b) is performed in a country or territory outside the United Kingdom.

(7) In this section ‘business’ includes trade or profession.”

Section 4: Improper performance to which bribe relates

“(1) For the purposes of this Act a relevant function or activity—

(a) is performed improperly if it is performed in breach of a relevant expectation, and

(b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

(2) In subsection (1) ‘relevant expectation’—

(a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and

(b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(3) Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity."

Section 5: Expectation test

"(1) For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

(2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.

(3) In subsection (2) 'written law' means law contained in— (a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or (b) any judicial decision which is so applicable and is evidenced in published written sources."

POSSIBLE FORM OF DIRECTION ON BRIBING ANOTHER

The charge is one of bribing another. (As appropriate)(Section 1(2)) In this case the Crown say that the accused has committed this offence. The offence is committed when a person offers, promises or gives a financial or other advantage to another person, and he/she intends that that advantage to either induce another person to perform improperly a relevant function or activity, or to reward another person for the improper performance of such a function or activity. It does not matter whether the person to whom the advantage is offered, promised or given is the same as the person who is to perform, or has performed, the function or activity concerned.

(As appropriate)(Section 1(3)) In this case the Crown say that the accused has committed this offence. The offence is committed when a person offers, promises or gives a financial or other advantage to another person, and he/she knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

The statute talks about 'intends','knows', or 'believes.' Intention and belief are states of mind. What a person intends or believes require to be inferred or deduced from what's been proved to have been said or done. Similarly what a person knows requires to be inferred or deduced from what has been proved to have been said or done.

I have referred to relevant activity or function. A function or activity is defined as including any function of a public nature, any activity connected with business, any activity performed in the course of someone's employment, any activity performed by or on behalf of a company, partnership, association. Business includes trade or profession. The function or activity does not have to be connected to the United Kingdom or performed there.

To be a relevant activity or function, at least one of the following three conditions have to apply:-

1. The person performing such an activity or function is expected to perform it in good faith

2. The person performing the function or activity is expected to perform it impartially or,

3. The person performing the function or activity is in a position of trust as a result of performing that function or activity.

I have also referred to improper performance. Improper performance occurs if the performance breaches a relevant expectation. Improper performance is further taken to have occurred when there is a failure to perform the function or activity in question and that failure is itself a breach of relevant expectation.

When considering relevant expectation anything that a person has done or omitted to have done arising from or in connection with performing a relevant function or activity is treated as being done or omitted by that person in performance of that function or activity.

If a person is expected to perform the function or activity concerned in good faith or impartially, that amounts to the relevant expectation.

If a person is in a position of trust by virtue of performing the function or activity, the manner in which or the reasons for which the activity or function will be performed arising from the position of trust amounts to the relevant expectation.

Reference to expectation simply means what a reasonable person in the United Kingdom would expect in relation to the performance of the function or activity concerned. In circumstances in which performance is not subject to the law of any part of the United Kingdom, you do not consider any local custom or practice unless allowed by the constitution, legislation, or court decisions in the country or territory concerned.

It does not matter whether the advantage is offered, promised or given by the accused is direct or through a third party.

LAW (2)

Statutory Provisions

Section 2: Receiving bribes

Offences relating to being bribed

“(1) A person (‘R’) is guilty of an offence if any of the following cases applies.

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

(3) Case 4 is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a

reward for the improper performance (whether by R or another person) of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,

(b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper."

POSSIBLE FORM OF DIRECTION RELATING TO RECEIVING BRIBES

The charge is one of receiving a bribe. (As appropriate)(Section 2(2)) In this case the Crown say that the accused has committed this offence. The offence is committed when a person requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by him/her or someone else.

(Section 2(3)) In this case the Crown say that the accused has committed this offence. The offence is committed when a person requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by him/her of a relevant function or activity.

(Section 2(4)) In this case the Crown say that the accused has committed this offence. The offence is committed when a person requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by him/her or someone else) of a relevant function or activity.

(Section 2(5)) In this case the Crown say that the accused has committed this offence. The offence is committed when in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by either him/her or by someone else at his/her request or with his/her agreement or acquiescence (active or passive agreement).

It does not matter whether he/she requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through someone else and the advantage is for

his/her or someone else's benefit.

(In relation to Sections 2(3) –(5) namely ……..detail as appropriate) knowledge or belief on his/her part that the performance of the function or activity is improper is neither here nor there.

(In relation to Section 2(5)) in circumstances in which someone else is performing the function or activity, knowledge or belief on the part of that person that the performance of the function or activity is improper is neither here nor there.

I have referred to relevant activity or function. A function or activity is defined as including any function of a public nature, any activity connected with business,any activity performed in the course of someone's employment, any activity performed by or on behalf of a company, partnership, association. Business includes trade or profession. The function or activity does not have to be connected to the United Kingdom or performed there.

To be a relevant activity or function, at least one of the following three conditions have to apply:-

1. The person performing such an activity or function is expected to perform it in good faith

2. The person performing the function or activity is expected to perform it impartially or,

3. The person performing the function or activity is in a position of trust as a result of performing that function or activity.

I have also referred to improper performance. Improper performance occurs if the performance breaches a relevant expectation. Improper performance is further taken to have occurred when there is a failure to perform the function or activity in question and that failure is itself a breach of relevant expectation.

When considering relevant expectation anything that a person has done or omitted to have done arising from or in connection with performing a relevant function or activity is treated as being done or omitted by that person in performance of that function or activity.

If a person is expected to perform the function or activity concerned in good faith or impartially, that amounts to the relevant expectation.

If a person is in a position of trust by virtue of performing the function or activity, the manner in which or the reasons for which the activity or function will be performed arising from the position of trust amounts to the relevant expectation.

Reference to expectation simply means what a reasonable person in the United Kingdom would expect in relation to the performance of the function or activity concerned. In circumstances in which performance is not subject to the law of any part of the United Kingdom, you do not consider any local custom or practice unless allowed by the constitution, legislation, or court decisions in the country or territory concerned.

Children and Young Persons (Scotland) Act 1937

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1. CRUELTY TO PERSONS UNDER 16

2. POSSIBLE FORM OF DIRECTION ON ILL-TREATMENT AND NEGLECT OF CHILD

CRUELTY TO PERSONS UNDER 16

Section 12

(1) If any person who has attained the age of 16 years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully ill-treats, neglects, abandons, or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence.

(2) For the purposes of this section—

(a) a parent or other person legally liable to maintain a child or young person or the legal guardian of a child or young person] shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;

(b) where it is proved that the death of a child under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the child) while the child was in bed with some other person who has attained the age of 16 years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the child in a manner likely to cause injury to his health.

(3) A person may be convicted of an offence under this section—

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.

(4) Where any person who has attained the age of 16 years is tried on indictment for the culpable homicide of a child or young person under the age of 16 years and he had parental responsibilities in relation to, or charge or care of, that child or young person], it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section, to find him guilty of that offence.

A person has parental responsibilities for the purposes of this section if they fall within section 3 of the Children (Scotland) Act 1995. These in summary are:-

a) the child's mother

b) the child's father if either he was married to the child's mother at the time of conception or any time thereafter or he has been registered as the child's father in the Register of Births, Marriages, and Deaths

c) where the child is conceived, not by sexual intercourse, but as a result of medical treatment, the person who carried the child amd their civil partner at the time

d) by agreement in the appropriate form with the child's mother.

Whether a person has 'charge or care' of a child or young person is a question of fact. It covers the likes of a babysitter. In terms of section 27 of the 1937 Act any person to whose charge a child or young person is committed by any person who has parental responsibilities in relation to him shall be presumed to have charge of the child or young person. In addition any other person having actual possession or control of a child or young person shall be presumed to have the care of him.

'Wilfully' means that the acts or omissions must be deliberate and intentional as opposed to accident al or inadvertent. It does not require any intention to cause any suffering to the child – *H v Lees; D v Orr*, 1993 SCCR 900 Lord Justice General Hope at 907C-D. Being unaware that what was done was likely to cause suffering does not constitute a defence – *Clark v HMA*, 1968 JC 53.

'Neglect' is simply a failure to provide proper care and attention for someone - *H v Lees; D v Orr 1993*, SCCR 900 Lord Justice General Hope at 908C-D. It amounts to a want of reasonable care. It must amount to something more than trivial. It amounts to a want of reasonable care. Reasonable care is what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention to the child - *H v Lees; D v Orr*, 1993 SCCR 900 Lord Justice General Hope at 909A-B. It can be an omission to do something such as provide medical care or provide clothing or food. It is not confined to what can be seen. A child may give the outward may give the appearance of not being neglected but is still the victim of neglect – *Kennedy v S* 1986 SC 43 Lord Justice Clerk Ross at 49-50. Further section 12(2) deems certain behaviour to amount to neglect.

'Abandons' means that a child is left to its fate – *Mitchell v Wright* 1905 7F 568. It is a question of fact, circumstances, and degree – *McD v Orr* 1994 SCCR 645 at 649E. For general observations also see *H v Lees; D v Orr* 1993 SCCR 900.

The neglect, ill-treatment etc must occur in a manner likely to cause unnecessary suffering or injury to the health of the child or young person. The suffering or injury involved requires to be substantial. The suffering or injury which is anticipated must be the result of the neglect etc. The offence is still committed even although the actual suffering or injury or its likelihood was avoided as a result of another intervening, for example by telephoning the police or breaking down a door.

POSSIBLE FORM OF DIRECTION ON ILL-TREATMENT AND NEGLECT OF CHILD

The charge is one of child ill-treatment and neglect. An offence is committed if a person who has reached the age of 16 years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully ill-

treats, neglects, abandons, or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement).

There are a number of matters which require explanation. The first is that the section in effect creates an offence which can be committed by two classes of person. The first is the persons who have parental responsibilities in relation to a child or young person. The second is the persons who have charge or care of a child or young person.

(As appropriate)

A person having parental responsibilities in relation to a child is one include the following persons:-

a) the child's mother

b) the child's father if either he was married to the child's mother at the time of conception or any time thereafter or he has been registered as the child's father in the Register of Births, Marriages, and Deaths

c) where the child is conceived, not by sexual intercourse, but as a result of medical treatment, the person who carried the child amd their civil partner at the time

d) by agreement in the appropriate form with the child's mother.

Whether an individual has 'charge or care' of a child is a question of fact for you to decide? A person can have charge or care of a child irrespective of whether they have any relationship of any kind with the child in question. So it can cover the likes of a babysitter. Any person into whose charge a child or young person is placed by any person who has parental responsibilities in relation to him is presumed to have charge of the child or young person. This, for example, covers the classic babysitter scenario where a child's parent(s) go out leaving the child with a babysitter. In addition, any other person having actual possession or control of a child or young person is presumed to have the care of him.

'Wilfully' simply means that the acts or omissions must be deliberate and intentional as opposed to accidental or inadvertent. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. There does not need to be any intention to cause any suffering to the child. Further being unaware that what was done was likely to cause suffering is of no relevance as to whether the offence was committed or not.

'Neglect' is simply a failure to provide proper care and attention to someone. It must amount to something more than trivial. It amounts to a want of reasonable care. Reasonable care is what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention to the child. It can be an omission to do something such as provide medical care or provide clothing or food. It is not confined to what can be seen. A child may give the outward appearance of not being neglected but may still suffer neglect. **Refer to section 12(2) if appropriate.**

'Abandons' means that a child is left to its fate. You require to consider all the evidence that has

been led and consider whether you are satisfied in all the facts and circumstances that the accused abandoned the child.

Whether any ill-treatment, neglect, abandonment, or exposure is criminal for the purposes of this statutory offence, it is essential that it occurs in a manner likely to cause unnecessary suffering or injury to the health of the child or young person. The suffering or injury involved needs to be substantial. The suffering or injury which is anticipated must be the result of the neglect etc. I say anticipated because the offence is still committed even although the actual suffering or injury or its likelihood is avoided as a result of another intervening, for example, by telephoning the police or breaking down a door.

Civic Government (Scotland) Act 1982: Indecent Photographs etc. of Children

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1. Law

2. POSSIBLE FORM OF DIRECTION ON INDECENT PHOTOGRAPHS OF CHILDREN

3. POSSESSION OF INDECENT IMAGES OF CHILDREN

4. POSSIBLE FORM OF DIRECTION ON POSSESSION OF INDECENT PHOTOGRAPHS OF CHILDREN

Law

Statutory Provisions

Section 52(1)

“Any person who-

(a) takes, or permits to be taken, or makes any indecent photograph or pseudo- photograph of a child;

(b) distributes or shows such an indecent photograph or pseudo-photograph;

(c) has in his possession such an indecent photograph or pseudo-photograph with a view to its being distributed or shown by himself or others; or

(d) publishes or causes to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph, or intends to do so shall be guilty of an offence under this section.

(2) In subsection (1) above ‘child’ means, subject to subsection (2B) below, a person under the age of 18; and in proceedings under this section a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 18.

(2A) In this section, ‘pseudo-photograph’ means an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph.

(2B) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

(2C) In this section, references to an indecent pseudo-photograph include-

(a) a copy of an indecent pseudo-photograph;

(b) data stored on a computer disc or by other electronic means which is capable of conversion into an indecent pseudo-photograph.

(4) For the purposes of this section, a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.

(5) Where a person is charged with an offence under subsection (1)(b) or (c) above, it shall be a defence for him to prove-

(a) that he had a legitimate reason for distributing or showing the photograph or pseudo-photograph or (as the case may be) having it in his possession; or

(b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent.

(7) References in the Criminal Procedure (Scotland) Act 1975 (except in sections 171 and 368 thereof) and in Part III of the Social Work (Scotland) Act 1968 (children in need of compulsory measures of care) to the offences mentioned in Schedule 1 to that Act shall include an offence under subsection (l)(a) above.

(8) In this section-

(a) references to an indecent photograph include an indecent film, a copy of an indecent photograph or film and an indecent photograph comprised in a film;

(b) a photograph (including one comprised in a film) shall, if it shows a child and is indecent, be treated for all purposes of this section as an indecent photograph of a child;

(c) references to a photograph include-

(i) the negative as well as the positive version; and

(ii) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph ..

(d) ‘film’ includes any form of video-recording.”

(9) In this section, references to a photograph also include a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).

(10) And subsection (2B) applies in relation to such an image as it applies in relation to a pseudo-photograph.

1 For a commentary on these provisions see Renton & Brown, *Statutory Offences*, paras B-004 and B-004.2, Gordon's *Criminal Law*, (3rd edition) para 41.21 and Supplement p 191, and especially SME Reissue, Criminal Law para 308.

2 There is a distinction to be drawn between the taking of a photograph and assessing whether it is indecent or not. The context in which a photograph was taken is relevant to mens rea, deciding whether it was taken deliberately or accidentally.[713] The context in which it was taken is not relevant to judging whether it is decent or indecent. That is not to be assessed by reference to extraneous circumstances.[714]

3 'To make' has to be given its natural and ordinary meaning, 'to cause to exist', 'to produce by action', 'to bring about', 'to produce by extraction'. It aptly describes the way in which data stored on disc is produced, namely by use of a computer extracting electronic signals from the internet and converting them into that data for storage.[715] Making a photograph covers the activity by which a person using a computer brings into existence the data stored on disc.[716]

4 In proving the essential fact that the subject of an image was under 18 years of age the Crown normally will have to lead evidence from expert witnesses.[717]

5 The mens rea is that the act of making should be a deliberate and intentional act with knowledge that the image made is, or is likely to be, an indecent photograph or pseudo-photograph.[718] This is a fundamental requirement of the offence and should normally be explained to the jury.[719]

6 The observations of the Divisional Court in *Atkins v DPP* [2000] 2 All ER 425[720] at p 423j on the need for a sceptical approach towards the 'legitimate reason' defence should be borne in mind.

7 It may be inferred from the fact that an accused, who has enabled a file- sharing function on a computer programme, had the intention of allowing others access to the files and was holding them with a view to their being distributed or shown by himself. That constitutes the mens rea required for a contravention of section 52(1)(c), whether or not any user accessed those files.[721] An accused who holds indecent images in a shared folder with a view to their being distributed or shown by himself commits the further offence under section 52(1)(b) when another person accesses it.[722]

POSSIBLE FORM OF DIRECTION ON INDECENT PHOTOGRAPHS OF CHILDREN

"Charge relates to the creation generally of indecent photographs of children or the distribution, showing or publication of such images. indecent photographs of children. It alleges a contravention of the Act mentioned there.

Reading it short, you commit an offence if you:

• take, permit the taking of, or make, an indecent photograph or pseudo- photograph of a child, or

• distribute or show an indecent photograph or pseudo-photograph of a child, or

• have an indecent photograph or pseudo-photograph of a child in your possession with a view to its being distributed or shown by you or others, or

• publish or cause to be published an advertisement likely to be understood as conveying that the advertiser distributes or shows an indecent photograph or pseudo-photograph of a child, or intends to do so.

There are several things to be noted here.

How do you judge if something is indecent? You simply examine the material and decide, using your common sense and experience of life, if it's indecent. If it affronts your sensibilities, applying the standards of the average citizen in contemporary society, it's indecent. If it lies outside what you think of as recognised contemporary standards of common propriety, it's indecent. In deciding that you can take the age of the child into account. The same picture of an adult might not be indecent, whereas one of a child might be.

An indecent photograph includes a negative, and data electronically stored, on CD or otherwise, which can be converted into a photograph. It also includes a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both). It also includes an indecent film, a copy of such a photograph or film, and an indecent photograph contained in a film. If a photograph, or one contained in a film, shows a child, and is indecent, then you treat that as an indecent photograph of a child.

A pseudo-photograph is simply an image which appears to be a photograph. It can be made by computer graphics or in any other way. An indecent pseudo- photograph can be in the form of a copy, or data stored electronically, on CD or otherwise, which can be converted into a pseudo-photograph. It also includes a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).

A child is a person under 18 years of age. You can take it that the person depicted in the photograph was under 18 at the material time if it appears from the evidence as a whole that he/she was under that age. There's no need for the Crown to prove exactly what age the child was age. So expert, and other, evidence may establish that the child was under 18. So also with a pseudo- photograph. If it gives the impression that the person shown is a child, you must regard it a showing a child.

Even if some of the physical characteristics shown are of an adult, you still regard it as showing a child, if that is the predominant impression conveyed.

• The taking/making/distributing or showing of an indecent photograph involves a deliberate and intentional act, knowing that the image taken/ made/ distributed or shown is, or is likely to be, an indecent photograph or pseudo-photograph of a child.

• 'Making' a photograph or pseudo-photograph covers downloading material from the internet to disc, or any other storage device. It covers printing off a photograph from the internet. It covers opening an e-mail attachment, or downloading an image from the website on to your computer screen.

• 'Distributing' an indecent photograph or pseudo-photograph covers parting with possession of

it, or exposing it or offering it for acquisition by another person, or making images available through the internet.

• 'Publishing an advertisement' involves a deliberate or intentional act, knowing that the advert is likely to be understood as meaning that the advertiser distributes or shows indecent photographs of children.

• The expression 'having possession with a view to distribution' calls for some explanation. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's have a say in what happens to it. So, the concept of possession has these two elements to it. In this case that possession must be with a view to distribution. That's a matter of intent, to be inferred or deduced from what's been proved to have been said or done.

So, for the Crown to prove this charge, you would need to be satisfied:

(1) there were photographs or pseudo-photographs

(2) the person depicted in them was under 18

(3) they were indecent

(4) the accused

• took/permitted the taking or/made the photographs or pseudo- photographs, in the sense I've described

• distributed or showed the photographs or pseudo-photographs

• had the photographs or pseudo-photographs in his possession with a view to their being distributed or shown by himself or others

• published, or caused to be published an advertisement likely to be understood as conveying that the advertiser distributes or shows indecent photographs or pseudo-photographs, or intends to do so."

If defence to offence under s 52(1) (b) or (c) is raised

• "In this case the accused says the accused says he had a legitimate reason for

• distributing the material

• showing the material

• having the material in his possession

• In this case the accused says he hadn't seen the material himself, and didn't know, and didn't have any cause to suspect it was indecent.

The Act says if he proves that, that's a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had a legitimate reason for distributing/showing/having the material or no knowledge or suspicion of the nature of the material. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn't need to be corroborated. If you think he has proved that on a balance of probabilities, you must acquit him.

What constitutes a 'legitimate reason' is a question of fact you have to decide. But you are entitled to bring a measure of scepticism to bear in this. You shouldn't conclude too readily that this defence has been made out."

REMEMBER: Warning in the chapter on The General Introductory Directions re reverse burden of proof

Consider whether to give a direction under section 288DA **(delay in reporting)**

POSSESSION OF INDECENT IMAGES OF CHILDREN

Section 52A **Possession of indecent photographs of children.**

(1) It is an offence for a person to have any indecent photograph or pseudo- photograph of a child in his possession.

(2) Where a person is charged with an offence under subsection (1), it shall be a defence for him to prove—

(a) that he had a legitimate reason for having the photograph or pseudo- photograph in his possession; or

(b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or

(c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

(4) Subsections (2) to (2C) and (8) to 10 of section 52 of this Act shall have effect for the purposes of this section as they have for the purposes of that section.

1. Possession

Possession involves both knowledge and control. Control involves an ability to do something with the image. If a person is aware of his capacity to do something with an image but chooses not to do so the necessary element of control is present. If however, that person is unaware of this capacity, the necessary element of control is absent.[719] It is necessary to give a jury guidance on the legal concept of possession, including basic directions about the elements of knowledge and control. It is sufficient to establish possession that the accused was in possession of data stored on computer discs which could produce the indecent images and which he has the capacity to access even although he cannot be shown to have opened or scrutinised the material. The Crown has to prove knowledge of the existence of the things which were in the control of the accused but not

knowledge of the quality or content of the things. [724] Guidance on the issue of possession is even more important when others may have access to the computer and where the accused denies responsibility and asserts that another/others may be responsible [725]

2. Defences

The defences set out in subsection 2 place a burden of proof upon an accused to establish the defences on a balance of probabilities.[726]

POSSIBLE FORM OF DIRECTION ON POSSESSION OF INDECENT PHOTOGRAPHS OF CHILDREN

Adapt the charge for contraventions of section 52 as appropriate.

For standard directions on possession, see MISUSE OF DRUGS ACT 1971 below.

See also reference to Redpath v HMA in the legal section.

If a defence in terms of section 52A(2) is advanced, the burden of proof of establishing the defence falls on the accused.

[713] *Bruce v McLeod*, 1998 SCCR 733, at p 734 F - G

[714] *ibid*, at p 735 D – F.

[715] *Smart v HMA*, 2006 SCCR 120 at para [19]

[716] *Longmuir v HMA*, 2000 SCCR 447 at p 451 E – F.

[717] *Griffiths v Hart* 2005 SCCR 392 at para [19].

[718] *Smart v HMA*, 2006 SCCR 120 at paras [20]-[22], *R v Smith, R v Jayson* [2003]1 Cr App Rep 13.

[719] *Harris v HMA* 2012 SCCR 234.

[720] [2000] 1 W.L.R 1427

[721] *Peebles v HMA* 2007 JC 93 at para [30]

[722] *supra* at para [31].

[723] *Harris v HMA* 2012 SCCR 234.

[724] *Redpath v HMA* 2019 HCJAC 38.

[725] *MacLennan v HMA* 2012 SCCR 625 at para 19.

[726] *McMurdo v HMA* 2015 SLT 277

Civic Government (Scotland) Act 1982: Possession of Extreme Photography

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON POSSESSION OF EXTREME PORNOGRAPHY

LAW

Statutory Provisions

Section 51A

(1) A person who is in possession of an extreme pornographic image is guilty of an offence under this section.

(2) An extreme pornographic image is an image which is all of the following—

(a) obscene,

(b) pornographic,

(c) extreme.

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person's possession) an image forms part of a series of images, the question of whether the image is pornographic is to be determined by reference to—

(a) the image itself, and

(b) where the series of images is such as to be capable of providing a context for the image, its context within the series of images, and reference may also be had to any sounds accompanying the image or the series of images.

(5) So, for example, where—

(a) an image forms an integral part of a narrative constituted by a series of images, and

(b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic (even if

it may have been found to be pornographic where taken by itself).

(6) An image is extreme if it depicts, in an explicit and realistic way any of the following—

(a) an act which takes or threatens a person's life,

(b) an act which results, or is likely to result, in a person's severe injury,

(c) rape or other non-consensual penetrative sexual activity,

(d) sexual activity involving (directly or indirectly) a human corpse,

(e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).

(7) In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (6), reference may be had to—

(a) how the image is or was described (whether the description is part of the image itself or otherwise),

(b) any sounds accompanying the image,

(c) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 3 years or to a fine or to both.

(9) In this section, an "image" is—

(a) a moving or still image (made by any means), or

(b) data (stored by any means) which is capable of conversion into such an image.

51B **Extreme pornography: excluded images**

(1) An offence is not committed under section 51A if the image is an excluded image.

(2) An "excluded image" is an image which is all or part of a classified work.

(3) An image is not an excluded image where—

(a) it has been extracted from a classified work, and

(b) it must be reasonably be assumed to have been extracted (whether with or without other images) from the work solely or principally for the purpose of sexual arousal.

(4) In determining whether (as found in the person's possession) the image was extracted from the work for the purpose mentioned in subsection (3)(b), reference may be had to—

(a) how the image was stored,

(b) how the image is or was described (whether the description is part of the image itself or otherwise),

(c) any sounds accompanying the image,

(d) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(5) In this section—

• "classified work" means a video work in respect of which a classification certificate has been issued by a designated authority,

• "classification certificate" and "video work" have the same meanings as in the Video Recordings Act 1984 (c.39),

• "designated authority" means an authority which has been designated by the Secretary of State under section 4 of that Act,

• "extract" includes an extract of a single image,

• "image" is to be construed in accordance with section 51A.

51C **Extreme pornography: defences**

(1) Where a person ("A") is charged with an offence under section 51A, it is a defence for A to prove one or more of the matters mentioned in subsection (2).

(2) The matters are—

(a) that A had a legitimate reason for being in possession of the image concerned,

(b) that A had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image,

(c) that A—

(i) was sent the image concerned without any prior request having been made by or on behalf of A, and

(ii) did not keep it for an unreasonable time.

(3) Where A is charged with an offence under section 51A, it is a defence for A to prove that—

(a) A directly participated in the act depicted, and

(b) subsection (4) applies.

(4) This subsection applies—

(a) in the case of an image which depicts an act described in subsection (6) (a) of that section, if the act depicted did not actually take or threaten a person's life,

(b) in the case of an image which depicts an act described in subsection (6) (b) of that section, if the act depicted did not actually result in (nor was it actually likely to result in) a person's severe injury,

(c) in the case of an image which depicts an act described in subsection (6)(c) of that section, if the act depicted did not actually involve non- consensual activity, (d) in the case of an image which depicts an act described in subsection (6)

(d) of that section, if what is depicted as a human corpse was not in fact a corpse,

(e) in the case of an image which depicts an act described in subsection (6) (e) of that section, if what is depicted as an animal (or the carcase of an animal) was not in fact an animal (or a carcase). (5) The defence under subsection (3) is not available if A shows, gives or offers for sale the image to any person who was not also a direct participant in the act depicted. (6) In this section "image" and "extreme pornographic image" are to be construed in accordance with section 51A.".

1. Possession

Possession involves both knowledge and control. Control involves an ability to do something with the image. If a person is aware of his capacity to do something with an image but chooses not to do so the necessary element of control is present. If however, that person is unaware of this capacity, the necessary element of control is absent.[727] It is necessary to give a jury guidance on the legal concept of possession, including basic directions about the elements of knowledge and control. This is even more important when others may have access to the computer and where the accused denies responsibility and asserts that another/others may be responsible.[728]

POSSIBLE FORM OF DIRECTION ON POSSESSION OF EXTREME PORNOGRAPHY

Adapt the charge for contraventions of section 52 as appropriate.

For standard directions on possession, see **MISUSE OF DRUGS ACT 1971** below.

[727] *Harris v HMA* 2012 SCCR 234.

[728] *MacLennan v HMA* 2012 SCCR 625 at para 19.

Corporate Manslaughter and Corporate Homicide Act 2007

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CORPORATE HOMICIDE

LAW

Statutory Provisions

Section 1

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised–

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are–

(a) a corporation;

(b) a department or other body listed in Schedule l;

(c) a police force;

(d) a partnership, or a trade union or employers' association, that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act–

(a) "relevant duty of care" has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) "senior management", in relation to an organisation, means the persons who play significant roles in–

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

(5) The offence under this section is called–

(a) corporate homicide, in so far as it is an offence under the law of Scotland.

Section 2

(1) A "relevant duty of care", in relation to an organisation, means any of the following duties owed by it under the law of negligence–

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with–

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing;

(d) (not yet in force) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.

(2) A person is within this subsection if:- (a) he is detained at a custodial institution or in a custody area at a court or police station; (b) he is detained at a removal centre or short-term holding facility; (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements; (d) he is living in secure accommodation in which he has been placed; (e) he is a detained patient.

(3) Subsection (I) is subject to sections 3 to 7.

(4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.

(5) For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law. The judge must make any findings of fact necessary to decide that question.

(6) For the purposes of this Act there is to be disregarded:-

(a) any rule of the common law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;

(b) any such rule that has the effect of preventing a duty of care from being owed to a person by reason of his acceptance of a risk of harm.

(7) In this section– “construction or maintenance operations” means operations of any of the following descriptions–

(a) construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of:-

(i) any building or structure,

(ii) anything else that forms, or is to form, part of the land, or

(iii) any plant, vehicle or other thing;

(b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operations within paragraph (a); “custodial institution” means a prison, a young offender institution, a secure training centre, a young offenders institution, a young offenders centre, a juvenile justice centre or a remand centre; “detained patient” means:-

(a) a person who is detained in any premises under– (i) Part 2 or 3 of the Mental Health Act 1983 (c. 20) (“the 1983 Act”), or (ii) Part 2 or 3 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4)) (“the 1986 Order”);

(b) a person who (otherwise than by reason of being detained as mentioned in paragraph (a)) is deemed to be in legal custody by– (i) section 137 of the 1983 Act, (ii) Article 131 of the 1986 Order, or (iii) article 1 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (Si. 2005/2078);

(c) a person who is detained in any premises, or is otherwise in custody, under the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) or Part 6 of the Criminal Procedure (Scotland) Act 1995 (c. 46) or who is detained in a hospital under section 200 of that Act of 1995;

“immigration escort arrangements” means arrangements made under section 156 of the Immigration and Asylum Act 1999 (c. 33); “the law of negligence” includes:-

(a) in relation to Scotland, the Occupiers’ Liability (Scotland) Act 1960 (c. 30); “prison escort arrangements” means arrangements made under section 80 of the Criminal Justice Act 1991 (c. 53) or under section 102 or 1 18 of the Criminal Justice and Public Order Act 1994 (c. 33);

“removal centre” and “short-term holding facility” have the meaning given by section 147 of the Immigration and Asylum Act 1999;

“secure accommodation” means accommodation, not consisting of or forming part of a custodial institution, provided for the purpose of restricting the liberty of persons under the age of 18.

Section 8

(1) This section applies where– (a) it is established that an organisation owed a relevant duty of care to a person, and (b) it falls to the jury to decide whether there was a gross breach of that duty.

(2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so– (a) how serious that failure was; (b) how much of a risk of death it posed.

(3) The jury may also– (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it; (b) have regard to any health and safety guidance that relates to the alleged breach.

(4) This section does not prevent the jury from having regard to any other matters they consider relevant.

(5) In this section "health and safety guidance" means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

POSSIBLE FORM OF DIRECTION ON CORPORATE HOMICIDE

"Charge is a charge of corporate homicide. It alleges a contravention of section 1 of the 2007 Act. Reading it short, certain organisations are guilty of corporate homicide if the way in which their activities are managed or organised 1. causes someone's death, and 2. amounts to a gross breach of a relevant duty of care owed by them to the person who has died.

The Act applies to

• corporations

• various government departments or bodies

• police forces

• partnerships, trades union or employers' associations if they employ people

Plainly it applies to the accused in this case. That's not in dispute.

Guilt of this offence arises only if the way in which the accused's activities were managed or organised by senior management was a substantial element in the gross breach of a relevant duty of care.

There are several expressions there that need explanation:

Whether a "relevant duty of care" exists in the circumstances of this case is a question of law, and the Act says that is for me, not you, to decide. Based on these facts (indicate factual basis of liability) I can advise you that such a duty was owed by the accused to the deceased.

A “gross breach” of duty of care arises if the conduct set out in the charge falls far below what can reasonably be expected of the organisation in the circumstances.

The “senior management” of the accused covers persons who play significant roles:

• in making decisions about how the whole or a substantial part of its activities are to be managed or organised, or

• in the actual managing or organising of the whole or a substantial part of those activities.

According to the Act, what you have to decide is:

1. whether there was a breach of the duty of care which the accused owed to the deceased

2. whether the way in which its activities were managed or organised by its senior management contributed substantially to that breach

3. whether that breach was gross.

In doing that, you must consider:

1. whether the evidence shows that there was a failure to comply with any health and safety legislation that relates to the breach.

2. If there was, how serious that failure was, and how much a risk of death it posed.

You may also consider

1. the extent to which the accused’s attitudes, policies, systems or accepted practices were likely to have encouraged that failure or produced tolerance of it.

2. any health and safety guidance relating to the duty breached, in any code, guidance or manual concerning health and safety, issued by an authority responsible for enforcing health and safety legislation.

3. any other matters you think are relevant.

So for this offence to be proved, the Crown must show:

1. the accused owed a relevant duty of care to the deceased, which concluded it did.

2. the accused was in breach of that duty.

3. the way in which the accused’s activities were managed or organised by its senior management must have been a substantial element in that breach.

4. that management failure itself must have been a gross breach of duty, falling far below what could reasonably be expected in the circumstances.

5. “that must have caused the death.”

Criminal Justice (Scotland) Act 2003

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1. LAW

2. POSSIBLE FORM OF CHARGE FOR PEOPLE TRAFFICKING

LAW

Please note that section 22 of the *Criminal Justice (Scotland) Act 2003* is repealed by the *Human Trafficking and Exploitation (Scotland) Act 2015 asp 12 (Scottish Act) Sch.1 para.2* from 17 December 2016. This repeal has effect subject to transitional provision specified in SSI 2016/385 reg.3).

Statutory Provisions

Section 22

Traffic in prostitution etc.

"(1) A person commits an offence who arranges or facilitates—

(a) the arrival in or the entry into the United Kingdom of, or travel there (whether or not following such arrival or such entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual, there or elsewhere; or

(b) the departure from there of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual, outwith the United Kingdom.

(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual, there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.

(2) For the purposes of subsections (1) and (1A), a person exercises control over prostitution by an individual if the person exercises control, direction or influence over the prostitute's movements in a way which shows that the person is aiding, abetting or compelling the prostitution.

(4) (4)Subsections (1) and (1A) apply to anything done in or outwith the United Kingdom.

(7) In this section, "material" has the same meaning as in section 51 of the Civic Government (Scotland) Act 1982 (c. 45) and includes a pseudo-photograph within the meaning of section 52 of that Act, a copy of a pseudo-photograph and data stored on a computer disc or by any other electronic means which is capable of conversion into a photograph or pseudo-photograph."

POSSIBLE FORM OF CHARGE FOR PEOPLE TRAFFICKING

Section 22(1)

The charge alleges that the accused was involved in what is commonly described as people trafficking. The offence is committed if a person arranges or assists in—

(a) the arrival in or the entry into the United Kingdom of, or travel within the United Kingdom there (whether or not following such arrival or such entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual, there or elsewhere;

The offence is also committed if a person arranges or assists in—

(b) the departure from the United Kingdom of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual, outwith the United Kingdom.

Now a person exercises control over prostitution by an individual if he/she exercises control, direction or influence over the individual's movements in a way which shows that the person is aiding, abetting or compelling the prostitution.

'Aiding' and 'abetting' simply means involved in some way in promoting the prostitution. 'Compelling' requires that a person is doing something against their freewill.

Reference is also made to indecent material. 'Material' includes any book, magazine, bill, paper, print, film, tape, disc or other kind of recording (whether of sound or visual images or both), photograph, drawing, painting, representation, model or figure. It also includes a pseudo-photograph, a copy of a pseudo-photograph and data stored on a computer disc or by any other electronic means which is capable of conversion into a photograph or pseudo- photograph. A pseudo-photograph is simply an image which appears to be a photograph. It can be made by computer graphics or in any other way. An indecent pseudo-photograph can be in the form of a copy, or data stored electronically, on CD or otherwise, which can be converted into a pseudo-photograph.

What are the characteristics of something indecent? You simply examine the material and decide, using your common sense and experience of life, if it's indecent. If it affronts your sensibilities, applying the standards of the average citizen in contemporary society, it's indecent. If it lies outside what you think of as recognised contemporary standards of what is considered proper, it's indecent.

The statute talks about 'intends' or 'believes.' Intention and belief are states of mind. What a person intends or believes require to be inferred or deduced from what's been proved to have been said or done.

Section 22(1A)

The same except the locus is anywhere apart from the United Kingdom and relates basically to a British citizen.

Criminal Justice and Immigration Act 2008: Non-Compliance with a Violent Offender Order

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON BREACH OF A VIOLENT OFFENDER ORDER

LAW

Section 113

(1) If a person fails, without reasonable excuse, to comply with any prohibition, restriction or condition contained in – (a) a violent offender order, or (b) an interim violent offender order, the person commits an offence.

(2) If a person fails, without reasonable excuse, to comply with –

(a) secion 108(1), 109(1) or (6)(b), 110(1) or 112(4), or (b) any requirement imposed by regulations made under section 111(1), the person commits an offence.

(3) If a person notifies to the police, in purported compliance with –

(a) section 108(1), 109(1) or 110(1), or (b) any requirement imposed by regulations made under section 111(1), any information which the person knows to be false, the person commits an offence.

(4) As regards an offence under subsection (2), so far as it relates to non- compliance with – (a) section 108(1), 109(1) or 110(1), or (b) any requirement imposed by regulations made under section 111(1), a person commits such an offence on the first day on which the person first fails, without reasonable excuse, to comply with the provision mentioned in paragraph (a) or (as the case may be) the requirement mentioned in paragraph (b), and continues to commit it throughout any period during which the failure continues.

(5) But a person must not be prosecuted under subsection (2) more than once in respect of the same failure.

(6) A person guilty of an offence under this section is liable – (a) on summary conviction, to imprisonment for a term not exceeding the relevant period or a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

(7) In subsection (6)(a) “the relevant period” means – (a) in relation to England and Wales and Scotland, 12 months; (b) in relation to Northern Ireland, 6 months.

(8) Proceedings for an offence under this section may be commenced in any court having jurisdiction in any place where the person charged with the offence resides or is found.

POSSIBLE FORM OF DIRECTION ON BREACH OF A VIOLENT OFFENDER ORDER

"Charge… alleges a contravention of section 113(2) of the Act mentioned. That makes it an offence for a person, on whom a violent offender order has been made, to fail, without reasonable excuse, to comply with the requirements of another section of the Act, that he must notify the police within three days of it happening, of

• his use of a new name

• a change of a new home address.

A word or two of explanation may be helpful.

A violent offender order operates for not less than two years and not more than five years. It can be made by a court in England and Wales, but not Scotland. But it can be dealt with in Scotland, if it's breached here. It can apply to a person, aged 18 or over, who has been convicted of a serious offence involving violence, and has been sentenced to at least 12 months custody for it. The aim of the order is to protect the public from serious harm.

So, for the Crown to prove this charge, it has to show that:

1. the accused is over 18

2. he has been convicted of a serious offence involving violence

3. he was sentenced to at least 12 months custody

4. he is a subject of a VOO

5. he changed his name/home address on [date]

6. he failed to notify the police of that change within 3 days."

If defence raised

"In this case the accused says he has a reasonable excuse for not notifying the police. Evidence to support his position doesn't need to be corroborated. It's for the Crown to meet that, and to show his excuse was not a reasonable one. You'll have to decide on this, looking at all the evidence."

Criminal Justice and Licensing (Scotland) Act 2010: Threatening or Abusive Behaviour

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON THREATENING OR ABUSIVE BEHAVIOUR

LAW

Statutory Provisions

Section 38: Threatening or abusive behaviour

"(1) A person ('A') commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct."

Interpretation

For the offence to be committed a person must as a matter of fact behave in an abusive manner. A polite conversational request or compliment will not be construed as threatening merely because it is uninvited or unwelcome. [729] The behaviour does not require to cause a person actual fear or alarm provided the behaviour is such that a reasonable person would be likely to suffer such fear or alarm. The accused also requires to have the necessary intention to cause such fear or alarm or

be reckless as to whether the behaviour in question would have such a result.[730] An indication as to what might constitute a defence of 'reasonable behaviour in the circumstances' in terms of section 38(2) is set out in paragraphs 28 and 29 of *Paterson v Harvie*.

POSSIBLE FORM OF DIRECTION ON THREATENING OR ABUSIVE BEHAVIOUR

The charge is one of threatening or abusive behaviour. This offence is committed if a person behaves in a threatening or abusive manner and that behaviour would be likely to cause a reasonable person to suffer fear or alarm. There is no need for actual fear or alarm to be caused to any person provided it could be anticipated that a reasonable person would suffer fear or alarm as a result of the behaviour in question. In addition, the person responsible for the behaviour must either intend to cause fear or alarm as a result of his behaviour or alternatively, whilst not intending that result, the person was reckless as to whether his behaviour would cause such fear or alarm.

You must consider what has been proved regarding the person's intention. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. A person is reckless as to whether the behaviour would cause fear or alarm if he failed to think about or was indifferent as to whether his/her behaviour would have that result.

Reference to 'a reasonable person' simply means the ordinary man or woman in the street.

When I refer to behaviour, this includes behaviour of any kind including, in particular, things said or otherwise communicated as well as things done. Behaviour also includes a single act, or a course of conduct on the part of the accused.

So to establish the offence the Crown must prove the following—

1. The accused behaved in a threatening or abusive manner

2. That behaviour would be likely to cause a reasonable person to suffer fear or alarm

3. The accused intended that his behaviour would cause fear or alarm or was reckless as to whether his behaviour would have that result.

If you consider, in all the circumstances, the accused's conduct to be reasonable you must acquit.

[729] *Ahmed v HMA* 2020 HCJAC 37

[730] *Paterson v Harvie* 2014 HCJAC 87

Criminal Justice and Licensing (Scotland) Act 2010: Stalking

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON STALKING

LAW

Statutory Provisions

Section 39: Offence of stalking

"(1) A person ('A') commits an offence, to be known as the offence of stalking, where A stalks another person ('B').

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A's course of conduct causes B to suffer fear or alarm.

(3) This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

(5) It is a defence for a person charged with an offence under this section to show that the course of conduct—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section— 'conduct' means—

(a) following B or any other person,

(b) contacting, or attempting to contact, B or any other person by any means,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) monitoring the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering any premises,

(f) loitering in any place (whether public or private),

(g) interfering with any property in the possession of B or of any other person,

(h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,

(i) watching or spying on B or any other person,

(j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm, and 'course of conduct' involves conduct on at least two occasions.

(8) Subsection (9) applies where, in the trial of a person ('the accused') charged with the offence of stalking, the jury or, in summary proceedings, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under section 38(1).

(9) The jury or, as the case may be, the court may acquit the accused of the charge and, instead, find the accused guilty of an offence under section 38(1)."

POSSIBLE FORM OF DIRECTION ON STALKING

The charge is one of stalking. An accused person stalks another if he engages in a course of conduct and as a result the other person suffers fear or alarm. In addition, to be convicted of the offence of stalking, an accused must either have intended that the other person would suffer fear or alarm as a result of the course of conduct carried out by the accused or alternatively have known or ought in all the circumstances to have known that engaging in that course of conduct would be likely to cause the other person to suffer fear or alarm. Fear and alarm clearly is more than irritation.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. When considering whether a person knew something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts. If you are not satisfied that the accused had the necessary intention or knowledge, then you still require to consider whether he ought to have known in all the circumstances. This is an objective test. You require to consider all the circumstances and decide whether in light of those the accused should

have known that the other person was likely to suffer fear or alarm as a result of his engaging in that course of conduct.

I have referred to a course of conduct. This means conduct on at least two occasions.
(Suggest refer to conduct libelled. This conduct is specifically referred to in section 39 and thus is conduct which can constitute stalking if the other requirements of the offence are established.)

If any of the conduct does not fall within specific provisions of section 39 but falls within the catch all '(j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm', suggest the following:-

In relation to this category of behaviour, reference to a 'reasonable person' simply means the ordinary man or woman in the street. Accordingly you will require to consider what actions on the part of the accused are proved and once you have reached a decision on that matter consider whether a reasonable person would expect such actions would cause a person to suffer fear or alarm as I have already defined it.

In order to prove the offence the Crown must establish—

1. The accused engaged in the course of conduct set out in the charge,

2. The course of conduct caused the person named in the charge to suffer fear or alarm,

3. The accused engaged in the course of conduct with the intention of causing the person named in the charge to suffer fear or alarm or alternatively the accused knew or ought to have known in all the circumstances that engaging in the course of conduct would be likely to cause the person named in the charge to suffer fear or alarm.

(If applicable)

It is a defence for a person charged with the offence of stalking to show that the course of conduct was authorised by virtue of any enactment or rule of law, was engaged in for the purpose of preventing or detecting crime, or was, in the particular circumstances, reasonable. The first two are self explanatory. In relation to whether the course of conduct was reasonable in the particular circumstances, you will require to consider the nature of the conduct concerned, including its frequency, the effect of the conduct on (the person named in the charge), the circumstances in which the conduct arose, and any explanation given by the accused for the conduct. You will require to weigh up all these factors and if after completing this exercise, you have a reasonable doubt in your mind, you would require to acquit the accused.

(If applicable)

Now, ladies and gentlemen, if you are not satisfied that the Crown have proved the charge of stalking against the accused, that is not an end to the matter, you require to consider whether you are satisfied that the accused behaved in a threatening and abusive manner. You require to consider this additional issue because this is an alternative verdict which may be brought in when a person is charged with the offence of stalking.

(Thereafter give the appropriate direction regarding section 38 of the 2010 Act)

Criminal Justice and Licensing (Scotland) Act 2010: Articles for Use in Frauds

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1. LAW

2. POSSIBLE FORM OF CHARGE ON ARTICLES FOR USE IN FRAUD

LAW

Statutory Provisions

Section 49: Articles for use in frauds

"(1) A person ('A') commits an offence if A has in A's possession or under A's control an article for use in, or in connection with, the commission of fraud.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(5) In this section, 'article' includes a program or data held in electronic form."

POSSIBLE FORM OF CHARGE ON ARTICLES FOR USE IN FRAUD

Section 49(1)

"The charge alleges that accused had possession of or had under his/her control an article for use in, or in connection with, the commission of fraud.

Dealing with possession first, 'possession' doesn't necessarily mean ownership. Possession requires knowledge (and control). Knowledge involves awareness, knowing of something's existence.

Turning to 'having under one's control' control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's having a say in what happens to it.

The section of the Act is wide enough to cover an article which might be used in or in connection with the commission of any fraud. 'Article' can cover anything which in fact might be used in or is

in fact connected with the commission of fraud. It can include a program or data held in electronic form. The article does not require to be fake.

Section 49(3)(a) The charge alleges that the accused has made, adapted, supplied or offered to supply an article knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud.

The word 'made' is self explanatory. 'Adapted' just means changed in some way. The change can be minimal or significant. 'Supply' and 'supplies' have their ordinary and common sense meanings. It's parting with possession. It covers any form of supply – sale, exchange, barter, gift. The Crown doesn't need to prove the supply was to be to any particular person. To 'offer to supply' should be considered accordingly.

The Act is wide enough to cover an article which might be used in or in connection with the commission of any fraud. 'Article' can cover anything which in fact might be used in or is in fact connected with the commission of fraud. It can include a program or data held in electronic form. However, I stress that the article must be designed or adapted for use or in connection with the commission of fraud. This means that the design or adaptation of the article is limited to these purposes. It would cover the likes of fake items or items which may have been genuine initially but have been altered for these purposes.

To establish the offence the Crown require to prove:-

1. The accused made, adapted, supplied, or offered to supply an article

2. The accused knew that that article is designed or adapted for use in or in connection with the commission of fraud.

Section 49(3)(b)

The charge alleges that the accused has made, adapted, supplied, or offered to supply an article intending that it be used in, or in connection with, the commission of fraud.

The word 'made' is self explanatory. 'Adapted' just means changed in some way. The change can be minimal or significant. 'Supply' and 'supplies' have their ordinary and common sense meanings. It's parting with possession. It covers any form of supply – sale, exchange, barter, gift. The Crown doesn't need to prove the supply was to be to any particular person. To 'offer to supply' should be considered accordingly.

In this charge the Crown allege that the article was intended for use in or in connection with the commission of fraud. The Crown has to prove the accused made, adapted etc the article with that intention although the article may also have a normal, quite innocent use. What his intention was is something to be inferred from the proved facts and circumstances. The Act is wide enough to cover an article which might be used in or in connection with the commission of any fraud. 'Article' can cover anything which in fact might be used in or is in fact connected with the commission of fraud. It can include a program or data held in electronic form.

To establish the offence the Crown require to prove:-

1. The accused made, adapted, supplied, or offered to supply an article,

2. The accused intended that article to be used in or in connection with the commission or fraud."

Criminal Law (Consolidation) (Scotland) Act 1995: Incest

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON INCEST

LAW

Statutory Provisions

Section 1. "(1) Any male person who has sexual intercourse with a person related to him in a degree specified in column 1 of the Table set out at the end of this subsection, or any female person who has sexual intercourse with a person related to her in a degree specified in column 2 of that Table, shall be guilty of incest, unless the accused proves that he or she –

(a) did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was related in a degree so specified; or

(b) did not consent to have sexual intercourse, or to have sexual intercourse with that person; or

(c) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.

Table - Degrees of Relationships

1. *Relationships by Consanguinity*

Column 1	Column 2
Mother	Father
Daughter	Son
Grandmother	Grandfather
Grand-daughter	Grandson
Sister	Brother
Aunt	Uncle
Niece	Nephew
Great grandmother	Great grandfather
Great grand-daughter	Great grandson

2. *Relationships by Adoption*

Column 1	Column 2
Adoptive mother or former adoptive mother	Adoptive father or former adoptive father
Adoptive daughter or former adopted daughter	Adopted son or former adoptive son

(2) For the purpose of this section, a degree of relationship exists in the case of a degree specified in paragraph 1 of the Table –

(a) whether it is of the full blood or the half blood; and

(b) even where traced through to any person whose parents are not or have not been married to one another.

(3) For the avoidance of doubt sexual intercourse between persons who are not related to each other in a degree referred to in subsection (1) above is not incest."

Legal Principles

1 The offence of incest is committed by any male or female person who has sexual intercourse with a person to whom he or she is related within the degrees set out in section 1. Proof of sexual intercourse is constituted in the same manner as is proof of rape. Sexual activity between persons in the prohibited degrees which falls short of sexual intercourse could also have been formerly charged as shameless indecency.[731]

2 Once the Crown have proved that sexual intercourse took place and that the parties were related within the prohibited degrees, the accused can escape conviction only by proving on the balance of probabilities one of the defences set out in sub- paras (a) to (c) of section 1(1) – see previous page.

3 Reverse Burden of Proof

Problems may arise with the reverse burden of proof. The different approaches to the thorny issues of legal and evidential burdens taken in the obiter opinions in *R v Lambert* [2002] 2 AC 541, [2001] 3 WLR 206, [2001] 3 A ER 577 and *R v Johnstone* [2003] 1 WLR 1736, [2003] 3 A ER 884, and considered by the House of Lords in Sheldrake v DPP [2005] 1 A ER 237 have not really been resolved in a way that eases the task of trial courts. Unless the Crown or the defence give notice under section 72(1)(d) of the 1995 Act to raise the issue pre-trial, or unless the jury speeches make clear the parties are agreed on the nature of the burden – at the moment the trial court is only left with *AG's Ref (No 1 of 2004)* [2004] 1 WLR 2111 at [52] as a general guide as to whether a legal burden on the accused should be read down to become simply an evidential burden. In that event a direction in the style of what is generally said about special defences would be appropriate.

In brief, AG's Ref says:

1. At present, Johnstone is the latest word on the subject.

2. Reverse legal burdens are probably justified where the Crown has to prove the essential ingredients of the case, but there are significant reasons why it is fair and reasonable to deny the accused the normal protection of the presumption of innocence.

3. Where an exception is proportionate, it is sufficient if the exception is reasonably necessary.

4. An evidential burden on an accused does not contravene Art 6(2).

5. The court has to decide what will be the realistic effects of the reverse burden. If an Act creates

an offence plus an exception, that strongly indicates no breach of Art 6(2).

6. The easier an accused can discharge a burden, the more likely it is that it is justified.

7. The ultimate question is: “Would the exception prevent a fair trial?” If it would the provision must be read down if possible, or declared incompatible.

8. The need for a reverse burden is not necessarily reflected by the gravity of the offence.

9. *Salabiaku* 13 EHRR 379, 388 para 28 gives guidance on the European approach.

POSSIBLE FORM OF DIRECTION ON INCEST

"Charge [ ] is a charge of what is commonly called incest.

The Act mentioned in the charge makes it a crime for persons of the opposite sex, who are within certain close degrees of blood relationship or adoptive relationship, to have sexual intercourse with each other.

In this case the Crown alleges that the accused had sexual intercourse with his [eg daughter] which is one of the forbidden categories.

It is not a defence that the person named in the charge consented to what happened.

For the Crown to prove this charge, you would need to be satisfied that:

1. The accused and [name of complainer] were related to each other in the way the charge says [eg father] and [eg daughter] and
2. The accused had sexual intercourse with her. For that there must be penetration of her vagina by the accused's penis to any extent. It is not necessary that there is any ejaculation.

(If defence raised)

Even if you are satisfied that these essential elements are proved it is a defence to the charge if the accused proves that [select as appropriate]:

- he did not know and had no reason to suspect that [name of complainer] was [specify relationship], or
- he did not consent to sex, or to sex with [name of complainer], or
- he and the complainer were validly married in another country , and the marriage is recognised as valid in Scotland.

Here the accused is saying [summary of defence position].

It is for the accused to establish this defence. But there are two important things for you to bear in mind:-

First he has to do so on the balance of probabilities.

Proof on a balance of probabilities is a lower standard than beyond reasonable doubt and means that the defence is more probable, or more likely to be true, than not.

Second, evidence to support his position does not need to be corroborated.

If you think he has proved his defence on the balance of probabilities, then you must acquit him."

REMEMBER: Warning re reverse burden of proof

Consider whether to give a direction under section 288DA (delay in reporting)

[731] *R v HMA*, 1988 SCCR 254. As the crime of shameless indecency has been abolished (see *Webster v Dominick*, 2003 SCCR 525), the charge would now have to be lewd, indecent and libidinous practices where a child is involved.

Criminal Law (Consolidation) Scotland Act 1995: Sexual Intercourse with a Girl Under 13

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON SEXUAL INTERCOURSE WITH GIRL UNDER 13

LAW

Please note that section 5 of the *Criminal Law (Consolidation) (Scotland) Act 1995* has been repealed by the Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.6 para.1 *with effect from 1 December 2010.*

Section 5

(1) Any person who has unlawful sexual intercourse with any girl under the age of 13 years shall be liable on conviction on indictment to imprisonment for life.

(2) Any person who attempts to have unlawful sexual intercourse with any girl under the age of 13 years shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years or on summary conviction to imprisonment for a term not exceeding three months.

The Crown must establish mens rea on the part of the accused as to the complainer's age.[732]

POSSIBLE FORM OF DIRECTION ON SEXUAL INTERCOURSE WITH GIRL UNDER 13

"Charge is a charge of having under-age sex. It alleges a contravention of the Act mentioned there. That makes it an offence for a person to have, or attempt to have, unlawful sexual intercourse with any girl under 13 years of age.

It's the fact that the girl under the age of 13 that makes the intercourse unlawful. The law aims to protect young girls, because of their age, against sexual abuse. Whether the girl is a willing or an unwilling participant is irrelevant. Her consent or lack of consent isn't an issue. To prove this charge the Crown doesn't need to show she didn't consent. Who started it, who was at fault, is irrelevant. Equally, whether the accused thought she was much older is irrelevant. That isn't a defence.

By law, an attempt to commit a crime is a crime itself, so an attempt to have under-age intercourse is a crime itself.

There are several matters you've to be satisfied about.

First, that the accused had sexual intercourse with the girl. There must have been penetration of

the girl's vagina by the accused's penis. The penetration needn't be complete, any degree is enough, and it's not necessary for there to have been any emission of semen.

Second, the girl was aged under 13 years at the time and thirdly that the accused knew that.

A word of guidance about the evidence.

This case stands or falls on [the person named in the charge]'s evidence. To convict the accused you would have to regard her as a credible and reliable witness. If you don't believe her, or if you have a reasonable doubt about the reliability of her evidence, you couldn't convict. But if you think she is credible and reliable, there must be other evidence supporting what she says.

For the Crown to prove this charge, you would have to be satisfied that:

1. the accused had sexual intercourse with [the person named in the charge]
2. at the time she was under 13 years of age
3. the accused knew that."

Consider whether to give a direction under section 288DA (delay in reporting)

[732] *H v Griffiths* 2009 SLT 199 at para [29], 2009 GWD 6-96. The Court avoided deciding if that involved simply honest belief or a belief for which there were reasonable grounds. But at para [28] it seemed to favour the reasonable belief test. However, it also referred with approval at para [26] to *B (A Minor) v DPP* [2000] 2 AC 428, where it is stated at page 463G "In principle, an age-related ingredient of a statutory offence stands on no different footing from any other ingredient. If a man genuinely believes that the girl whom he is committing a grossly indecent act is over 14, he is not intending to commit such an act with a girl who is under 14".

Criminal Law (Consolidation) (Scotland) Act 1995: Indecent Behaviour Towards Girls Between 12 and 16

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON INDECENT BEHAVIOUR TOWARDS GIRL BETWEEN 12 AND 16

LAW

Statutory Provisions – Applicable to offences committed before 1 December 2010. (Section 6 was repealed by *Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.6 para.1).*

1 Section 6. "Any person who uses towards a girl of or over the age of 12 years and under the age of 16 years any lewd, indecent or libidinous practice or behaviour which, if used towards a girl under the age of 12 years, would have constituted an offence at common law shall, whether the girl consented to such practice or behaviour or not, be liable on conviction on indictment to imprisonment for a term not exceeding 10 years or on summary conviction to imprisonment for a term not exceeding three months."

2 The Crown must establish mens rea on the part of the accused as to the complainer's age.[733]

3 Where the complainer's age is specified in the charge, it is, by virtue of s255A of the Criminal Procedure (Scotland) Act 1995, held as having been admitted unless it has been challenged by a notice of preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

For additional legal principles, see chapter on **LEWD AND LIBIDINOUS PRACTICES** above.

POSSIBLE FORM OF DIRECTION ON INDECENT BEHAVIOUR TOWARDS GIRL BETWEEN 12 AND 16

"The charge is of engaging in indecent conduct towards a girl who had reached the age of 12 but was not yet 16 years of age.

The Act mentioned made indecent conduct with a girl of that age, knowing that she was under 16, an offence whether she consented or not. The aim is to protect such girls from sexual abuse.

The accused's behaviour must involve indecent conduct. The behaviour must be deliberate.

[WHERE APPROPRIATE IT MAY BE SUFFICIENT TO SAY]

The conduct alleged on this charge is obviously indecent. That is not in dispute.

[OTHERWISE]

Whether conduct is indecent is to be judged by the social standards that would be applied by reasonable people in contemporary society, using their common sense.

The conduct can be conduct against the child directly, or it can be conduct in the child's presence.

This sexual abuse can take many forms, and includes:

[SELECT AS APPROPRIATE]

- indecent physical contact with the child
- showing indecent photographs to the child
- indecent conduct in the presence of the child
- indecent conversation with the child, directly, by phone or electronically

Applying your common sense as reasonable people, you decide whether the conduct was indecent. The Crown does not need to prove what the accused's motivation was.

So, for the Crown to prove this charge, you would need to be satisfied of all of the following:

1. that the accused behaved in the way described in the charge
2. that that behaviour was deliberate
3. that that behaviour amounted to indecent conduct
4. that the child was under the age of16, (which is admitted in this case)

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer had reached the age of 12 but was under 16 on/between the date(s) set out in the charge and so you can take that fact as having been established.

5. that the accused knew that the child was under 16.

[WHERE APPROPRIATE]

which is not in dispute.

OR

[IF DISPUTED]

which can be inferred in this case [SPECIFY REASON]."

Consider whether to give a direction under section 288DA (delay in reporting)

[733] *H v Griffiths* [2009] HCJAC 15, 2009 SLT 199. The court avoided deciding if that involved simply honest belief or belief for which there are reasonable grounds. But at para [28] it seemed to favour the reasonable belief test. However, it also referred with approval at para [26] to *B (A*

Minor) v DPP [2000] 2 AC 428, where it is stated at page 463G “In principle, an age-related ingredient of a statutory offence stands on no different footing from any other ingredient. If a man genuinely believes that the girl whom he is committing a grossly indecent act is over 14, he is not intending to commit such an act with a girl who is under 14”.

Criminal Law (Consolidation) (Scotland) Act 1995: Unlawful Sexual Intercourse with Girl Aged Between 13 and 16

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON UNDER-AGE SEX

LAW

Statutory Provisions – Applicable to offences committed before 1 December 2010. (Section 5(3) is repealed by Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.6 para.1)

Section 5(3) "Without prejudice to sections 1 to 4 of this Act, any person who has, or attempts to have, unlawful sexual intercourse with any girl of or over the age of 13 years and under the age of 16 years shall be liable on conviction on indictment to imprisonment for a term not exceeding 10 years or on summary conviction to imprisonment for a term not exceeding three months.

(5) It shall be a defence to a charge under subsection (3) above that the person so charged:-

(a) had reasonable cause to believe that the girl was his wife; or

(b) being a man under the age of 24 years who had not previously been charged with a like offence, had reasonable cause to believe that the girl was of or over the age of 16 years.

(6) In subsection (5) above, "a like offence" means an offence under subsection (3) above; or

(a) section 4(1) or 10(1) of the Sexual Offences (Scotland) Act 1976 or section 5 or 6 of the Criminal Law Amendment Act 1885 (the enactments formerly creating the offences mentioned in subsection (3) above and section 9(1) of this Act); or

(b) section 6 of the Sexual Offences Act 1956 (the provision for England and Wales corresponding to subsection (3) above), or with an attempt to commit such an offence; or (cc) any of sections 9 to 14 of the Sexual Offences Act 2003; or

(c) section 9(1) of this Act."

POSSIBLE FORM OF DIRECTION ON UNDER-AGE SEX

"Charge is a charge of having under-age sex. It alleges a contravention of the Act mentioned there. Reading it short, that says it's an offence for a person to have, or attempt to have, unlawful sexual intercourse with any girl of or over 13 and under 16 years of age.

It's the fact that the girl is within that age-bracket that makes the intercourse unlawful. The law

aims to protect young girls, because of their age, against sexual abuse. Whether the girl is a willing or unwilling participant is irrelevant. Her consent or lack of consent isn't an issue. To prove this charge the Crown doesn't need to show she didn't consent. It isn't a defence that she was the instigator or a willing participant in what took place. Who started it, who was at fault is irrelevant.

By law, an attempt to commit a crime is a crime itself, so an attempt to have under-age intercourse is a crime itself.

There are several matters you've to be satisfied about.

First, that the accused had sexual intercourse with the girl. There must have been penetration of the girl's vagina by the accused's penis. The penetration needn't be complete, any degree is enough, and it's not necessary for there to have been any emission of semen.

Secondly, that the girl was aged between 13 and 16 years at the time. A word of guidance about the evidence. This case stands or falls on [the person named in the charge]'s evidence. To convict the accused you have to regard her as a credible and reliable witness. If you do not, you must acquit the accused. But if you think she's credible and reliable, there must be other evidence supporting what she says.

For the Crown to prove this charge, you would have to be satisfied that:

(1) the accused had sexual intercourse with [the person named in the charge]

(2) at the time she was aged between 13 and 16 years.

Where statutory defence raised: In this case the accused says

• he had reasonable cause to believe [the person named in the charge] was his wife. If he proves that, that's a defence to the charge, and you must acquit him. He has to satisfy you on a balance of probabilities that he had reasonable cause to believe that she was his wife. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn't need to be corroborated.

REMEMBER: Warning re reverse burden of proof

Or

1) he had reasonable cause to believe [the person named in the charge] was over 16 years of age, and

2) at the time he was under 24 years of age, and

3) he hadn't previously been charged with any of these:

• an offence under this particular provision or the equivalent English provision

• an offence of permitting a girl of under 13 or between 13 and 16 years to use premises for sexual intercourse

• an offence of sexual activity with a child

• an offence of causing or inciting a child to engage in sexual activity

• an offence of causing a child to watch a sexual act

• an offence of arranging or facilitating the commission of a child sex offence.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. A mistaken belief must have had an objective background. It can't be purely subjective, or of the nature of a hallucination.

Evidence in support of the accused's position doesn't need to be corroborated. If it's believed, or if it raises a reasonable doubt, an acquittal must result. It's for the Crown to meet that, and to show that he did not have a reasonable cause for that belief.

Criminal Law (Consolidation) (Scotland) Act 1995: Homosexual Offences

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1. LAW

2. POSSIBLE FORM OF DIRECTION FOR HOMOSEXUAL OFFENCE

LAW

Please note that the version of this section applicable will vary depending on the date on which the offence was committed.

- **For offences committed before 13 December 2010, please see versions 4 and 5, available here.**
- **For offences committed after 13 December 2010, please see version 6, which is replicated below.**

(9) A person who knowingly lives wholly or in part on the earnings of another from male prostitution [...][3] shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.

POSSIBLE FORM OF DIRECTION FOR HOMOSEXUAL OFFENCE

"Charge… is a charge of contravening section 13 of Act referred to in the charge.

That makes it an offence for a person

• to commit,

• to be party to the commission of

• to procure or attempt to procure the commission of a homosexual act,

• otherwise than in private

• without the consent of the parties to the act

• with a person under the age of 16.

A ‘homosexual act’ means:

• sodomy. That is committed when a man inserts his penis into another man’s anus. Any degree of penetration is enough. There doesn’t need to be ejaculation.

• an act of gross indecency or shameless indecency by one male with another male. Its essence is indecent conduct intended to gratify the accused sexually, or intended to corrupt the other male. It involves indecent physical contact with the other male, or indecent conduct in the other male's presence.

Intention is a state of mind, to be inferred or deduced from what’s been proved to have been said or done. What is described in this charge could amount to an act of gross indecency or shameless indecency.

There are some homosexual acts that are not criminal. What is alleged here is not such a case. That’s because:

• what is alleged didn’t take place in private, there were more than two present

• the victim didn’t consent to what happened

• the victim was under 16 years of age at the time

• this act took place in a public lavatory, one to which the public have or are permitted to have, access, free or for payment.”

So, for the Crown to prove this charge, it must show:

1. a homosexual act, as I have defined it, took place

2. it did not take place in private/it took place without the the person named in the charge's consent/ the the person named in the charge was under 16

3. the accused was responsible for committing it. Where statutory defence raised

In this case the accused says:

1. at the time he was under 24 years of age

2. he hadn’t previously been charged with a similar offence

3. he had reasonable cause to believe the person named in the charge was over 16.

The belief must have been based on reasonable grounds, even if they turn out to be mistaken. A mistaken belief must have had an objective background. It can’t be purely subjective, or of the nature of a hallucination.

Evidence to support his position doesn’t need to be corroborated. If it’s believed, or if it raises a

reasonable doubt, an acquittal must result. It's for the Crown to meet that, and to show he didn't have reasonable cause to believe that. You'll have to decide on this, looking at all the evidence."

Criminal Law (Consolidation) (Scotland) Act 1995: Prohibition of the Carry of Offensive Weapons

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON PROHIBITION OF THE CARRYING OF OFFENSIVE WEAPONS

LAW

Section 47. "(1) Any person who has with him in any public place any offensive weapon shall be guilty of an offence."

"(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.

(4) In this section 'offensive weapon' means any article –

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by

(i) the person having it or

(ii) some other person 'public place' means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

'domestic premises' means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling) and 'offensive weapon' means any article made or adapted for use for causing injury to a person, or intended by the person having it with him for such use by him or by some other person."

1. For commentary on these provisions see Renton & Brown, *Criminal Procedure Legislation*, paras A1.93 and A1.95: Renton and Brown *Statutory Offences* C-029 – C-029.3.

2. Where an accused has something apparently concealed in his clothing, he may be searched lawfully under section 48 if a police officer has reasonable grounds for suspecting that one

possible explanation is that the accused may have an offensive weapon with him.[734]

3. A male stripper, dressed and equipped as a policeman, and shortly to perform, had a reasonable excuse for having a side-handled baton and friction lock baton with him as props for his act, on basis that they added verisimilitude to it.[735]

4. The stairwell of a common close entered by a main door which was normally locked with a controlled entry locking system, but which at the time was merely closed, the lock being broken, was not a public place. A place does not become a public place merely because the public is able to enter it. It is necessary that they should have access to it, as members of the public, by invitation or toleration.[736]

5.*Crowe v Waugh*[737] suggests that the words "has with him" carry no implication that knowledge of the presence of the weapon is required. Cf R v Cugullere, [1961] 1 WLR 858. However, in circumstances in which an accused is unaware of the existence of the item in circumstances in which he would have no reason to have been so aware, the accused may fall within the ambit of the statutory defence of reasonable excuse.[738]

6. The decision in *Ashton v HMA*, 2011 HCJAC 124 which dealt with possession of a broken bottle indicates that whether such an object is made or adapted for use for causing injury to a person is a question of fact for the jury to determine notwithstanding that the presiding judge may have found the evidence of the accused implausible.

POSSIBLE FORM OF DIRECTION ON PROHIBITION OF THE CARRYING OF OFFENSIVE WEAPONS

[PLEASE NOTE: These specimen directions contain all of the issues which could arise. Many parts of what follows may not be necessary in a particular case. Directions should be adapted to the circumstances of the particular case.]

"Charge is a charge of having an offensive weapon. It is an offence for any person to have with him in any public place any offensive weapon.

The words 'has with him' call for two comments.

(1) The words simply have their ordinary meaning. They describe a factual situation of ready availability. They do not involve any complicated legal concepts. The Crown does not have to prove that the accused knew he had the item concerned with him.

(2) The words also require a close physical link with, or a degree of immediate control over, the weapon. The accused must have been carrying the weapon, or had it immediately available to him. Ready accessibility, applying common sense, is the key requirement here.

It is an essential of the offence that the accused has an offensive weapon with him in a 'public place'. Public place means any place other than—

(a) domestic premises,

(b) school premises

(c) a prison,

'domestic premises' means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling). An appurtenance covers such as a shed, garden house, tree house, coal cellar or boiler house.

An 'offensive weapon' is any item made or adapted for causing injury to a person or intended by the person who has it with him for that purpose by the person having it or some other person.

• weapons of offence

Some weapons are clearly made for causing personal injury, things like rifles, swords, bayonets, flick-knives, coshes. Some weapons have been adapted for causing personal injury, things like sharpened bicycle chains, a studded belt, a table knife sharpened to a point. [(If applicable in relation to items adapted for causing injury where the accused gives an explanation as per Ashton *supra*). In the present case the Crown say that the item with the accused was adapted for causing personal injury. If you are satisfied beyond reasonable doubt that the item was so adapted for causing personal injury then the Crown does not need to prove the accused's intention. If you are not satisfied that it was adapted for causing personal injury then the Crown has to prove the accused had this weapon with him with the intention of using it to cause personal injury to someone.

What his intention was is something to be inferred form the proved facts and circumstances. The Crown does not need to prove who the intended victim was. It does not matter if the intended use was defensive or offensive.] With either type their intended use is obvious. That is the sort of weapon we are concerned with here. The Crown does not need to prove these are weapons of offence. Their design and nature shows they are.

• other weapons

The normal use of many items has nothing to do with causing personal harm, things like hammers, bread knives, scissors, cleavers, kitchen knives, baseball bats. That is the sort of weapon we are concerned with here. The Crown has to prove the accused had this weapon with him with the intention of using it to cause personal injury to someone. What his intention was is something to be inferred from the proved facts and circumstances. The Crown does not need to prove who the intended victim was. It does not matter if the intended use was defensive or offensive.

For the Crown to prove this charge, you would need to be satisfied that:

1. the accused had the weapon with him, in the sense I have described
2. the place where he had it was a public place, in the sense I have described
3. the weapon was made or adapted for causing injury or intended to cause injury (with it) to a person

(or the accused intended either himself or some other person to cause injury with it."

If defence raised

"In this case the accused says he had lawful authority/a reasonable excuse/for having the weapon

with him. Proof of that lies on him. That means he has to satisfy you on a balance of probabilities that he had lawful authority/a reasonable excuse for having the weapon with him. The reasonable excuse must apply to having the weapon with him in a public place. Fear of an attack is not a reasonable excuse. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not."

[734] *Druce v HMA*, 1992 SLT 1110

[735] *Frame v Kennedy*, [2008] HCJAC 25, 2008 JC 317, 2008 SLT 517, 2008 SCCR 382.

[736] *Templeton v HMA*, 2008 GWD 40-593.

[737] 1999 SCCR 610 at 615A, 1999 JC 292 at 296 C-D, 1999 SLT 1181.

[738] Hill v HMA 2014 HCJAC 117

Criminal Law (Consolidation) (Scotland) Act 1995: Having, in a Public Place, Article with Blade or Point

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON HAVING, IN A PUBLIC PLACE, ARTICLE WITH BLADE OR POINT

LAW

Section 49(1)**.** "Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence."

Section 49(2)**.** "Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed."

Section 49(3)**.** "This section does not apply to a folding pocketknife if the cutting edge of its blade does not exceed three inches (7.62 centimetres)."

A lock knife with a blade about 2 inches long, with an inoperable locking mechanism, is to be classed as a folding pocket knife, since it is immediately foldable, and can be carried in a pocket.[739]

Section 49(4)**.** "It shall be a defence for a person charged with an offence under subsection (1) above to show that the person had a reasonable excuse or lawful authority for having the article with him in the public place."

Taking home a knife, securely wrapped and very recently purchased through the agency of another, constitutes a good defence.[740]

Section 49(5). "Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under subsection (1) above to show that he had the article with him –

(a) for use at work;

(b) for religious reasons; or

(c) as part of any national costume."

Section 49(7)**.** Public Place means any place other than –

(a) domestic premises

(b) school premises (within the meaning of section 49A(6))

(c) a prison (within the meaning of section 49C(7))

'domestic premises' means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).'

For commentary on these provisions, see Renton & Brown, *Criminal Procedure Legislation*, para A1-100, Renton and Brown *Statutory Offences* C-030 – C-030.2. Where an accused had forgotten he had two craft knives, which he used at work and had forgotten to leave there, he could not be said to have had them for use at work.[741] However, in circumstances in which an accused is unaware of the existence of the item in circumstances in which he would have no reason to have been so aware, the accused may fall within the ambit of the statutory defence of reasonable excuse.[742]Where an accused has something apparently concealed in his clothing, he may be searched lawfully under s 50 if a police officer has reasonable grounds for suspecting that one possible explanation is that the accused may have an article which has a blade or is sharply pointed.[743]

The stairwell of a common close entered by a main door which was normally locked with controlled entry locking system, but which at the time was merely closed, the lock being broken, was not a public place. A place does not become a public place merely because the public is able to enter it. It is necessary that they should have access to it, as members of the public, by invitation or toleration.[744]

POSSIBLE FORM OF DIRECTION ON HAVING, IN A PUBLIC PLACE, ARTICLE WITH BLADE OR POINT

[PLEASE NOTE: These specimen directions contain all of the issues which could arise. Many parts of what follows may not be necessary in a particular case. Directions should be adapted to the circumstances of the particular case.]

"Charge is a charge of having a bladed or sharply pointed article. It alleges a contravention of the Act mentioned there. (Reading it short, that says) It is an offence for any person to have with him in any public place any article with a blade or that is sharply pointed.

It does not apply to a folding pocket knife with a blade less than 3 inches or 7.62 cm long. But it covers all other knives, whatever the length of the blade, chisels, knitting needles, darts, garden shears. It is an offence to have things like that.

The words 'have with him' call for two comments.

1. They simply have their ordinary meaning. They describe a factual situation of ready availability. They do not involve any complicated legal concepts. The Crown does not have to prove that the accused knew he had the item concerned with him.
2. Ready availability obviously covers the situation of someone carrying the article, or having the article about his person. But it also covers having access to the article, eg in a car nearby. Accessibility, applying common sense, is the key.

It is an essential of the offence that the accused has the article with him in a public place. Public place means any place other than -

(a) domestic premises,

(b) school premises,

(c) a prison,

'domestic premises' means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling)." An appurtenance covers such as a shed, garden house, tree house, coal cellar or boiler house.

For the Crown to prove this charge, you would need to be satisfied that:

1. the accused had the article referred to in the charge with him, in the sense I have described
2. the place where he had it was a public place, in the sense I have described
3. the article had a blade or was sharply pointed."

If defence raised

"In this case the accused says he had reasonable excuse/lawful authority for having this article with him. In ordinary circumstances, simply forgetting you have the item with you is not reasonable excuse, but where the accused has been unaware of the object or article and there is no reason for him to be aware, this is to be treated as a reasonable excuse for having it. If he shows, in other words, proves it, that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had reasonable excuse/lawful authority for having the article with him. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him.

The reasonable excuse must exist at the time the accused was arrested. A reasonable excuse before then may no longer be one.

What you have to decide is whether the excuse being put forward by the accused amounts to a justifiable exception to the general prohibition against having articles like this.

In this case the accused says he had this article with him for use at work, or for religious reasons, or as part of any national costume. If he shows, in other words, proves it , that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had the article with him for use at work, or for religious reasons, or as part of any national costume at the time the accused was arrested. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him."

[739] *McAuley v Mulholland*, 2003 SCCR 326, reported as *McAuley v Brown*, 2003 SLT 736.

[740] *McGuire v Higson*, 2003 SCCR 440, 2003 SLT 890.

[741] Robertson v Higson, 2003 SCCR 685, 2003 SLT 1276

[742] Hill v HMA, 2014 HCJAC 117

[743] *Miller v Jamieson*, 2007 SCCR 497, 2007 SLT 1180

[744] *Templeton v H.M. Advocate* 2008 G.W.D. 40-593

Criminal Law (Consolidation) (Scotland) Act 1995: Having an Offensive Weapon/Article with a Blade, or is Sharply Pointed, in Prison

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON HAVING AN OFFENSIVE WEAPON/ARTICLE WITH A BLADE OR SHARP POINT, IN PRISON

LAW

Section 49C

"(1) Any person who has with him in a prison-

(a) an offensive weapon, or

(b) any other article which has a blade or is sharply pointed commits an offence.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon or other article with him in the prison.

(3) A defence under subsection (2) includes in particular, a defence that the person had the weapon or other article with him in prison-

(a) for use at work,

(b) for religious reasons, or

(c) as part of any national costume.

(4) Where a person is convicted of an offence under subsection (1), the court may make an order for the forfeiture of any weapon or other article to which the offence relates.

(5) Any weapon or other article forfeited under subsection (4) is, subject to section 193 of the Criminal Procedure (Scotland) Act 1995 (c.46), to be disposed of as the court may direct.

(7) In this section- "offensive weapon" has the meaning given by section 47(4), "prison" includes-

(a) any prison other than a naval, military or air force prison,

(b) a remand centre (within the meaning of paragraph (a) of subsection (1) of section 19 of the Prisons (Scotland) Act 1989 (c.45) (provision of remand centres and young offenders institutions),

(c) a young offenders institution (within the meaning of paragraph (b) of that subsection), and

(d) secure accommodation within the meaning of section 93(1) of the Children (Scotland) Act 1995 (c.36).

For general commentary, see Renton & Brown, *Criminal Procedure Legislation*, para A1-100.7 Renton and Brown *Statutory Offences* C–034A

POSSIBLE FORM OF DIRECTION ON HAVING AN OFFENSIVE WEAPON/ARTICLE WITH A BLADE OR SHARP POINT, IN PRISON

[PLEASE NOTE: These specimen directions contain all of the issues which could arise. Many parts of what follows may not be necessary in a particular case. Directions should be adapted to the circumstances of the particular case.]

"Charge is a charge of having an offensive weapon/article with a blade is sharply pointed in prison. (It alleges a contravention of the Act mentioned there. Reading it short, that says) it is an offence for any person to have with him in a prison an offensive weapon, or any article which has a blade or is sharply pointed. The aim is to prevent people having things like that in prison.

An 'offensive weapon' is any article made or adapted for use for causing injury to the person, or intended by the person who has it with him for that.

Some weapons are clearly made for use for causing injury to a person. Things like rifles and coshes. That is the sort of weapon we're concerned with here. Some weapons have been adopted for that purpose, things like sharpened bicycle chains, studded belts. That is the sort of weapon we're concerned with here.

With either type their use is obvious. The Crown does not need to prove these are weapons of offence. Their design and nature shows they are.

But there are many items the normal use of which has nothing to do with causing injury to a person, things like hammers, mallets and baseball bats. That is the sort of weapon we are concerned with here. The Crown has to prove the accused had this weapon with him with the intention of using it to cause personal injury to someone. What his intention was is something to be inferred from the proved facts and circumstances. The Crown does not need to prove who the intended victim was. It does not matter if the intended use was defensive or offensive.

"Any other article which has a blade or is sharply pointed" covers things like knives of all sorts, vegetable knives, kitchen knives, pen knives, cleavers, scissors, chisels, knitting needles, darts, garden shears. It is an offence to have things like that.

The words 'has with him' call for two comments.

1. The words simply have their ordinary meaning. They describe a factual situation of ready availability. They do not involve any complicated legal concepts. The Crown does not have to prove that the accused knew he had the item concerned with him.
2. The words require a close physical link with, or a degree of immediate control over, the weapon.

A “prison” includes a remand centre, a young offenders institution and secure accommodation for children.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused has the article referred to in the charge with him, in the sense I have described

(2) the place where he had it was a prison or custodial centre of the sort I have described

(3) the article was an offensive weapon, as I have defined it, or had a blade or was sharply pointed.”

If defence raised

“In this case the accused says he had reasonable excuse/lawful authority for having this article with him. In ordinary circumstances, simply forgetting you have the item with you is not reasonable excuse but where the accused has been unaware of the object or article and there is no reason for him to aware, this is to be treated as a reasonable excuse for having it. If he shows that, in other words, proves it, that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had reasonable excuse/lawful authority for having the article with him. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn’t need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him.

The reasonable excuse must exist at the time the accused was in the prison. A reasonable excuse before then may no longer be one.

What you have to decide is whether the excuse being put forward by the accused amounts to a justifiable exception to the general prohibition against having articles like this in prison.”

“In this case the accused says he had this article with him for use at work, or for religious reasons, or as part of any national costume. If he shows that, in other words, proves it, that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had the article with him for use at work, or for religious reasons, or as part of any national costume. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him. The particular reason (specify which of the three it is) must exist at the time the accused is present in the prison.

Criminal Law (Consolidation) (Scotland) Act 1995: Having an Offensive Weapon/Article with a Blade, or is Sharply Pointed, on School Premises

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON HAVING AN OFFENSIVE WEAPON ON SCHOOL PREMISES

LAW

Statutory Provisions

Section 49A**.** Offence of having article with blade or point (or offensive weapon) on school premises.

"(1) Any person who has an article to which section 49 of this Act applies with him on school premises shall be guilty of an offence.

(2) Any person who has an offensive weapon within the meaning of section 47 of this Act with him on school premises shall be guilty of an offence.

(3) It shall be a defence for a person charged with an offence under subsection (1) or (2) above to show that he had a reasonable excuse or lawful authority for having the article or weapon with him on the premises in question.

(4) Without prejudice to the generality of subsection (3) above, it shall be a defence for a person charged with an offence under subsection (1) or (2) above to show that he had the article or weapon in question with him—

(a) for use at work,

(b) for educational purposes,

(c) for religious reasons, or

(d) as part of any national costume.

(6) In this section and section 49B of this Act, "school premises" means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school; and "school" has the meaning given by section 135(1) of the Education (Scotland) Act 1980.

Section 135(1) "school" means an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school, a self-governing school or an independent school, and includes a nursery school and a special school;

and the expression “school” where used without qualification includes any such school or all such schools as the context may require.

School does not, however, include residential establishments as defined by the Social Work (Scotland) Act 1968 and the Children (Scotland) Act 1995 albeit these establishments are often called schools.”

POSSIBLE FORM OF DIRECTION ON HAVING AN OFFENSIVE WEAPON ON SCHOOL PREMISES

[PLEASE NOTE: These specimen directions contain all of the issues which could arise. Many parts of what follows may not be necessary in a particular case. Directions should be adapted to the circumstances of the particular case.]

Offensive weapon (as appropriate)

“Charge is a charge of having an offensive weapon on school premises. It is an offence for any person to have with him on school premises an offensive weapon.

An ‘offensive weapon’ is any article made or adapted for use for causing injury to the person, or intended by the person who has it with him for that.

Some weapons are clearly made for use for causing injury to a person. Things like rifles and coshes. That is the sort of weapon we are concerned with here. Some weapons have been adopted for that purpose, things like sharpened bicycle chains, studded belts. That is the sort of weapon we are concerned with here.

With either type their use is obvious. The Crown does not need to prove these are weapons of offence. Their design and nature shows they are.

But there are many items the normal use of which has nothing to do with causing injury to a person, things like hammers, mallets and baseball bats. That is the sort of weapon we are concerned with here. The Crown has to prove the accused had this weapon with him with the intention of using it to cause personal injury to someone. What his intention was is something to be inferred from the proved facts and circumstances. The Crown does not need to prove who the intended victim was. It does not matter if the intended use was defensive or offensive.

Articles with a blade or other sharp pointed (as appropriate)

“Charge is a charge of having an article with a blade or other sharp point on school premises. It is an offence for any person to have with him on school premises such an article. The aim is to prevent people having such articles on school premises.

“An article which has a blade or is sharply pointed” covers things like knives of all sorts, vegetable knives, kitchen knives, pen knives, cleavers, scissors, chisels, knitting needles, darts, garden shears. It is an offence to have things like that. It does not however apply to a folding pocket knife with a blade less than 3 inches or 7.62 cm long. But it covers all other knives, whatever the length of the blade as well as the other items I have just mentioned. It is an offence to have things like that.

The words ‘has with him’ call for two comments.

(1) The words simply have their ordinary meaning. They describe a factual situation of ready availability. They do not involve any complicated legal concepts. The Crown does not have to prove that the accused knew he had the item concerned with him.

(2) The words require a close physical link with, or a degree of immediate control over, the weapon.

'School premises' means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school. This means that the likes of a janitor's house would be excluded. School itself includes all schools, nursery, primary, secondary, local authority, independent, and special.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused has the article referred to in the charge with him, in the sense I have described

(2) the place where he had it was school premises as I have described

(3) the article was an offensive weapon, as I have defined it, or had a blade or was sharply pointed.(as appropriate)"

If defence raised

"In this case the accused says he had reasonable excuse/lawful authority for having this article/weapon with him. In ordinary circumstances, simply forgetting you have the item with you is not reasonable excuse but where the accused has been unaware of the object or article and there is no reason for him to aware, this is to be treated as a reasonable excuse for having it. If he shows that, in other words, proves it, that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had reasonable excuse/lawful authority for having the article/weapon with him. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him.

The reasonable excuse must exist at the time the accused is present on school premises. A reasonable excuse before then may no longer be one.

What you have to decide is whether the reason being put forward by the accused amounts to a justifiable exception to the general prohibition against having articles like this."

"In this case the accused says he had this article/weapon with him on school premises for use at work, or for educational purposes, or for religious reasons, or as part of any national costume. If he shows that, in other words, proves it, that is a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had the article/weapon with him for use at work, or for educational purposes, or for religious reasons, or as part of any national costume. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him. The particular reason (specify which of the four it is) must exist at the time the accused is present on school premises.

Criminal Law (Consolidation) (Scotland) Act 1995: Vandalism

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON VANDALISM

LAW

1 Statutory Provisions

Section 52**.** "(1) Subject to subsection (2) below, any person who, without reasonable excuse, wilfully or recklessly destroys or damages any property belonging to another shall be guilty of the offence of vandalism. (2) It shall not be competent to charge acts which constitute the offence of wilful fire-raising as vandalism under this section."

For commentary on these provisions, see Renton & Brown, *Criminal Procedure Legislation*, para. A1.106.

2 It is for the Crown to meet the defence of reasonable excuse, and to satisfy the jury beyond reasonable doubt that it should be rejected.[745]

See also chapter on **MALICIOUS MISCHIEF OR DAMAGE** above.

POSSIBLE FORM OF DIRECTION ON VANDALISM

"Charge is a charge of vandalism. It alleges a contravention of the Act mentioned there. Read short, that says it's the crime of vandalism wilfully or recklessly to destroy of damage another's property without reasonable excuse.

The key words are 'wilfully' and 'recklessly'. 'Wilfully' just means 'intentionally' or 'deliberately'. That's something to be inferred or deduced from what's been proved to have been said or done. 'Recklessly' means acting without any care or consideration for the property, being totally indifferent to what happens to it, engaging in conduct carrying an obvious and material risk of damage.

• If defence of reasonable excuse raised

In this case the accused says he had a reasonable excuse for acting as he did. Hence he should be acquitted. The defence don't need to prove that excuse to any particular standard. You just consider any evidence about it along with the rest of the evidence. If it's believed, or if it raises a reasonable doubt about the accused's guilt, an acquittal must result. It's for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused acted in the way described in the charge

(2) he did so wilfully or recklessly

(3) his actions destroyed or damaged the other's property if reasonable excuse raised:

(4) the accused had no reasonable excuse for acting in that way."

[745] *Henvey v HMA* 2005 SCCR 282; 2005 SLT 384 para [11].5

Criminal Law (Consolidation) (Scotland) 1995: Racially-Aggravated Harassment

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON RACIALLY-AGGRAVATED HARASSMENT

LAW

Statutory Provisions

Section 50A

"(1) A person is guilty of an offence under this section if he – (a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and – (i) is intended to amount to harassment of that person; or (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

(2) For the purposes of this section a course of conduct or an action is racially aggravated if –

(a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person's membership (or presumed membership) of a racial group; or

(b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

(3) In subsection (2)(a) above – "membership", in relation to a racial group, includes association with members of that group; "presumed" means presumed by the offender.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on–

(a) the fact or presumption that any person or group of persons belongs to any religious group; or

(b) any other factor not mentioned in that paragraph.

(6) In this section- "conduct" includes speech; "harassment" of a person includes causing the person alarm or distress; "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins, and a course of conduct must involve conduct on at least two occasions."

1 This provision is concerned with harassment towards an individual personally, or towards a group of individuals of the same racial or ethnic group, because of that person's or that group's racial or ethnic origins. It does not apply to harassment based on religious affiliations or sexual orientation. "African" constitutes a distinct racial group, at least as far as black Africans are concerned.[746]

2 The person affected by the racist remarks must be the person at whom they were targeted, not a third-party by-stander.[747]

3 In the event of it not being proved that the target heard the racist remarks, but by-standers did so, it is open to the court to convict of racially aggravated breach of the peace.[748]

4 A course of conduct must arise from two separate or distinct incidents.[749]

POSSIBLE FORM OF DIRECTION ON RACIALLY-AGGRAVATED HARASSMENT

These directions should be adapted to the circumstances of the case

"Charge is a charge of racially aggravated harassment. It alleges a contravention of the Act mentioned there. This crime can be committed if either:

• you pursue a racially aggravated course of conduct amounting to harassment of the other person, which either

• you intend to amount to harassment of the other person, or

• appears to a reasonable person to amount to harassment of the other person.

or

• you act in a manner which is racially aggravated, and this causes, or is intended to cause, the other person alarm or distress. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. The alarm or distress must be suffered by the target of your conduct. It's not enough for a bystander, at whom your conduct wasn't directed, to be affected.

Your course of conduct or your manner of acting is racially aggravated if either: • Immediately before, during, or after it, you show malice and ill-will to the other person, based on his membership, actual or presumed by you, of a racial group. Membership covers association with members of the group.

or

• Your conduct is wholly or partly motivated by malice and ill-will towards members of a racial group, based on their membership of that group.

In either case, it's immaterial that your malice and ill-will is also based on the other person's membership, actual or presumed, of any religious group, or any other factor.

Some more definitions, to make things clear:

(1) “Conduct” includes speech.

(2) A “course of conduct” simply means conduct on at least two occasions.

(3) “Harassment” includes causing the other person alarm or distress.

(4) “Racial group” covers any group of persons, defined by race, colour, nationality, citizenship, or ethnic or national origins.

For the Crown to prove this charge, you would need to be satisfied that:

either (1) the accused pursued a course of racially aggravated conduct, (2) that conduct amounted to harassment of the person named in the charge, (3) it was either intentional, or, would be regarded as harassment by a reasonable person. or else (1) the accused acted in a manner that was racially aggravated. (2) that caused, or was intended to cause the person named in the charge alarm and distress.”

[746] *R v White* [2001] CrimLR 576

[747] *Martin v Bott* 2005 SCCR 554 at para [8]

[748] *Anderson v Griffiths* 2005 SCCR 41 at para [16], *Martin v Bott* 2005 SCCR 554 at para [12]

[749] *McGlennan v McKinnon* 1998 SLT 494

Criminal Procedure (Scotland) Act 1995: Breach of Bail

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1. LAW

2. POSSIBLE FORM OF DIRECTION FOR s 27(1) OFFENCE (12 months maximum)

3. POSSIBLE FORM OF DIRECTION FOR s 27(7) OFFENCE (5 years maximum)

LAW

1 Statutory Provisions

Section 27

(1) Subject to subsection (7) below, an accused who having been granted bail fails without reasonable excuse–

(a) to appear at the time and place appointed for any diet of which he has been given due notice or at which he is required by this Act to appear; or

(b) to comply with any other condition imposed on bail, shall, subject to subsection (3) below, be guilty of an offence...

[section (2) not included]

(3) Where, and to the extent that, the failure referred to in subsection (1) (b) above consists in the accused having committed an offence while on bail (in this section referred to as "the subsequent offence"), he shall not be guilty of an offence under that subsection but, subject to subsection (4) below, the court which sentences him for the subsequent offence shall, in determining the appropriate sentence or disposal for that offence, have regard to–

(a) the fact that the offence was committed by him while on bail and the number of bail orders to which he was subject when the offence was committed;

(b) any previous conviction of the accused of an offence under subsection (1)(b) above; and

(c) the extent to which the sentence or disposal in respect of any previous conviction of the accused differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

(4) The court shall not, under subsection (3) above, have regard to the fact that the subsequent offence was committed while the accused was on bail unless that fact is libelled in the indictment or, as the case may be, specified in the complaint.

(4A) The fact that the subsequent offence was committed while the accused was on bail shall, unless challenged:-

(a) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 7] (2) or 72(6)(b)(i) of this Act; be held as admitted.

(4B) In any proceedings in relation to an offence under subsection (1) above [or subsection (7) below], the fact that (as the case may be) an accused- (a) was on bail; (b) was subject to any particular condition of bail; (c) failed to appear at a diet; or (d) was given due notice of a diet, shall, unless challenged in the manner described in paragraph (a) or (b) of subsection (4A) above, be held as admitted.

[sections 5 and 6 not included]

(7) An accused who having been granted bail in relation to solemn proceedings fails without reasonable excuse to appear at the time and place appointed for any diet of which he has been given due notice (where such diet is in respect of solemn proceedings) shall be guilty of an offence...]

POSSIBLE FORM OF DIRECTION FOR s 27(1) OFFENCE (12 months maximum)

"Charge alleges a contravention of section 27(1) of the 1995 Act. Read short, that makes it an offence for someone who has been granted bail, to fail, without reasonable excuse,

• to appear in court for a hearing of which he's been given due notice

• to comply with any other condition of bail.

• In section 27(1)(a) case (failure to appear) In this case, there's been no challenge, and therefore the accused is held to have admitted, that he:

• was on bail

• was given notice to appear in court

• failed to do so.

• In case where reasonable excuse not pleaded

So, since the three elements needed for conviction are all admitted, you could convict the accused of this charge.

• In case where reasonable excuse is pleaded

In this case the accused says he had a reasonable excuse for acting as he did. Hence he should be acquitted. He doesn't need to prove that defence to any particular standard. You just consider any evidence about it along with the rest of the evidence. It it's believed, or if it raises a reasonable doubt about the accused's guilt, an acquittal must result. It's for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

• In s 27(1)(b) case (breach of special bail condition)

In this case, there's been no challenge, and therefore the accused is held to have admitted, that he:

• was on bail

• was subject to a condition that (eg):-

• he didn't approach or communicate with X

• enter (address)

• In case where reasonable excuse not pleaded

So, with this charge, all the Crown needs to prove is that the accused

• approached or communicated with X

• entered (address).

• In case where reasonable excuse is pleaded

In this case the accused says he had a reasonable excuse for acting as he did. Hence he should be acquitted. He doesn't need to prove that defence to any particular standard. You just consider any evidence about it along with the rest of the evidence. It it's believed, or if it raises a reasonable doubt about the accused's guilt, an acquittal must result. It's for the Crown to meet that defence,and to satisfy you beyond reasonable doubt that it should be rejected.

POSSIBLE FORM OF DIRECTION FOR s 27(7) OFFENCE (5 years maximum)

"Charge alleges a contravention of section 27(7) of the 1995 Act. Read short, that makes it an offence for someone who has been given bail in relation to proceedings involving a jury trial to fail, without reasonable excuse, to appear for a hearing of which he's been given due notice.

In this case, there's been no challenge, and therefore the accused is held to have admitted, that he:

• was on bail

• was given notice to appear in court

• failed to do so

• In case where reasonable excuse not pleaded

So, with this charge, all the Crown needs to prove is: That the accused was indicted in another case. Of course, that isn't a pointer to his guilt in this case that you're now dealing with.

• If defence of reasonable excuse raised

In this case the accused says he had a reasonable excuse for acting as he did. Hence he should be acquitted. He doesn't need to prove that defence to any particular standard. You just consider any evidence about it along with the rest of the evidence. It it's believed, or if it raises a reasonable doubt about the accused's guilt, an acquittal must result. It's for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected.

Criminal Procedure (Scotland) Act 1995: Breach of Non-harassment Orders

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1. Law

Law

Section 234A Non-harassment orders

(1) Where a person is convicted of an offence involving harassment of a person ("the victim"), the prosecutor may apply to the court to make a non-harassment order against the offender requiring him to refrain from such conduct in relation to the victim as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.

(4) Any person who is **F2**. . . in breach of a non-harassment order shall be guilty of an offence and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both such imprisonment and such fine; and

To establish that a non harassment order has been breached, the Crown require to prove that a person deliberately acted in a manner prohibited by the order. If such an action is an unintended consequence of other actions by the accused, then the order is not breached. The motivation behind a person deliberately acting in such a manner is irrelevant. [750]

POSSIBLE FORM OF DIRECTION ON BREACH OF A NON HARASSMENT ORDER

"Charge… alleges a contravention of section 234A of the Criminal Procedure (Scotland) Act 1995. That makes it an offence for a person, on whom a non harassment order has been made, to act in a manner prohibited by that order. To prove this charge the Crown have to prove what the accused did, that these actions were deliberate on the part of the accused, and that those actions were prohibited by the terms of the non harassment order. The reasons for the accused so acting are not relevant.

(If the accused position was that any breach of the order was incidental to other actions on his part)

In the instance, the accused accepts that his actions may appear, on the face of it, to have run in

conflict with the terms of the order. However, he explains that any such apparent breach of the terms of the order was quite incidental to an activity which was not in breach of the order and he did not know that by acting in that other way he was also breaching the order. You will have to consider all the evidence and decide what you make of it. It is for the Crown to prove the offence and in this instance the Crown require to prove that the accused knew that by his actions he was breaching the order, albeit he might also have had other reasons for acting in the way that he did.

FOR INFORMATION

Recent legislation has provided for the granting of various orders – Trafficking and Exploitation Prevention and Risk Orders (Part 4 of the Human Trafficking and Exploitation (Scotland) Act 2015, Sexual Harm Prevention Orders and Sexual Risk Orders (Parts 3 and 4 of the Abusive Behaviour and Sexual harm (Scotland) Act 2016). These provisions are framed in a similar way to section 234A above although the reasonable excuse qualification is present in the provisions created the offence for breaching these orders. The foregoing charge can be adapted accordingly in the instances of such contraventions being libelled.

[750] *Harvie v Murphy 2015 SCCR 363* paras 28-30

Customs and Excise Management Act 1979 Section 170: Fraudulent Evasion of Prohibition, etc

Table of contents

1. LAW

2. POSSIBLE FORM OF DIRECTION ON FRAUDULENT EVASION OF PROHIBITION FOR USE IN CASES OF DRUGS

LAW

Statutory Provisions

Section 170**.** "(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person-

(a) knowingly acquires possession of any of the following goods, that is to say –

(i) goods which have been unlawfully removed from a warehouse or Queen's warehouse;

(ii) goods which are chargeable with a duty which has not been paid;

(iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of enactment; or

(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be detained.

(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; o

r (c) any provision of the Customs and Excise Acts 1979 applicable to the goods, he shall be guilty of an offence under this section and may be detained."

Judicial Interpretation

1 The fraudulent evasion of the prohibition means dishonest conduct deliberately directed to evading or defeating the effect of the prohibition against the importation of goods. "Importation" means bringing goods into the United Kingdom from a foreign country. Before an accused person can be convicted of the charge it must be proved that he was knowingly concerned in the operation of evasion. It is essential for it to be proved that the accused knew that the goods being imported were prohibited goods, for example controlled drugs. The Crown, however, does not need to prove that the accused knew the precise character of the drugs.[751]

POSSIBLE FORM OF DIRECTION ON FRAUDULENT EVASION OF PROHIBITION FOR USE IN CASES OF DRUGS

"Charge is a charge of what's commonly called drug smuggling. It alleges contraventions of the Acts mentioned there. Reading them short, they make it a crime for any person to be in any way knowingly concerned in the fraudulent evasion of the prohibition against importing controlled drugs.

'Importing' simply means bringing goods into the UK from abroad. It covers unloading.

'Fraudulent evasion of the prohibition against importing controlled drugs' means dishonest conduct designed to get round the ban on importing controlled drugs.

I want to split being 'knowingly concerned' into two.

To be '*concerned*' in the evasion has a very wide meaning. It covers everyone involved, those who plan and direct, those who put up the money, those on the fringes, those who load, unload or transport or store the goods. So, it catches all those involved in a practical way in the operation of evading the ban.

To be '*knowingly*' concerned implies an awareness of what's going on. It means the accused must know that what was being imported was a controlled drug. He doesn't need to know precisely what drug was involved. It also means he must know that he was taking part in an operation aimed at avoiding the importation prohibition. So, he has to know the illegal nature of the operation, and that it involved controlled drugs of some sort.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the subject matter of the activities you've been hearing about was the controlled drug *(specify)*

(2) the aim of these activities was the dishonest and illegal one of avoiding the ban on its importation into the UK

(3) the accused was knowingly concerned in these activities, in the sense I've just described."

[751] *Howarth v HMA*, 1992 SCCR 364, 366-367 per Lord Penrose.

Domestic Abuse (Scotland) Act 2018

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1. Law

1.1. Corroboration

2. Possible form of direction on Domestic Abuse (Scotland) Act 2018

Please note that sheriffs and senators have access to the Domestic Abuse Resource Kit, which provides further information on the 2018 Act and coercive control, including an explanation of the new legislation, flowcharts on the offence itself and the aggravation in the relation to a child, as well as interviews with experts discussing issues arising from the new crime, its investigation and prosecution, and during the court process. The Resource Kit can be found here: Domestic Abuse Resource Kit.

Law

Domestic Abuse (Scotland) Act 2018

"s.1 Abusive behaviour towards partner or ex-partner

(1) A person commits an offence if—

(a) the person ("A") engages in a course of behaviour which is abusive of A's partner or ex-partner ("B") , and

(b) both of the further conditions are met.

(2) The further conditions are—

(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,

(b) that either—

(i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or

(ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.

(3) In the further conditions, the references to psychological harm include fear, alarm and distress."

"s.2 What constitutes abusive behaviour

(1) Subsections (2) to (4) elaborate on section 1(1) as to A's behaviour.

(2) Behaviour which is abusive of B includes (in particular) —

(a) behaviour directed at B that is violent, threatening or intimidating,

(b) behaviour directed at B, at a child of B or at another person that either—

(i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3) , or

(ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3) .

(3) The relevant effects are of—

(a) making B dependent on, or subordinate to, A,

(b) isolating B from friends, relatives or other sources of support,

(c) controlling, regulating or monitoring B's day-to-day activities,

(d) depriving B of, or restricting B's, freedom of action,

(e) frightening, humiliating, degrading or punishing B.

(4) In subsection (2) —

(a) in paragraph (a) , the reference to violent behaviour includes sexual violence as well as physical violence,

(b) in paragraph (b) , the reference to a child is to a person who is under 18 years of age."

"s.4 Evidence of impact on victim

(1) The commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2) .

(2) The operation of section 2(2) (b) does not depend on behaviour directed at someone actually having on B any of the relevant effects set out in section 2(3) .

(3 Nothing done by or mentioned in subsection (1) or (2) prevents evidence from being led in proceedings for an offence under section 1(1) about (as the case may be) —

(a) harm actually suffered by B as a result of the course of behaviour, or

(b) effects actually had on B of behaviour directed at someone."

"s.5 Aggravation in relation to a child

(1) This subsection applies where it is, in proceedings for an offence under section 1(1) —

(a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and

(b) proved that the offence is so aggravated

(2) The offence is so aggravated if, at any time in the commission of the offence—

(a) A directs behaviour at a child, or

(b) A makes use of a child in directing behaviour at B.

(3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.

(4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A's behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both) .

(5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child—

(a) has ever had any—

(i) awareness of A's behaviour, or

(ii) understanding of the nature of A's behaviour, or

(b) has ever been adversely affected by A's behaviour.

(6) Evidence from a single source is sufficient to prove that the offence is so aggravated.

(7) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is so aggravated,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(8) Each of subsections (2) to (4) operates separately along with subsection (5) , but subsections (2)

to (4) may be used in combination along with subsection (5) .

(9) Nothing in subsections (2) to (5) prevents evidence from being led about—

(a) a child's observations of, or feelings as to, A's behaviour, or

(b) a child's situation so far as arising because of A's behaviour.

(10) In subsections (4) and (5) , the references to adversely affecting a child include causing the child to suffer fear, alarm or distress.

(11) In this section, the references to a child are to a person who—

(a) is not A or B, and

(b) is under 18 years of age."

"s.6 Defence on grounds of reasonableness

(1) In proceedings for an offence under section 1(1) , it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.

(2) That is to be regarded as shown if—

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1) , and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1)."

"s.10 Meaning of references to behaviour

(1) Subsections (2) to (4) explain what is meant by the references to behaviour in this Part.

(2) Behaviour is behaviour of any kind, including (for example) —

(a) saying or otherwise communicating something as well as doing something,

(b) intentionally failing—

(i) to do something,

(ii) to say or otherwise communicate something.

(3) Behaviour directed at a person is such behaviour however carried out, including (in particular) —

(a) by way of conduct towards property,

(b) through making use of a third party,

as well as behaviour in a personal or direct manner.

(4) A course of behaviour involves behaviour on at least two occasions."

"s.11 Meaning of partner and ex-partner

(1) Subsections (2) and (3) describe who is a person's partner or ex-partner as referred to in this Part.

(2) Someone is a person's partner if they are—

(a) spouses or civil partners of each other,

(b) living together as if spouses of each other, or

(c) in an intimate personal relationship with each other.

(3) Whether someone is a person's ex-partner is to be determined accordingly."

"s.7 Presumption as to the relationship

(1) In proceedings for an offence under section 1(1) , the matter of B being A's partner or ex-partner is to be taken as established—

(a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and

(b) unless the matter is challenged as provided for in subsection (2) .

(2) The matter is challenged—

(a) in summary proceedings, by—

(i) preliminary objection before the plea is recorded, or

(ii) later objection as the court allows in special circumstances,

(b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6) (b) (i) of the Criminal Procedure (Scotland) Act 1995."

"s.3 Extra-territorial jurisdiction

(1) An offence under section 1(1) can be constituted by a course of behaviour engaged in by A even if the course of behaviour occurs wholly or partly outside the United Kingdom.

(2) If the course of behaviour occurs wholly outside the United Kingdom—

(a) A may be prosecuted, tried and punished for the offence—

(i) in a sheriff court district in which A is apprehended or in custody, or

(ii) in a sheriff court district that is determined by the Lord Advocate,

as if the offence has been committed entirely in that district,

(b) the offence is, for all things incidental to or consequential on trial and punishment, deemed to have been committed entirely in that district.

(3) Subsections (1) and (2) apply only if A, when the course of behaviour occurs—

(a) is habitually resident in Scotland, or

(b) is a UK national.

(4) "UK national" means someone who is, as referred to in the British Nationality Act 1981—

(a) a British citizen,

(b) a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen, or

(c) a British subject or a British protected person."

Corroboration

1 See the chapter on Corroboration: Omnibus/Composite charges.

2 The question of corroboration of a charge under section 1 was discussed in a currently embargoed first instance opinion (*DF v HM Advocate*) dated 10 August 2021. [752] The question was whether, where there was corroborated evidence, accepted by the jury, of some parts of the libel [at least two episodes of abuse at a minimum] the jury would be entitled to convict in respect of other uncorroborated parts of the libel, in particular where, as in this case, those were allegations of sexual crime and thus of a different character. The issue was crystallised as relating to what was required to prove a "course of behaviour" for the purpose of the statutory charge and whether individual crimes making up the alleged course of behaviour required each to be individually corroborated.

Lord Matthews said at paragraphs 38 and 39:

> *"[38]...If, once two incidents of behaviour are corroborated, parts of a charge which are otherwise uncorroborated must fall away if they are of a different type, then the 2018 Act is nothing but a cosmetic change.*
>
> *[39] Drawing all this together, in my opinion the acceptance by the jury on corroborated evidence that two episodes of the abusive behaviour had been proved would suffice to warrant a conviction of the new offence. Whether they could also convict of uncorroborated elements would depend on whether or not they were satisfied that those uncorroborated elements formed part of the same course of behaviour. There requires to be some sort of nexus or link between the various elements otherwise they would be simply separate incidents and not part of a course of behaviour. Whether or not that link exists will*

*depend on the evidence in each case and may not be capable of delineating ab ante, although it might be found if the jury were satisfied, for example, that there was a continuity of purpose in that the accused intended or was reckless as to whether his behaviour, whatever it was, caused the complainer to suffer physical or psychological harm, in other words if the accused was pursuing the sort of campaign described in McAskill [*McAskill v HM Advocate 2016 SCCR 402*]. In my opinion it is not necessary that the individual incidents require to be of the same kind or of a similar kind to the full extent required by Moorov. That is part of the law of evidence rather than a substantive requirement of an offence. It will always be open to an accused person to submit that there was no case to answer where the evidence did not support a course of conduct"*

3. Section 1 and the question of corroboration has now been examined by the appeal court in *CA v HM Advocate* [2022] HCJAC 33. The court provides a succinct synopsis of the offence at paras 2-4. The sheriff had directed that it was the course of behaviour which required to be proved on corroborated evidence but the appellant argued that each of 13 averments of abusive conduct libelled in a single charge required corroboration. The appellant founded on decisions in *Dalton v HM Advocate* 2015 SCCR 125, *Spinks v Harrower* 2018 JC 177, *Wilson v HM Advocate* [2019] HCJAC 36 and *Rysmanowski v HM Advocate* 2020 JC 84.

The court endorsed the general approach taken by Lord Matthews in *DF*, but did not refer to a requirement for a nexus between uncorroborated elements and corroborated elements in stating:

"[10] That the rule in Spinks v Harrower does not apply to offences under the 2018 Act is a necessary consequence of the way in which that Act is framed. The Act specifically creates a new offence which, in the words of the Lord Justice General, constitutes "a separate crime known as a course of conduct". It is the course of behaviour which is the core of the offence, and it is thus the course of behaviour – in other words proof of behaviour "on at least" two occasions - which must be established by corroborated evidence. Once there is corroborative evidence of this kind it is open to the jury to determine that other incidents equally form part of the course of conduct, even though spoken to by only one witness. *Where the commission of a course of conduct is the core element of an offence, it is the proof of a course of conduct which constitutes the relevant essential element of the offence.*

*[11] In these circumstances the "course of behaviour" may be equiparated with the evidential position which applies in relation to a single charge of assault: in the case of a single episode of assault, there is no need for every element of the libel to be corroborated. In the same way that one must look for corroboration of a single charge of assault, without demanding corroboration of every individual element thereof, in a case such as this it is the course of behaviour which must be established, without any requirement for corroboration of every single element of that course of behaviour. T*here is one single offence which lies in a course of conduct."

[Emphasis added]

Possible form of direction on Domestic Abuse (Scotland) Act 2018

Charge [ ] is brought under section 1 of the 2018 Act which makes it a crime for someone to engage in a course of abusive behaviour towards a partner or ex partner, when two further conditions are met:

1. that a reasonable person would consider the course of behaviour to be likely to cause the partner to suffer physical or psychological harm; and
2. that the accused either intended the course of behaviour to cause the partner to suffer physical or psychological harm; or was reckless as to whether it would have that effect.

To apply this section properly and decide if the accused is guilty of the charge you have to understand a number of things

First,

[IN MOST CASES]

There is no dispute here that [NAME] was, at the time of the alleged behaviour, the partner or ex-partner of the accused so you do not need to consider that aspect of things.

[OR – WHERE THE NATURE OF THE RELATIONSHIP HAS BEEN CHALLENGED AND IS A LIVE ISSUE, DIRECT BEARING IN MIND THE FOLLOWING]

Partner means a spouse, civil partner, persons living together as spouses, or in an intimate relationship with each other. What is intimate will depend on all the circumstances. It may involve having sexual relations but such relations are not a precondition for persons to be in an intimate relationship.

An ex partner is someone who used to be in such a relationship with the accused but was not at the date(s) of the alleged behaviour.

Second, a course of behaviour involves behaviour that the accused has engaged in on at least two occasions

It is for you to determine in the particular circumstances of this case whether the incidents truly amount to a course of abusive behaviour, as I will go on to define it.

Third, - behaviour

There is no limit to what can be “behaviour". The Act includes some examples but the list is not exhaustive

It includes the accused communicating and doing things, and failing to communicate and do things.

Fourth, “abusive”

The behaviour must be abusive and the Act provides some examples but the list is not exhaustive.

It includes behaviour directed at the complainer that is violent, threatening or intimidating

[Where appropriate- violent behaviour includes sexual violence]

Behaviour can be directed at a person in many ways which can include using somebody else to carry out the behaviour and can include behaviour towards property.

Abusive behaviour includes behaviour directed towards the complainer, or towards a child [aged under 18] of the complainer or towards someone else, where:-

EITHER

that behaviour has as one of its purposes one or more of the following effects

[DIRECT AS APPROPRIATE FROM AMONGST THE EFFECTS SPECIFIED IN SECTION 2(3) –]

(a) making the complainer dependent on, or subordinate to, the accused

(b) isolating the complainer from friends, relatives or other sources of support,

(c) controlling, regulating or monitoring the complainer's day-to-day activities,

(d) depriving the complainer of, or restricting their, freedom of action,

(e) frightening, humiliating, degrading or punishing the complainer.

OR

even if none of these things was the purpose of the behaviour, if the behaviour, would be considered by a reasonable person to be likely to have one or more of those effects:

[A JUDGE MAY CHOOSE TO REPEAT THE EFFECTS ALREADY SELECTED]

…

Fifth, a reasonable person, meaning an ordinary person, would consider the course of behaviour to be likely to cause the complainer to suffer physical or psychological harm. Psychological harm includes fear, alarm and distress.

It is not necessary that the complainer actually did suffer such harm, only that, considered by a reasonable person, the course of behaviour would be likely to cause such harm.

Sixth, the accused either

a) intended the course of behaviour to cause the complainer to suffer physical or psychological harm, or

b) was reckless as to whether the course of behaviour would cause the complainer to suffer

physical or psychological harm,

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done in the circumstances described.

A person is reckless as to whether the behaviour would cause the complainer such harm if they failed to think about or were indifferent as to whether the behaviour would have that result.

In considering the accused's state of mind you should use your common sense based on what it is proved that the accused said or did in the circumstances described.

Finally on the question of corroboration, the essentials of the charge, which must be established by corroborated evidence, are:-

1.**IF IN ISSUE** the fact that the accused and the complainer were at the time partners or ex partners; and

2.That the accused engaged in a course of abusive behaviour towards the complainer.

The course of behaviour must be proved by corroborated evidence. In practice at least two incidents forming the alleged course of behaviour must be proved by evidence coming from at least two sources. Provided that is the case, then whether you can convict of elements of the charge which are spoken to only by a single witness depends on whether you are satisfied that those elements were part of the same course of abusive behaviour, as I have defined it.

[NOTE – There may be cases where corroboration could be found by mutual corroboration from the evidence of another complainer, or there may be a basis for mutual corroboration to be found in the manner described in *Rysmanowski v HM Advocate* 2020 JC 84 at para 21. See also the Corroboration: Omnibus/ Composite charges chapter. Appropriate directions on mutual corroboration would be required and may in some cases replace the sentence "In practice corroboration of at least two incidents forming the alleged course of behaviour must be proved by evidence coming from at least two sources."]

[IF THERE IS A DISPUTE ON THE QUESTION OF WHETHER THE INCIDENTS AMOUNT TO A COURSE OF ABUSIVE BEHAVIOUR]

[Summarise the position of the Crown and defence and direct the jury to determine whether the incidents amount to a course of abusive behaviour]

[IF THERE IS A DEFENCE OF REASONABLENESS]

In this case the accused has stated that the course of behaviour in the charge was reasonable in the particular circumstances.

You will have to decide if there is evidence which is enough to suggest this is the case. If there is not then reasonableness is not an issue and you need not consider it further.

If you are satisfied that there is such evidence, then the Crown has to prove beyond reasonable doubt that the course of behaviour was not reasonable in the particular circumstances.

In relation to whether the course of behaviour was reasonable in the particular circumstances, you should consider the nature of the behaviour concerned, including its frequency, the effect of the behaviour on the complainer, the circumstances in which the behaviour arose, and any explanation given by the accused for the behaviour.

You must weigh up all these factors and if after completing this exercise, you conclude that the Crown has failed to exclude beyond reasonable doubt that the behaviour was reasonable, you must acquit the accused.

[IF THERE IS A CHILD AGGRAVATION LIBELLED]

You will see that after the description of the charge as set out in the indictment it goes on to say that the offence is aggravated by reason of involving a child. You will have to decide if you are satisfied that the offence is aggravated in that way. If you are then I must take that into account when considering sentence.

A child is a person who was under 18 at the time.

The aggravation is proved if you are satisfied that/about one or more of the following:-[A judge may list all of these or select as appropriate to the circumstances of the case]

if, at any time in the commission of the offence the accused has directed behaviour at a child, or

has made use of a child in directing behaviour at [NAME]

OR

if a child has seen or heard, or was present during, an incident of behaviour that the accused directed at [NAME] as part of the course of behaviour set out in the charge

OR

if a reasonable person would consider the course of behaviour, or an incident of the accused's behaviour that forms part of the course of behaviour, would be likely to adversely affect a child usually residing with [NAME] or the accused (or both). That includes causing the child to suffer fear, alarm or distress.

BUT

be clear about this:-

There does not need to be evidence that a child—

actually ever had awareness of the accused's behaviour, or ever had any understanding of the nature of the behaviour

AND

There does not need to be evidence that a child has ever been adversely affected by the behaviour, only that a reasonable person would think it likely.

FINALLY evidence from a single source is sufficient to prove that the offence is aggravated in this way. There is no need for corroboration.

Might I suggest that you consider this charge in the following way:-

You first consider whether the offence detailed in the charge was committed by the accused. If you are not satisfied that the offence in the charge itself was committed, the aggravation falls as well.

If you are satisfied that the offence was committed, you would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you are not, you would simply convict the accused of the offence itself and delete the aggravation by scoring out the words "[INSERT the relevant words in the charge]".

SUMMARY

So for the Crown to prove this charge you would have to be satisfied

•[ONLY WHEN CHALLENGED That at the time of the behaviour [NAME] was the partner or ex partner of the accused]

•That the accused engaged in a course of behaviour which was abusive of the complainer

•That a reasonable person would consider such behaviour to be likely to cause the complainer to suffer physical or psychological harm

•That the accused either intended by the course of behaviour to cause the complainer to suffer such harm or was reckless as to whether it would cause the complainer to suffer such harm.

[ONLY IF APPROPRIATE]

•That the accused's behaviour was not reasonable in the circumstances

[AND REMEMBER, IF APPROPRIATE]

•That the offence is aggravated by reason of involving a child

[ALTERNATIVE VERDICTS – IF APPROPRIATE]

Now, members of the jury, if you are not satisfied that the Crown has proved the charge of domestic abuse against the accused, that is not an end to the matter.

There are alternative verdicts which may open to you when a person is charged with the offence of domestic abuse and you are not satisfied that that charge has been proved.

In those circumstances you will require to consider whether you are satisfied that the accused behaved in a manner which constitutes one of these other offences.

(Thereafter give the appropriate direction regarding sections 39 and/or 38 of the 2010 Act which

are available alternatives under section 8 of the 2018 Act **which, according to the "Explanatory Notes," are intended to be additional to the general power to convict of an alternative common law offence per** 1995 Act schedule 3 at para 14**.)**

[752] Judges can find this Opinion on the T:drive in the "Appeal Opinions – Pre Trial" folder. For public readers of the Jury Manual, a hyperlink to the opinion will be made available on this page once the opinion has been published on the scotcourts website.

Emergency Workers (Scotland) Act 2005

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON ASSAULT OF AN EMERGENCY WORKER RESPONDING TO AN EMERGENCY

3. POSSIBLE FORM OF DIRECTION FOR ASSAULT ON PERSON ASSISTING EMERGENCY WORKER RESPONDING TO AN EMERGENCY

LAW

Statutory Provisions

Section 2 Assaulting or impeding certain emergency workers responding to emergency circumstances

"(1) A person who assaults, obstructs or hinders another while that other person is, in a capacity mentioned in subsection (3) below, responding to emergency circumstances, commits an offence.

(2) No offence is committed under subsection (1) above unless the person who assaults, obstructs or hinders knows or ought to know that the person being assaulted, obstructed or hindered–

(a) is acting in that capacity; and

(b) is or might be responding–

(i) to emergency circumstances; or

(ii) as if there were emergency circumstances.

(3) The capacity referred to in subsection (1) above is–

(a) that of a prison officer, that is to say–

(i) a person who holds a post, otherwise than as a medical officer, to which the person has been appointed for the purposes of section 3(1A) of the Prisons (Scotland) Act 1989 (c.45); or

(ii) a prisoner custody officer within the meaning of Chapter II of Part VIII of the Criminal Justice and Public Order Act 1994 (c.33);

(b) that of a member of Her Majesty's Coastguard;

(c) that of a member of the crew of a vessel operated by–

(i) the Royal National Lifeboat Institution; or

(ii) any other person or organisation operating a vessel for the purpose of providing a rescue service on a body of water, or a person who musters the crew of such a vessel or attends to its lauch;

[…]1

(g) that of a social worker, within the meaning given by section 77(1) of the Regulation of Care (Scotland) Act 2001 (asp 8), while taking action required or permitted by–

(i) a child protection order; or

(ii) an authorisation under section 61 of the Children (Scotland) Act 1995 (c.36) (emergency protection of children where child protection order not available); or

(h) that of a mental health officer, that is to say–

(i) a mental health officer within the meaning given by section 32(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13); or

(ii) until section 32(1) of that Act (appointment and deemed appointment of mental health officers) comes into force, a mental health officer within the meaning given by section 125 of the Mental Health (Scotland) Act 1984 (c.36).

(4) For the purposes of this section and section 3 of this Act, a person is responding to emergency circumstances if the person–

(a) is going anywhere for the purpose of dealing with emergency circumstances occurring there; or

(b) is dealing with emergency circumstances or preparing to do so.

(5) For the purposes of this Act, circumstances are "emergency" circumstances if they are present or imminent and–

(a) are causing or are likely to cause–

(i) serious injury to or the serious illness (including mental illness) of a person;

(ii) serious harm to the environment (including the life and health of plants and animals and fabric of buildings); or

(iii) a worsening of any such injury, illness or harm; or

(b) are likely to cause the death of a person."

POSSIBLE FORM OF DIRECTION ON ASSAULT OF AN EMERGENCY WORKER RESPONDING TO AN EMERGENCY

Charge [ ] is brought under section 2 of the Emergency Workers (Scotland) Act 2005 which makes it a crime for someone to assault, obstruct, or hinder any of a number of persons when they are responding to emergency circumstances:

These persons include [SELECT AS APPROPRIATE]

- a prison officer
- a prisoner custody officer
- a coastguard
- a crew member of an RNLI boat
- any other person or body operating a vessel to provide rescue services on water, or who musters its crew or attends its launch
- a social worker taking action under a child protection order or emergency child protection procedures
- a mental health officer.

For such an offence to be committed the accused must have known, or ought to have known, that the person assaulted, obstructed or hindered was acting in one of these capacities, and was, or might be, responding to emergency circumstances, or as if there were emergency circumstances.

A number of these terms need explanation.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result. [So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word “repeatedly” in the charge just means “more than once”.

Obstruction and hindering can involve a physical element. Any slight degree of physical obstruction or hindrance is enough. But there does not need to be a physical element to it. It does not need to be directed at the other person. It can be effected against the vehicle,

apparatus or equipment the other person is using. Hindering can take the form of giving false information to the emergency worker intending that it will be acted on.

Obstruction or hindering must be deliberate - accidental or careless behaviour is not an offence here. Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

Where any degree of injury is alleged see ASSAULT.

“Emergency circumstances” means present or imminent circumstances causing or likely to cause

[SELECT AS APPROPRIATE]:

- serious injury to or the serious illness of a person (including mental illness)
- serious harm to the environment (including the life and health of plants and animals and the fabric of buildings)
- a worsening of any such injury, illness or harm, or
- a person’s death.

“Responding to emergency circumstances” covers going to the place where there is an emergency to deal with it, dealing with the emergency circumstances, or preparing to do so. So, it is quite a wide concept.

So, for the Crown to prove this charge, it has to show that:

1. the accused deliberately acted in the way described in the charge
2. the accused knew, or ought to have known, that the person they assaulted, obstructed or hindered was acting as a [complainer’s capacity at time]
3. the accused knew or ought to have known that the complainer was responding to emergency circumstances, actual or potential, as I have defined these.
4. (if aggravation libelled) the attack resulted in injury [as described].

POSSIBLE FORM OF DIRECTION FOR ASSAULT ON PERSON ASSISTING EMERGENCY WORKER RESPONDING TO AN EMERGENCY

Charge alleges a contravention of section 3 of the Act mentioned. Reading it short, that makes it an offence for anyone to assault, obstruct, or hinder any person assisting any of a number of persons when they are responding to emergency circumstances:

These persons include [SELECT AS APPROPRIATE]

- a police constable
- a member of the fire brigade
- a member of the ambulance service
- a prison officer

- a prisoner custody officer
- a coastguard
- a crew member of an RNLI boat
- any other person or body operating a vessel to provide rescue services on water, or who musters its crew or attends its launch
- a social worker taking action under a child protection order or emergency child protection procedures
- a mental health officer

For such an offence to be committed the accused must have known, or ought to have known, that the person assaulted, obstructed or hindered was assisting someone acting in one of these capacities, and was, or might be, responding to emergency circumstances, or as if there were emergency circumstances.

A number of these terms need explanation.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result.[So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate) The word “repeatedly” in the charge just means “more than once”.

Where any degree of injury is alleged see ASSAULT.

Obstruction and hindering can involve a physical element. Any slight degree of physical obstruction or hindrance is enough. But there does not need to be a physical element to it. It does not need to be directed at the other person. It can be effected against the vehicle, apparatus or equipment he is using. Hindering can take the form of giving false information to the emergency worker, intending that it will be acted on.

Obstruction or hindering must be deliberate - accidental or careless behaviour is not an offence here. Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

“Emergency circumstances” means present or imminent circumstances causing or likely to cause:

[SELECT AS APPROPRIATE]

- serious injury to or the serious illness of a person (including mental illness)
- serious harm to the environment (including the life and health of plants and animals and the fabric of buildings)
- a worsening of any such injury, illness or harm, or

- a person's death.

"Responding to emergency circumstances" covers going to the place where there is an emergency to deal with it, dealing with the emergency circumstances, or preparing to do so. So, it is quite a wide concept.

So, for the Crown to prove this charge, it has to show that:

1. the accused deliberately acted in the way described in the charge
2. the accused knew, or ought to have known, that the person being assisted by the complainer was acting as a [ ] at the time
3. the accused knew or ought to have known that the person being assisted by the complainer was responding to emergency circumstances, actual or potential, as I have defined these.
4. (if aggravation libelled) the attack resulted in injury [as described].

Firearms Act 1968

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON FIREARMS ACT 1968

LAW

Statutory Provisions

Requirement of firearm certificate

Section 1. "(1) Subject to any exemption under this Act, it is an offence for a person –

(a) to have in his possession, or to purchase or acquire, a firearm to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate;

(b to have in his possession, or to purchase or acquire, any ammunition to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate, or in quantities in excess of those so authorised."

Requirement of certificate for possession of shot guns

Section 2. "(1) Subject to any exemption under this Act, it is an offence for a person to have in his possession, or purchase or acquire, a shot gun without holding a certificate under this Act authorising him to possess shot guns."

Conversion of weapons

Section 4. "(1) Subject to this section, it is an offence to shorten the barrel of a shot gun to a length less than 24 inches."…

"(4) A person who commits an offence under section 1 of this Act by having in his possession, or purchasing or acquiring, a shot gun which has been shortened, contrary to subsection (1) above… (whether by a registered firearms dealer or not), without holding a firearm certificate authorising him to have it in his possession, or to purchase or acquire it, shall be treated for the purposes of provisions of this Act relating to the punishment of offences as committing that offence in an aggravated form."

Weapons subject to general prohibition

Section 5. (section 1 amended by section 108 of the Anti Social Behaviour, Crime and Policing Act

2014, new sections 2A and 3 inserted by said section)

(1) A person commits an offence if, without the authority of the Defence Council or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), he has in his possession, or purchases or acquires –

(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;

(ab) any self-loading or pump-action rifled gun other than one which is chambered for .22 rim-fire cartridges;

(aba) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon,. . . a muzzle-loading gun or a firearm designed as signalling apparatus;

(ac) any self-loading or pump-action smooth-bore gun which is not an air weapon or chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or . . . is less than 40 inches in length overall;

(ad) any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges or a muzzle-loading gun;

(ae) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as signalling apparatus;

(af) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system;

(b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing; and

(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid.

(1A) Subject to section 5A of this Act, a person commits an offence if, without the authority of the Secretary of State or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998, he has in his possession, or purchases or acquires, —

(a) any firearm which is disguised as another object;

(b) any rocket or ammunition not falling within paragraph (c) of subsection (1) of this section which consists in or incorporates a missile designed to explode on or immediately before impact and is for military use;

(c) any launcher or other projecting apparatus not falling within paragraph (ae) of that subsection which is designed to be used with any rocket or ammunition falling within paragraph (b) above or with ammunition which would fall within that paragraph but for its being ammunition falling

within paragraph (c) of that subsection;

(d) any ammunition for military use which consists in or incorporates a missile designed so that a substance contained in the missile will ignite on or immediately before impact;

(e) any ammunition for military use which consists in or incorporates a missile designed, on account of its having a jacket and hard-core, to penetrate armour plating, armour screening or body armour;

(f) any ammunition which incorporates a missile designed or adapted to expand on impact;

(g) anything which is designed to be projected as a missile from any weapon and is designed to be, or has been, incorporated in—

(i) any ammunition falling within any of the preceding paragraphs; or

(ii) any ammunition which would fall within any of those paragraphs but for its being specified in subsection (1) of this section.]

(2) The weapons and ammunition specified in subsections (1) and (1A) of this section (including, in the case of ammunition, any missiles falling within subsection (1A)(g) of this section)are referred to in this Act as “prohibited weapons” and “prohibited ammunition” respectively.

“(2A) A person commits an offence if without authority—

(a) he manufactures any weapon or ammunition specified in subsection (1) of this section,

(b) he sells or transfers any prohibited weapon or prohibited ammunition,

(c) he has in his possession for sale or transfer any prohibited weapon or prohibited ammunition, or

(d) he purchases or acquires for sale or transfer any prohibited weapon or prohibited ammunition.”

“(3) In this section “authority” means an authority given in writing by—

(a) the Secretary of State (in or as regards England and Wales), or

(b) the Scottish Ministers (in or as regards Scotland).”

(4) The conditions of the authority shall include such as the Defence Council or, where the authority is given by them (by virtue of provision made under section 63 of the Scotland Act 1998, having regard to the circumstances of each particular case, think fit to impose for the purpose of securing that the prohibited weapon or ammunition to which the authority relates will not endanger the public safety or the peace.

(5) It is an offence for a person to whom an authority is given under this section to fail to comply with any condition of the authority.

(6) The Defence Council may at any time, if they think fit, revoke an authority given to a person under this section by notice in writing requiring him to deliver up the authority to such person as may be specified in the notice within twenty-one days from the date of the notice; and it is an offence for him to fail to comply with that requirement.

(7) For the purposes of this section and section 5A of this Act—

(a) any rocket or ammunition which is designed to be capable of being used with a military weapon shall be taken to be for military use;

(b) references to a missile designed so that a substance contained in the missile will ignite on or immediately before impact include references to any missile containing a substance that ignites on exposure to air; and

(c) references to a missile's expanding on impact include references to its deforming in any predictable manner on or immediately after impact.

(8) For the purposes of subsection (1)(aba) and (ac) above, any detachable, folding, retractable or other movable butt-stock shall be disregarded in measuring the length of any firearm.

(9) Any reference in this section to a muzzle-loading gun is a reference to a gun which is designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and a separate ball (or other missile).

…"

Possession of firearm with intent to injure

Section 16. "It is an offence for a person to have in his possession any firearm or ammunition with intent by means thereof to endanger life ... or to enable another person by means thereof to endanger life ... whether any injury to person or property has been caused or not."

Possession of firearm with intent to cause fear of violence

Section 16A. "It is an offence for a person to have in his possession any firearm or imitation firearm with intent—

(a) by means thereof to cause, or

(b) to enable another person by means thereof to cause,

any person to believe that unlawful violence will be used against him or another person. "

Use of firearm to resist arrest

Section 17. "(1) It is an offence for a person to make or attempt to make any use whatsoever of a firearm or imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or another person.

(2) If a person, at the time of committing or being arrested for an offence specified in Schedule 2 to this Act, has in his possession a firearm or imitation firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object. ...

(5) In the application of this section to Scotland, a reference to Schedule 2 to this Act shall be substituted for the reference in subsection 2 to Schedule 1."

Carrying firearm with criminal intent

Section 18. "(1) It is an offence for a person to have with him a firearm or imitation firearm with intent to commit any offence specified in paragraphs 1 to 18 of Schedule 2 to this Act, or to resist arrest or prevent the arrest of another, in either case while he has the firearm or imitation firearm with him."

Carrying firearm in a public place

Section 19. "A person commits an offence if, without lawful authority or reasonable excuse (the proof whereof lies on him) he has with him in a public place – (a) a loaded shot gun, or (b) an air weapon (whether loaded or not), (c) any other firearm (whether loaded or not), together with ammunition suitable for use in that firearm, or (d) an imitation firearm."

Possession of firearms by persons previously convicted of crime

Section 21. "(1) A person who has been sentenced to custody for life or to preventative detention, or to imprisonment or to corrective training for a term of three years, or who has been sentenced to be detained for such a term in a young offenders institution in Scotland, shall not at any time have a firearm or ammunition in his possession. (2) A person who has been sentenced to imprisonment for a term of three months or more but less than three years or to youth custody for such a term, or who has been sentenced to be detained for such a term in a detention centre or in a young offenders institution in Scotland or who has been subject to a secure training order or a detention and training order, shall not at any time before the expiration of the period of five years from the date of his release have a firearm or ammunition in his possession. … (4) It is an offence for a person to contravene any of the foregoing provisions of this section."

Schedule 2: Offences to which sections 17(2) and 18 apply in Scotland

"Common law offences

1. Abduction.

2. Administration of drugs with intent to enable or assist the commission of a crime.

3. Assault.

4. Housebreaking with intent to steal.

5. Malicious mischief.

6. Mobbing and rioting.

7. Perverting the course of justice.

8. Prison breaking and breaking into prison to rescue prisoners.

9. Rape.

10. Robbery.

11. Theft.

12. Use of threats with intent to extort money or property.

13. Wilful fire raising and culpable and reckless fire raising.

Statutory offences

13A. Offences against section 57 of the Civic Government (Scotland) Act 1982.

14. (Repealed)

15. (Repealed)

16. Offences against sections 2, 3 or 4 of the Explosive Substances Act 1883.

17. Offence against section 175 of the Road Traffic Act 1972.

18. Offences against section 41 of the Police (Scotland) Act 1967.

Attempts

19. Attempt to commit any of the offences mentioned in this Schedule."

Judicial Interpretation

1 "The term 'possession' in the context of the firearms legislation involves proof of two separate elements, knowledge and control. The Crown does not require to prove that the accused knew he had a pistol or that he had a firearm. What the Crown does require to prove is that the accused knew he had some object, whatever it was, in his hand and that he had control over the object to the extent that he had a meaningful say in what was to be done with it."[753] In the context of an object concealed within a container it is necessary for the Crown to show that the accused knew that the container held something, and that he had control over that. and that the container in fact held the firearm referred to in the charge[754]

2 "Has with him" is a non-technical expression which should be read in its ordinary meaning free of the technicalities of the term "possession". The phrase is wider than "carry" and extends to all situations where there is a close physical link, a nearness in relation between a particular accused and the firearm and ammunition and a degree of immediate control by him over them. For a charge under section 19 of the 1968 Act the Crown has to establish that the accused knew he had the firearm and that he also knew that he had ammunition.[755]

3 For the purposes of section 1(1)(a) a firearm is disguised as another object if on a straightforward objective assessment, the item concerned is presented in such a way as to conceal that amongst its functions is that of a firearm. It is a matter for the jury to determine in light of all the circumstances of the case including the appearance of the item and whether it has the appearance of a firearm or something else, whether it functions as a firearm as well as another item, whether its function as a firearm and how to operate that function is clearly indicated on that item, and whether there was a reason to disguise the item as something else. 'Disguise' was given its normal meaning and the issue required to be determined from the perspective of the ordinary person in the street and implied deception. The fact that the firearm was incorporated into a dual purpose item did not mean it could not be regarded as a firearm disguised as another object. [756]

POSSIBLE FORM OF DIRECTION ON FIREARMS ACT 1968

Sections 1(1) **and** 4(4)**: possession of sawn-off shot gun**

“Charge is a charge of possessing a sawn-off shot gun. It alleges contraventions of the Firearms Act. Read short, these make it an offence to have in your possession, buy, or acquire a shot gun with a barrel shorter than 24 inches (0.609m) without being the holder of a current firearm certificate.

A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel. A shot gun is a smooth-bore gun, holding at most two cartridges, with a barrel over 24 inches long. It requires another type of certificate.

The key word here is “possession”. That doesn’t necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. It’s enough if you know you have something, and it turns out to be a weapon. You don’t have to know it was a weapon. Control doesn’t just mean being readily within reach. It’s wider than that. You can have control of something that’s stored elsewhere. It’s having a say in what happens to it.

• (where object concealed in container)

Here the weapon was in a [bag]. For the accused to be in possession of that weapon he must have known of the [bag’s] existence, and that it contained something, even if he didn’t know exactly what. That can be a matter of inference from, eg its bulk or weight. He must also have control over the bag and its contents. If there’s other evidence that what the bag contained was the weapon referred to in the charge, that’s enough to prove possession by the accused.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a firearm, in this case a shot gun

(2) its barrel had been shortened to less than 24 inches

(3) the accused had possession of it, in the sense I’ve described (4) he didn’t have a current firearm certificate for it.”

Section 2(1): possession of shot gun without certificate

“Charge is a charge of possessing a shot gun without a certificate. It alleges a contravention of the Firearms Act. Read short, that makes it an offence for you to possess, purchase or acquire a shot gun without holding a certificate permitting you to do so.

A shot gun is a smooth-bore gun, holding at most two cartridges, with a barrel over 24 inches long, and a bore of less than 2 inches.

The key word here is “possession”. That doesn’t necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. Control doesn’t just mean being readily within reach. It’s wider than that. You can have control of something that’s stored elsewhere. It’s having a say in what happens to it.

• (where object concealed in container)

Here the weapon was in a [bag]. For the accused to be in possession of that weapon he must have known of the [bag’s] existence, and that it contained something, even if he didn’t know exactly what. That can be a matter of inference, eg. from its bulk and weight. He must also have control over the bag and its contents. If there’s other evidence that what the [bag] contained was the weapon referred to in the charge, that’s enough for possession by the accused.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a shot gun

(2) the accused had possession of/bought/acquired) it

(3) he didn’t have a shot gun certificate for it.”

Section 4(1)**: conversion of shot gun**

“Charge is a charge of converting a shot gun. It alleges a contravention of the Firearms Act. Read short, that says it’s an offence to shorten the barrel of a shot gun to under 24 inches. A registered firearms dealer can do so, in the course of a repair, but that doesn’t arise here.

A shot gun is a smooth-bore gun, holding at most two cartridges, with a barrel over 24 inches long, and a bore of less than 2 inches.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a shot gun, as I’ve defined it

(2) its barrel had been shortened to less than 24 inches

(3) it was the accused who did that.”

Section 5(1)(b)**: possession of prohibited weapon**

“Charge is a charge of possession a prohibited weapon. It alleges a contravention of the Firearms Act. Read short, that makes it an offence to have in your possession, buy, or acquire, or manufacture, sell, or transfer any weapon (specify the firearm by reference to section 5(1) of the

Firearms Act 1968).

Acquire has a wide meaning, in the context of gaining, obtaining, or receiving - in short, "get hold of".

One of the key words here is “possession”. That doesn’t necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. Control doesn’t just mean being readily within reach. It’s wider than that. You can have control of something that’s stored elsewhere. It’s having a say in what happens to it.

• (where object concealed in container)

Here the weapon was in a [bag]. For the accused to be in possession of that weapon he must have known of the [bag’s] existence, and that it contained something, even if he didn’t know exactly what. That can be a matter or inference, eg from its bulk or weight. He must also have control over the [bag] and its contents. If there’s other evidence that what the [bag] contained was the weapon referred to it in the charge, that’s enough for possession by the accused.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a weapon of the sort I’ve described

(2) the accused had it in his possession in the sense I’ve described/ bought/acquired it.”

Section 5(1A)**:** Adapt the above having regard to the items specified in that subsection.

- (where disguised as another object)

See *Lord Advocate's Reference (No 1 of 2020)* 2020 SCCR 303 at para 27.

Section 5(2A)**:**

“Charge is a charge of manufacturing, selling, or transferring, having in his possession for sale or transfer, or purchasing or acquiring for sale or transfer (specify the item) {a prohibited weapon or prohibited ammunition as specified in section 5(1) and (1A)}. Section 5(2A) of the Firearms Act makes the allegation in the charge an offence.

‘Manufacture’ includes creating, assembling, or forming. It has a wide meaning.

‘Sell’ doesn’t just mean exchanging ownership for money. It covers hiring out, giving, lending, and generally parting with possession.

‘Transfer’ means generally ‘moving on elsewhere or to another’

‘Having in your possession’ doesn’t necessarily require ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. Control doesn’t just mean being readily within reach. It’s wider than that. You can have control of something that’s stored elsewhere. It’s having a say in what happens to it. The possession in this offence is for a

specific purpose, namely sale or transfer and the references to 'sell' and 'transfer' can be adapted accordingly.

(If knowledge is disputed then adapt the direction given in relation to section 5(1) on this point)

'Purchasing' includes buying, securing, or procuring. 'Acquiring' has a wide meaning including gaining, obtaining, or receiving – in short 'get hold of'. Again the purchasing or acquiring is for the specific purpose of sale or transfer.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the item involved falls with the ambit of the legislation

(2) the accused manufactured, sold, transferred the item, had it in his possession in the sense I've described for sale or transfer or purchased or acquired it for sale or transfer.

Section 16**: possession of firearm with intent to endanger life**

"Charge is a charge of possessing a firearm with intent to injure. It alleges a contravention of the Firearms Act. Read short, that makes it an offence to have a firearm or ammunition in your possession with intent to endanger life, or cause serious injury to property, or to enable another person to do so.

Clearly, before danger or damage could be done the weapon would have to be loaded. But it's still an offence even if no danger to life or damage to property resulted.

A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel.

I want to split "possession with intent" into two.

"Possession" doesn't necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's having a say in what happens to it.

"With intent" involves something more than just thinking about it. It describes acting so as to bring about, so far as you can, what you think can be brought about. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

The danger to life or damage property that was intended needn't be immediate. It's enough if it's danger of damage in the future that's intended.

• (where object concealed in container)

Here the weapon was in a [bag]. For the accused to be in possession of that weapon he must have known of the [bag's] existence, and that it contained something, even if he didn't know exactly what. That can be a matter of inference, eg from its bulk or weight. He must also have control over the [bagl and its contents. If there's other evidence that what the [bag] contained was the weapon referred to in the charge, that's enough for possession by the accused.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a firearm

(2) the accused had possession of it, in the sense I've described

(3) he intended to endanger life or cause serious injury to property or

(4) he intended to enable someone else to endanger life or cause serious injury to property."

Section 16A:

"Charge is a charge of possession a prohibited weapon. It alleges a contravention of section 16A of the Firearms Act. That makes it an offence to have in your possession any firearm or imitation firearm with a specific intent.

The first matter the Crown have to prove is possession. That doesn't necessarily require ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's having a say in what happens to it.

(If necessary) Firearm/imitation firearm are defined as follows:-

The Crown also have to prove that possession of the item was with a specific intent namely:-

(a) by means thereof to cause, or

(b) to enable another person by means thereof to cause,

any person to believe that unlawful violence will be used against him or another person.

The Crown have to prove that the accused had the necessary intent. Intent is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

The violence has to be unlawful which simply means that there is no legal justification for it.

Section 17(2) and (5)**: committing crime while in possession of firearm**

"Charge is a charge of possessing a weapon while committing, or being arrested for, a crime. It alleges a contravention of the Firearms Act. Read short, that makes it an offence to have a firearm or an imitation firearm in your possession at the time of committing, or being arrested for the crime of, among others:

• abduction

• administering drugs to enable or assist the commission of a crime

• assault

• housebreaking with intent to steal

• malicious mischief

• mobbing and rioting

• perverting the course of justice

• prison breaking or breaking in to free prisoners

• rape

• robbery

• theft

• using threats for extortion

• wilful fireraising and culpable and reckless fireraising

• loitering with intent to commit theft

• explosive substances offences

• taking and driving away a motor vehicle

• assaulting or obstructing the police

A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel. An imitation firearm is anything with the appearance of a firearm, whether or not it's capable of discharging anything.

The firearm needn't be loaded. An imitation one, of course, couldn't be.

The key word here is "possession". That doesn't necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. It's enough if you know you have something, and it turns out to be a weapon. You don't have to know it was a weapon. Control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's having a say in what happens to it.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a firearm/imitation firearm

(2) the accused had it in his possession in the sense I've described

(3) at that time he was committing, or had been arrested for committing, the crime of (specify)."

If defence raised

"In this case the accused says he had this weapon in his possession for a lawful object. The Act says if he shows that, that's a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had it in his possession for a lawful object. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn't need to be corroborated. If you think he has proved that on a balance of probabilities, you must acquit him. Resisting an unlawful arrest might be a lawful object."

Reference is made to the chapter on The General Introductory Directions re reverse burden of proof

Section 18(1) and (3)**: carrying firearm with criminal intent**

"Charge is a charge of having a weapon with criminal intent. It alleges a contravention of the Firearms Act. Read short, that makes it an offence to have a firearm or an imitation firearm with you to resist your or another's arrest, or with intent to commit the crime of, among others:

- abduction
- administering drugs to enable or assist the commission of a crime
- assault
- housebreaking with intent to steal
- malicious mischief
- mobbing and rioting
- perverting the course of justice
- prison breaking or breaking in to free prisoners
- rape
- robbery
- theft
- using threats for extortion
- wilful fireraising and culpable and reckless fireraising
- loitering with intent to commit theft
- explosive substances offences
- taking and driving away a motor vehicle

• assaulting or obstructing the police.

A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel. An imitation firearm is anything with the appearance of a firearm, whether or not it's capable of discharging anything. The firearm needn't be loaded. An imitation one, of course, couldn't be.

The words 'have with him' call for two comments.

(1) They simply have their ordinary meaning. They describe a factual situation of ready availability. They don't involve any complicated legal concepts. Knowing about the weapon, and its intended use, don't come into it.

(2) Ready availability obviously covers the situation of someone carrying a weapon, or having a weapon about his person. But it also covers having access to a weapon, eg in a car nearby. Accessibility, applying common sense, is the key.

"With intent" involves something more than just thinking about it. It describes acting to bring about, so far as you can, what you think can be brought about. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon involved was a firearm/imitation firearm

(2) the accused had it with him, in the sense I've described

(3) at the time he intended to commit the crime of (specify)/to resist arrest/to prevent the arrest of someone else."

Section 19**: carrying firearm in a public place**

"Charge is a charge of carrying a weapon in a public place. It alleges a contravention of the Firearms Act. Read short, that makes it an offence to have with you in a public place a

• loaded shotgun

• loaded air weapon

• any other firearm, loaded or unloaded, together with ammunition suitable for that weapon.

A shotgun is a smooth-bore gun, holding at most two cartridges, with a barrel over 24 inches long. An air weapon is an air rifle, and air gun, or an air pistol. A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel.

The words 'have with him' call for two comments.

(1) They simply have their ordinary meaning. They describe a factual situation of ready availability. They don't involve any complicated legal concepts. Knowing about the weapon, and its intended use, don't come into it.

(2) Ready availability obviously covers the situation of someone carrying a weapon, or having a weapon about his person. But it also covers having access to a weapon, eg in a car nearby. Accessibility, applying common sense, is the key.

A 'public place' includes a road, and any place where the public can have access, for payment or free. Common stairs or landings in blocks of flats are public places. But note this. Even though a person's found in a private place, like a room in a house, if you can infer that he must have passed through a public place with such an article on his way there, he's guilty of this crime.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused had the weapon and suitable ammunition referred to in the charge with him, in the sense I've described

(2) the place where he had them was a public place, in the sense I've described

(3) the weapon was a (specify)."

If defence raised

"In this case the accused says he had lawful authority/a reasonable excuse for having these items. The Act says he has to prove that. If he does, that's a defence to the charge. That means he has to satisfy you on a balance of probabilities that he had lawful authority/a reasonable excuse for having these items. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn't need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him.

What's a reasonable excuse for having a weapon and ammunition to go with it depends on the circumstances. But remember this, the Act aims to protect the public from people who might put items like these to potentially lethal use, and to discourage their being carried in public places. Taking them to surrender them at a police station might be a reasonable excuse. Simply having a firearm certificate doesn't amount to having lawful authority."

REMEMBER: Warning in the chapter on The General Introductory Directions re reverse burden of proof

Section 21(2) and (4): possession by convicted person

"Charge is a charge of being in possession of a firearm or ammunition within five years of serving a custodial sentence. It alleges a contravention of the Firearms Act. Read short, it's an offence for someone, who has been sentenced to between 3 months and 3years prison or detention, to have a firearm or ammunition in his possession within five years of his release. It applies to shotgun ammunition, for which you don't need a firearm certificate, as well as to all types of firearms and ammunition, and air weapons and their ammunition.

A firearm is a lethal weapon capable of discharging shot, bullets or missiles from its barrel.

The key word here is “possession”. That doesn’t necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. It’s enough if you know you have something, and it turns out to be a weapon or ammunition. Control doesn’t just mean being readily within reach. It’s wider than that. You can have control of something that’s stored elsewhere. It’s having a say in what happens to it.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the weapon referred to in the charge was a firearm as I’ve described it, or ammunition

(2) the accused had it in his possession in the sense I’ve described

(3) the accused had been sentenced to between 3 months and 3 years in custody

(4) his possession of the firearm occurred within five years of his release from that sentence.”

[753] *Smith v HMA*, 1996 SCCR 49, 5 I (opinion of the court approving the sheriff’s direction

[754] *Wali v HMA*, 2007 SCCR 106, 2007 JC 111 at para [11].

[755] *Smith, supra*, at 50 (sheriffs direction).

[756] *Lord Advocate's Reference (No 1 of 2020)* 2020 SCCR 303

Human Trafficking and Exploitation (Scotland) Act 2015

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Offence of human trafficking

Section 1.

"(1) A person commits an offence if the person—

(a) takes a relevant action, and

(b) does so with a view to another person being exploited.

(2) In this Part, *"relevant action"* means an action which is any of the following—

(a) the recruitment of another person,

(b) the transportation or transfer of another person,

(c) the harbouring or receiving of another person,

(d) the exchange or transfer of control over another person, or

(e) the arrangement or facilitation of any of the actions mentioned in paragraphs (a) to (d).

(3) It is irrelevant whether the other person consents to any part of the relevant action.

(4) For the purposes of subsection (1), a person takes a relevant action with a view to another person being exploited only if—

(a) the person intends to exploit the other person (in any part of the world) during or after the

relevant action, or

(b) the person knows or ought to know the other person is likely to be exploited (in any part of the world) during or after the relevant action.

(5) An offence under this section is to be known as the offence of human trafficking."

Exploitation for purposes of offence of human trafficking

Section 3

"(1) For the purposes of section 1, a person is exploited only if one or more of the following subsections apply in relation to that person.

Slavery, servitude and forced or compulsory labour

(2) The person is the victim of conduct which—

(a) involves the commission of an offence under section 4, or

(b) would constitute such an offence were it done in Scotland.

Prostitution and sexual exploitation

(3) Another person exercises control, direction or influence over prostitution by the person in a way which shows that the other person is aiding, abetting or compelling the prostitution.

(4) Another person involves the person in the making or production of obscene or indecent material (material is to be construed in accordance with section 52(1)(a) of the Civic Government (Scotland) Act 1982 and includes images within the meaning of section 51A of that Act).

(5) The person is the victim of conduct which—

(a) involves the commission of an offence under—

(i) sections 1, 2 or 7 to 10 of the Criminal Law (Consolidation) (Scotland) Act 1995 (sexual offences),

(ii) sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (sexual services of children and child pornography),

(iii) Part 1 of the Sexual Offences (Scotland) Act 2009 (rape etc.),

(iv) Part 4 of the Sexual Offences (Scotland) Act 2009 (children), or

(v) Part 5 of the Sexual Offences (Scotland) Act 2009 (abuse of a position of trust), or

(b) would constitute such an offence were it done in Scotland.

Removal of organs etc.

(6) The person is encouraged, required or expected to do anything—

(a) which involves the commission, by the person or another person, of an offence under Part 1 of the Human Tissue (Scotland) Act 2006 (transplantation etc.),

(b) in connection with the removal of any part of a human body as a result of which the person or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (a)), or

(c) which would constitute an offence mentioned in paragraph (a) or (b) were it done in Scotland.

Securing services and benefits

(7) The person is subjected to force, threats or deception designed to induce the person—

(a) to provide services of any kind,

(b) to provide another person with benefits of any kind, or

(c) to enable another person to acquire benefits of any kind.

(8) Another person uses or attempts to use the person for any purpose within subsection (7)(a), (b) or (c), where—

(a) the person is—

(i) a child, or

(ii) an adult whose ability to refuse to be used for a purpose within subsection (7)(a), (b) or (c) is impaired through mental or physical illness, disability, old age or any other reason (a “vulnerable adult”), and

(b) a person who is not a child or a vulnerable adult would be likely to refuse to be used for that purpose."

Slavery, servitude and forced or compulsory labour

Section 4

"(1) A person commits an offence if—

(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being

required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard is to be
had in particular to any personal circumstances of the person (for example the person being a child, or the person's age, or the person's family relationships or health) that may make the person more vulnerable than other persons.

(4) The consent of a person to any of the acts alleged to constitute holding the person in slavery or servitude or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude or required to perform forced or compulsory labour."

Aggravation involving a child

Section 6

"(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that the offence of human trafficking is aggravated by being committed against a child, and

(b) proved that the offence is so aggravated.

(2) Evidence from a single source is sufficient to prove that the offence is aggravated by being committed against a child.

(3) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by being committed against a child,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reason for that difference, or

(ii) otherwise, the reasons for there being no difference."

Aggravation involving public official

Section 7

"(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that the offence of human trafficking is aggravated by an abuse of a public position, and

(b) proved that the offence is so aggravated.

(2) The offence of human trafficking is aggravated by an abuse of a public position if the offender is, at the time of committing the offence—

(a) a public official, and

(b) acting or purporting to act in the course of official duties.

(3) Evidence from a single source is sufficient to prove that the offence is aggravated by an abuse of a public position.

(4) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by an abuse of a public position,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(5) In this section *"a public official"* means an individual who (whether in Scotland or elsewhere)—

(a) holds a legislative or judicial position of any kind,

(b) exercises a public function in an administrative or other capacity, or

(c) is an official or agent of an international organisation.

(6) For the purpose of subsection (5)(c), *"an international organisation"* means an organisation whose members are—

(a) countries or territories,

(b) governments of countries or territories,

(c) other international organisations, or

(d) a mixture of any of the above.

(7) The Scottish Ministers may by regulations modify subsections (5) and (6)."

- *"adult"* means an individual aged 18 or over
- *"captain"* means master of a ship or commander of an aircraft
- *"child"* means a person under 18 years of age

In *Miller v HMA* 2019 HCJAC 7 (2019 *S.C.C.R. 78*) it was observed in relation to a contravention of section 4 that where the libel alleged forcing the complainer to live under the control of the accused, holding the complainer against his will, and forcing him to work for little or no pay, it was difficult to conceive the complainer not being in a state of servitude if these three elements were established. Slavery was observed to carry connotations of ownership and servitude involved a particularly serious form of denial of freedom. Servitude involved aggravated forced or compulsory labour in which a person felt that his condition was permanent and unlikely to change.

POSSIBLE FORM OF DIRECTIONS IN RELATION TO S.1: OFFENCE OF HUMAN TRAFFICKING

The charge is one of human trafficking. This offence is committed if firstly a person does one of the following:-

(a) the recruitment of another person,

(b) the transportation or transfer of another person,

(c) the harbouring or receiving of another person,

(d) the exchange or transfer of control over another person, or

(e) the arrangement or facilitation of any of these actions mentioned.

There requires to be corroborated evidence of these actions.

It is of no relevance that the other person may have consented to any part of these actions.

In addition to carrying out any of these actions, the offence is only committed if the action was carried out with a view to another person being exploited. This requires the person committing the offence either to have the intention to exploit the other person anywhere either during or after the action(s) mentioned in the charge were carried out or alternatively the person committing the offence knew or ought to have known that the other person is likely to be exploited anywhere either during or after the action(s) mentioned in the charge.

When considering the issue of intention, this is a state of mind, to be inferred or deduced from what's been proved to have been said or done. Consideration of whether a person knew or ought

to have known that someone is likely to be exploited is an objective test. You consider all the relevant circumstances and then determine whether the accused knew or ought to have known that to be the case.

A person is being exploited if one or more of the following scenarios are established:-

1 The person is subjected to the following conduct

(a) he/she is held in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held, or

(b) he/she is required by another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform such labour. (Objective test)

Forced or compulsory labour means work or service exacted from someone under threat of penalty for which that person has not volunteered. Forced suggests physical or mental restraint.

In determining whether a person is subject to such conduct, regard is to be had in particular to his/her personal circumstances that may make him/her more vulnerable than other persons.

The fact that he/she may have given consent to the actions of the other does not mean that he/she is not being held in slavery or servitude or required to perform forced or compulsory labour.

Slavery is established if the status or condition of the person is such it could be determined that another person could be said to own the first person to some extent.

Servitude is established in circumstances in which a person is coerced to provide services to another. It involves a serious form of denial of freedom and includes a requirement that a person not only performs services for others but also is to live on another person's property. In addition the person cannot alter his circumstances. It is a form of forced labour in which the person kept in servitude feels that their condition is permanent and cannot be changed.

Forced labour means all work or service which is undertaken by a person as a result of menace and for which that person has not offered himself voluntarily. Compulsory labour involves a person facing penalty if the labour is not undertaken. The penalty however must involve physical violence, physical restraint, or psychological consequences such a threats to report that person to the authorities.

(Corroboration)

2 The accused controls, directs, or influences exercises control, direction or influence over prostitution by (name the complainer)showing that the accused is aiding, abetting or compelling the prostitution.

3. The accused involves (name the complainer) in the making or production of obscene or

indecent material (material is to be construed in accordance with section 52(1)(a) of the Civic Government (Scotland) Act 1982 [indecent photograph of a child] and includes images within the meaning of section 51A of that Act [extreme pornography).

4. (Name the complainer) is the subject of conduct which—

(a) involves the commission of an offence under—

(i) sections 1, 2 or 7 to 10 of the Criminal Law (Consolidation) (Scotland) Act 1995 (sexual offences),

(ii) sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (sexual services of children and child pornography),

(iii) Part 1 of the Sexual Offences (Scotland) Act 2009 (rape etc.),

(iv) Part 4 of the Sexual Offences (Scotland) Act 2009 (children), or

(v) Part 5 of the Sexual Offences (Scotland) Act 2009 (abuse of a position of trust)

5 (Name the complainer) is encouraged, required or expected to do anything—

(a) which involves the commission, by the person or another person, of an offence under Part 1 of the Human Tissue (Scotland) Act 2006 (transplantation etc.),

(b) in connection with the removal of any part of a human body as a result of which the person or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (a)),

6 (Name the complainer) is subjected to force, threats or deception intended to induce him/her—

(a) to provide services of any kind,

(b) to provide another person with benefits of any kind, or

(c) to enable another person to acquire benefits of any kind.

7 The accused uses or attempts to use (name the complainer) to provide services of any kind,

to provide another person with benefits of any kind, or

to enable another person to acquire benefits of any kind.

where—

(a) (name the complainer) is—

(i) a child, or

(ii) an adult whose ability to refuse to be used for a purpose within subsection (7)(a), (b) or (c) is impaired through mental or physical illness, disability, old age or any other reason (a "vulnerable adult"), and

(b) a person who is not a child or a vulnerable adult would be likely to refuse to be used for that purpose.

In order to prove the offence the Crown must establish—

1. The accused has carried out the actions alleged in the charge.

2. The accused has so acted with the view of exploiting the complainer.

AGGRAVATIONS (if applicable)

Child

The complainer in the charge is said to be a child, that is a person under the age of eighteen years of age. This is an aggravation of the offence and makes it more serious. If you are satisfied that the offence has been committed then you consider whether the aggravation has been established. You can be satisfied that the complainer was a child from one source of evidence.

Public Official

The accused is said to have committed the offence whilst a public official and acting or purporting to act in the course of his/her official duties. This is an aggravation of the offence and makes it more serious. If you are satisfied that the offence has been committed then you consider whether the aggravation has been established. You can be satisfied that the accused committed the offence whilst acting or purporting to act in the course of his official duties as a public official from one source of evidence. A public official is an individual who (whether in Scotland or elsewhere)—

(a) holds a legislative or judicial position of any kind,

(b) exercises a public function in an administrative or other capacity, or

(c) is an official or agent of an international organisation.

An international organisation is an organisation whose members are—

(a) countries or territories,

(b) governments of countries or territories,

(c) other international organisations, or

(d) a mixture of any of the above.

POSSIBLE FORM OF DIRECTIONS IN RELATION TO S.4: SLAVERY, SERVITUDE AND FORCED OR COMPULSORY LABOUR

The offence is one of slavery and servitude. This offence is committed in circumstances in which a person is subjected to the following conduct by the accused

(a) he/she is held in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held, or

(b) he/she is required by another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform such labour. (Objective test)

Forced or compulsory labour means work or service exacted from someone under threat of penalty for which that person has not volunteered. Forced suggests physical or mental restraint.

In determining whether a person is subject to such conduct, regard is to be had in particular to his/her personal circumstances that may make him/her more vulnerable than other persons.

The fact that he/she may have given consent to the actions of the other does not mean that he/she is not being held in slavery or servitude or required to perform forced or compulsory labour.

Slavery is established if the status or condition of the person is such it could be determined that another person could be said to own the first person to some extent.

Servitude is established in circumstances in which a person is coerced to provide services to another. It involves a serious form of denial of freedom and includes a requirement that a person not only performs services for others but also is to live on another person's property. In addition the person cannot alter his circumstances. It is a form of forced labour in which the person kept in servitude feels that their condition is permanent and cannot be changed.

Forced labour means all work or service which is undertaken by a person as a result of menace and for which that person has not offered himself voluntarily. Compulsory labour involves a person facing penalty if the labour is not undertaken. The penalty however must involve physical violence, physical restraint, or psychological consequences such a threats to report that person to the authorities.

(Corroboration)

Identity Documents Act 2010

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Section 4 **Possession of false identity documents etc with improper intention**

(1) It is an offence for a person ("P") with an improper intention to have in P's possession or under P's control—

(a) an identity document that is false and that P knows or believes to be false,

(b) an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or

(c) an identity document that relates to someone else.

(2) Each of the following is an improper intention—

(a) the intention of using the document for establishing personal information about P;

(b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.

(3) In subsection (2)(b) the reference to P or anyone else does not include, in the case of a document within subsection (1)(c), the individual to whom it relates.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both).

Section 5**Apparatus designed or adapted for the making of false identity documents etc**

(1) It is an offence for a person ("P") with the prohibited intention to make or to have in P's possession or under P's control—

(a) any apparatus which, to P's knowledge, is or has been specially designed or adapted for the making of false identity documents, or

(b) any article or material which, to P's knowledge, is or has been specially designed or adapted to

be used in the making of such documents.

(2) The prohibited intention is the intention—

(a) that P or another will make a false identity document, and

(b) that the document will be used by somebody for establishing, ascertaining or verifying personal information about a person.

(3) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both).

Section 6**Possession of false identity documents etc without reasonable excuse**

(1) It is an offence for a person ("P"), without reasonable excuse, to have in P's possession or under P's control—

(a) an identity document that is false,

(b) an identity document that was improperly obtained,

(c) an identity document that relates to someone else,

(d) any apparatus which, to P's knowledge, is or has been specially designed or adapted for the making of false identity documents, or

(e) any article or material which, to P's knowledge, is or has been specially designed or adapted to be used in the making of such documents.

(2) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), or

(b) on summary conviction, to imprisonment for a term not exceeding the maximum period or a fine not exceeding the statutory maximum (or both).

(3) In subsection (2)(b) "the maximum period" means—

(a) in England and Wales or Scotland, 12 months, and

(b) in Northern Ireland, 6 months.

(4) In subsection (3)(a) the reference to 12 months in England and Wales is to be read, in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, as a reference to 6 months.

Section 7**Meaning of "identity document"**

(1) For the purposes of sections 4 to 6 “identity document” means any document that is or purports to be—

(a) an immigration document,

(b) a United Kingdom passport (within the meaning of the Immigration Act 1971),

(c) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom or by or on behalf of an international organisation,

(d) a document that can be used (in some or all circumstances) instead of a passport,

(e) a licence to drive a motor vehicle granted under Part 3 of the Road Traffic 1988 or under Part 2 of the Road Traffic (Northern Ireland) Order 1981, or

(f) a driving licence issued by or on behalf of the authorities of a country or territory outside the United Kingdom.

(2) In subsection (1)(a) “immigration document” means—

(a) a document used for confirming the right of a person under the EU Treaties in respect of entry or residence in the United Kingdom,

(b) a document that is given in exercise of immigration functions and records information about leave granted to a person to enter or to remain in the United Kingdom, or

(c) a registration card (within the meaning of section 26A of the Immigration Act 1971).

(3) In subsection (2)(b) “immigration functions” means functions under the Immigration Acts (within the meaning of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004).

(4) References in subsection (1) to the issue of a document include its renewal, replacement or re-issue (with or without modifications).

(5) In this section “document” includes a stamp or label.

(6) The Secretary of State may by order amend the definition of “identity document”.

Section 8**Meaning of “personal information”**

(1) For the purposes of sections 4 and 5 “personal information”, in relation to an individual (“A”), means—

(a) A's full name,

(b) other names by which A is or has previously been known,

(c) A's gender,

(d) A's date and place of birth,

(e) external characteristics of A that are capable of being used for identifying A,

(f) the address of A's principal place of residence in the United Kingdom,

(g) the address of every other place in the United Kingdom or elsewhere where A has a place of residence,

(h) where in the United Kingdom and elsewhere A has previously been resident,

(i) the times at which A was resident at different places in the United Kingdom or elsewhere,

(j) A's current residential status,

(k) residential statuses previously held by A, and

(l) information about numbers allocated to A for identification purposes and about the documents (including stamps or labels) to which they relate.

(2) In subsection (1) "residential status" means—

(a) A's nationality,

(b) A's entitlement to remain in the United Kingdom, and

(c) if that entitlement derives from a grant of leave to enter or remain in the United Kingdom, the terms and conditions of that leave.

Section 9**Other definitions**

(1) "Apparatus" includes any equipment, machinery or device and any wire or cable, together with any software used with it.

(3) An identity document was "improperly obtained" if—

(a) false information was provided in, or in connection with, the application for its issue to the person who issued it, or

(b) false information was provided in, or in connection with, an application for its modification to a person entitled to modify it.

(4) In subsection (3)—

(a) "false" information includes information containing any inaccuracy or omission that results in a tendency to mislead,

(b) "information" includes documents (including stamps and labels) and records, and

(c) the "issue" of a document includes its renewal, replacement or re-issue (with or without modifications).

(5) References to the making of a false identity document include the modification of an identity document so that it becomes false.

(6) This section applies for the purposes of sections 4 to 6.

POSSIBLE FORM OF DIRECTION ON IDENTITY DOCUMENTS ACT 2010

Section 4**Possession of false identity documents etc with improper intention**

Charge relates to identity documents. It's an offence for a person to have in his/her possession or under his/her control with an improper intention an identity document which

• is false, and you knew or believed it to be false, or

• was improperly obtained, and you knew or believed it to have been improperly obtained, or

• relates to someone else.

An identity document was "improperly obtained" if false information was provided in, or in connection with, the application for its issue to the person who issued it, or false information was provided in, or in connection with, an application for its modification to a person entitled to modify it. 'Information' includes documents (including stamps and labels) and records and it is false if it contains any inaccuracy or omission that results in a tendency to mislead. 'Issue' of a document includes its renewal, replacement or re-issue (with or without modifications).

In the case of the document which is false or improperly obtained, the accused has also to know or believe it is false or improperly obtained. In considering the issue of knowledge or belief you are looking at the state of mind of a person. You are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts as to the knowledge or belief of the accused.

Reference is made to 'improper intention.' That is constituted by each of the following:-

(a) the intention of using the document for establishing personal information about that person;

(b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about that person or anyone else. In this instance however in circumstances in which the identity document relates to another person it does not cover the use of that document in relation to that other person.

Intention is a state of mind and thus you require to consider what has been proved to have been said or done and then decide whether the necessary intention as improper intention as I have defined it can be inferred or deduced from these proven facts.

Personal information in relation to an individual means that person's full name, other names by which he/she is or has previously been known, his/her gender, date and place of birth, external

characteristics of that person capable of being used for identifying him/her, the address of his/her principal place of residence in the United Kingdom, the address of every other place in the United Kingdom or elsewhere where he/she has a place of residence, where in the United Kingdom and elsewhere he/she has previously been resident, the times at which he/she was resident at different places in the United Kingdom or elsewhere, his/her current and previous residential status, and information about numbers allocated to him/her for identification purposes and about the documents (including stamps or labels) to which they relate.

When reference is made to residential status" it means his/her nationality, his/her entitlement to remain in the United Kingdom, and if that entitlement derives from a grant of leave to enter or remain in the United Kingdom, the terms and conditions of that leave.

To have something in your possession requires knowledge and control. You must know you have it, and you must have power to dispose of it. Having control of something can be immediate or remote, having something on your person, or being able to direct what happens to it.

An identity document includes any of the following and when reference is made to 'document' that includes a 'stamp or label'. (It would be anticipated that in most cases there will be no issue that the document concerned is indeed 'an identity document. In that event the direction would simply advise the jury that the document concerned is an identity document for the purposes of the legislation and thus the following would not require to be covered!)

(a) an immigration document which itself includes a document used for confirming the right of a person under the EU Treaties in respect of entry or residence in the United Kingdom, a document that is given in exercise of immigration functions and records information about leave granted to a person to enter or to remain in the United Kingdom, or a registration card (within the meaning of section 26A of the Immigration Act 1971).

(b) a United Kingdom passport (within the meaning of the Immigration Act 1971),

(c) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom or by or on behalf of an international organisation,

(d) a document that can be used (in some or all circumstances) instead of a passport,

(e) a licence to drive a motor vehicle granted under Part 3 of the Road Traffic 1988 or under Part 2 of the Road Traffic (Northern Ireland) Order 1981, or

(f) a driving licence issued by or on behalf of the authorities of a country or territory outside the United Kingdom.

Section 5**Possession of apparatus designed or adapted for the making of false identity documents etc**

Charge is a charge of having possession or control of equipment for making false identity documents. Section 5 of the legislation that makes it an offence for a person to make, or have in his/her possession or under his/her control:-

(a) any apparatus which, to the knowledge of the accused, is or has been specially designed or

adapted for the making of false identity documents, or

(b) any article or material which, to the knowledge of the accused, is or has been specially designed or adapted to be used in the making of such documents.

For the offence to be committed, an accused person requires to have the apparatus/article in his/her possession or under his/her control with the necessary intention namely:-

(a) that the accused or another will make a false identity document, and

(b) that the document will be used by somebody for establishing, ascertaining or verifying personal information about a person.

"Apparatus" includes any equipment, machinery or device and any wire or cable, together with any software used with it. 'The making of a false identity document' includes the modification of an identity document so that it becomes false.

Intention is a state of mind and thus you require to consider what has been proved to have been said or done and then decide whether the necessary intention as improper intention as I have defined it can be inferred or deduced from these proven facts.

Personal information in relation to an individual means that person's full name, other names by which he/she is or has previously been known, his/her gender, date and place of birth, external characteristics of that person capable of being used for identifying him/her, the address of his/her principal place of residence in the United Kingdom, the address of every other place in the United Kingdom or elsewhere where he/she has a place of residence, where in the United Kingdom and elsewhere he/she has previously been resident, the times at which he/she was resident at different places in the United Kingdom or elsewhere, his/her current and previous residential status, and information about numbers allocated to him/her for identification purposes and about the documents (including stamps or labels) to which they relate.

When reference is made to residential status" it means his/her nationality, his/her entitlement to remain in the United Kingdom, and if that entitlement derives from a grant of leave to enter or remain in the United Kingdom, the terms and conditions of that leave.

To have something in your possession requires knowledge and control. You must know you have it, and you must have power to dispose of it. Having control of something can be immediate or remote, having something on your person, or being able to direct what happens to it.

The accused also requires to know that the apparatus or article has been designed or adapted for the particular purpose. In considering the issue of knowledge you are looking at the state of mind of a person. You are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts as to the knowledge of the accused.

An identity document includes any of the following and when reference is made to 'document' that includes a 'stamp or label'. (It would be anticipated that in most cases there will be no issue that the document concerned is indeed 'an identity document. In that event the direction would simply advise the jury that the document concerned is an identity document for the purposes of the legislation and thus the following would not require to be covered!)

(a) an immigration document which itself includes a document used for confirming the right of a person under the EU Treaties in respect of entry or residence in the United Kingdom, a document that is given in exercise of immigration functions and records information about leave granted to a person to enter or to remain in the United Kingdom, or a registration card (within the meaning of section 26A of the Immigration Act 1971).

(b) a United Kingdom passport (within the meaning of the Immigration Act 1971),

(c) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom or by or on behalf of an international organisation,

(d) a document that can be used (in some or all circumstances) instead of a passport,

(e) a licence to drive a motor vehicle granted under Part 3 of the Road Traffic 1988 or under Part 2 of the Road Traffic (Northern Ireland) Order 1981, or

(f) a driving licence issued by or on behalf of the authorities of a country or territory outside the United Kingdom.

Section 6**Possession of false identity documents etc without reasonable excuse**

Charge is an allegation that the accused, without reasonable excuse, had in his/her possession or under his/her control an identity document or apparatus/article which falls into one of five categories namely:-

• a false identity document, or

• an improperly obtained identity document, or

• an identity document which related to someone else

• any apparatus which, to the knowledge of the accused, is or has been specially designed or adapted for the making of false identity documents, or

• any article or material which, to the knowledge of the accused, is or has been specially designed or adapted to be used in the making of such documents.

An identity document was “improperly obtained” if false information was provided in, or in connection with, the application for its issue to the person who issued it, or false information was provided in, or in connection with, an application for its modification to a person entitled to modify it. ‘Information’ includes documents (including stamps and labels) and records and it is false if it contains any inaccuracy or omission that results in a tendency to mislead. ‘Issue’ of a document includes its renewal, replacement or re-issue (with or without modifications).

“Apparatus” includes any equipment, machinery or device and any wire or cable, together with any software used with it. ‘The making of a false identity document’ includes the modification of an identity document so that it becomes false.

To have something in your possession requires knowledge and control. You must know you have

it, and you must have power to dispose of it. Having control of something can be immediate or remote, having something on your person, or being able to direct what happens to it.

An identity document includes any of the following and when reference is made to 'document' that includes a 'stamp or label'. (It would be anticipated that in most cases there will be no issue that the document concerned is indeed 'an identity document. In that event the direction would simply advise the jury that the document concerned is an identity document for the purposes of the legislation and thus the following would not require to be covered!)

(a) an immigration document which itself includes a document used for confirming the right of a person under the EU Treaties in respect of entry or residence in the United Kingdom, a document that is given in exercise of immigration functions and records information about leave granted to a person to enter or to remain in the United Kingdom, or a registration card (within the meaning of section 26A of the Immigration Act 1971).

(b) a United Kingdom passport (within the meaning of the Immigration Act 1971),

(c) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom or by or on behalf of an international organisation,

(d) a document that can be used (in some or all circumstances) instead of a passport,

(e) a licence to drive a motor vehicle granted under Part 3 of the Road Traffic 1988 or under Part 2 of the Road Traffic (Northern Ireland) Order 1981, or

(f) a driving licence issued by or on behalf of the authorities of a country or territory outside the United Kingdom.

In the instance of possession or control of any apparatus, article, or material, the accused also requires to know that the apparatus or article has been designed or adapted for the particular purpose. In considering the issue of knowledge you are looking at the state of mind of a person. You are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts as to the knowledge of the accused.

If the issue raised

In this case the accused says he/she had reasonable excuse/lawful authority for having this article in his/her possession or under his/her control. If, for example, an accused person has with him/her an item which is covered by the statutory provision but is unaware of that and there was no reason for him/her to be aware of that as opposed to having forgotten that he/she had the item in his/her possession or under his/her control, that may amount to a reasonable excuse. The reasonable excuse must exist at the time of the alleged offence. A reasonable excuse before then may no longer be one. What you have to decide is whether the excuse being put forward by the accused amounts to a justifiable exception to the general prohibition against having articles like this. But the accused having raised the issue, there is no burden of proof upon him/her. The onus still rests of the Crown. The Crown in effect require to establish that the relevant item was in the accused's possession or under his/her control and that there was no reasonable excuse beyond reasonable doubt.

Misuse of Drugs Act 1971

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2. POSSIBLE FORM OF DIRECTION ON MISUSE OF DRUGS ACT 1971

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Restriction of production and supply of controlled drugs

"(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person –

(a) to produce a controlled drug; or

(b) to supply or offer to supply a controlled drug to another.

(2) Subject to section 28 of this Act, it is an offence for a person –

(a) to produce a controlled drug in contravention of subsection (1) above; or

(b) to be concerned in the production of such a drug in contravention of that subsection by another.

(3) Subject to section 28 of this Act, it is an offence for a person –

(a) to supply or offer to supply a controlled drug to another in contravention of subsection (1) above; or

(b) to be concerned in the supplying of such a drug to another in contravention of that subsection; or

(c) to be concerned in the making to another in contravention of that subsection of an offer to supply such a drug."

Statutory Interpretation: Section 4(2)

1 The words "to produce" a controlled drug, mean producing it by manufacture, cultivation or any other method (Section 37(1)). It includes changing a drug from one form to another[757] and bulking out or splitting drugs.[758]

2 The words "concerned in" occurring in section 4(2)(b) and section 4(3)(b) indicate that the accused must have a degree of knowledge. One cannot be concerned in producing or supplying a controlled drug if one is not aware of being involved in producing or supplying. The Crown must establish that the accused knew that he was involved in producing or supplying something, and must prove that the thing which he was concerned in producing or supplying was the controlled drug libelled in the charge.[759] Being concerned in an activity imports participation in that activity. Participation implies knowledge of the activity. What is required is participation in an operation which has as its objective the supplying of something (material or a substance) which turns out to be a controlled drug, and knowledge that what one is involved in is a producing or supplying exercise.[760]

3 Section 4(2)(b) and Section 4(3)(b) were purposely enacted in the widest terms and were intended to cover a great variety of activities both at the centre and also on the fringes of producing, supplying or dealing in controlled drugs.

Being concerned in supplying would, for example, in appropriate circumstances include the activities of financiers, couriers and other go-betweens, look-outs, advertisers, and many links in the chain of production and distribution. Being concerned in supplying controlled drugs would certainly include the activities of persons who take part in the breaking up of bulk, the adulteration and reduction of purity, division into deals and the weighing and packaging of deals. A person may be convicted of being concerned in the supplying of drugs even if no actual supply takes place, and the offence can relate to drugs supplied or to be supplied by the accused person himself.[761]

4 The concept of being concerned in supply is all-embracing, and consequently, evidence of actual supply may be subsumed into a s 4(3)(b) charge where the state of the evidence justifies that course. While it is not necessary for proof of a s 4(3)(b) charge that evidence of actual supply be led, it does not follow that such evidence is not relevant to proof of such a charge, and it may competently be led.[762]

5 If, in cases arising under section 4(3)(b) the accused is participating in the operation of producing or supplying, the doctrine of common law concert does not apply.[763] That decision also suggests that the doctrine does not apply in the case of contraventions of section 4(2)(b) of the 1971 Act. If accused persons were to be charged art and part, the degree of knowledge which the Crown has to prove is no different than if they were not so charged.

6 To secure a conviction, the prosecutor has to establish that there was a production or supplying operation, and that the accused was involved himself in a material way in one or more aspects of that operation. The case against any such accused has to be considered separately, in the sense that he is not to be convicted of being concerned in the drug production or supplying operation just because he was associating with others who plainly were actively involved in such an operation. He has to be shown to be personally, actively and knowingly involved in the operation.[764] In the context of his own actions, the accused's association with others who are engaged at the time in a production or supplying operation may be relevant to support an inference that he was actively and knowingly concerned in the operation.[765] Similarly, there would appear to be little room for the special defence of incrimination.[766]

7 If a person is charged with offences under s4(3)(b) and 5(3) and the evidence relating to each charge is the same, then the jury can only convict of one.[767]

8 Where concern production or in supply is libelled throughout a period of time, the jury must be directed that it must be satisfied beyond reasonable doubt of the involvement of the accused throughout the period covered in any verdict of guilty.[768]

9 Section 4A of the Act provides for an aggravation of the offence of supply of a controlled drug and provides as follows:

" (1) This section applies if—

(a) a court is considering the seriousness of an offence under section 4(3) of this Act, and

(b) at the time the offence was committed the offender had attained the age of 18.

(2) If either of the following conditions is met the court—

(a) must treat the fact that the condition is met as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and

(b) must state in open court that the offence is so aggravated.

(3) The first condition is that the offence was committed on or in the vicinity of school premises at a relevant time.

(4) The second condition is that in connection with the commission of the offence the offender used a courier who, at the time the offence was committed, was under the age of 18.

(5) In subsection (3), a relevant time is—

(a) any time when the school premises are in use by persons under the age of 18;

(b) one hour before the start and one hour after the end of any such time.

(6) For the purposes of subsection (4), a person uses a courier in connection with an offence under section 4(3) of this Act if he causes or permits another person (the courier)—

(a) to deliver a controlled drug to a third person, or

(b) to deliver a drug related consideration to himself or a third person.

(7)For the purposes of subsection (6), a drug related consideration is a consideration of any description which—

(a) is obtained in connection with the supply of a controlled drug, or

(b) is intended to be used in connection with obtaining a controlled drug.

(8) In this section—

“school premises” means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school; and

“school” has the same meaning—

(a) in England and Wales, as in section 4 of the Education Act 1996;

(b) in Scotland, as in section 135(1) of the Education (Scotland) Act 1980;

(c) in Northern Ireland, as in Article 2(2) of the Education and Libraries (Northern Ireland) Order 1986.]

Statutory Provisions: Section 5.

Restriction of possession of controlled drugs

“(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

(3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.

(4) In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove -

(a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or

(b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.

(5) [Repealed]

(6) Nothing in subsection (4) or (5) above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection.”

Judicial Interpretation: Section 5

1 “Possession”, where it occurs, has to be given its ordinary meaning. The concept of possession covers an article subject to the control of the possessor. “[T]he concept of control would imply knowledge that the article in question was subject to that control. Control is not a function of the

unconscious".[769] In the case of an accused charged with a contravention of section 5(2) where the substance in question was found in a container, the Crown has an initial burden of proving that the accused knew that he had the container in his control, and that it contained something which was proved to be the controlled drug described in the charge.[770] In other words, the Crown must show that the accused knew that the container held something, and that he had control over that, and that the contents of the container were in fact the drugs referred to in the charge.[771] The trial judge should direct the jury, if they are not satisfied beyond reasonable doubt that the narrative set out in the previous sentence is proved, they should acquit the accused: but that, if they find these facts to have been proved, they should be directed to consider, where the defence raise the issue by putting forward evidence, whether on all the evidence, they are satisfied, that the accused neither knew nor suspected nor had reason to suspect, that the contents of the container comprised a controlled drug. If they are so satisfied, they must acquit.[772]

2 Section 5(3) requires the Crown to prove, in addition to possession, an intent to supply. Proof of intent to supply can be inferred from surrounding circumstances or from the quantity or form of the drugs.[773]

Statutory Provisions: Defence

Section 28.

Proof of lack of knowledge etc to be a defence in proceedings for certain offences

"(1) This section applies to offences under any of the following provisions of this Act, that is to say section 4(2) and (3), section 5(2) and (3), section 6(2) and section 9.

(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused –

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof –

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any

offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section."

Judicial Interpretation of Statutory Defence

1 Section 28(2) provides the accused with a defence that he was justifiably ignorant of some fact that it was necessary for the Crown to prove in discharging the initial onus. If, for example, the Crown prove that the accused was in possession of a container holding tablets of a controlled drug, the accused will be acquitted if he was justifiably ignorant of the fact that there were tablets in the container.[774]

2 Section 28(3) is concerned only with a situation where the Crown have proved, or the accused has admitted, that the substance or product found in his possession was the controlled drug described in the charge. Section 28(3)(a) negatives any defence based on the contention that the accused did not know that the substance or product in question was the controlled drug described in the charge rather than another controlled drug.[775] But section 28(3)(b)(i) affords a defence to an accused who thought that the tablets in question were not a controlled drug, and that he was justifiably ignorant of the true position.[776] In addition section 28(3)(b)(ii) affords a defence to a doctor authorised to possess or supply particular controlled drugs. If that doctor is found in possession of controlled drugs which are not covered by his authority, it is a defence if the Crown fails to disprove his belief that they were.[777]

3 The facts necessary for any defence under section 28 can be proved on the basis of uncorroborated evidence.[778]

Burden of proof in statutory defence

1 Having regard to article 6(2) of the ECHR, section 3(1) of the Human Rights Act 1998 and dicta in *R v Lambert*, a defence under section 4(2) or (3), 5(2), (3) or (4) of the 1971 Act does not imply a legal or persuasive burden on the accused to prove the statutory defence on a balance of probabilities. The defence imposes merely an evidential burden on him, that is to say, the accused has to raise the issue of the defence (by pointing to evidence before the jury); but the burden of proof remains on the Crown who must then prove beyond reasonable doubt that the defence is not made out.[779]

2 Not all defences to drugs charges involve recourse to section 28. Accordingly it may not always be necessary to refer to the statutory defence but reference should be made to the line of defence raised at trial.[780]

3 To discharge the evidential burden on the accused, he has to point to evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. The evidence would have to show that the accused neither knew nor suspected nor had reason to suspect the existence of the fact alleged by the prosecution which it was necessary for the prosecution to prove. The Crown would then require to meet that defence, and to satisfy the jury beyond reasonable doubt that it should be rejected. If the jury believe evidence that the accused neither knew, nor suspected nor had reason to suspect the existence of the relevant fact, he must be acquitted. Even if they are not prepared to go so far as to believe that evidence, but are left in

reasonable doubt about that matter, he must be acquitted.[781] Where there is no issue as to whether the accused did not know or suspect or have reason to suspect the relevant fact, there is no need for the jury to be given directions in regard to section 28. In a section 4(3)(b) case, where no such issue is raised on the evidence, the conviction will depend on whether the jury are satisfied that the accused knew he was concerned in the supplying of something, and are further satisfied that that thing was a controlled drug. If, on the other hand, there is evidence which, if believed, could support a defence under section 28, the jury will require to be directed that they must acquit if they accept that evidence, or are left in reasonable doubt about the matter.[782]

Section 23(4)

"(4) A person commits an offence if he—

(a) intentionally obstructs a person in the exercise of his powers under this section; or

(b) conceals from a person acting in the exercise of his powers under subsection (1) above any such books, documents, stocks or drugs as are mentioned in that subsection; or

(c) without reasonable excuse (proof of which shall lie on him) fails to produce any such books or documents as are so mentioned where their production is demanded by a person in the exercise of his powers under that subsection."

POSSIBLE FORM OF DIRECTION ON MISUSE OF DRUGS ACT 1971

Section 4(2)(a)**: production of a controlled drug**

"Charge.... is a charge of producing a controlled drug. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to produce a controlled drug. The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. The key words are "to produce a controlled drug".

"To produce" means to manufacture, cultivate or produce by any other means. (Where appropriate – "It includes changing a drug from one form to another and bulking out or splitting drugs.")

For the Crown to prove this charge, you would need to be satisfied that:

- The accused produced something
- The accused knew that he had produced something and
- What he produced was [the controlled drug]

Section 4(2)(b): to be concerned in the production of a controlled drug

“Charge….. is a charge of being concerned in the production of a controlled drug. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to be concerned in the production of a controlled drug. The drugs involved

(specify) are classified under the Act as Class A/B/C controlled drugs respectively. The key words are “to be concerned in the production of a controlled drug”.

“To produce” means to manufacture, cultivate or produce by any other means.

(where appropriate – “It includes changing a drug from one form to another and bulking out or splitting drugs.”)

‘Being concerned in’ requires the accused’s active involvement in the production. The accused requires to be participating in the enterprise. That can take many forms such as allowing his premises to be used, supplying equipment, providing funds or ordering raw materials. This is not an exhaustive list. He must be involved in some way in the production operation.

‘Being concerned in’ production also requires the Crown to prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an operation to produce something. The Crown has to prove that what was actually being produced was the controlled drug specified in the charge. But the Crown does not need to prove that the accused knew it was the controlled drug specified in the charge which was being produced.

For the Crown to prove this charge, you would need to be satisfied that:

- There was an operation to produce something
- The accused was knowingly involved in it; and
- What he was in fact supplying was the drugs referred to in the charge.

Where more than one accused involved

“As I have said, a charge of this sort can cover a wide range of activities in the production operation. Different people can be involved, in different ways, in different places, and at different times. One person’s function may be unconnected with, or connected with, another person’s function, or run in conjunction with it. In the production situation everybody involved in the production operation commits a crime. Each one is guilty of the whole charge, because he is part of the production operation. So, each person who is proved to have knowingly taken part in the production operation is guilty of the whole charge, as it is libelled in the indictment.

In this case there is more than one person accused on this charge. Here the Crown say the evidence shows they were knowingly part of a production operation. The defence say no such conclusion can be drawn. In deciding this you might find it helpful to look at the evidence in stages:

(1) decide if there was a production operation. If that is not proved, the Crown could not prove this charge

(2) decide what each accused did, on his own, and along with others

(3) decide if he was knowingly part of the production operation.

(4) decide if what was being produced was (specify drug).

If you conclude there was such a production operation, that an accused knowingly took part in it, and that it was the drug (specify) that was being produced, you would convict him of this charge." (adapt the last sentence where there is a statutory defence)

If defence raises section 28(2) (accused thought the production operation was producing something that could not be associated with controlled drugs)

"In this case the accused (through his statement to the police) says he thought what was being produced was something completely different from drugs (e.g. cigarettes), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was of the nature of a drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 28(3) (accused thought (for example, the pills) were not controlled drugs) [adapt as appropriate]

"In this case the accused (through his statement to the police) says he neither knew nor suspected nor had reason to suspect that the pills that were being produced were controlled drugs, but he thought they were (e.g. aspirin), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was being produced was a controlled drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 4(3)(b)**: being concerned in the supplying of a controlled drug**

"Charge is a charge of being concerned in the supply of drugs. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to be concerned in supplying a controlled drug to another person.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That's not in dispute. The key words are 'being concerned in supplying'. That calls for

three comments. ‘Supplying’ has its ordinary and common-sense meaning. It’s parting with possession. It covers any form of supply – sale, exchange, barter, gift.

‘Being concerned in’ requires the accused’s active involvement in the supply chain. That can take many forms, at the centre or on the fringes of drug dealing, from the big barons to the street dealers. It covers financiers, couriers, go-betweens, look- outs, advertisers, those who store drugs, those who break up bulk quantities, reduce their purity, divide them into deals, or package them, and suppliers of single deals. It covers supply itself, or any link in the chain of distribution from producer to ultimate consumer. It can relate to drugs supplied to, or supplied by, the accused. He must be involved in some way like that.

“Being concerned in supplying” also requires the Crown to prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an operation to supply something, but not necessarily that it was a controlled drug. The Crown has to prove that what was actually being supplied was the controlled drug specified in the charge. But the Crown does not need to prove that the accused knew it was the controlled drug specified in the charge which was being supplied.

For the Crown to prove this charge, you would need to be satisfied that:

(1) There was an operation to supply something

(2) the accused was knowingly involved in it

(3) what he was in fact supplying was the drugs referred to in the charge.”

Where more than one accused involved

“As I’ve said, a charge of this sort can cover a wide range of activities in the distribution chain. Different people can be involved, in different ways, in different places, and at different times. One person’s function may be unconnected with, or connected with, another person’s function, or run in conjunction with it. In the supply situation everybody involved in the distribution chain commits a crime. Each one is guilty of the whole charge, because he’s part of the distribution chain from producer to ultimate consumer. So, each person who is proved to have knowingly taken part in the supply chain is guilty of the whole charge, as it’s libelled in the indictment.

In this case there’s more than one person accused on this charge. Here the Crown say the evidence shows they were knowingly part of a distribution chain. The defence say no such conclusion can be drawn. In deciding this you might find it helpful to look at the evidence in stages:

(1) decide if there was a supplying operation. If that’s not proved, the Crown couldn’t prove this charge

(2) decide what each accused did, if anything, on his own, and along with others

(3) decide if he was knowingly part of the supplying operation

(4) decide if what was being supplied was (specify drug).

If you conclude there was such a supplying operation, that an accused knowingly took part in it, and that it was the drug (specify) that was being supplied, you could convict him of this charge."

Aggravations applicable to section 4(3) offences

You will see that this offence is said to be aggravated as a consequence of what is set out in the aggravation. In terms of the legislation, an offence in terms of section 4(3) of the legislation is aggravated if it is committed in certain circumstances. This results in the offence being viewed more seriously and has a bearing on the sentence imposed in the event of the accused being convicted of the offence. For the offence to be aggravated the accused has to be aged 18 years or older.

In this case it is claimed that the offence is committed on or in the vicinity of school premises. For the aggravation to apply the school premises must be being used by persons under 18 years of age or within one hour of school starting or ending. [If necessary define school premises in terms of section 4A(8)]

Or

In this case it is claimed that the accused at the time of the commission of the offence used a person as a courier and that person was under the age of 18 years. The accused uses that person as a courier if he causes or permits him to deliver the substance in question to another or deliver consideration related to drugs to the accused or someone else. Such consideration covers anything of value - money, material items – which is obtained in connection with the supply of such a substance or is intended to be used in connection with obtaining such a substance.

In considering the aggravation, might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. If you do not consider this to be the case, the aggravation does not concern you.

If, on the other hand, you consider that the offence was committed by the accused, you then move on to consider whether this aggravation applies to the charge. If you were satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

if defence raises section 28(2) (accused thought container held something which could not be associated with drugs)

"In this case the accused (through his statement to the police) says he thought what was in the bag was something completely different from drugs (e.g. a video, SIM cards, cigarettes), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was of the nature of a drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove that to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 28(3) (accused thought the pills were not controlled drugs)

"In this case the accused (through his statement to the police) says he neither knew nor suspected nor had reason to suspect that the tablets in the container were controlled drugs, but he thought they were (e.g. aspirin), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was a controlled drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove that to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 5(2)**: simple possession**

"Charge is a charge of being in possession of drugs. It alleges a contravention of the Act mentioned in the charge. Read short, that says it is not lawful for you to have a controlled drug in your possession.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That is not in dispute.

The key word is "possession".

"Possession" does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

For the Crown to prove this charge, you would have to be satisfied that the accused was in possession, in the sense I have explained, of the controlled drug referred to in the charge."

if defence raises section 28(2) (accused thought container held something which could not be associated with drugs)

"In this case the accused (through his statement to the police) says he thought what was in the bag was something completely different from drugs (e.g. a video, SIM cards, cigarettes), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was

in the bag was of the nature of a drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

section 28(3) (accused thought the pills were not controlled drugs)

"In this case the accused (through his statement to the police) says he neither knew nor suspected nor had reason to suspect that the tablets in the container were controlled drugs, but he thought they were (e.g. aspirin), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was a controlled drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused's position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 5(3): possession with intent to supply

“Charge is a charge of being in possession of drugs with intent to supply. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to have a controlled drug in your possession with intent to supply it to another person.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That is not in dispute.

The key words are “possession with intent to supply”.

“Possession” does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something’s existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

• ***(where drugs concealed in a container)***

Here the drugs were in a [bag]. For the accused to be in possession of them he must have known of the [bag’s] existence, and that it contained something, even if he did not know exactly what. He must also have control over the [bag] and its contents. If there is other evidence that what the bag contained was the drug referred to in the charge, that is enough for possession by the accused.

“Intent” is a state of mind, to be inferred or deduced from what has been proved to have been said or done.

“Supply” has its ordinary and common sense meaning. It is parting with possession. It covers any form of supply – sale, exchange, barter, gift. The Crown does not need to prove the supply was to be to any particular person.

For the Crown to prove this charge, you would have to be satisfied that:

(1) The accused was in possession, in the sense I have explained, of the controlled drug referred to in the charge

(2) That possession was with intent to supply it to some other person.”

if defence raises section 28(2) (accused thought container held something which could not be associated with drugs)

“In this case the accused (through his statement to the police) says he thought what was in the bag was something completely different from drugs (e.g. a video, SIM cards, cigarettes), and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was of the nature of a drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused’s position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt.”

section 28(3) (accused thought the pills were not controlled drugs)

“In this case the accused (through his statement to the police) says he neither knew nor suspected nor had reason to suspect that the tablets in the container were controlled drugs but he thought they were (e.g. aspirin) and so he should be acquitted. If you accepted that evidence, and if you thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag was a controlled drug, you would acquit him. You have to judge this matter objectively.

Remember it is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it should be rejected. Evidence to support the accused’s position does not need to be corroborated. He does not need to prove it to any particular standard. If what he says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt.”

Section 23**: Powers to search and obtain evidence**

Section 23(4)(a)

The offence is committed by a person who intentionally obstructs a police officer exercising his powers to search for drugs/seize and detain items found in the course of a drugs search. The person has to have acted intentionally. Acting recklessly or accidentally is not enough. To determine someone's intention look at all the circumstances surrounding the incident and consider whether you can infer that they had the appropriate intention.

Obstruction includes actual physical hindrance or restraint or doing anything which is done with the intention to hinder officers in carrying out their search or seizure. So it can cover a person physically struggling with police who are trying to search him. It can also cover the scenario in which a person swallows something or throws something away when he sees police officers approaching. So it covers any circumstances in which a person tries to avoid a search taking place. The Crown does not have to prove that the accused actually had drugs on his person or that drugs were in the property. The Crown does not have to prove that a drug was swallowed. The crux of the charge is intentional obstruction of the search or seizure. So, for the Crown to prove this charge, it has to show that:

"(1) The constable was exercising his powers to search for drugs/seize and detain items found in the course of a drugs search,

(2) The accused obstructed the officer and

(3) The accused intentionally acted in the way described."

[757] *R. v Russell (Peter Andrew)* (1992) 94 Cr. App. R. 351; [1991] 12 WLUK 102

[758] *R. v Williams (Darren)* [2011] EWCA Crim 232; [2011] 1 WLUK 525

[759] *Salmon v HMA*, 1999 SLT 169, *Moore v HMA*, 1998 SCCR 740, 756E-F and 757A-B per LJ-G Rodger, 1999 JC 67, 1999. *Carnall v HMA*, Appeal Court 28 November 2001 at para [11] SLT 169, 178. See also *Sharkey v HMA*, 2001 SCCR 290, 2001 SLT 290. *Cairns v HMA*, 2005 SCCR 239.

[760] Salmon, supra, at 772F-773B per Lord Bonomy. Cairns, *supra* para [5] per Lord Marnoch. *Dickson v HMA*, 2001 JC 203; 2001 SCCR 397; 2001 SLT 674 at para [31]. *Aiton v HMA* 2010 SCCR 306 at 318 para 30 per Lord Bonomy.

[761] *Salmon*, supra, at 764 C-E (charge of trial judge, Lord Osborne).

[762] *HMA v Grant* 2008 SCCR 143, 2008 SLT 339, [2007] HCJAC 71, 2008 GWD 5-86.

[763] *Salmon*, supra, at 763B per LJ-G Rodger; *Clark v HMA*, 2002 SCCR 675 at para [12]; *Barclay v HMA* 2020 HCJAC 8

[764] Salmon, *supra,* at 762 E. Dicta in *Rodden v HMA* 1994 SCCR 841, 1995 SLT 185 that it must be established for art and part guilt that there was knowledge on the part of each accused that drugs were involved, was, therefore, doubted

[765] Clark, *supra*, at para [12].

[766] *Flanagan v HMA* 2011 SCCR 555.

[767] *Kyle v HMA*, 1988 SLT 601, 603 per LJ-C Ross, 1987 SCCR 116.

[768] *Aiton v HMA* 2010 SCCR 306, [2010] HCJAC 15 at para [50].

[769] *McKenzie v Skeen*, 1983 SLT 121, 122 77 per Lord Cameron

[770] *Salmon v HMA; Moore v HMA*, 1999 SLT 169, 176 per LJ-G Rodger.

[771] *Wali v HMA* 2007 SCCR 106, 2007 JC [1] at para [11]; Salmon, *supra*, at 178 per LJ-G Rodger; and dicta in *R v Lambert* [2001] UKHL 37.

[772] *Ibid*

[773] Salmon, *supra*, at 177 per LJ-G Rodger.

[774] Salmon, *supra*, at 177 per LJ-G Rodger; and *R v Lambert*, [2001] UK HL37, [2001] 3 All ER 577 (HL).

[775] For example, if he thought he was involved in supplying Ecstacy when it fact it was heroin.

[776] For example, that he thought that he was involved in a scheme for a black market sale of some (uncontrolled) "lifestyle" drug and that the tablets were tablets of that lifestyle drug.

[777] Salmon, *supra*, at 173 per LJ-G Rodger; and R v Lambert, *supra*.

[778] *Salmon*, *supra*, at 175, per LJ-G Rodger; and R v Lambert, *supra*.

[779] *supra*; *Henvey v HMA*, 2005 SCCR 282; 2005 SLT 384.

[780] *Glancy v HMA*, 2001 SCCR 385 at para [13]. *Aiton v HMA*, 2010 SCCR 306, [2009] HCJAC 15 makes clear the importance of determining whether or not the accused has raised a statutory defence. If a section 28 defence is not raised, directions on it should not be given. It is only when that is the defence that the trial judge is required to direct the jury to consider the defence that the accused neither knew nor suspected nor had reason to suspect that the drugs charged were involved. Claiming lack of knowledge of the presence of a package does not raise a section 28 defence.

[781] Henvey, *supra* at para [11]

[782] *ibid*, at para [12].

Police (Scotland) Act 1967 and Police and Fire Reform (Scotland) Act 2012

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1. LAW – POLICE (SCOTLAND) ACT 1967

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LAW – POLICE (SCOTLAND) ACT 1967

Statutory Provisions Applicable to offences committed prior to 1 April 2013. (Section 41 is repealed by Police and Fire Reform (Scotland) Act 2012 sch.8 (1) para. 1.

Section 41(1)

"(1) Any person who-

(a) assaults, resists, obstructs, molests or hinders a constable or police custody and security officer in the execution of his duty or a person assisting a constable or any such officer in the execution of his duty, or

(b) rescues or attempts to rescue, or assists or attempts to assist the escape of, any person in custody,

shall be guilty of an offence and on summary conviction shall be liable-

(ii) to imprisonment for a period not exceeding 12 months or to a fine not exceeding the prescribed sum within the meaning of section 225(8) of the Criminal Procedure (Scotland) Act 1995, or to both.

(2) The reference in subsection (l) of this section to a person in custody shall be construed as a reference to a person-

(a) who is in the lawful custody of a constable or police custody and security officer or any person assisting a constable or any such officer in the execution of his duty, or

(b) who is in the act of eluding or escaping from such custody, whether or not he has actually been arrested.

(3) This section also applies to a constable who is a member of a police force maintained in England and Wales or in Northern Ireland when he is executing a warrant or otherwise acting in Scotland by virtue of any enactment conferring powers on him in Scotland.

(4) In this section references to a person assisting a constable in the execution of his duty include references to any person who is neither a constable nor in the company of a constable but who-

(a) is a member of an international joint investigation team that is led by a constable of a police force; and

(b) is carrying out his functions as a member of that team.

(5) In this section 'international joint investigation team' means any investigation team formed in accordance with-

(a) any framework decision on joint investigation teams adopted under Article 34 of the Treaty on European Union;

(b) the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, and the Protocol to that Convention, established in accordance with that Article of that Treaty; or

(c) any international agreement to which the United Kingdom is a party and which is specified for the purposes of this section in an order made by the Secretary of State with the consent of the Scottish Ministers."

For commentary on these provisions see para Z-003.3 in Renton & Brown's Statutory Offences. Reference may also be made to *Walsh v McFadyen* 2001 SCCR 864, 2002. JC 93, 2002 SLT 351

Criminal Justice (Scotland) Act 2003 section 76

76. Police custody and security officers–

(1) The Police (Scotland) Act 1967 (c. 77) is amended as follows.

(1A) The category of persons–

(a) so employed or appointed; and

(b) in respect of each of whom there is for the time being a certificate the purposes of performing functions in relation to custody and security and is accordingly authorised to perform them for the police force, shall be known as the police authority's "police custody and security officers".

(1C) The powers are–

(a) to transfer persons in legal custody from one set of relevant premises to another;

(b) to have custody of persons held in legal custody on court premises (whether or not such persons would otherwise be in the custody of the court) and to produce them before the court;

(c) to have custody of persons temporarily held in legal custody in relevant premises while in the course of transfer from one set of such premises to another;

(d) to apprehend a person who was in the custody of the officer in relevant premises or in such course of transfer but who is unlawfully at large;

(e) to remove from relevant premises any person–

(i) who he has reasonable grounds to believe has committed or is committing an offence; or

(ii) who is causing a disturbance or nuisance;

(f) in any place to search any person who is in legal custody or is unlawfully at large;

(g) in relevant premises, or in any other place in which a person in his custody who is being transferred from one set of relevant premises to another is present, to search (any or all)– (i) property; (ii) any person who he has reasonable grounds to believe has committed or is committing an offence; (iii) any person who is seeking access to a person in the officer's custody or to relevant premises;

(h) in relevant premises, or in any other place in which a person in legal custody is or may be, to require any person who he has reasonable grounds for suspecting has committed or is committing an offence to give his name and address and either– (i) to remain there with the officer until the arrival of a constable; or (ii) where reasonable in all the circumstances, to go with the officer to the nearest police station, but only if before imposing any such requirement on a person the officer informs him of the nature of the suspected offence and of the reason for the requirement;

(i) in fulfilment of his duties under subsection (1E)(d) below, to apprehend any person and to detain that person in custody in the premises of the court in question;

(j) at a constable's direction, to photograph, or take relevant physical data from, any person held in legal custody; and

(k) to use reasonable force (which may include the use of handcuffs and other means of restraint) where and in so far as it is requisite to do so in exercising any of the other powers.

(1E) The duties are– (a) to attend to the well-being of persons in their custody; (b) to prevent the escape of such persons from their custody; (c) to prevent, or detect and report on, the commission or attempted commission by such persons of other unlawful acts; (d) to act with a view to preserving good order in the premises of any court and in land connected with such premises; (e) to ensure good order and discipline on the part of such persons (whether or not in the premises of any court or in land connected with such premises); and (f) to give effect to any order of a court.

POSSIBLE FORM OF DIRECTION ON POLICE ASSAULT

Charge [ ] is brought under section 41(1)(a) of the Police (Scotland) Act 1967 which makes it a crime for someone to
assault, resist, obstruct, molest or hinder police constables, or police custody and security officers, in the course of their duties, or anyone assisting a

constable in the execution of his duty.

An assault is an attack on another person carried
out with evil intent, which simply means that the attack was deliberate.
Accidental or careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or
may not result. [So,] menaces or threats producing fear or alarm in the other
person are assaults. Spitting
on or at someone is an assault.

Whether a person
has acted deliberately can only be inferred or deduced from what has been
proved to have been said and/or done.

(If appropriate)
The word “repeatedly” in the charge just means “more than once”.

Where any degree
of injury is alleged see ASSAULT.

Obstruction involves a physical element. So does
molesting, resisting and hindering. But the physical element may be small. Any
slight degree of physical obstruction, molestation, resistance or hindrance is
enough. Remaining inert, instead of moving when requested, thus requiring the police
to lift the accused, is enough.

Obstruction, molesting, resisting or hindering must be deliberate
- accidental or careless behaviour is
not an offence here. Whether a person
has acted deliberately can only be inferred or deduced from what has been
proved to have been said and/or done.

So, for the Crown to prove this charge, it has to show
that:

1. the constable was acting in the course of his or her duty
   at the time
2. the accused knew, or ought to have known, that
3. the accused deliberately acted in the way described.
4. (if aggravation libelled) the
   attack resulted in injury [as described].

LAW – POLICE AND FIRE REFORM (SCOTLAND) ACT 2012

As from 1st April 2013 this legislation will replace the provisions of the Police (Scotland) Act 1967.

The reference to 'acting in a capacity' in the statutory provisions in the 2012 Act in contrast to 'in the execution of his duty' may mean that the issue of whether an officer was or was not acting in the execution of his duty is now only of academic interest. Decisions such as *Twycross v Farrell* 1973 SLT (Notes) 85 may no longer be applicable. For authorities on this point – Renton & Brown's Statutory Offences para Z - 003.3.

Statutory Provisions

Section 90 **- Assaulting or impeding police**

"(1) It is an offence for a person to assault—

(a) A person ("A") acting in a capacity mentioned in subsection (3), or

(b) A person assisting A while A is acting in such capacity.

(2) It is an offence for a person to resist, obstruct or hinder—

(a) A person ("A") acting in a capacity mentioned in subsection (3), or

(b) A person assisting A while A is acting in such capacity.

(3) The capacities are—

(a) that of a constable,

(b) that of a member of police staff,

(c) that of a member of a relevant police force when such member is executing a warrant or is otherwise acting in Scotland by virtue of any enactment conferring powers on the member in Scotland,

(d) that of a person who—

(i) is a member of an international joint investigation team that is led by a person acting in a capacity mentioned in paragraph (a) or (c), and

(ii) is carrying out functions as a member of that team.

(4) A person who is guilty of an offence under subsection (1) or (2) is liable on summary conviction to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both.

(5) A complaint may include a charge that is framed so as to comprise (in a combined form) the specification of both an offence under subsection (1) and an offence under subsection (2).

(6) Where a charge in a complaint is so framed the charge is to be regarded as being a single yet cumulative charge.

(7) In this section and section 91, a reference to a member of a relevant police force is a reference

to a member of—

(a) a police force maintained under section 2 of the Police Act 1996 (c.16),

(b) the metropolitan police force,

(c) the City of London police force, or

(d) the Police Service of Northern Ireland."

Section 91 **- Escape from custody**

"(1) It is an offence for a person—

(a) to remove a person from custody, or

(b) to assist the escape of a person in custody.

(2) The reference in subsection (1) to a person in custody is to be construed as a reference to a person—

(a) who is in the lawful custody of a person ("A") acting in a capacity mentioned in subsection (3) or a person assisting A while A is acting in such capacity, or

(b) who is in the act of eluding or escaping from such custody, whether or not the person has actually been arrested.

(3) The capacities are—

(a) that of a constable,

(b) that of a police custody and security officer,

(c) that of a member of a relevant police force when such member is executing a warrant or is otherwise acting in Scotland by virtue of any enactment conferring powers on the member in Scotland,

(d) that of a person who—

(i) is a member of an international joint investigation team that is led by a person acting in a capacity mentioned in paragraph (a) or (c), and

(ii) is carrying out functions as a member of that team.

(4) A person who is guilty of an offence under subsection (1) is liable on summary conviction to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both."

POSSIBLE FORM OF DIRECTION ON SECTIONS 90 AND 91 OF THE POLICE AND FIRE REFORM (SCOTLAND) ACT 2012

Section 90

These directions should be
adapted to the circumstances of the case

Charge [ ] is brought under section 90 of the Police and Fire Reform (Scotland) Act 2012 which makes it a crime for someone to assault, resist, obstruct, or hinder police officers, or members of police staff such as police custody and security officers, whilst acting in such a capacity, or anyone assisting such a person.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

[SELECT FROM THE FOLLOWING WHERE APPROPRIATE]

Weapons may or may not be involved. Injury may or may not result.[So,] menaces or threats producing fear or alarm in the other person are assaults. Spitting on or at someone is an assault.

Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

(If appropriate)
The word "repeatedly" in the charge just means "more than once".

Where any degree of injury is alleged see ASSAULT.

Obstruction involves a deliberate physical element. So does resisting and hindering. But the

Obstruction, resisting or hindering must be deliberate - accidental or careless behaviour is not an offence here. Whether a person has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

So, for the Crown to prove this charge, it has to show that:

1. the police officer etc. was acting in that capacity at

the time
2. the accused knew, or ought to have known, that
3. the accused deliberately acted in the way described.

Section 91

Charge [ ] is brought under section 91
of the Police and Fire Reform (Scotland) Act 2012 which makes it a crime for someone to remove a person
from custody or assist the ____

Custody means in the lawful custody of police officers, or police staff such as police custody and security officers, whilst acting in that capacity or anyone assisting those persons whilst acting in that capacity. A person who is in the act of evading or escaping such lawful custody, irrespective of whether that person is arrested, is also someone in custody for the purposes of the statutory provision.

Removing from custody or assisting escape must be done deliberately - accidental or careless behaviour is
not an offence here. Whether a person
has acted deliberately can only be inferred or deduced from what has been proved to have been said and/or done.

So, for the Crown to prove the charge, it has to show the following:

1. the police officer etc. was acting in that capacity at the time
2. the person (name) was in the custody of the officer as I have defined it,
3. the
accused deliberately acted in the way described.

Prisons (Scotland) Act 1989

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON COMMUNICATIONS DEVICES

LAW

Statutory Provisions

Section 41ZA: Further provision for communication devices “(1) A person commits an offence if, knowing another person to be a prisoner, the person gives a personal communication device to the prisoner while the prisoner is inside a prison.

(2) A person commits an offence if, by means of a personal communication device, the person—

(a) transmits, from inside a prison, a communication of any kind, or

(b) intentionally receives, when inside a prison, a communication of any kind.

(3) A person commits an offence if, while inside a prison, the person is in possession of a personal communication device.

(6) In this section, ‘personal communication device’ is to be construed in accordance with section 41(9B) namely

(a) a mobile telephone,

(b) any other portable electronic device that is capable of transmitting or receiving a communication of any kind,

(c) any—

(i) component part of a device mentioned in paragraph (a) or (b),

(ii) article that is designed or adapted for use with such a device.

41ZB Exceptions as to communication devices

(1) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(1) to (3), is committed by a person where subsection (2) applies.

(2) This subsection applies—

(a) if (and in so far as) the act which constitutes the offence is done by the person at or in relation to a designated area at the prison, or (b) if (and in so far as) the person is acting in circumstances to which an authorisation under subsection (8) applies.

(3) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(2) or (3), is committed by a prison officer (or other prison official) where subsection (4) applies.

(4) This subsection applies—

(a) if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or

(b) if (and in so far as) the person is acting in accordance with those duties.

(5) No offence under section 41ZA(3) is committed by a person other than a prisoner if in the circumstances there is a reasonable excuse for the possession.

(6) The defences mentioned in subsection (7) apply in any proceedings for an offence under—

(a) section 41(1), where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA(1) to (3).

(7) In relation to such an offence, it is a defence for the accused person to show that—

(a) the person reasonably believed that the person was acting in circumstances to which an authorisation under subsection (8) applied (even though no such authorisation did apply), or

(b) in the circumstances there was an overriding public interest which justified the person's actions.

(8) An authorisation under this subsection is a written authorisation that is given—

(a) in favour of any person specified in the authorisation (or person of a specified description),

(b) for a specified purpose, and

(c) by—

(i) the governor or director of a prison in relation to activities at that prison, or

(ii) the Scottish Ministers in relation to activities at any specified prison.

(9) A designated area referred to in subsection (2)(a) is any part of the prison, used solely or principally for an administrative or similar purpose, that is specified as such by a written designation given under this paragraph by the governor or director of the prison.

(10) Prison officers (or other prison officials) who are Crown servants or agents do not benefit from Crown immunity in relation to an offence under—

(a) section 41, where the proscribed article falls within paragraph (a) of subsection (9A) of that section (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA."

POSSIBLE FORM OF DIRECTION ON COMMUNICATIONS DEVICES

The charge relates to a communications device in prison.

Depending on the actual offence charged

A person commits an offence if, knowing another person to be a prisoner, he/she gives a personal communication device to the prisoner while the prisoner is inside a prison. Whether the accused knew that another person was a prisoner will require you to look at what was said or done and make the necessary inferences or deductions from those matters.

A person commits an offence if, by means of a personal communication device, the person transmits, from inside a prison, a communication of any kind, or intentionally receives, when inside a prison, a communication of any kind. Intentionally does not include accidentally. Accordingly whether a person intentionally received a communication will depend upon what was said or done and you making the necessary inferences and deductions.

A person commits an offence if, while inside a prison, the person is in possession of a personal communication device. Possession doesn't necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control doesn't just mean being readily within reach. It's wider than that. You can have control of something that's stored elsewhere. It's having a say in what happens to it.

A personal communication device includes the following:

(a) a mobile telephone,

(b) any other portable electronic device that is capable of transmitting or receiving a communication of any kind,

(c) any—

(i) component part of a device mentioned in paragraph (a) or (b),

(ii) article that is designed or adapted for use with such a device.

Accordingly, the offence covers such things as Blackberries, iphones, ipads, smart phones, and palmtops.

(If the statutory defence in terms of section 41ZB(7) is raised, reference is made to chapter on the General Introductory Directions as to whether a reverse burden of proof applies)

Proceeds of Crime Act 2002

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1. LAW

2. POSSIBLE FORM OF DIRECTION FOR PROCEEDS OF CRIME

LAW

Section 327**: Concealing etc.**

"(1) A person commits an offence if he—

(a) conceals criminal property;

(b) disguises criminal property;

(c) converts criminal property;

(d) transfers criminal property;

(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(2A) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(2B) In subsection (2A) 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property."

(2C) A deposit-taking body that does an act mentioned in paragraph (c) or (d) of subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the value of the criminal property concerned is less than the threshold amount determined under section 339A for the act.

(3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it."

The law of concert applies to offences under this section –*Lowrie and others v HMA*, 2009 HCJAC 71.

Conversion of property includes any substitution, actual or constructive, in the quality or form of the property. So, for example, the exchange of a book or voucher for cash or goods is covered – *R v Burden* 2007 EWCA Crim 863.

Transfer simply means passing from one person to another – Lowrie and others v HMA, *supra*.

If the actions complained of are dealt with by a legal person in which an accused has an interest, such actions may well fall within the terms of section 328 – *Sarwar v HMA* 2011 SCCR 159.

It is essential that the accused knows or suspects that the property concerned is criminal property – Sarwar v HMA, *supra*.

'Criminal property' is defined in expansive terms in section 340.

Property is criminal property if—

(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

Criminal conduct is conduct which -

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

It is immaterial - (a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after the passing of this Act.

A person benefits from conduct if he obtains property as a result of or in connection with the

conduct.

'Deposit making body' is defined in section 340(13) as a business which engages in the activity of accepting deposits or the National Savings Bank.

For the effect of subsections (2), (2A), and (2C) in this section and the succeeding sections, they are only of relevance if they are put at issue by evidence. In that event, the onus is on the Crown to prove beyond reasonable doubt that they do not apply – *Ahmad v HMA* 2011 HCJAC 21.

Section 328: Arrangements

(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(4) In subsection (3) 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property."

(5) A deposit-taking body that does an act mentioned in subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the arrangement facilitates the acquisition, retention, use or control of criminal property of a value that is less than the threshold amount determined under section 339A for the act."

It is unnecessary to identify the particular offence from which the proceeds are derived – *R v*

Sabharwal (Tarsemwal), 2001 2 Crim App R (S) 81.

Retention or control are apt to cover facilitation by conversion of currency. The reason or purpose for the conversion is immaterial – *R v Macmaster* 1999 1 Cr App R 402.

Suspicion that an arrangement facilitates acquisition etc constitutes an offence if the accused enters into or becomes concerned in that arrangement even although that arrangement might turn out to be completely innocent – *Squirrell Ltd v National Westminster Bank* 2006 1 WLR 637.

An arrangement does not cover the ordinary conduct of litigation by legal professionals – *Bowman v Fels* 2005 1 WLR 3088 but does cover such a professional or a bank carrying out financial business whilst knowing or suspecting that a transaction will facilitate the use of criminal property.

Section 329: Acquisition, use and possession "

(1) A person commits an offence if he—

(a) acquires criminal property;

(b) uses criminal property;

(c) has possession of criminal property.

(2) But a person does not commit such an offence if—

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;

(c) he acquired or used or had possession of the property for adequate consideration;

(d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(2A) Nor does a person commit an offence under subsection (1) if—

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

(b) the relevant criminal conduct—

(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

(ii) is not of a description prescribed by an order made by the Secretary of State.

(2B) In subsection (2A) 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property."

(2C) A deposit-taking body that does an act mentioned in subsection (1) does not commit an offence under that subsection if—

(a) it does the act in operating an account maintained with it, and

(b) the value of the criminal property concerned is less than the threshold amount determined under section 339A for the act."

(3) For the purposes of this section—

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;

(c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

Bona fide acquisition, use, or possession of property which turns out to be criminal property is not an offence in terms of this section.

Consideration in subsection (2)(c) has its ordinary meaning – any act by one party from which the other derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by one, provided such an act is performed, or such inconvenience suffered by that person with the implied or express consent of the other.

Acquisition, use, and possession have their normal meanings.

Section 330: Failure to disclose: regulated sector

"(1) A person commits an offence if each of the conditions in subsections (2) to (4) are satisfied.

(2) The first condition is that he—

(a) knows or suspects, or

(b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

(3) The second condition is that the information or other matter—

(a) on which his knowledge or suspicion is based, or

(b) which gives reasonable grounds for such knowledge or suspicion, came to him in the course of business in the regulated sector.

(3A) The third condition is—

(a) that he can identify the other person mentioned in subsection (2) or the whereabouts of any of

the laundered property, or

(b) that he believes, or it is reasonable to expect him to believe, that the information or other matter mentioned in subsection (3) will or may assist in identifying that other person or the whereabouts of any of the laundered property.

(4) The fourth condition is that he does not make the required disclosure to—

(a) a nominated officer, or

(b) a person authorised for the purposes of this Part by the Director General of the Serious Organised Crime Agency, as soon as is practicable after the information or other matter mentioned in subsection (3) comes to him.

(5) The required disclosure is a disclosure of—

(a) the identity of the other person mentioned in subsection (2), if he knows it,

(b) the whereabouts of the laundered property, so far as he knows it, and

(c) the information or other matter mentioned in subsection (3).

(5A) The laundered property is the property forming the subject-matter of the money laundering that he knows or suspects, or has reasonable grounds for knowing or suspecting, that other person to be engaged in.

(6) But he does not commit an offence under this section if—

(a) he has a reasonable excuse for not making the required disclosure,

(b) he is a professional legal adviser and—

(i) if he knows either of the things mentioned in subsection (5)(a) and (b), he knows the thing because of information or other matter that came to him in privileged circumstances, or

(ii) the information or other matter mentioned in subsection (3) came to him in privileged circumstances, or (c) subsection (7) applies to him.

(7) This subsection applies to a person if—

(a) he does not know or suspect that another person is engaged in money laundering, and

(b) he has not been provided by his employer with such training as is specified by the Secretary of State by order for the purposes of this section.

(7A) Nor does a person commit an offence under this section if—

(a) he knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the United Kingdom, and

(b) the money laundering—

(i) is not unlawful under the criminal law applying in that country or territory, and

(ii) is not of a description prescribed in an order made by the Secretary of State.

(7B) This subsection applies to a person if—

(a) he is employed by, or is in partnership with, a professional legal adviser or a relevant professional adviser to provide the adviser with assistance or support,

(b) the information or other matter mentioned in subsection (3) comes to the person in connection with the provision of such assistance or support, and

(c) the information or other matter came to the adviser in privileged circumstances.

(8) In deciding whether a person committed an offence under this section the court must consider whether he followed any relevant guidance which was at the time concerned—

(a) issued by a supervisory authority or any other appropriate body,

(b) approved by the Treasury, and

(c) published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it.

(9) A disclosure to a nominated officer is a disclosure which—

(a) is made to a person nominated by the alleged offender's employer to receive disclosures under this section, and

(b) is made in the course of the alleged offender's employment and in accordance with the procedure established by the employer for the purpose.

(9A) But a disclosure which satisfies paragraphs (a) and (b) of subsection (9) is not to be taken as a disclosure to a nominated officer if the person making the disclosure—

(a) is a professional legal adviser,

(b) makes it for the purpose of obtaining advice about making a disclosure under this section, and

(c) does not intend it to be a disclosure under this section.

(10) Information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him— (a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,

(b) by (or by a representative of) a person seeking legal advice from the adviser, or

(c) by a person in connection with legal proceedings or contemplated legal proceedings.

(11) But subsection (10) does not apply to information or other matter which is communicated or given with the intention of furthering a criminal purpose.

(12) Schedule 9 has effect for the purpose of determining what is—

(a) a business in the regulated sector;

(b) a supervisory authority.

(13) An appropriate body is any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.

(14) A relevant professional adviser is an accountant, auditor or tax adviser who is a member of a professional body which is established for accountants, auditors or tax advisers (as the case may be) and which makes provision for—

(a) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and

(b) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards ."

The obligation to make disclosure arises on mere suspicion or reasonable cause to suspect that money laundering was taking place – *Ahmad v HMA*, 2009 SLT 794 It is suggested that knowledge comes from direct information and also circumstances which lead a person of ordinary understanding and in the same situation as the accused to conclude.

'Money laundering' is defined in section 340(11) namely an act which -

(a) constitutes an offence under section 327, 328 or 329,

(b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),

(c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or

(d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom

'Reasonable excuse' in terms of subsection (6) may be construed restrictively. In an unreported English decision a solicitor was held not to have a reasonable excuse in circumstances in which he formed a suspicion but failed to report it as a result of erroneous advice from someone he had consulted.

Section 340: Interpretation

"(1) This section applies for the purposes of this Part.

(2) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if—

(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

(4) It is immaterial— (a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after the passing of this Act.

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct...

(11) Money laundering is an act which—

(a) constitutes an offence under section 327, 328 or 329,

(b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),

(c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or

(d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom..."

It is unnecessary for the Crown to prove the source of funds provided that the source is criminal. It does not matter from what sort of crime the profit has come – Ahmad v HMA, 2009 SLT 794. Property does not become criminal property because it is intended to be used for crime – R v Loizou 2005, 2 Cr App R 37.

[9] Section 338 ("authorised disclosures") provides:

"(1) For the purposes of this Part a disclosure is authorised if - (a) it is a disclosure to a constable, a customs officer or a nominated officer by the alleged offender that property is criminal property,

(b) ...

(c) the first or second condition set out below is satisfied.

(2) ...

(3) The second condition is that—

(a) the disclosure is made after the alleged offender does the prohibited act,

(b) there is a good reason for his failure to make the disclosure before he did the act, and

(c) the disclosure is made on his own initiative and as soon as it is practicable for him to make it."

POSSIBLE FORM OF DIRECTION FOR PROCEEDS OF CRIME

Section 327

The charge is one of concealing/disguising/converting/transferring/ criminal property or the charge is one of removal of criminal property from part of the United Kingdom.

Concealing or disguising includes concealing or disguising the nature, source, location, disposition, movement or ownership of the property in question and also includes the concealing or disguising of any rights with respect to it.

Conversion of property includes any substitution, actual or constructive, in the quality or form of the property. So, for example, the exchange of a book or voucher for cash or goods is covered.

Transfer simply means the passing of property from one to another.

Now, ladies and gentlemen, when I refer to the accused concealing/disguising etc criminal property, for the charge to be established, it is not sufficient for the crown to prove beyond reasonable doubt that the accused concealed etc property which was in fact criminal property. You must be satisfied beyond reasonable doubt that the accused carried out these acts in relation to that property knowing or suspecting that the property was indeed criminal property. I say that because of the definition given to criminal property.

Property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and that person knows or suspects that it constitutes or represents such a benefit. An example of 'representing such a benefit' would be a car bought from money acquired as a result of crime.

A person benefits from conduct if he obtains property or an interest in it as a result or in connection with the conduct. Property includes all property no matter where it is situated. It accordingly cover heritable property such as buildings and land and securities over heritable property and moveable property such as paintings, cars, antiques, shares, and money to give just a few examples.

Criminal conduct is conduct which constitutes or would constitute an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there.

In considering whether property is criminal property it does not matter who carried out the conduct or when it occurred and who benefited from it. (If the matters raised in subsections (2), (2A), or (2C) are an issue) Now in this case there is evidence led before you that (take in the circumstances as set out in subsections (2), (2A), or (2C) as appropriate). In terms of the relevant legislation an offence is not committed if these circumstances apply. Accordingly the way I would suggest that you approach your deliberations is firstly consider whether you are satisfied beyond reasonable doubt that the accused has concealed etc criminal property bearing in mind what I have said that all entails. If you are not so satisfied, you would require to acquit the accused. If,

however, you are satisfied on that issue, then you require to consider the evidence relating to (the circumstances as set out in subsections (2), (2A), or (2C) as appropriate). You will require to acquit the accused unless the Crown satisfy you beyond reasonable doubt that these circumstances do not apply in the present case.

Section 328

The charge is that the accused entered into or became concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person.

Now, ladies and gentlemen, when I refer to the accused entering into or becoming concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person for the charge to be established, it is not sufficient for the crown to prove beyond reasonable doubt that the accused engaged in such actions which facilitated the acquisition etc of property which was in fact criminal property. You must be satisfied beyond reasonable doubt that the accused acted in that manner knowing or suspecting that the property concerned was indeed criminal property. I say that because of the definition given to criminal property. Property is criminal property of it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and that person knows or suspects that it constitutes or represents such a benefit. An example of 'representing such a benefit' would be a car bought from money acquired as a result of crime.

A person benefits from conduct if he obtains property or an interest in it as a result or in connection with the conduct. Property includes all property no matter where it is situated. It accordingly cover heritable property such as buildings and land and securities over heritable property and moveable property such as paintings, cars, antiques, shares, and money to give just a few examples.

Criminal conduct is conduct which constitutes or would constitute an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there.

In considering whether property is criminal property it does not matter who carried out the conduct or when it occurred and who benefited from it.

(If the matters raised in subsections (2), (3), or (5) are an issue)

Now in this case there is evidence led before you that (take in the circumstances as set out in subsections (2), (3), or (5) as appropriate). In terms of the relevant legislation an offence is not committed if these circumstances apply. Accordingly the way I would suggest that you approach your deliberations is firstly consider whether you are satisfied beyond reasonable doubt that the accused has concealed etc criminal property bearing in mind what I have said that all entails. If you are not so satisfied, you would require to acquit the accused. If, however, you are satisfied on that issue, then you require to consider the evidence relating to (the circumstances as set out in subsections (2), (3), or (5) as appropriate). You will require to acquit the accused unless the Crown satisfy you beyond reasonable doubt that these circumstances do not apply in the present case.

Section 329

The charge is that the accused acquired/ used/ had possession of criminal property. Acquisition and use have their normal meanings. Possession perhaps needs a little explanation. Possession does not amount to ownership. Possession simply requires that the accused knew or was aware of the presence of the item and had control over it. Now control does not cover something within easy reach. A person can still control something which is stored elsewhere. Control means having a say in what happens to the item.

Now, ladies and gentlemen, when I refer to the accused acquiring/using/having possession of criminal property for the charge to be established, it is not sufficient for the crown to prove beyond reasonable doubt that the accused did acquire/ use/have possession of property which was in fact criminal property. You must be satisfied beyond reasonable doubt that the accused did acquire/use/have possession of that property knowing or suspecting that the property concerned was indeed criminal property. I say that because of the definition given to criminal property.

Property is criminal property of it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and that person knows or suspects that it constitutes or represents such a benefit. An example of 'representing such a benefit' would be a car bought from money acquired as a result of crime.

A person benefits from conduct if he obtains property or an interest in it as a result or in connection with the conduct. Property includes all property no matter where it is situated. It accordingly cover heritable property such as buildings and land and securities over heritable property and moveable property such as paintings, cars, antiques, shares, and money to give just a few examples.

Criminal conduct is conduct which constitutes or would constitute an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there.

In considering whether property is criminal property it does not matter who carried out the conduct or when it occurred and who benefited from it.

(If the matters raised in subsections (2), (2A), or (2C) are an issue)

Now in this case there is evidence led before you that (take in the circumstances as set out in subsections (2), (2A), or (2C) as appropriate). In terms of the relevant legislation an offence is not committed if these circumstances apply. Accordingly the way I would suggest that you approach your deliberations is firstly consider whether you are satisfied beyond reasonable doubt that the accused has concealed etc criminal property bearing in mind what I have said that all entails. If you are not so satisfied, you would require to acquit the accused. If, however, you are satisfied on that issue, then you require to consider the evidence relating to (the circumstances as set out in subsections (2), (2A), or (2C) as appropriate). You will require to acquit the accused unless the Crown satisfy you beyond reasonable doubt that these circumstances do not apply in the present case.

Section 330

The charge is one in which the accused is said to have failed to disclose information. The obligation to disclose only arises if a number of conditions are satisfied. These conditions are:-

First, he/she knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

Secondly, the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in the course of business in the regulated sector. (as appropriate There is no dispute that the business concerned in this instance is in the regulated sector or the regulated sector is defined as [ref to sch 9])

Thirdly, the accused can identify at least one of three matters: (1) the whereabouts of the laundered property, (2) the person he knows or suspects or has reasonable grounds for knowing or suspecting is engaged in money laundering or (3) he believes, or it is reasonable to expect him to believe, that the information in the second condition I have mentioned will or may assist in the identification of the other person or the whereabouts of laundered property.

Finally, the accused has not made the required disclosure as soon as is practicable to either a nominated officer or a person nominated by the Director General of SOCA.

The information which is required to be disclosed is the person he knows or suspects or has reasonable grounds for knowing or suspecting is engaged in money laundering if he knows this, the whereabouts of the laundered property so far as he knows it, and the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion.

Accordingly the Crown have to satisfy you beyond reasonable doubt that these four conditions are proved.

I have referred to 'Laundered property'. This is the property forming the subject matter of the money laundering the accused knows or suspects or has reasonable grounds for knowing or suspecting that the other person is engaged in.

(If the matters raised in subsections (6), or (7A), are an issue)

Now in this case there is evidence led before you that (take in the circumstances as set out in subsections (6), or (7A), as appropriate). In terms of the relevant legislation an offence is not committed if these circumstances apply. Accordingly, the way I would suggest that you approach your deliberations is firstly consider whether you are satisfied beyond reasonable doubt that the four conditions to which I referred apply. If you are not so satisfied, you would require to acquit the accused. If, however, you are satisfied on that issue, then you require to consider the evidence relating to (the circumstances as set out in subsections (6), or (7A) as appropriate). You will require to acquit the accused unless the Crown satisfy you beyond reasonable doubt that these circumstances do not apply in the present case.

Protection of Children etc. (Scotland) Act 2005: Sexual Grooming

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LAW

General references

See Renton & Brown *Statutory Offences* Vol.I

Statutory Provisions

Section 1(1) "A person ("A") commits an offence if–

(a) having met or communicated with another person ("B") on at least one earlier occasion, A–

(i) intentionally meets B;

(ii) travels, in any part of the world, with the intention of meeting B in any part of the world; or

(iii) makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;

(b) at the time, A intends to engage in unlawful sexual activity involving B or in the presence of B–

(i) during or after the meeting; and

(ii) in any part of the world;

(c) B is–

(i) aged under 16; or

(ii) a constable;

(d) A does not reasonably believe that B is 16 or over; and

(e) at least one of the following is the case–

(i) the meeting or communication on an earlier occasion referred to in paragraph (a) (or, if there is more than one, one of them) has a relevant Scottish connection;

(ii) the meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred to in sub-paragraph (ii) of that paragraph or the making of arrangements referred to in sub-paragraph (iii) of that paragraph, has a relevant Scottish connection;

(iii) A is a British citizen or resident in the United Kingdom.

(2) In subsection (1) above–

(a) the reference to A's having met or communicated with B is a reference to A's having met B in any part of the world or having communicated with B by any means from or in any part of the world (and irrespective of where B is in the world); and

(b) a meeting or travelling or making of arrangements has a relevant Scottish connection if it, or any part of it, takes place in Scotland; and a communication has such a connection if it is made from or to or takes place in Scotland.

(3) For the purposes of subsection (1)(b) above, it is not necessary to allege or prove that A intended to engage in a specific activity.

(5) Subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (which determines the sheriff court district in which proceedings against persons committing certain sexual acts outside the United Kingdom are to be taken) apply in relation to proceedings for an offence under this section as they apply to an offence to which that section applies

POSSIBLE FORM OF DIRECTION ON SEXUAL GROOMING

"Charge is a charge of sexual grooming somebody under 16 years of age, a child. It alleges a contravention of the Act mentioned there.

Reading it short, that says it's an offence: If, having met or communicated with the child at least once before, you either

• intentionally meet or communicate with the child, or

• travel anywhere in the world, intending to meet the child, or

• you make arrangements anywhere, with the intention of meeting the child, for the child to travel anywhere in the world,

when at the time you intend to engage in unlawful sexual activity involving the child, or in the child's presence, either during or after the meeting, or anywhere in the world, and where

(1) the child is under 16 (or in entrapment case – a police constable), and

(2) you don't reasonably believe the child is over 16, and

(3) at least one of these circumstances applies the prior meeting or communication, has a relevant Scottish connection, or

• the subsequent meeting, or travelling, or arrangement has a relevant Scottish connection, or

• you are a British citizen or resident in the UK.

There are several things to be noted here.

The prior communication with the child may have been by any method, writing, phoning, e-mailing, accessing internet chat rooms and SMS communication. The communication may have, but it needn't have an explicitly sexual content.

The prior meeting with the child can have take place anywhere in the world. The prior communication can have been from or in any part of the world, irrespective of where the child is.

It's sufficient for "a relevant Scottish connection" if the meeting, or the travelling, or the making arrangements took place in Scotland, or if the communication was made from or took place in Scotland. For that it's enough if any part of these activities took place in Scotland. So, the connection can be slight. Passing through a Scottish airport, or making a phone call from here, on a journey from one foreign country to another would be enough.

The accused, on the subsequent occasion, must have intended to engage in unlawful sexual activity involving the child, or in the child's presence. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

"Sexual activity" means an activity that a reasonable person would consider to be sexual, in all the circumstances. Engaging in sexual activity also covers attempting to or plotting to engage in it, and aiding, abetting advising or inciting another person to engage in such activity. However the Crown doesn't need to prove the accused intended to engage in a specific activity. The offence is committed even if the intended unlawful sexual activity doesn't take place.

The child must be under 16 years of age, and the accused doesn't reasonably believe the child is 16 or over.

The subsequent meeting or travel or arranging may be intended to take place anywhere in the world. But there must be a relevant Scottish connection.

So, for the Crown to prove this charge, you would need to be satisfied:

(1) the person named in the charge was under 16

(2) the accused had met or communicated with the person named in the charge on a prior occasion

(3) subsequently the accused intentionally met, travelled to meet, or arranged for the person named in the charge to travel to meet him

(4) the accused intended to engage in unlawful sexual activity involving the child or in the child's presence

(5) the accused had a prior meeting or communication with the child, which had a relevant Scottish connection, or the subsequent meeting, or travel or travel arrangements had a relevant

Scottish connection, or the accused was a British citizen or UK resident.

In this case, there are several of these requirements which it appears, the defence don't dispute. It's a matter you have to decide, but these may not cause you much difficulty. What you will have to decide is whether or not the Crown have proved _ , which is in dispute."

Protection of Children etc. (Scotland) Act 2005: Paying for Sexual Services of a Child

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON PAYING FOR SEXUAL SERVICES OF A CHILD

LAW

General References

See Renton & Brown Statutory Offences Vol.I para 8-136

Statutory Provisions

Section 9(1) "A person ("A") commits an offence if– (a) A intentionally obtains for himself or herself the sexual services of another person ("B"); (b) before obtaining those services, A– (i) makes or promises payment for those services to B or to a third person; or (ii) knows that another person has made or promised such a payment; and (c) either– (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or (ii) B is aged under 13.

(2) In subsection (1)(b) above, "payment" means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(3) For the purposes of subsections (1) and (2) above, "sexual services" are–

(a) the performance of sexual activity; or

(b) the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification, and a person's sexual services are obtained where what is obtained is the performance of such an activity by the person."

POSSIBLE FORM OF DIRECTION ON PAYING FOR SEXUAL SERVICES OF A CHILD

"Charge is a charge of purchasing sex from someone under 18. It alleges a contravention of the Act mentioned there.

Reading it short, that says it's an offence for you intentionally to obtain for yourself the sexual services of another person, if

(1) before obtaining them

a) you make or promise payment for them, to the other person or a third person, or

b) you know another person had made or promised such payment, and

(2) the other person is either

a) under 18 years of age, and you don't reasonably believe that the other person is 18 or over,

b) or the other person is under 13.

There are several things to be noted here.

"Payment" doesn't just mean handing over cash. It covers also conferring any financial advantage, such as paying off or cancelling another debt, or providing goods or services free or at a discount. The services provided can include sexual services.

"Sexual services" cover the performance of sexual activity, or the performance of any other activity that a reasonable person would think was for the purposes of sexual gratification, looking at all the circumstances. So the definition is wide.

Sexual services are obtained when the other person performs such an activity. There must be a link between the payment or the promise to pay, and the provision of these services. The services must be brought about by the payment or the promise.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

So, for the Crown to prove this charge, you would need to be satisfied:

(1) the person named in the charge was either under 18 and the accused didn't reasonably believe that the person named in the charge was 18 or over, or the person named in the charge was under 13

(2) the accused had promised payment for sexual services, to the person named in the charge or to somebody else, or he knew that another person had made or promised such payment

(3) the accused intentionally obtained for himself the person named in the charge's sexual services in the sense that I've explained."

(where person named in the charge is 14 or older and accused raises "reasonable belief" defence)

"In this case the accused says he had a reasonable belief that the person named in the charge was 18 or older. If he believed he/she was, he's not guilty of this charge. It doesn't matter that the grounds for that belief are mistaken provided that they are reasonable. If there were reasonable grounds for believing he/she was 18 or older, it may be easier to accept the accused did believe that. If you didn't think the grounds were reasonable, you might find it harder to accept that his belief was genuine, but if you thought his belief was honestly held, you have to acquit. It's not an honest belief if he acted without thinking, or if he didn't really care if she was under 18 or not. Evidence in support of the accused's position does not need to be corroborated. If it is believed or it raises a reasonable doubt, an acquittal must result. It is for the Crown to meet that, and to show

that the accused did not have reasonable grounds for that belief."

Protection of Children etc. (Scotland) Act 2005: Causing or Inciting Provision by a Child of Sexual Services or Pornography

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON CAUSING OR INCITING PROVISION BY A CHILD OF SEXUAL SERVICES OR PORNOGRAPHY

LAW

General References

Renton and Brown Statutory Offences Vol 1 paras B – 137 to B – 139.

Statutory Provisions

Section 10 **Causing or inciting provision by child of sexual services or child pornography**

(1) A person ("A") commits an offence if–

(a) A intentionally causes or incites another person ("B") to become a provider of sexual services, or to be involved in pornography, in any part of the world; and

(b) either–

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable–

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years [or a fine or both]

Section 11 **Controlling a child providing sexual services or involved in pornography**

(1) A person ("A") commits an offence if–

(a) A intentionally controls any of the activities of another person ("B") relating to B's provision of sexual services or involvement in pornography in any part of the world; and

(b) either–

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable–

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years [or a fine or both]

Section 12 **Arranging or facilitating provision by child of sexual services or child pornography**

(1) A person ("A") commits an offence if–

(a) A intentionally arranges or facilitates the–

(i) provision of sexual services in any part of the world by; or

(ii) involvement in pornography in any part of the world of, another person ("B"); and

(b) either–

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable–

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years [or a fine or both]

POSSIBLE FORM OF DIRECTION ON CAUSING OR INCITING PROVISION BY A CHILD OF SEXUAL SERVICES OR PORNOGRAPHY

"Charge" is one of intentionally causing or inciting a person under 18 to become a provider of sexual services or to be involved in pornography. It is an offence for you intentionally to cause or incite a person under 18 to become a provider of sexual services or to be involved in pornography.

The accused must act intentionally. Carelessly or recklessly are not enough. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. Causing simply means there must be some direct connection between the actions of the accused and what happened. No compulsion is needed. Inciting simply means actively encouraging.

A person is a provider when that person on at least one occasion, whether willingly or under compulsion provides his/her sexual services to another for payment or the promise of payment either to himself/herself or another person.

“Sexual services” cover the performance of sexual activity, or the performance of any other activity that a reasonable person would consider was for the purposes of sexual gratification, looking at all the circumstances. So the definition is wide. Something would fall to be sexual if a reasonable person would consider it so in all the circumstances.

“Payment” doesn’t just mean handing over cash. It covers also conferring any financial advantage, such as paying off or cancelling another debt, or providing goods or services free or at a discount. The services provided can include sexual services.

A person is involved in pornography if an indecent image of that person is recorded.

The person who is the provider of sexual services or to be involved in pornography has to be either a) under 18 years of age, and the person intentionally causing or inciting does not reasonably believe that the he/she is 18 or over, or b) or is under 13.

So, for the Crown to prove this charge, you would need to be satisfied: (1) the person named in the charge was either under 18 and the accused didn’t reasonably believe that he/she was 18 or over, or was under 13 (2) the accused intentionally caused or incited him/her to become a provider of sexual services or to be involved in pornography in the sense that I’ve explained.”

(where victim 14 or older and accused raises “reasonable belief” defence)

In this case the child (named) is aged (thirteen years or over). The Crown needs to prove that the accused knew his/her age, or prove that he/she had no reasonable belief that he/she was 18 or over. If the accused actually knew the age of the child then he has not reasonably believed that that child was eighteen years of age or more. Here he/she says he/she didn’t know that the child was aged between thirteen and eighteen years of age, but believed he/she was eighteen years of age or more. The Crown must prove that that belief wasn’t a reasonable one for him/her to have held to prove the charge. Simply honestly believing that the child was eighteen years or more is not enough. The belief must also be held on reasonable grounds.

How do you judge that? You can look objectively at what facts you find established.

To decide if the accused reasonably believed that the child was eighteen years or more, you have to have regard to

1. whether he/she took any steps to find out the true age of the child, and

2. what steps these were.

For offences under sections 11 and 12 amend the above as appropriate.

Protection of Vulnerable Groups (Scotland) Act 2007: Section 34

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON PROTECTION OF VULNERABLE GROUPS

LAW

Statutory Provisions

Section 34

(1) It is an offence for an individual to do, or to seek or agree to do, any regulated work from which the individual is barred. (2) It is a defence for an individual charged with an offence under subsection (1) to prove that the individual did not know, and could not reasonably be expected to have known (a) that the individual was barred from that regulated work, or (b) that the work concerned was regulated work.

Section 91

(1) Regulated work means regulated work with children or protected adults. (2) Regulated work with children is work of the type described in schedule 2. (a) Regulated work with adults is work of the type described in schedule 3. (b) References in this Act to types of regulated work are to be construed accordingly.

Section 92

(1) An individual is barred from regulated work with children if the individual is–

(a) listed in the children's list, (b) included in the children's barred list maintained under section (2) of the Safeguarding Vulnerable Groups Act 2006 (c.47), (c) included (otherwise than provisionally) in the list kept under article 3 of the Protection of Children and Vulnerable Adults (Norther Ireland) Order 2003, or (d) an individual falling within subsection (3).

(2) An individual is barred from regulated work with adults if the individual is–

(a) listed in the adults' list,

(b) included in the adults' barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006 (c.47),

(c) included (otherwise than provisionally) in the list kept under article 35 of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, or

(d) an individual falling within subsection (4).

(3) An individual falls within this subsection if, under the law of the Channel Islands, the Isle of Man, any British overseas territory or any other territory or country outwith the United Kingdom, the individual is subject to a prohibition or disqualification which Ministers by order provide corresponds to being barred from regulated work with children by virtue of any of paragraphs (a) to (c) of subsection (1).

(4) An individual falls within this subsection if, under the law of the Channel Islands, the Isle of Man, any British overseas territory or any other territory or country outwith the United Kingdom, the individual is subject to a prohibition or disqualification which Ministers by order provide corresponds to being barred from regulated work with adults by virtue of any of paragraphs (a) to (c) of subsection (2).

POSSIBLE FORM OF DIRECTION ON PROTECTION OF VULNERABLE GROUPS

"Charge alleges a contravention of section 34 of the 2007 Act. Read short, that makes it an offence for someone to do, or to seek to do, or agree to do, any regulated work from which he is banned.

As the name of the Act indicates, the purpose of this law is to protect vulnerable groups, such as children and protected adults. It bans certain individuals from working with them.

There are several matters to note.

A child is someone under the age of 18. A protected adult is someone over 16 who is provided with

• a service by someone carrying on a support service, or an adult placement service, or a care home service, or a housing support service, or

• a prescribed service by an NHS health body, an independent hospital, a private psychiatric hospital, an independent clinic or an independent medical agency.

"Regulated work" with children covers holding a position where the normal duties include:

• caring for children

• teaching, instructing, training and supervising children

• being in sole charge of children

• having unsupervised contact with children

• providing advice or guidance to children

• controlling electronic communication services for or mainly for children

• providing home care services for children

• providing independent health care services for children

• working on day care premises when children are being looked after there.

It also includes holding a position in:

• a children's detention institution

• a children's hospital a school

• a pupils' hostel

• a children's home.

It also covers having a position where the normal duties include supervising of managing someone doing regulated work with children.

"Regulated work" with adults covers holding a position where the normal duties include:

• caring for protected adults • teaching, instructing, training and supervising protected adults

• providing assistance, advice or guidance to protected adults

• providing care home services for protected adults

• inspecting adult care services which offer support services, adult placement services, housing support services, or independent health care services. It also includes holding a position in a Social Work care home, or a residential establishment or accommodation, supported accommodation in the community for the mentally disordered.

Someone is barred from regulated work with children if he is named on the children's list for Scotland, similar lists for England, Northern Ireland, and lists for the Channel Isles, the Isle of Man, and overseas which have been certified as equivalent.

Someone is barred from regulated work with adults if he is named on the adults' barred list for Scotland, similar lists for England, Northern Ireland, and lists for the Channel Isles, the Isle of Man, and overseas which have been certified as equivalent.

"Work" is widely construed. It covers work of any kind, paid or unpaid, work done under contract, or in carrying out the functions of some statutory office, being a foster carer, caring for or supervising people taking part in any organised activity. But it doesn't cover work within a personal or family relationship.

So, for a conviction on this charge, the Crown must prove:

1. the accused was doing / seeking to do / had agreed to do regulated work of the sort described

2. he was barred from that because he was a listed person."

(Where s 34(2) defence raised)

"In this case the accused says he didn't know, and couldn't reasonably have been expected to

have known that:

• he was barred from that regulated work

• the work concerned was regulated work.

The Act says if he proves that, that's a defence to the charge. That means he has to satisfy you on a balance of probabilities that he didn't know / couldn't reasonably have been expected to have known / that. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. Evidence to support his position doesn't need to be corroborated. If you think he has proved that on a balance of probabilities, you must acquit him."

REMEMBER: Warning in the chapter on The General Introductory Directions re reverse burden of proof

Psychoactive Substances Act 2016

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1. LAW

2. SUGGESTED DIRECTIONS

2.1. Section 4: Producing a psychoactive substance

2.2. Section 5(1): Supplying a psychoactive substance

2.3. Section 5(2): Offering to supply a psychoactive substance

2.4. Section 6: Aggravations applicable to section 5 offences

2.5. Section 7: Possession of psychoactive substance with intent to supply

2.6. Section 8: Importing or exporting a psychoactive substance

2.7. Section 9: Possession of a psychoactive substance in a custodial institution

LAW

The Psychoactive Substances Act 2016 came into force on 26 May 2016. It deals with what are called Psychoactive Substances ("PAS"). The purpose of this Act is to criminalise the production, supply, export and import of PAS which are not otherwise caught by other legislation such as the Misuse of Drugs Act 1971 ("MDA"). It is directed at what had come to be known as "legal highs" or synthetic drugs. Unlike the MDA, the PAS Act does not list the substances to which it applied. Drugs such as heroin, cocaine, cannabis etc. have been specified as controlled drugs and unauthorised production and supply of these is criminalised by the MDA. The PAS Act applies instead to substances by reference to their effect. That was done because it was known that the chemical composition of substances could be changed quickly or completely new ones developed and these substances would not necessarily be prohibited under MDA.

Thus a PAS is defined in section 2 of the Act as "*any substance which is capable of producing a psychoactive effect*". According to section 2(2), such a substance produces a psychoactive effect if, by stimulating or depressing a person's central nervous system, it affects that person's mental functioning or emotional state. Section 2(3) provides that a person consumes a substance if the person causes or allows the substance, or fumes given off by the substance, to enter the person's body in any way.

Sections 4-9 create various offences in respect of the production, supply or offering to supply, possession with intent to supply, importing or exporting and possession in a custodial institution of PAS. These are dealt with below. The terms of the relevant section of the Act should be studied

in the course of formulating the directions in any particular case.
There are exemptions for those legitimately involved in PAS such as Health Care Professionals, those authorised by the Human Medicines Regulations and approved scientific research [783].

SUGGESTED DIRECTIONS

[If appropriate and to be amended as required]

[The Psychoactive Substances Act 2016 came into force on 2 May 2016. It deals with what are called Psychoactive Substances (PAS). The purpose of this Act is to criminalise the production, supply, export and import of PAS which are not otherwise caught by other legislation such as the Misuse of Drugs Act 1971. It is directed at what had come to be known as "legal highs" or synthetic drugs. Unlike the MDA, the PAS Act does not list the substances to which it applied. You may know that drugs such as heroin, cocaine, cannabis etc. have been specified as controlled drugs and unauthorised production and supply of these is criminalised by the MDA. The PAS applies instead to substances by reference to their effect. That was done because it was known that the chemical composition of substances could be changed quickly or completely new ones developed and these substances would not necessarily be prohibited under MDA.]

A PAS is defined in the Act as a *"substance which is capable of producing a psychoactive effect"*. Such a substance produces a psychoactive effect, according to the Act if, by stimulating or depressing a person's central nervous system, it affects that person's mental functioning or emotional state.

[If appropriate]

There has been some evidence that [the PAS in issue] is a medicine and is authorised as such in some countries. That may be true of those countries. Here, the Act specifically excludes from its scope what are termed "medicinal products". So recognised medicines, when produced for medicinal purposes and under proper regulation which have a psychoactive effect, are not rendered illegal under the Act. But for the purposes of this case, [the PAS in issue] is not a medicinal product and it is not excluded from the operation of the Act and its production is illegal in terms of this section.

Section 4**: Producing a psychoactive substance**

Charge is one of production of a psychoactive substance. Such an offence is committed if a person:
a) intentionally produces a psychoactive substance
b) knows or suspects that the substance is a psychoactive substance and
c) intends to consume the substance for its psychoactive effects or knows or is reckless as to whether the psychoactive substance is likely to be consumed by someone else for those effects.

Production includes the manufacture, cultivation or any other method of creation. It involves a wide range of activities. The provision covers anyone intentionally involved in the production of the psychoactive substance, whether as someone supplying the finance to purchase ingredients or machinery, making available premises for the production of PAS, knowing that they are being used for that purpose, the buyer of ingredients including the materials used to bulk it up or adulterate it, those mixing up the ingredients, the operators of machinery and the packaging of the product. All such activity would come under the umbrella of production.

A person consumes a substance if the person causes or allows the substance, or fumes given off the substance, to enter the person's body in any way.
Reference is made to intentionally and intends. This denotes a state of mind, to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

When considering whether a person knows or suspects something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.

A person is reckless if he/she/they failed to think about or was indifferent as to an outcome. Recklessness in this context means knowing that there is a substantial risk that the substance is likely to be consumed for its psychoactive effects and involving yourself in the production, heedless of that risk. Again that matter must be a matter of inference from the facts and circumstances you find proved against the individual accused.

In order to find this charge proved you would have to be satisfied that:

1. the accused intentionally produced [the PAS in issue]
2. that he/she/they knew or suspected that the substance was a PAS
3. that he/she/they

(i) intended to consume the substance for its PAS effects OR
(ii) knew, or was reckless as to whether, the PAS was likely to be consumed by some other person for its PAS effects.

[This section is subject to section 11 exceptions]

Section 5(1): **Supplying a psychoactive substance**

Charge is one of supplying a psychoactive substance. This offence is committed if:

a) a person intentionally supplies a substance to another person
b) that substance is a PAS
c) the person knows or suspects or ought to know or suspect that the substance is a psychoactive substance and
d) the person knows, or is reckless as to whether, the psychoactive substance is likely to be consumed by the person to whom it is supplied, or by some other person, for its psychoactive effects.

'Supplying' has its ordinary and common-sense meaning. It includes distribution. It is parting with possession and covers any form of supply including sale, exchange, barter or gift.
Intention is a state of mind, to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

When considering whether a person knows or suspects something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.

If you are not satisfied that the accused had the necessary knowledge or suspicion that the substance was a psychoactive one, then you still require to consider whether he ought to have known or suspected in all the circumstances. This is an objective test. You require to consider all the circumstances and decide whether, in light of those, the accused ought to have known or suspected that the substance was a psychoactive one.

A person is reckless if he/she/they failed to think about or was indifferent as to an outcome. Recklessness in this context means knowing that there is a substantial risk that the substance is likely to be consumed for its psychoactive effects and involving himself in the supply of the substance heedless of that risk. Again that matter must be a matter of inference from the facts and circumstances you find proved against the individual accused.

In order to find this charge proved you would have to be satisfied that:

1. the accused intentionally supplied a PAS to another person
2. the accused knew or suspected or ought to have known or suspected that the substance was a PAS and
3. the accused knew or was reckless as to whether the PAS was likely to be consumed for its PAS effects.

[This section is subject to section 11 exceptions]

Section 5(2): **Offering to supply a psychoactive substance**

Charge is offering to supply a psychoactive substance. The offence is committed if:-

a) An accused offers to supply a psychoactive substance to another person and
b) The accused knows or is reckless as to whether the person or some other person, would, if supplied with a substance in accordance with the offer, be likely to consume the substance for its psychoactive effects.

'Supply' has its ordinary and common-sense meaning. It includes distribution. It is parting with possession. It covers any form of supply including sale, exchange, barter or gift.
When considering whether a person knows something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.

A person is reckless if he/she/they failed to think about or was indifferent as to an outcome. Recklessness in this context means knowing that there is a substantial risk that the substance is likely to be consumed for its psychoactive effects and involving himself in offering to supply the substance heedless of that risk. Again that matter must be a matter of inference from the facts and circumstances you find proved against the individual accused.

In order to find this charge proved you would have to be satisfied that:

1. the accused offered to supply a PAS to another
2. the accused was reckless as to whether the PAS would be likely to be consumed for its PAS effects if supplied in accordance with the offer.

[If appropriate: see section 5(3)(b)]

When reference is made to the psychoactive effects of the substance these include a reference to the effects which the substance would have if it was the substance which the accused offered to supply.

[This section is subject to section 11 exceptions]

Section 6**: Aggravations applicable to section 5 offences**

You will see that this offence is said to be aggravated as a consequence of what is set out in the aggravation. In terms of the legislation, an offence in terms of section 5 of the legislation is aggravated if it is committed in certain circumstances. This results in the offence being viewed more seriously and has a bearing on the sentence imposed in the event of the accused being convicted of the offence. For the offence to be aggravated the accused has to be aged 18 years or older.

[As appropriate]

In this case it is said that the offence was committed on or in the vicinity of school premises at a time when they were in use by persons under 18 years of age or within one hour of school starting or ending. [If necessary define school premises in terms of section 6(5)]

Or

In this case the accused, at the time of the commission of the offence, is said to have used a person (name) as a courier and that he/she/they was under the age of 18 years. The accused uses a person as a courier if he causes or permits him/her/them to deliver the substance in question to another or deliver a consideration related to drugs to the accused or someone else. Such consideration covers anything of value - money, material items – which is obtained in connection with the supply of such a substance or is intended to be used in connection with obtaining such a substance. At this point I simply refer back to what I said regarding intention.

Or

The offence is committed in a custodial institution. (If necessary define this by reference to section 6(10)).

In considering the aggravation, might I suggest that you consider this charge in the following way. First consider whether the offence detailed in the charge was committed by the accused. If you do not consider this to be the case, the aggravation does not concern you.

If, on the other hand, you consider that the offence was committed by the accused, you then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself. I will tell you how you would reflect that in your verdict in due course.

Please note that what I said regarding corroboration generally does not apply to the aggravation of the charge. So evidence from one source, if it satisfies you, is sufficient to prove the aggravation.

Section 7: **Possession of psychoactive substance with intent to supply**

Charge is one of possession of a psychoactive substance with intent to supply.

A person commits an offence under this section if:
(a) the person is in possession of a psychoactive substance,
(b) the person knows or suspects that the substance is a psychoactive substance, and
(c) the person intends to supply the psychoactive substance to another person for its consumption, whether by any person to whom it is supplied or by some other person, for its psychoactive effects.

Possession does not necessarily mean ownership but requires both knowledge and control. Knowledge involves awareness, knowing of the existence of the substance. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

When considering whether a person knows or suspects something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.

Intention denotes a state of mind, to be inferred or deduced from what has been proved to have been said or done.

"Supply" has its ordinary and common sense meaning. It includes distribution. It is parting with possession. It covers any form of supply – sale, exchange, barter or gift. The Crown does not need to prove the supply was to be to any particular person.

In order to find this charge proved you would have to be satisfied that:

1. the accused was in possession of a PAS
2. the accused knew or suspected that it was a PAS
3. the accused intended to supply the PAS to another to consume for its psychoactive effects.

Section 8**: Importing or exporting a psychoactive substance**

Charge is one of intentionally importing/exporting a psychoactive substance. This offence is committed if a person intentionally imports/exports a psychoactive substance, when that person knows, suspects, or ought to know or suspect that the substance is a psychoactive one,

and [in the case of importing] either intends to consume that substance for its psychoactive effects

or knows or is reckless as to whether that substance is likely to be consumed by another person for those effects.

When considering whether a person knows or suspects something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.

If you are not satisfied that the accused had the necessary knowledge or suspicion that the

substance was a psychoactive one, then you still require to consider whether he ought to have known or suspected in all the circumstances. This is an objective test. You require to consider all the circumstances and decide whether in light of those the accused should have known or suspected that the substance was a psychoactive one.

Intends and intention denote a state of mind, to be inferred or deduced from what has been proved to have been said or done.

A person is reckless if he/she/they failed to think about or was indifferent as to an outcome. Recklessness in this context means knowing that there is a substantial risk that the substance is likely to be consumed for its psychoactive effects and involving him/herself/themselves in the importation/export of the substance heedless of that risk. Again that matter must be a matter of inference from the facts and circumstances you find proved against the individual accused.

[If applicable]

In this case the substance was a controlled drug in terms of the Misuse of Drugs Act 1971 as opposed to a psychoactive substance. This does not matter in terms of the relevant legislation. You deal with the charge as if the controlled drug was a psychoactive substance.

In order to find this charge proved you would have to be satisfied that:

1. that the accused intentionally imported/exported a substance;
2. that the substance was a PAS;
3. that the accused knew or suspected or ought to have known or suspected that the substance was a PAS **and**
4. the accused—

[**for importing cases only:** The accused intended to consume the PAS for its psychoactive effects and]
knew or was reckless as to whether the PAS was likely to be consumed by another person for its psychoactive effects.

[Where the substance imported or exported was in fact a controlled drug: see section 8(3). This section is subject to section 11 exceptions.]

Section 9: **Possession of a psychoactive substance in a custodial institution**

The charge is one of possession of a psychoactive substance in a custodial institution. This offence is committed if:

a) A person is in possession of a psychoactive substance in a custodial institution,
b) the person knows or suspects that the substance is a psychoactive substance, and
c) the person intends to consume the psychoactive substance for its psychoactive effects.

"Possession" does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

When considering whether a person knows or suspects something you again are looking at the state of mind of a person and thus you are considering what has been proved to have been said or done and then considering what can be inferred or deduced from these proven facts.
Intends denotes a state of mind, to be inferred or deduced from what has been proved to have been said or done.

A custodial institution "custodial institution" means any of the following:

(a) a prison;
(b) a young offender institution, secure training centre, secure college, young offenders institution, young offenders centre, juvenile justice centre or remand centre;
(c) a removal centre, a short-term holding facility or pre-departure accommodation;
(d) Service custody premises.

[783] see section 11 and Schedule 2

Road Traffic Act 1988

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2. POSSIBLE FORMS OF DIRECTIONS ON ROAD TRAFFIC ACT 1988 AS AMENDED BY ROAD SAFETY ACT 2006

Law

Statutory Provisions: Sections 1, 2 and 2A

Section 1 **Causing death by dangerous driving**

“A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place shall be guilty of an offence.”

Section 1A(1) **Causing serious injury by dangerous driving**

“A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2. In this section "serious injury" means -
   a. ...
   b. in Scotland, severe physical injury."

Section 2 **Dangerous driving**

“A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.”

Section 2A **Meaning of dangerous driving**

1. "For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) –
    a. the way he drives falls far below what would be expected of a competent and careful driver, and
    b. it would be obvious to a competent and careful driver that driving in that way would be dangerous.
2. A person is to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
3. In subsections (1) and (2) above 'dangerous' refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those sub-sections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
4. In determining for the purpose of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is carried."

Judicial interpretation: Sections 1, 2 and 2A

1 By analogy with the interpretation given to the word "recklessly" by the court in *Allan v Patterson*,[784] the meaning given to "dangerously" is an objective one. In addition, "dangerous" refers to danger either of injury to any person, including the driver, or serious damage to property.[785]

2 Meaning of "road or other public place". In determining whether a road is one to which the RTA 1988 applies, each case will turn to some extent on its own facts. The approach of the court in *Harrison v Hill*[786] was that the presence of members of the public who are just visiting householders on the road for business or social purposes is to be ignored, and there requires to be evidence that the road is actually used by the general public without objection by the landlord or proprietor. That approach, rather surprisingly, appears to be perpetuated in *Yates v Murray*.[787]

3 On the issue of causation reference is made to the decision in *Rai v HMA*.[788].

Statutory Provisions: Section 3 and 3A

Section 3 **Careless driving, and inconsiderate driving**

"If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence."

Section 3A**. Causing death by careless driving when under the influence of drink or drugs**

1. "If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and –
    a. he is, at the time when he is driving, unfit to drive through drink or drugs, or
    b. he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or
    c. he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, he is guilty of an offence.
2. For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.
3. Subsection 1(b) and (c) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle."

Judicial Interpretation: Sections 3 and 3A

1 "Carelessly" also should be interpreted objectively.

2 On the meaning of "road or other public place", see Judicial Interpretation: Sections 1, 2 and 2A, above, paragraph 2.

3 On the issue of causation see Judicial Interpretation: Sections 1, 2, and 2A, above, paragraph 3.

Statutory Provisions: Section 3ZB

Section 3ZB **Causing death by driving: unlicensed, disqualified or uninsured drivers**

"A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under-

a. section 87(1) of this Act (driving otherwise than in accordance with a licence),
b. section 103(1)(b) of this Act (driving while disqualified), or
c. section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks)."

Judicial Interpretation: Sections 3ZB

1 The driving in question does not require to be dangerous or careless to cause a person's death.

2 There must, however, be something more than simply the accused being the driver. The accused must either do something or fail to do something which results in his being open to legitimate criticism. There must be an element of fault albeit that may be less than carelessness.[789] This decision has now been followed in Scotland in *Stewart v HMA* 2017 HCJAC 90.

R v Hughes 2013 1 WLR 2461;

"32. To draw fine distinctions between these cases would be to make the law confusing and incoherent, as well as being unmanageable for trial courts, both for judges and juries. We are driven to the view that there is no logical or satisfactory intermediate position between holding (a) that the law imposes guilt of homicide whenever the unlicensed motorist is involved in a fatal accident and (b) that he is guilty of causing death only when there is some additional feature of his driving which is causative on a common sense view and the latter entails there being something in the manner of his driving which is open to proper criticism. To give effect to the words "causes…death…by driving" there must be something more than "but for" causation. If causing death by driving cannot be constituted simply by being involved in a fatal collision, it would be contrary to the common law's common sense approach to agony of the moment situations for it to be constituted by (for example) a desperate last-millisecond attempt to swerve out of the way of the oncoming vehicle of such as Mr Dickinson. Once this is accepted, there is no stopping point short of some act or omission in the driving which is open to criticism, ie which involves some element of fault. Mr Smith's concession in the present case proves, on close inspection, to go further than it should. The statutory expression cannot, we conclude, be given effect unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death. It is unwise to attempt to foresee every possible scenario in which this may be true. It may well be that in many cases the driving will amount to careless or inconsiderate driving, but it may not do so in every case. Cases which might not could, for example, include driving slightly in excess of a speed limit or breach of a construction and use regulation. If on facts similar to the present case, D who was driving safely and well at 34 mph in a 30 mph limit, or at 68 mph in a 60 mph limit was unable to stop before striking the oncoming drunken driver's car, but would have been able to stop if travelling within the speed limit, his driving would be at fault, and one cause of the death, but would be unlikely to amount, by itself, to careless driving. The same might be true if he could not stop in time because a tyre had become underinflated or had fallen below the prescribed tread limit, something which he did not know but could, by checking, have discovered.

33. Juries should thus be directed that it is not necessary for the Crown to prove careless or inconsiderate driving, but that there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death. How much this offence will in practice add to the other offences of causing death by driving will have to be worked out as factual scenarios present themselves; it may be that it will add relatively little, but this is the inevitable consequence of the language used and the principles of construction explained above."

Statutory Provisions: Sections 3ZC and 3ZD

Section 3ZC Causing death by driving: disqualified drivers

"A person is guilty of an offence under this section if he or she—

a. causes the death of another person by driving a motor vehicle on a road, and
b. at that time, is committing an offence under section 103(1)(b) of this Act (driving while

disqualified)."

Section 3ZD Causing serious injury by driving: disqualified drivers

1. A person is guilty of an offence under this section if he or she—
    a. causes serious injury to another person by driving a motor vehicle on a road, and
    b. at that time, is committing an offence under section 103(1)(b) of this Act (driving while disqualified).
2. In this section "serious injury" means—
    a. ...
    b. in Scotland, severe physical injury.

For alternative verdicts, see the chapter on "Alternative verdicts" and the appendix "Alternative verdicts under the Road Traffic Offenders Act 1988"

POSSIBLE FORMS OF DIRECTIONS ON ROAD TRAFFIC ACT 1988 AS AMENDED BY ROAD SAFETY ACT 2006

[These directions should be adapted to the circumstances of the case]

Section 1**: causing death by dangerous driving**

“Charge is a charge of causing death by dangerous driving. It alleges a contravention of the Act referred to in the charge. Read short, that makes it an offence for you to cause another person’s death by driving a mechanically propelled vehicle dangerously on a road or other public place.

A ‘mechanically propelled vehicle’ includes things like cars, lorries, tractors and motor bikes. ‘Driving’ means having substantial control of its movement and direction.

A ‘road’ is a way or a route over which the public has the right to pass. It includes culs-de-sac, lay-bys, verges, pavements and bridges. A public place is a place to which the public have access, with express or implied permission. It includes car parks and garage forecourts.

What is in dispute here is the quality of the accused’s driving.

The offence requires the driving to be dangerous. A person drives dangerously if and only if:

(1) the way he drives falls far below what would be expected of a competent and careful driver, and

(2) it would be obvious to a competent and careful driver that that manner of driving, or driving the vehicle in the condition it was in, or loaded as it was, would be dangerous.

‘Dangerous’ driving in this context covers risk of injury to anybody, including the accused driver and his passengers, and risk of serious damage to property. It covers driving in the face of obvious and material dangers which should have been seen, appreciated and avoided. It also covers driving which shows a complete disregard of potential danger resulting from the manner of driving. It’s driving that shows a high degree of negligence, much more than lack of due care and attention.

It's courting material risks deliberately, or ignoring or being grossly inattentive to risks that would be obvious to a careful driver.

The test for dangerous driving is an objective one. In judging whether the accused's driving fell far below the standard of the careful and competent driver you can look at circumstances shown to be within his knowledge, like whether he had taken alcohol, the state of his brakes or a heavy insecure load. You can also look at those he ought to have been aware of, potential hazards like wet or icy roads, road works, or busy junctions. You're not concerned with his intentions, or his skill or experience as a driver. The driving of the accused also requires to have caused the death of *(the person named in the charge).* This does not mean that the driving was the sole cause of death, but rather was a cause of the death. The driving must have caused the death in the sense that but for the accused being on the road (X) would not have died.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused was driving the vehicle on a road or in a public place

(2) he drove dangerously, as I have defined that

(3) his driving caused the death of *(the person named in the charge)."*

Section 1A**: causing serious injury by dangerous driving**

[Adapt the charge for section 1.]

Serious injury means severe physical injury. Examples of severe physical injury are:

• multiple lacerations

• deep wounds

• ones causing much loss of blood

• broken bones

Section 3**: careless driving**

"Charge is a charge of careless driving. It alleges a contravention of the Act referred to in the charge. Read short, that makes it an offence for you to drive a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for others using the road.

A "mechanically propelled vehicle" includes things like cars, lorries, tractors and motor bikes. "Driving" it means having substantial control of its movement and direction.

A "road" is a way or a route over which the public has the right to pass. It includes culs-de-sac, lay-bys, verges, pavements and bridges. A public place is a place to which the public have access, with express or implied permission. It includes car parks and garage forecourts. What is in dispute here is the quality of the accused's driving. The offence requires the driving to be careless or inconsiderate. A person drives carelessly or without due care and attention if and only if the way

he drives falls below what would be expected of a competent and careful driver. The test for careless driving is an objective one. Driving without due care and attention may arise out of simple acts of carelessness or failure to pay sufficient attention in the circumstances, a lack of judgement, momentary inattention or lack of concentration, or a simple mistake.

In judging whether the accused's driving fell below that standard you can look at the circumstances he could be expected to be aware of. That would cover potential hazards like wet or icy roads, road works, or busy junctions. You can also look at any circumstances shown to be within his knowledge, such as whether he had taken alcohol, or the state of his brakes, or knowing a heavy load was insecure. Remember, you are not concerned with his intentions, or with his skill and experience as a driver.

Let me remind you that, a person drives carelessly or without due care and attention if and only if the way he drives falls below what would be expected of a competent and careful driver.

A person drives without due consideration for other road users if and only if they are inconvenienced by his driving. So, there must actually be other people on the road, and they must have been inconvenienced as a result of the accused's driving. But a passenger in the accused's car, alarmed by his driving, comes into that category.

For the Crown to prove this charge, you would need to be satisfied that:

(1) the accused was driving the vehicle on a road or in a public place

(2) he drove without due care and attention, or without consideration for other road users, as I have explained these terms."

Section 3A**: causing death by careless driving while under the influence of drink or drugs**

"Charge is a charge of causing death by careless driving while under the influence, as they say. It alleges a contravention of the Act referred to in the charge. Read short, that makes it an offence for you to drive a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for others using the road, when you're unfit through drink or drugs, or over the limit, or you've failed to provide a specimen of breath or blood for analysis within 18 hours of the incident.

A "mechanically propelled vehicle" includes things like cars, lorries, tractors and motor bikes. "Driving" it means having substantial control of its movement and direction. A "road" is a way or a route over which the public has the right to pass. It includes culs-de-sac, lay-bys, verges, pavements and bridges. A "public place" is a place to which the public have access, with express or implied permission. It includes car parks and garage forecourts.

What's in dispute here is:

• the quality of the accused's driving.

The offence requires the driving to be careless or inconsiderate.

A person drives carelessly or without due care and attention if and only if the way he drives falls below what would be expected of a competent and careful driver. The test for careless driving is

an objective one. In judging whether the accused's driving fell below that standard you can look at the circumstances he could be expected to be aware of.

That would cover potential hazards like wet or icy roads, road works, or busy junctions. You can also look at any circumstances shown to be within his knowledge, such as whether he had taken alcohol, or the state of his brakes, or knowing a heavy load was insecure. Remember, you're not concerned with his intentions, or with his skill and experience as a driver.

A person drives without due consideration for other road users if and only if they are inconvenienced by his driving. So, there must actually be other people on the road, and they must have been inconvenienced as a result of the accused's driving. But a passenger in the accused's car, alarmed by his driving, comes into that category.

• the accused's state. The test of driving when unfit through drink or drugs is objective. You decide if the accused's ability to drive properly at the time was impaired by either alcoholic drink or by a substance which, when taken, affects control of his body, or by both of these.

• whether the accused was over the limit. What you've to decide is whether or not, at the time of the incident, the accused was driving with more than the permitted level of alcohol in his breath/blood/urine, that is with more than 35µg/80µg/107µg in 100 ml of breath/blood/urine.

• whether the accused failed to provide a specimen without reasonable excuse when required to do so within 18 hours of the incident. In investigating a case like this the police can require the driver to provide specimens of breath for analysis by an approved device such as, an Intoxilyzer or an Intoximeter, or blood or urine for laboratory analysis. "Failing to provide" a specimen includes refusing to do so, and failing to provide enough for analysis."

The driving of the accused also requires to have caused the death of (the person named in the charge). This does not mean that the driving was the sole cause of death, but rather was a cause of the death. The driving must have caused the death in the sense that but for the accused's being on the road (X) would not have died.

(if raised by defence)

"In this case the accused says he had a reasonable excuse for his failure, and so should be acquitted. Evidence to support his position doesn't need to be corroborated. He doesn't need to prove his excuse to any particular standard. If it's believed, or if it raises a reasonable doubt, then acquittal must result. It's for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it should be rejected. A genuine apprehension about the conduct of the police might be a reasonable excuse. So might an incapacitating injury. A mere fear of needles, or embarrassment, wouldn't be."

"For the Crown to prove this charge, you'd need to be satisfied that:

(1) the accused was driving the vehicle on a road or in a public place

(2) he drove without due care and attention, or without consideration for other road users, as I've explained these terms

(3) his driving caused the death of (the person named in the charge)

(4) at the time he was driving he:

• was unfit to do so through drink or drugs

• was over the limit

or

(5) he failed to provide a specimen within 18 hours after the time he was driving."

Section 2B**: causing death by careless or inconsiderate driving**

Charge is a charge of causing death by careless or inconsiderate driving. It alleges a contravention of the Act referred to in the charge. Read short, that makes it an offence for you to cause another person's death by driving a mechanically propelled vehicle without due care and attention, or without reasonable consideration for other road users, on a road or other public place.

A "mechanically propelled vehicle" includes things like cars, lorries, tractors and motor bikes. "Driving" it means having substantial control of its movement and direction.

A "road" is a way or a route over which the public has the right to pass. It includes culs-de-sac, lay-bys, verges, pavements and bridges. A public place is a place to which the public have access, with express or implied permission. It includes car parks and garage forecourts. What is in dispute here is the quality of the accused's driving. The offence requires the driving to be careless or inconsiderate. A person drives carelessly or without due care and attention if and only if the way he drives falls below what would be expected of a competent and careful driver. The test for careless driving is an objective one. Driving without due care and attention may arise out of simple acts of carelessness or failure to pay sufficient attention in the circumstances, a lack of judgement, momentary inattention or lack of concentration, or a simple mistake.

In judging whether the accused's driving fell below that standard you can look at the circumstances he could be expected to be aware of.

That would cover potential hazards like wet or icy roads, road works, or busy junctions. You can also look at any circumstances shown to be within his knowledge, such as whether he had taken alcohol, or the state of his brakes, or knowing a heavy load was insecure. Remember, you are not concerned with his intentions, or with his skill and experience as a driver.

Let me remind you that, a person drives carelessly or without due care and attention if and only if the way he drives falls below what would be expected of a competent and careful driver.

A person drives without due consideration for other road users if and only if they are inconvenienced by his driving. So, there must actually be other people on the road, and they must have been inconvenienced as a result of the accused's driving. But a passenger in the accused's car, alarmed by his driving, comes into that category. The driving of the accused also requires to have caused the death of (the person named in the charge). This does not mean that the driving was the sole cause of death, but rather was a cause of the death. The driving must have caused the death in the sense that but for the accused's being on the road (X) would not have died.

For the Crown to prove this charge, you would need to be satisfied that:

1) the accused was driving the vehicle on a road or in a public place

2) he drove carelessly or inconsiderately, as I have defined these

3) his driving caused the death of (the person named in the charge).

Section 3ZB**: Causing death by driving: unlicensed, disqualified or uninsured drivers**

Charge is a charge of causing death by driving while unlicensed/uninsured/ or disqualified. It alleges a contravention of the Act referred to in the charge. Read short, that makes it an offence for you to cause another person's death by driving a motor vehicle on a road when at the time you're driving you are:-

• driving otherwise than in accordance with your licence

• driving while disqualified.

• using the vehicle without third party insurance cover

A "motor vehicle" includes things like cars, lorries, tractors and motor bikes. "Driving" means having substantial control of its movement and direction. "Using" is to be widely understood. It covers driving, it covers a vehicle which is being towed, it covers a vehicle parked on the street. It also applies to having the use of a vehicle, so more than one person may be guilty of this offence.

A "road" is a way or a route over which the public has the right to pass. It includes culs-de-sac, lay-bys, verges, pavements and bridges.

The driving of the accused (also) requires to have caused the death of (the person named in the charge). Two issues require to be proved. Firstly to cause the death, the driving requires to be a cause of the death rather than the cause of death of the person named in the charge. This does not mean that the driving was the sole cause of death, but rather was a cause of the death. The driving must have caused the death in the sense that but for the accused's being on the road (X) would not have died. Secondly whilst the driving of the accused does not need to be dangerous or careless, it must involve his doing something or failing to do something which would be open to legitimate criticism. There must be something open to proper criticism in the driving of the accused, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death. There requires to be some element of fault on the part of the accused in driving his vehicle at the material time albeit the fault may be less than careless.

For the Crown to prove this charge, you would need to be satisfied that:

1) the accused was driving the motor vehicle on the road

2) while he was driving he was committing the offence of:

a) driving other than in accordance with his licence, by (eg)

• Driving without being the holder of a licence

• Driving without supervision or L plates

b) driving the vehicle without third party insurance cover, or

c) driving while disqualified

3) his driving caused the death of (X), as I've explained the meaning of that term, namely it was a cause of the death of X and his driving was open to legitimate criticism.

Section 3ZC **(Causing death by driving: unlicensed or uninsured drivers) and** Section 3ZD **(Causing serious injury by driving: disqualified drivers)**

Adapt charge for section 3ZB - see charge for section 1A for 'serious injury'.

[784] 1980 JC 57

[785] *Carstairs v Hamilton*, 1998 SLT 220, 221, (opinion of the court).

[786] 1932 JC 13, 1931 SLT 598.

[787] 2003 SCCR 727 at para [19], 2003 SLT 1348.

[788] 2012 SCCR 591

[789] *R v Hughes* 2013 1 WLR 2461

Sending Grossly Offensive/Indecent Material

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1. LAW

2. POSSIBLE FORM OF DIRECTION ON SENDING OFFENSIVE/ INDECENT MATERIAL

LAW

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Section 127 of Communications Act 2003 (max-6 months or level 5 fine or both)

(1) A person is guilty of an offence if he–

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive[790] or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he–

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network. [section 3 not included]

(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).

POSSIBLE FORM OF DIRECTION ON SENDING OFFENSIVE/ INDECENT MATERIAL

“Charge is a charge of sending indecent or obscene material by the internet. It alleges a contravention of section 127 of the Communications Act 2003.

Reading it short, it’s an offence to send, or cause to be sent, grossly offensive material or material that’s of an indecent, obscene or menacing character, by a public electronic communications network.

There are several things to be noted here.

A “public electronic communications network” is a transmission system, available to the public, for sending signals of any type, using electrical, magnetic, or electromagnetic energy. It covers also the equipment used in the system, the equipment used for switching or routing signals, and the software and stored data associated with it. How do you judge if something is grossly offensive? You simply examine the material against the reaction of reasonable people, and the standards of an open and just multi-cultural society. Applying reasonably enlightened, but not perfectionist, contemporary standards, you decide if this was liable to cause gross offence.

How do you judge if something is indecent or obscene? You simply examine the material against the standards of the ordinary sensible person in contemporary society. If it lies outside what you think of as recognised contemporary standards of common propriety, it’s indecent or obscene.

So, for the Crown to prove this charge, you would need to be satisfied:

1. the accused sent material via the internet

2. applying the test I have indicated, that material was

• grossly offensive

• of an indecent, obscene or menacing character.

[790] DPP v Collins [2006] 1 WLR 2223, [2006] 4 AER 602, R v Rimmington [2006] 1 AC 459, [2006] 2 All ER 257.

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Section 28

Involvement in serious organised crimes

(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.

(2) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person —

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.

(3) For the purposes of this section and sections 29 to 31 —

“serious organised crime” means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,

“serious offence” means an indictable offence —

(a) committed with the intention of obtaining a material benefit for any person, or

(b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and "material benefit" means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.

POSSIBLE FORM OF DIRECTION ON SERIOUS ORGANISED CRIMES

"Charge is a charge which alleges that the accused was involved in serious organised crime in contravention of section 28 of the Criminal Justice and Licensing (Scotland) Act 2010. This section makes it a crime for someone to agree with at least one other person to become involved in serious organised crime. Now what is actually involved in such an offence requires some explanation.

Firstly a person agrees to become involved in serious organised crime if he/she agrees to do something, which does not itself have to be a criminal offence and knows, suspects, or ought reasonably to know or suspect, that by doing that the commission of serious organised crime is assisted or promoted. Clearly, it is a matter for you to consider whether it is established on the evidence you have heard that the accused knew or suspected that by doing something the commission of serious organised crime is assisted or promoted. However, you might conclude that the accused in fact did not know or suspect that by doing something the commission of serious organised crime was being assisted or promoted. However, the accused might still be guilty of this offence if you decide on considering the evidence the accused should reasonably have known or suspected that in agreeing to do something the commission of serious organised crime was assisted or promoted. This is an objective test. You require to consider all the circumstances. You then require to decide whether in light of those the accused should reasonably have known or suspected that in so agreeing the commission of serious organised crime was *assisted or promoted.*

Secondly what constitutes serious organised crime? This is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences.

What qualifies as a serious offence? Well you can take it that what is alleged to be the object of the agreement between the accused falls within the scope of the legislation. However, more is required. The offence must be committed either with the intention of obtaining a material benefit for anyone or is a threat or violent act intended to achieve such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind. *The benefit you have heard about would amount to such an interest.*

Statutory ProvisionsSection 29 Offences aggravated by connection with serious organised crimes

(1) This subsection applies where it is— (a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and (b) proved that the offence is so aggravated. (2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime. (3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime. (4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime."

POSSIBLE FORM OF DIRECTION ON OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIMES

"You'll see that added at the end of the charge on the indictment is an allegation that the crime was committed as a result of being connected to serious organised crime. This is what is described as an aggravation of the charge. This means that if you are satisfied that the crime was committed by the accused and that the crime was connected to serious organised crime, it is to be regarded as being more serious when imposing a sentence in the event of a conviction.

What do you need to be satisfied of if this aggravation is to apply to the charge? Firstly, the person committing the offence requires to be motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

Secondly what constitutes serious organised crime? This is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences.

What qualifies as a serious offence?

These directions should be adapted to the circumstances of the case.

The offence must be committed either: (a) with the intention of obtaining a material benefit for anyone; or (b) must comprise a threat or violent act intended to obtain such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind.

Now in considering this it does not matter that the offence in the charge actually enabled the accused or another to commit serious organised crime. Further what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

Might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. You would then move on to consider whether this aggravation applies to the charge. If you are satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself."

LAW – CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

Statutory Provisions

Section 30 Directing serious organised crimes

(1) A person commits an offence by directing another person —

(a) to commit a serious offence,

(b) to commit an offence aggravated by a connection with serious organised crime under section 29.

(2) A person commits an offence by directing another person to direct a further person to commit an offence mentioned in subsection (1).

(3) For the purposes of subsections (1) and (2), a person directs another person to commit an offence if the person —

(a) does something, or a series of things, to direct the person to commit the offence,

(b) intends that the thing or things done will persuade the person to commit the offence, and

(c) intends that the thing or things done will —

(i) result in a person committing serious organised crime, or

(ii) enable a person to commit serious organised crime.

(4) The person directing the other person commits an offence under subsection (1) whether or not the other person in fact commits — (a) a serious offence, or

(b) an offence aggravated by a connection with serious organised crime under section 29.

(5) In this section "directing" a person to commit an offence includes inciting the person to commit the offence.

POSSIBLE FORM OF DIRECTION ON DIRECTING SERIOUS ORGANISED CRIMES

If section 30(1)(a)

"The charge alleges that the accused directed another (name that person if known/whose identity is not known) to commit a serious offence.

What is meant by directs? Well firstly "directs" is defined in the legislation as including 'incites'. A person directs another in the context of this offence if the following apply:-

(a) he/she does something, or a series of things, to direct the person to commit the serious offence,

(b) he/she intends that the thing or things done will persuade the person to commit the serious offence, and

(c) he/she intends that the thing or things done will —

(i) result in a person committing serious organised crime, or

(ii) enable a person to commit serious organised crime.

When I mention 'intends' this relates to a person's intention. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

I have referred to 'serious offence'. This has a special meaning. You can take it that what is alleged

to have been directed to be done falls within the scope of the legislation. However, more is required. The offence must be committed either with the intention of obtaining a material benefit for anyone or is a threat or violent act intended to achieve such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind. *The benefit you have heard about would amount to such an interest.*

What constitutes serious organised crime? This is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences."

If section 30(1)(b)

"The charge alleges that the accused directed another person (name that person if known/whose identity is not known) to commit an offence aggravated by a connection with serious organised crime under section 29.

Refer to the style regarding section 29 to deal with the aggravation.

What is meant by directs? Well firstly 'directs' is defined in the legislation as including 'incites'. A person directs another in the context of this offence if the following apply:-

(a) he/she does something, or a series of things, to direct the person to commit the serious offence,

(b) he/she intends that the thing or things done will persuade the person to commit the serious offence, and

(c) he/she intends that the thing or things done will —

(i) result in a person committing serious organised crime, or

(ii) enable a person to commit serious organised crime.

When I mention 'intends' this relates to a person's intention. Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done.

I have referred to 'serious offence'. This has a special meaning. You can take it that what is alleged to have been directed to be done falls within the scope of the legislation. However, more is required. The offence must be committed either with the intention of obtaining a material benefit for anyone or is a threat or violent act intended to achieve such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind. The benefit you have heard about would amount to such an interest.

What constitutes serious organised crime? This is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences."

If section 30(2)

"The charge alleges that directing another person to direct a further person to commit either:- (a)

a serious offence, or (b) an offence aggravated by a connection with serious organised crime. Then take in direction for section 30(1)(a) or 30(1)(b) as appropriate."

LAW – CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

Statutory Provisions

Section 31 Failure to report serious organised crimes

(1) This section applies where —

(a) a person ("the person") knows or suspects that another person ("the other person") has committed —

(i) an offence under section 28 or 30, or

(ii) an offence which is aggravated by a connection with serious organised crime under section 29, and

(b) that knowledge or suspicion originates from information obtained —

(i) in the course of the person's trade, profession, business or employment, or

(ii) as a result of a close personal relationship between the person and the other person.

(2) In the case of knowledge or suspicion originating from information obtained by the person as a result of a close personal relationship between the person and the other person, this section applies only where the person has obtained a material benefit as a result of the commission of serious organised crime by the other person.

(3) The person commits an offence if the person does not disclose to a constable —

(a) the person's knowledge or suspicion, and

(b) the information on which that knowledge or suspicion is based.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that the person had a reasonable excuse for not making the disclosure.

(5) Subsection (3) does not require disclosure by a person who is a professional legal adviser (an "adviser") of —

(a) information which the adviser obtains in privileged circumstances, or

(b) knowledge or a suspicion based on information obtained in privileged circumstances.

(6) For the purpose of subsection (5), information is obtained by an adviser in privileged circumstances if it comes to the adviser, otherwise than for the purposes of committing serious organised crime —

(a) from a client (or from a client's representative) in connection with the provision of legal advice by the adviser to that person,

(b) from a person seeking legal advice from the adviser (or from that person's representative), or

(c) from a person, for the purpose of actual or contemplated legal proceedings.

(7) The reference in subsection (3) to a constable includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

What may amount to a reasonable excuse is not clear. A similar provision appears in section 330 of the Proceeds of Crime Act 2002. See the annotation in Renton and Brown's Statutory Offences section I – 65.

POSSIBLE FORM OF DIRECTION ON FAILURE TO REPORT

"The charge alleges a failure to report certain knowledge or suspicions of organised crime to a police officer by the accused.

Section 31(1)(b)(i)

This obligation to report arises in circumstances in which knowledge or suspicion originates from information obtained in the course of the person's trade, profession, business or employment. The knowledge or suspicion relates to another person having contravened sections 28, 29, or 30 of the Criminal Justice and Licensing (Scotland) Act 2010.

(Necessary directions as to what would amount to a contravention of the particular section required.)

If a person does have such knowledge or suspicion, then he/she must inform a police officer of that knowledge or suspicion and the information on which it is based.

(If applicable)

In this case the accused is a solicitor/advocate and thus is a professional legal adviser. As a result he/she does not have an obligation to disclose either information to a police officer if he/she obtained it in privileged circumstances, or knowledge or a suspicion based on information to a police officer if he/she obtained it in privileged circumstances. Information is obtained by a professional legal adviser in privileged circumstances if it comes to the adviser, otherwise than for the purposes of committing serious organised crime in one of three situations:-

(a) from a client (or from a client's representative) in connection with the provision of legal advice by the adviser to that person,

(b) from a person seeking legal advice from the adviser (or from that person's representative),

(c) from a person, for the purpose of actual or contemplated legal proceedings.

Serious organised crime means (see directions for section 28)

(If applicable)

It is a defence to this charge for the accused to prove that he/she had a reasonable excuse for not making the disclosure. The Act says proof of that lies on him/her. That means he/she has to satisfy you on a balance of probabilities that he/she had lawful authority/a reasonable excuse for not making the disclosure. Evidence to support his/her position doesn't need to be corroborated. If you think he/she has proved that on the balance of probabilities, you must acquit him/her.

The reasonable excuse (see legal note).

REMEMBER: Warning in the chapter on The Opening / General Directions re reverse burden of proof

Section 31(1)(b)(ii)

This obligation to report arises in circumstances in which knowledge or suspicion originates from information obtained by a person as a result of a close personal relationship between him/her and the other person provided the person obtaining the information obtained a material benefit as a result of the commission of serious organised crime by the other person.

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Sexual Offences (Scotland) Act 2009

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Note: *the standard directions under the 2009 Act are presently under review, in light of recent case law and the desirability of simplification and use of plain English and will be reissued shortly. In the meantime and under reference to the discussion of Autonomy, which introduces this section of the Manual, judges may wish to preface their remarks by the following statement, adapted where necessary to the particular offence:*

> "The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice."

If there are multiple charges on which consent is in issue, it would not always be necessary to state this on each charge and it is a matter of judgement on which charge, or charges or where else in the judge's charge such a direction might be given. Some judges solve the problem by giving a generic direction before defining the individual charges.

A re-draft of the direction on section 7 has been issued now, taking account of what the High Court has said in Aziz about that offence, about autonomy and about the purpose of sexual gratification in section 49. That section applies to a number of other offences – sections 5 to 9, 22 to 26 and 32 to 36 – and pending revisal of these other directions the suggested direction on section 7 should be considered and the individual direction adapted as necessary.

Law

Autonomy

1 Particularly where consent is in issue, it is important that judges explain to juries that sexual offences, both at common law and under the 2009 Act, are intended to criminalise conduct which interferes with another person's sexual autonomy. Such a direction has two benefits:

1. It will ensure that juries understand the nature of the offence they are considering;
2. It should prevent erroneously held conventional wisdom about the nature of crimes of rape and sexual assault and "rape myths" intruding on decision making.

In *PF Edinburgh v Aziz* 2022 HCJAC 46 the appeal court examined the issue of autonomy in considering an offence of communicating indecently, section 7 of the 2009 Act, and noted that it underpinned the common law on sexual offences just as it underpins the Act. In para 20 of the opinion of the court, the Lord Justice General categorised the different ways in which the law has sought to protect the sexual autonomy of adults, children and the vulnerable.

In its analysis of the development of the common law and the 2009 Act, at paras 20-24, it is clear that the court was not innovating but drawing on long-established principles.

Autonomy in common law

2 In *Dickie v HM Advocate* 1897 2 Adam 331 LJC MacDonald observed in an appeal arising from a charge of indecent assault that:

> *"Every woman is entitled to protection from attack upon her person."*

In giving the leading opinion of a bench of seven judges in *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435 LJG Cullen explained, at para 40:

> *"….The criminal law exists in order to protect commonly accepted values against socially unacceptable conduct. What does the law of rape seek to protect in the modern world? It may be said with considerable force that it should seek to protect a woman against the invasion of her privacy by sexual intercourse, that is to say where that takes place without her consent. What happens with her consent on one occasion should not determine what is acceptable on another. In the present day, in which there is considerable sexual freedom, both in and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases?"*

Autonomy in the 2009 Act

3 The origins of the 2009 Act reveal an explicit concern to ensure that the sexual autonomy of individuals, regardless of gender, is respected as the court observed in *Aziz*.

Having noted the declaration in *Webster v Dominick* 2005 1 JC 65 that what had been thought to be the all-encompassing crime of shameless indecency did not exist and the redefinition of rape in *Lord Advocate's Reference (No 1 of 2001)* as the legal background, the LJG explained in *PF Edinburgh v Aziz* at para [22]:

> *"…the Scottish Law Commission produced its Report 9 on Rape and Other Sexual Offences*

(no 209) in 2007. This examined how, what it described as, "the most fundamental principle" of "Respect for sexual autonomy" might find its way into the criminal law. This respect was described as operating (para 1.25):

> *"Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime.""*

The Lord Justice General had previously referred to autonomy as an important principle in *GW v HM Advocate* 2019 JC 109 in which he quoted, at para [31], remarks made by Lady Hale in *R v Cooper* [2009] 1 WLR 1786 at para 27:

> "*….[I]t is difficult to think of an activity which is more person - and situation - specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place, autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention…*"

Lady Hale's explanation of consent chimes precisely with the provisions of the 2009 Act and the definition of consent as free agreement.

In appropriate circumstances, judges have found it useful to quote Lady Hale in their directions on consent and observed that juries appear readily to grasp her explanation.

The 2009 Act

4 The provisions relating to the new statutory sexual offences contained in the Sexual Offences (Scotland) Act 2009 came into force on 1 December 2010. The Act repealed certain parts of the Criminal Law Consolidation (Scotland) Act 1995 including Sections 3, 5, 6, 7(2), 7(3), 13(1) to (8A), 13(10), 13(11), 14, 16A, and 16B. Its provisions apply to offences committed from 1 December 2010. The common law and old statutory offences will continue to apply to offences committed prior to that date. Accordingly, existing law and directions relating to common law rape, for example, will continue to be required.

5 Broadly, the Act creates a series of offences comprising rape, sexual assault by penetration, sexual coercion, coercing a person to be present during a sexual activity, coercing a person into looking at a sexual image, sexual exposure and voyeurism. Part 1, sections 1 to 9 deal with these in the context of adult persons. Part 4 deals with these in the context of young children (sections 18 to 26) and older children (sections 28 to 37). Part 5 deals with abuse of trust in relation to children and mentally disordered persons.

6 The relevant provisions of the Act should always be studied with care. The suggested directions which follow provide definitions of the crimes created by the Act and offer some guidance on issues which may arise in the context of particular cases. It will always be necessary to select with care from within each style the directions which are relevant and to expand and adjust these to

suit the evidential circumstances of each individual case.

7 At the end of the draft directions on rape is a summary of points which may found the evidential basis of the prosecution case. This may be used as an aide-memoire, and can be easily adapted to suit other charges.

Consent

8 Section 12 defines consent as meaning free agreement. Section 13 lists certain examples in which free agreement is absent. The list is not exhaustive. Section 13 provides that free agreement to conduct is absent where:

- a complainer is incapable by reason of intoxication of consenting to it;
- a complainer submits because of violence or threats of violence;
- a complainer is unlawfully detained by the accused;
- a complainer submits due to a mistake because of the accused's deception as to the nature or purpose of the conduct;
- a complainer agrees or submits by reason of the accused impersonating a person known personally to the complainer;
- the only expression or indication of agreement is from a person other than the complainer. In other words, valid consent cannot be given on a complainer's behalf by someone else.

9 Section 14 provides that a person is incapable, while asleep or unconscious, of consenting to any conduct. *GW v HM Advocate* [2018] HCJAC 23 holds that consent, expressed at a point materially remote from the conduct said to constitute the crime, cannot provide a defence in terms of these provisions. There requires to be continuing consent throughout the conduct. Having regard to the provisions of section 14, there can never be a reasonable belief of consent when a person is asleep or unconscious.

10 Whether consent has been given, in whatever form, is examined by reference to the time of the sexual act and not at a point remote from it. Thus the fact that consensual conduct of the same type has happened before will not, at least on its own, constitute consent to the same conduct occurring at a different time. Accordingly, a sleeping person cannot consent to sexual activity and because consent must be given at the time, sexual conduct which occurs when a person is in that state is criminal.

11 Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances.[791] A more recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no "free agreement" in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T:drive, "Appeal opinions, pre-trial" folder.

12 Both the act of penetration and the lack of consent must be proved by the Crown with corroborated evidence.

13 Section 15 provides that consent to conduct does not of itself imply consent to any other conduct and that consent to conduct may be withdrawn at any time before or in the case of

continuing conduct, during the conduct. Accordingly, if the conduct takes place or continues after consent has been withdrawn it takes place without consent.

Reasonable Belief

14 Beyond the statutory definition of the crime appropriate to the particular circumstances of the case, no further direction on reasonable belief is required unless that issue is a live one at the trial.

It is only live in circumstances in which the evidence is such that the jury may determine that, although the complainer did not consent, there is evidence suggesting that the accused believed that the complainer consented and, in the circumstances, the accused's belief was reasonable.

> *"Putting matters in reverse order, first, although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding."* (*Maqsood*, infra, per the Lord Justice General at para 17)

15 If the issue is a live one, whether or not an accused has a reasonable belief will be a matter of inference drawn from established facts. It is not necessary for the Crown to prove absence of reasonable belief with corroborated evidence. [792] As the Lord Justice Clerk explained in *AA v HM Advocate* [2021] HCJAC 9, the court has declined to remit this issue for consideration by a full bench and the law is as stated in Maqsood.

16 In examining issues relating to mutual corroboration, in *Duthie v HM Advocate* 2021 SCCR 100, a full bench confirmed, at para [18] of the opinion of the court given by the Lord Justice General, that absence of honest or reasonable belief is not a fact which requires to be proved by corroborated evidence.

17 The evidence of the complainer alone can be sufficient to permit the inference, see *Schyff v HM Advocate* [2015] HCJAC 67 at para 13:

> *"...From the complainer's testimony about suddenly wakening up to find the appellant removing her clothing and proceeding to touch her vagina, the jury were entitled to infer that no such belief existed..."*

18 Section 16 provides that, for charges brought under sections 1-11 of the 2009 Act, in determining whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent, or as the case may be, knowledge and if so what those steps were.

19 If there is evidence such that reasonable belief is a live issue, but there has been significant violence, it may be permissible to deal with this issue by asking the jury to consider how the accused could have thought that the complainer was freely agreeing to intercourse if violence was used.

20 In cases where the only possible basis on which free agreement could be proved to be absent is because of a lack of capacity to consent on the part of the complainer, the lack of capacity requires to be proved by corroborated evidence. [793] However, it is the fact of lack of consent which requires to be proved and where the charge libels that the complainer was asleep, corroborated evidence that she did not consent is required rather that the fact that she was asleep. So, in *HMA v Afzal* 2019 HCJAC 37, where the complainer said that she had just woken up and was hazy when she felt the appellant penetrate her and a witness said she was asleep when penetrated there was sufficient evidence. The jury could delete the libel in relation to sleep (see paras 5, 6 and 7).[794]

21 In establishing whether there was no reasonable belief that the complainer consented in circumstances where the complainer has a mental disorder (section 17), this issue becomes one of lack of reasonable belief on the part of the accused that the complainer was capable of consenting and lack of reasonable belief that she did consent.

22 In *Winton v HM Advocate* 2017 SCCR 320, the court also explained that section 17 does not create an offence, but merely provides that a person who comes within the terms of the section is not capable of giving consent, and that where the requirements of that section are met, the Crown need not prove lack of consent.

Proof of age of complainer or other person

23 In certain cases brought under the Act, the age of the complainer will be a crucial fact requiring corroboration, if challenged. The offences set out in part 4 of the Act against young and older children will fall into this category.

However there is a statutory presumption that if the age of a person is specified in an indictment or complaint, it will be held as admitted.

24 Section 255A of the Criminal Procedure (Scotland) Act 1995 deals with proof of the age of a person and reads as follows:

> "Where the age of any person is specified in an indictment or a complaint, it shall, unless challenged—
>
> a. in the case of proceedings on indictment by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i)] of this Act; or
> b. in summary proceedings—
> i. by preliminary objection before the plea of the accused is recorded; or
> ii. by objection at such later time as the court may in special circumstances allow,
>
> be held as admitted."

In cases where the age of the complainer is challenged, the production of a birth certificate will be sufficient [795].

Section 49 and sexual gratification

25 Section 49 is relevant to a number of offences which deal with the purpose of the offender and provides:

> "49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36
>
> 1. For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—
>   a. obtaining sexual gratification, or
>   b. humiliating, distressing or alarming B,
>
> if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
>
> 2. In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A."

26 The provision was examined in *PF Edinburgh v Aziz* [2022] HCJAC 46. The High Court of Justiciary upheld the sheriff, who had been overturned by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence of indecent communication under section 7 in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked "what else can you offer?" and when they enquired what he meant he replied, "sex." Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

27 In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

28 The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case.

Dockets (section 288BA 1995 Act)

29 See Section 288BA- Dockets chapter.

Alternative verdicts

30 Subject to the observations of the court in *Duncan v HM Advocate* 2018 SCCR 319 which stresses that this may be a rare event if the matter has not been referred to by parties and a jury should then be directed only on an alternative verdict which obviously arises on the evidence, it may sometimes be appropriate to give the jury direction on an alternative verdict.

For 2009 Act offences, section 50 creates the power to convict of alternative offences and Schedule 3 of the Act sets out the alternative verdicts which are available on the various statutory offences listed there. Schedule 3 is reproduced as an appendix to the Jury Manual entitled " Alternative verdicts under Schedule 3 to the Sexual Offences (Scotland) Act 2009". See also the chapter on Alternative verdicts.

Possible form of direction on the Sexual Offences (Scotland) Act 2009

Section 1: Rape of an adult

Note on terminology and pronouns: *The directions should be adapted to make them comprehensible in the particular case: for example, in a rape by a male upon a female, it may make sense, in particular after general statements of the principles to use relevant pronouns rather than repeatedly refer to complainer or person,*

Direction

“Charge [ ] is a charge of rape under section 1 of the 2009 Act

The law aims to protect a person’s bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

Rape is the intentional or reckless penetration to any extent by the accused’s penis of the complainer’s:

- vagina,
- anus, or,
- mouth

without the complainer’s consent and without any reasonable belief on the part of the accused that the person consented.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

In this case it is alleged that the accused penetrated the complainer's [vagina/anus/mouth] with his penis without his/her/their consent.

Penetration:

Any degree of penetration is enough. Ejaculation of semen is not necessary.

Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[In this case it is not disputed that penetration was intentional].

In the exceptional case, where recklessness may arise on the evidence:

[Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to and complete disregard of the consequences.]

Consent:

Consent means free agreement. It is free agreement at the time of the sexual act that matters. Whether or not there is free agreement is for you to determine having regard to what the parties did and said to each other and the evidence as a whole. Did the complainer freely agree or was his/her/their freedom to choose restricted in some way?

A person does not freely agree to a sexual act just because s/he/they did not protest or did not physically resist or did not suffer physical injury. There is no need for violence or force to be used although they may be.

Only where appropriate:

[The fact that the complainer did not say or do anything to indicate free agreement could show that the act took place without consent.]

There must be consent specific to the occasion on which sexual activity took place.

There is no activity which is more person—and situation—specific than sexual relations. A person does not consent to sex in general but consents to this act of sex with this person at this time and in this place. Any person has a freedom to make a choice of whether or not to do so.

Relationships, similar cases or where there is said to be other consensual sexual activity:

[The law is that a complainer who is in a sexual relationship with somebody can be raped/sexually assaulted by that person. It does not matter that the complainer consented to sexual activity on an earlier or later occasion]

Situations where there is no consent/no capacity to consent or consent is withdrawn

The following directions address the circumstances listed under s13 where consent is absent. It is a non-exhaustive list. It does not imply that in circumstances not listed in s13, there is free agreement. Thereafter the directions address circumstances where there is no capacity to consent under s14 and 17 and where the scope of consent is withdrawn under s15.

Only where appropriate:

1. Where the conduct occurs at a time when the complainer is incapable of consenting because of the effect of alcohol or drugs

The law is that where sexual conduct occurs at a time when a complainer is incapable because of the effect of alcohol or any other substance of consenting to it, then there is no free agreement and no consent. It makes no difference whether the complainer took the alcohol or drugs him/herself/themselves or was plied them by another.

2. Where the person is subjected to or threatened with violence

Where a person agrees or submits to sexual conduct because of violence used against him/her/them [or anyone else] and/or because of threats of violence made against him/her/them [or anyone else], there is no free agreement. The violence or threat of violence need not immediately precede the conduct.

3. Where a complainer is detained by the accused

Where a person agrees or submits to sex with a person because they are unlawfully detained by him/her/them there is no free agreement.

Adapt as appropriate

Detention need not involve force. To trick somebody into a room, and then lock the door would be enough. Detention is simply the deprivation of freedom and liberty of movement. An accused does not have a right to detain anyone. If you are satisfied that the complainer was detained by the accused and because of that she/he/they submitted, then she/he/they did not consent.

4. Where the person is deceived about the nature or purpose of the conduct

There is no free agreement if a person only agrees or submits to the conduct because she/he/they had been deceived by the accused about the nature or purpose of the conduct. There has to be some deception by the accused and this must have led to the complainer being mistaken about the nature or purpose of the conduct complained of. If you concluded that the complainer did not realise that this was a sexual act but believed the accused when he/she/they told the complainer that it was, for example, some sort of medical procedure, there would be no free agreement on the complainer's part.

5. Where the person submits to the conduct as a result of impersonation

There is no free agreement if the accused induces the complainer to agree or submit to the conduct by impersonating somebody known personally to the complainer. If the accused pretends to be the person's regular sexual partner and the complainer mistakenly believed that, the accused would be guilty of rape if intercourse occurred because of that deception. There must be impersonation which led to the agreement or submission to what took place.

6. Third party consent

Only the complainer can give consent. It cannot be given on his/her/their behalf by anyone else.

7. Where the complainer is asleep or unconscious

The complainer must be in a position to give or withhold consent. So, sexual conduct with a person who is asleep or unconscious is criminal.

8. Where the person consented to some form of sexual activity

Consent to one form of sexual conduct does not of itself imply consent to another form of sexual conduct. Unless a/the particular activity specified in the charge was freely agreed to, it took place without consent.

9. Where the person withdraws consent at some stage

Consent must be present throughout sexual conduct for it to be consensual. Consent may be withdrawn and, if it is, then conduct which takes place after that occurs without consent.

10. Mentally disordered person

A person who is suffering from a mental disorder is incapable of consenting to sexual conduct where, because of the disorder, the person was unable to understand what the conduct was, or to form a decision as to whether to engage in the conduct or as to whether it should take place or to communicate such a decision.

A mental disorder means a mental illness, personality disorder or a learning disability.

As a consequence, where the Crown has proved the complainer suffers from a mental disorder, they do not have to prove a lack of consent on the part of the complainer.

Reasonable belief

This direction will only be required in the rare situation where, although the evidence is apt to prove that the complainer was not consenting, there is evidence that the accused believed that the complainer was consenting in circumstances where a reasonable person could think that the complainer was consenting.

If you accept that the complainer was not consenting to [eg] penetration, but you consider that the accused nevertheless reasonably believed that the complainer was consenting, or if you are left in reasonable doubt about that you would acquit the accused. That is because a person who [eg] penetrates the vagina/anus/mouth of another person reasonably believing that that person was consenting, although in fact they were not, is not guilty of [eg] rape. However, simply having an honest belief that the person consented would not be enough. The accused's belief must be held on reasonable grounds. Whether an accused had, or did not have, a reasonable belief is an inference from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused reasonably held that belief.

(**Here that evidence could be summarised**)

On the other hand the Crown remind you that;

(**Here the Crown's position could be summarised**)

To decide if the accused's belief that the person was consenting was reasonable, you should have regard, among other matters, to:

1. whether the accused took any steps to find out if the complainer was consenting, and
2. what steps these were.

If you accept any evidence that the accused believed that the complainer was consenting and that

the accused's belief was reasonably held, or if you are left in reasonable doubt about that you would acquit.]

where the complainer has a mental disorder

If you accept that the complainer had a mental disorder and was not capable of consenting to [eg] penetration, but you consider that the accused nevertheless reasonably believed that the complainer was capable of consenting, and did consent, or if you are left in reasonable doubt about those things you would acquit the accused. That is because a person who [eg] penetrates the vagina/anus/mouth of a complainer reasonably believing that that the complainer was capable of consenting, and did consent, although in fact the complainer could not, and did not, consent is not guilty of [eg] rape. However, simply having an honest belief that the complainer was capable of consenting, and did consent, would not be enough. The accused's belief must be held on reasonable grounds. Whether an accused had, or did not have, a reasonable belief is an inference from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused reasonably held that belief.

(**Here that evidence could be summarised**)

On the other hand the Crown remind you that;

(**Here the Crown's position could be summarised**)

To decide if the accused's belief that the person was capable of consenting, and did consent, was reasonable, you should have regard, among other matters, to:

1. whether the accused took any steps to find out if the complainer was capable of consenting, and did consent, and
2. what steps these were.

If you accept any evidence that the accused believed that the complainer was capable of consenting, and did consent, and that the accused's belief was reasonably held, or if you are left in reasonable doubt about those things you would acquit.

Corroboration

The essential elements of the charge are penetration and the lack of consent by the complainer. These must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed. That penetration was intentional [or reckless] does not need corroboration.

Where the complainer is an essential witness

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's

evidence as credible and reliable in its essentials: namely that the accused penetrated the complainer's [specify body part] with his penis and that the complainer did not consent.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

Please note in cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused the complainer, may not be an essential witness, in which case the foregoing direction may not be necessary, or may need to be adapted.

Only where appropriate:

Distress

*If anything more elaborate is required reference can be made to "*Corroboration: Evidence of Distress*" in Part II of the Manual.*

Corroboration for the complainer's lack of consent can come from the evidence of others that the complainer was distressed afterwards, provided their distress was genuine, was caused at least in part by what they said happened, and was not wholly due to other extraneous factors like shame or remorse.

Injury

Corroboration can also come from evidence of any injuries the complainer sustained. Signs of violence may be the consequence of, and evidence of, the complainer's lack of consent.

Summary

In many cases it may be unnecessary to narrate paras 1 and/or 2, in which case para 3 may require slight elaboration.

For the Crown to prove this charge, you must be satisfied that:

1. the accused penetrated the complainer's vagina/anus/mouth with his penis,
2. penetration was intentional [or reckless] and
3. the accused did so without the complainer's consent

Only where appropriate:

4. the accused had no reasonable belief that the complainer was consenting.

Consider whether to give a direction under section 288DB **(delay in reporting)**

Consider whether to give a direction under section 288DB **(lack of physical resistance or physical force)**

Directions on other offences under the 2009 Act

These offences are dealt with in the numerical order in which they appear in the 2009 Act.

Having said that, the charge of assault with intent to rape is not itself an offence under the Act but an assault at common law with the intent to commit either the statutory crime of rape or the common law offence of rape (or intent to ravish) depending on when it is alleged to have been committed. See the reference to these offences in section 210A (10)(iv) and (iva). Presumably there could be an offence of sexual assault under Section 3 of the 2009 Act with intent to commit the statutory crime of rape but if that arises the directions can be adapted. Sexual assault with intent to commit the statutory crime of rape is not mentioned in section 210A since sexual assault itself is already covered in any event.

Section 1: Assault with intent to rape (adult) under section 1 of the Sexual Offences (Scotland) Act 2009

N.B. Please see above. This is a common law crime with the aggravation of intent to commit a statutory one. It is included here for ease of reference. Intent is always a matter of inference from the primary facts and for these reasons the aggravation does not require to be proved by corroborated evidence.

An assault with intention to rape makes the assault more serious.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults. Weapons may or may not be involved. Injury may or may not result. So, menaces or threats producing fear or alarm in the other person are assaults.

If the complainer was deliberately threatened, menaced or attacked, with the intention of raping her, that is the crime of assault with intent to rape under the Act.

To define assault with intent to rape, I require to define the crime of rape under the Act referred to in the charge.

The crime of rape consists of the intentional or reckless penetration, to any extent, by the accused's penis of the person's

- vagina
- anus
- mouth

without the person's consent, and without any reasonable belief that the person consented.

In a charge of assault with intent to rape, two matters must be proved on the basis of corroborated evidence:

1. That the accused is the perpetrator
2. That he assaulted the complainer

Whether the accused has the necessary intent to rape is a matter which can only be inferred from what he has proved to have said or done and the circumstances in which it happened.

For the Crown to prove this charge, you must be satisfied that:

the accused deliberately menaced, threatened or attacked the complainer with the intention of carrying out the crime of rape as I have defined it.

Consider whether to give a direction under section 288DA (delay in reporting)

Consider whether to give a direction under section 288DB (lack of physical resistance or physical force)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 cases can be adapted if necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Section 2: Sexual assault by penetration

Charge…. is a charge of sexual assault by penetration, and alleges a contravention of the section of the Act referred to in the charge.

The crime of sexual assault by penetration consists of the intentional or reckless sexual penetration, to any extent, by any part of the accused's body, including his penis, or anything else, of the person's

• vagina

• anus

without the person's consent, and without any reasonable belief that the person consented.

Penetration and lack of consent must be proved by corroborated evidence.

>The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

In relation to the first requirement of penetration, any degree of penetration is enough. If the penetration was consented to initially but that consent was later withdrawn, continuing penetration is without the complainer's consent.

[In almost every case, recklessness will not arise as an issue, and so reference to recklessness can be omitted, but the following can be adapted as necessary:]

Penetration must be intentional or reckless. Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the behaviour. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

In relation to the second requirement, that of the lack of consent on the part of the complainer,

consent means free agreement which must continue throughout the sexual act under consideration. It is consent at the time of the particular act that matters. The complainer must be in a position to give or withhold consent.

When is something done "sexually"? Penetration is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Consider whether to give a direction under section 288DA (delay in reporting)

Consider whether to give a direction under section 288DB (lack of physical resistance or physical force)

Take in definition of Part 1 penetration as appropriate. See paragraph 5.1.1 below.

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the person named in the charge was penetrated vaginally or anally by some part of the accused's body or by anything else

2. that penetration was sexual

3. that penetration was intentional or reckless

4. the absence of the person's named in the charge consent to the conduct referred to in the charge.

[If appropriate]

5. the absence on the accused's part of any reasonable belief that the person named in the charge consented.

Section 3: Sexual assault

Charge…. is a charge of sexual assault, and alleges a contravention of the section of the Act referred to in the charge.

The crime of sexual assault can consist of:

[can be adapted as appropriate]

- the intentional or reckless sexual penetration, by any means, including penetration by the

accused's penis, and to any extent, of the complainer's vagina, anus or mouth
- intentionally or recklessly touching the complainer sexually
- engaging in any other form of sexual activity in which the accused intentionally or recklessly has physical contact with the complainer, including bodily contact, contact by means of an implement, and whether through clothing or not
- intentionally or recklessly ejaculating semen on to the complainer or
- intentionally or recklessly emitting urine or saliva on to the complainer

without the complainer's consent, and without any reasonable belief that (s)he consented.

The act of the sort described and the lack of consent must be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated.

Several points in the definition call for comment:

When is penetration "sexual", or when is an activity "sexual"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

[In almost every case recklessness will not arise and reference to it can be omitted but if it does, something like the following could be used or adapted].

The conduct must be intentional or reckless. Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the behaviour. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

Consider whether to give a direction under section 288DA (delay in reporting)

Consider whether to give a direction under section 288DB (lack of physical resistance or physical force)

Take in definition of Part 1 penetration. See paragraph 5.1.1 below. (In case not involving penetration adapt last three paragraphs to define intention and recklessness)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must establish the following:

1. conduct of the sort described in the charge by the accused

2. that it was sexual

3. the absence of the complainer's consent to that conduct

[If appropriate]

4. the absence on the accused's part of any reasonable belief that the complainer consented.

Section 4: Sexual coercion

Charge…. is a charge of sexual coercion, and alleges a contravention of the section of the Act referred to in the charge.

The crime of sexual coercion consists of the accused intentionally causing the person to participate in a sexual activity without that person's consent, and without any reasonable belief that he/she consented.

Causing the person to participate in a sexual activity and the lack of consent by the person have to be proved by corroborated evidence.
The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated.

Several points call for comment:

[Adapt the definition of "causing" depending on the nature of any issue that has arisen in connection with it].

"Causing" simply means that there must be some direct connection between what the accused did and the person's resulting conduct. Causing does not need to involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Physical contact between the accused and the person may be involved, but not necessarily so. Persuasion is enough.

When is something done "sexually" or what is a "sexual" activity?

Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Consider whether to give a direction under section 288DA (delay in reporting)

Consider whether to give a direction under section 288DB (lack of physical resistance or physical force)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1

rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused
2. that it was sexual
3. the absence of the person's consent to that conduct

[If appropriate]

4. the absence on the accused's part of any reasonable belief that the person consented.

Section 5: Coercing a person into being present during a sexual activity

Charge…. is a charge of causing a person into being present during a sexual activity, and alleges a contravention of the section of the Act referred to in the charge.

This crime requires the accused to have behaved with one or other or both of these purposes:

- for the purpose of obtaining sexual gratification; or
- for the purpose of humiliating, distressing or alarming the person.

This crime consists of the accused:

[can be adapted as appropriate]

- intentionally engaging in a sexual activity in the person's presence for the purpose of obtaining sexual gratification, or
- for the purpose of humiliating distressing or alarming the person (or both),

without the person's consent, and without any reasonable belief that the person consented

(Alternative modus)

This crime consists of the accused

- causing the person to be present while a third party engages in such an activity for the purpose of obtaining sexual gratification, or
- for the purpose of humiliating distressing or alarming the person (or both),

without the person's consent, and without any reasonable belief that the person consented.

Engaging in a sexual activity in the person's presence and the person's lack of consent have to be proved by corroborated evidence.

[Or as appropriate]

Causing the person to be present while the sexual activity occurs and the person's lack of consent have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Several points call for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the person's presence. It does not need to involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

When is something done "sexually" or what is a "sexual" activity? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Engaging in a sexual activity in the person's presence covers the accused engaging in such an activity in a place in which he can be observed by the person. It also covers a third party engaging in such an activity in a place in which he/she can be observed by the person.

What is "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of sexual gratification or satisfaction. It is subjective. The gratification must have come from the presence of the person. It is enough for the Crown to show that the person was present and could have seen what happened. It need not be shown that she/he did see.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused
2. the conduct was sexual
3. the purpose of that conduct was to obtain sexual gratification, or to humiliate, distress or alarm the person named in the charge,
4. the absence of the person's consent to that conduct

[If appropriate]

5. the absence on the accused's part of any reasonable belief that the person named in charge consented.

Section 6: Coercing a person to look at a sexual image

Charge…. is a charge of causing a person to look at a sexual image, and alleges a contravention of the section of the Act referred to in the charge.

This crime requires the accused to have behaved with one or other or both of these purposes:

- For the purpose of obtaining sexual gratification; or
- For the purpose of humiliating, distressing or alarming the person

This crime consists of the accused

- intentionally causing a person to look at a sexual image for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the person,
- without the person's consent, and without any reasonable belief that the person consented.

(IN MOST CASES)

In this case, however, I direct you that no issue of reasonable belief arises for consideration.

The causing of the person to look at the sexual image and the person's lack of consent have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances.

Those elements do not require to be corroborated. The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Several points call for comment:

What is a "sexual image"? In this context, It is an image produced in any way, still or moving, of the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or of the genitals of the accused, or of a third party or of an imaginary person. A sexual activity covers penetration, touching or any other activity which a reasonable person would, in all the circumstances of the case, consider it to be sexual.

"Causing" means that there must be some direct connection between what the accused did and the result which happened. Causing need not involve compulsion. Taking the person by surprise, e.g., by putting an offending image among slides being shown would be enough.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? That means that the accused must have acted so as to obtain some form of sexual gratification or satisfaction from causing the person to see the image. Whether or not a reasonable person would have got such gratification is neither here nor there. Whether or not the accused did get such gratification rom what he did does not matter so long as that was his purpose.

How do you judge the accused's purpose? Consider what the image was and ask yourselves the question, “Why did he/she cause the complainer to look at the image?”

If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary
So, for the Crown to prove this charge, it must show:

1. intentionally causing the person to look at a sexual image,
2. doing so to obtain sexual gratification himself/herself, or to humiliate, distress or alarm the person
3. the absence of the person's consent to that conduct

[If appropriate]

4. the absence on the accused's part of any reasonable belief that the person consented.

Section 7: Communicating indecently

Law:

“**7 Communicating indecently etc**.

1. If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by

whatever means, a sexual verbal communication at, another person ("B")—

a. without B consenting to its being so sent or directed, and
b. without any reasonable belief that B consents to its being so sent or directed,

then A commits an offence, to be known as the offence of communicating indecently.

2. If, in circumstances other than are as mentioned in subsection (1), a person ("A"), intentionally and for a purpose mentioned in subsection (3), causes another person ("B") to see or hear, by whatever means, a sexual written communication or sexual verbal communication—

a. without B consenting to seeing or as the case may be hearing it, and
b. without any reasonable belief that B consents to seeing or as the case may be hearing it,

then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.

3. The purposes are—

a. obtaining sexual gratification,
b. humiliating, distressing or alarming B.

4. In this section—

"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—

a. communication which comprises sounds of sexual activity (whether actual or simulated), and
b. communication by means of sign language."

Section 49:

"**49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36**

1. For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—

a. obtaining sexual gratification, or
b. humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

2. In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A."

The provision was examined in *PF Edinburgh v Aziz* [2022] HCJAC 46. The High Court of Justiciary upheld the sheriff, who had been overturned by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked "what else can you offer?" and when they enquired what he meant he replied, "sex." Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case.

Direction:

"Charge.... is a charge of communicating indecently under section 7 of the Act.

Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The right extends further. The law protects a person's freedom from being subjected to sexual language without their consent where it is directed for unlawful purposes which I will explain. There must be consent. A person must be in a position to make a choice.

Section 7(1)

This crime consists of the accused:

- intentionally sending, by any means, a sexual written communication, to a complainer, or
- intentionally directing, by any means, a sexual verbal communication, at a complainer,
- for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the complainer(or both),
- without the complainer's consent to it being so sent or directed, and
- without any reasonable belief that the complainer consented to it being so sent or directed.

(**IN MOST CASES**)

In this case, however, I direct you that no issue of reasonable belief arises for consideration.

Alternatively:

Section 7(2)

This crime can [also] take the form of the accused:

- intentionally causing the complainer to see or hear, by any means, a sexual written communication or verbal communication,
- for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the complainer (or both)
- without the complainer's consent to seeing or hearing it,
- and without any reasonable belief that the complainer was consenting to seeing or hearing it.]

IN MOST CASES

In this case, however, I direct you that no issue of reasonable belief arises for consideration.

The direction continues here for both 7(1) and 7(2):

Several points call for comment:

A "written communication" is one in any written form. It is wide enough to cover writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form. It includes a communication which comprises the sound of sexual activity, actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. The Crown does not need to show that what was sent or directed was actually received or heard. Just sending it is enough if the accused has done all he/she/they needs to do for the complainer to receive it.

"Causing", where the accused has not sent or directed the communication, simply means that there must be some direct connection between whatever the accused did and the result which happened, namely the seeing or hearing of it by the complainer.

The accused must have acted intentionally. Intention is to be inferred from what is proved to have been said and/or done. An intentional act is a deliberate act. It is the opposite of an accidental or careless act.

A communication is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

What is sexual gratification?

It means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the communication and ask yourselves the question, “Why would the accused send it to/direct it at/cause it to be seen/heard by, the complainer?”

If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Consent-

Use Directions from s1 as appropriate.

Reasonable belief-

Use Directions from s1 as appropriate.

Corroboration-

The essential elements of the charge are

- sending a written communication to the complainer

OR

- [directing a sexual verbal communication at a complainer; or causing the complainer person to see or hear, by any means, a sexual written communication or verbal communication,]

and

- lack of consent by the complainer

which must be proved by corroborated evidence, meaning evidence from two sources.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused’s purpose do not need corroboration.

(**Note** *If directing on reasonable belief, the direction should include the following:)*

[Whether an accused lacked reasonable belief is an inference from the evidence you accept. It does not need to be corroborated.]

Where the complainer is an essential witness-

Use Directions from s1 as appropriate.

Where corroboration from distress/injuries

Use Directions from s1 as appropriate.

Summary:

So, for the Crown to prove this charge, you must be satisfied that:

1. [**7(1)**] the accused intentionally sent a written communication to [or directed a verbal communication at the complainer] **OR**

[**7(2)**]the accused intentionally caused the complainer to see or hear, a written or verbal communication

2. its content was sexual
3. it can be reasonably inferred in all the circumstances that the accused did so to obtain sexual gratification, or to humiliate, distress or alarm the complainer
4. the complainer did not consent to it being sent or directed/seeing or hearing it, and

If appropriate

5. the accused had no reasonable belief that the complainer was consenting.

Consider whether to give a direction under section 288DA (delay in reporting)

Section 8: Sexual exposure

Charge…. is a charge of sexual exposure, and alleges a contravention of the section of the Act referred to in the charge.

Definition

This crime consists of the accused

- intentionally exposing his/her genitals in a sexual manner to the person, with the intention that the person will see them,
- for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the person (or both),
- without the person's consent, and
- without any reasonable belief that the person consented.

These two things

- exposure of the accused's genitals to the person and
- lack of consent by the person,

all have to be proved by corroborated evidence.

That the accused acted intentionally; that he intended the complainer to see his genitals and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated. The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

The exposure requires to be in a sexual manner. The exposure is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Several points call for comment:

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to produce humiliation, distress or alarm.

The exposure must have been to the person in particular and done with the intention that he/she sees the genitals. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? It means that the accused must have acted so as to obtain some form of sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. The gratification must have come from the exposure to the person. It is not enough for the Crown to show that the person was present, and could have seen what happened.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally exposed her/his genitals to the person named in the charge, intending

that the person named in the charge sees them,

2. the exposure is in a sexual manner,

3. his doing so was to obtain sexual gratification for herself/himself, or to humiliate, distress or alarm the person, or both

4. the absence of the person's consent to that conduct,

[If appropriate]

5. the absence on the accused's part of any reasonable belief that the person consented.

Section 9: Voyeurism

Charge…. is a charge of voyeurism, and alleges a contravention of the section of the Act referred to in the charge.

The crime of voyeurism consists of the accused: **[Select as appropriate]**

- observing a person doing a private act, to obtain sexual gratification for himself/herself, or to humiliate, distress or alarm the person (or both), or
- operating equipment with the intention of enabling himself/herself, or anyone else, to observe the person doing a private act, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both), or
- recording the person doing a private act, with the intention that the accused or anyone else, will look at an image of the person doing a private act, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both), or
- operating equipment beneath the person's clothing, with the intention that the accused, or anyone else, will see the person's genitals or buttocks, exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both), or
- recording an image beneath the person's clothing of the person's genitals or buttocks, exposed or covered with underwear, or of the underwear, in circumstances where these would not otherwise be visible, with the intention that the accused, or anyone else, will look at the image, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both), or
- installing equipment, or constructing or adapting a structure or part of a structure with the intention of enabling himself/herself, or anyone else,

to do any of these things, without the person's consent, and without any reasonable belief that the person consented.

(IN MOST CASES)

In this case, however, I direct you that no issue of reasonable belief arises for consideration.

The act described in the charge and the lack of consent by the person must be proved by

corroborated evidence.

The purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. That element does not need to be corroborated. The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Several points call for comment:

What is meant by a "private act"? The person is doing a private act if he/she is in a place which in the circumstances would reasonably be expected to provide privacy, and, for example,

• his/her genitals, buttocks or breasts are exposed or covered only with underwear, or

• he/she is using the lavatory, or

• he/she is doing a sexual act of a kind not ordinarily done in public.

[If required] 'operating equipment' is defined in section 10(2) and 'structure' defined in section 10(3) [adapt as necessary]

Intention is critical. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? It means that the accused must have acted so as to obtain some form of sexual gratification from observing a person doing a private act.. Whether or not a reasonable person would have got such gratification is neither here nor there. Whether or not the accused did get such gratification from what he/she did does not matter so long as that was his/her purpose.

How do you judge the accused's purpose?

Consider what the accused did and ask yourselves, “Why did he/she do that?”

[A judge may wish to specify the conduct libelled in posing the question]

If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant

Consider whether to give a direction under section 288DA (delay in reporting)

Deal with consent as appropriate. See paragraph 5.3 below.

Deal with reasonable belief as appropriate. See paragraph 5.4 below. The sample directions for s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. that conduct was for the purpose of obtaining sexual gratification for himself (or another), or to humiliate, distress or alarm the person named in the charge

3. the absence of the person's consent to that conduct

[If appropriate]

4. the absence on the accused's part of any reasonable belief that the alleged person named in the charge consented.

Section 11: Administering a substance for sexual purposes

Charge…. is a charge of administering a substance for sexual purposes, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of

- intentionally administering a substance to a person, or
- causing a substance to be taken by the person,
- without his/her knowledge,
- and without any reasonable belief that he/she knew,
- for the purpose of stupefying or overpowering him/her,
- and to enable anybody to engage in a sexual activity with him/her.

The fact of administration or the taking of the substance and the fact that it was unknown to the complainer require to be proved by corroborated evidence.

That the accused acted intentionally and his/her purpose in administering the substance are matters of inference from the proved facts and circumstances and do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Several points call for comment:

"Administering" simply means what it says, it is giving.

"Causing a substance to be taken" describes actions less direct and immediate.

"Causing" simply means that there must be some direct connection between what the accused did and the person's resulting action. It covers a variety of situations, like putting a drug into a bottle

of lemonade, intending it to be drunk by the person, or persuading someone else to spike the drink.

If the accused, by act or omission, induces a reasonable belief in the person that the substance administered or taken is of substantially less strength or quantity than in fact it is, then the law says you have to disregard any knowledge or belief as to knowledge which the person has. So, if the person is given a drink with more substantially vodka in it than he/she expected, the law says he/she does not know what he/she is consuming.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is a "sexual activity"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider that to be sexual. So, it is an objective test.

Consider whether to give a direction under section 288DA (delay in reporting)

In relation to reasonable belief, if it arises, the sample directions on s1 rape can be adapted as necessary.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the intentional administration of the substance by the accused or the causing by him of the substance to be taken by the person

2. that it was done to stupefy or overpower him/her

3. that it was to enable someone to engage in a sexual activity with him/her

4. he/she did not know he/she was being given the substance

[If appropriate]

5. the accused had no reasonable belief that he/she did know.

Section 18: Rape of a young child

Charge…. is a charge of rape of a young child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of rape of a young child consists of the intentional or reckless penetration, to any extent, by the accused's penis of the person's

- vagina
- anus
- mouth

where the person has not reached the age of 13 years.

The act of penile penetration and the fact that the child was under the age of 13 when the conduct is said to have occurred both have to be proved by corroborated evidence.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

In the circumstances of this case, the age of the complainer is established by it being stated in the charge. The age of the complainer is therefore not in dispute.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER, THIS DIRECTION WILL REQUIRE ADAPTATION: SEE THE LAW SECTION OF THIS CHAPTER PARAGRAPH 13].

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Any degree of penetration is enough, and is sufficient to complete the offence. Emission of semen is not necessary.

[Recklessness is unlikely to arise and reference to it can usually be omitted. If it does arise something like the following can be adapted]

Penetration must be intentional or reckless. Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the behaviour. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Reckless acts show total indifference to and complete disregard of the consequences.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the intentional or reckless penile penetration by the accused and

2. the child was under the age of 13 years at the time.

Section 18: Assault with intent to rape (young child)

Please see the remarks in relation to assault with intent to rape. This is a common law offence with a statutory aggravation but is included here for ease of reference.

An intention to rape a person makes the assault more serious.

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults. Weapons may or may not be involved. Injury may or may not result. So, menaces or threats producing fear or alarm in the other person are assault

If the child was deliberately threatened, menaced or attacked, with the intention of committing the offence of rape, that is the crime of assault with intent to rape.

To define assault with intent to rape, I require to define the crime of rape of a young child set out in the Act referred to in the charge

The crime of rape consists of the intentional or reckless penetration, to any extent, by the accused's penis of the child's

- vagina
- anus
- mouth

where the child has not reached the age of 13 years.

So in this case the fact that the accused assaulted the child and that the child was under the age of 13 when the conduct is said to have occurred have to be proved by corroborated evidence.

Whether the accused has the necessary intent to rape is a matter which can only be inferred from what is proved to have been said or done and the circumstances in which it happened.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

In the circumstances of this case, the age of the complainer is established by it being stated in the charge. The age of the complainer is therefore not in dispute.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the accused deliberately menaced, threatened or attacked the child with the intention of raping her.

2. the child was under the age of 13 years at the time

Section 19: Sexual assault of a young child by penetration

Charge…. is a charge of sexual assault of a young child by penetration, and alleges a contravention of the section of the Act referred to in the charge.

The crime of sexual assault of a young child by penetration consists of the intentional or reckless sexual penetration, to any extent, by the accused with any part of his body or anything else, of the child's

• vagina

• anus

where the child has not reached the age of 13 years.

These two things,

- The act of penetration of the sort described and
- that the child was under the age of 13 when the conduct is said to have occurred

have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

In the circumstances of this case, the age of the complainer is established by it being stated in the charge. The age of the complainer is therefore not in dispute.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

[Recklessness is unlikely to arise and if it does not then reference to it can be omitted. If it does arise something like the following can be adapted]

The conduct must be intentional or reckless. Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the behaviour. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

When is something done "sexually"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

It is important to note that the penetration can be by any part of the accused's body, or by an object of any sort. This offence applies to vaginal or anal penetration.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the child was penetrated vaginally or anally by the accused with some part of his body or anything else

2. that penetration was sexual

3. that penetration was intentional or reckless

4. the child was under the age of 13 years at the time.

Section 20: Sexual assault on a young child

Charge…. is a charge of sexual assault on a young child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of sexual assault consists of:

[can be adapted as appropriate]

- the intentional or reckless sexual penetration by any means, including penetration by the accused's penis, and to any extent, of the child's vagina, anus or mouth
- intentionally or recklessly touching the child sexually
- engaging in any other form of sexual activity in which the accused intentionally or recklessly has physical contact with the child, including bodily contact, contact by means of an implement, and whether through clothing or not

- intentionally or recklessly ejaculating semen on to the child
- intentionally or recklessly emitting urine or saliva on to the child sexually

where the child has not reached the age of 13 years.

These two things

- the act of the sort described and
- that the child was under the age of 13 when the conduct is said to have occurred

both have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

(In case not involving penetration adapt the following to define intention and recklessness. If recklessness does not arise then reference to it can be omitted)

The conduct must be intentional or reckless. Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the behaviour. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

When is penetration "sexual", or when is an activity "sexual"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

For the Crown to prove this charge, it must establish by corroborated evidence each of the following:

1. conduct of the sort described in the charge by the accused.

2. it was sexual

3. the child was under the age of 13 at the time.

Section 21: Causing a young child to participate in a sexual activity

Charge…. is a charge of causing a young child to participate in a sexual activity, and alleges a contravention of the section of the Act referred to in the charge.

The crime of causing a young child to participate in a sexual activity consists of the accused intentionally causing a child to participate in a sexual activity where that child has not reached the age of 13 years.

These two things,

- causing the child to participate in a sexual activity, and
- that the child was under the age of 13 when the conduct is said to have occurred

both have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the child's resulting conduct. Causing need not involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Physical contact between the accused and the child may be involved, but not necessarily so. Persuasion is enough.

When is something done "sexually" or what is a "sexual" activity? Penetration, touching or any

other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. it must be sexual

3. the child was under the age of 13 years at the time.

Section 22: Causing a young child to be present during a sexual activity

Charge…. is a charge of causing a young child to be present during a sexual activity, and alleges a contravention of the section of the Act referred to in the charge.

This crime requires the accused to have behaved with one or other or both of these purposes:

For the purpose of obtaining sexual gratification; or

For the purpose of humiliating, distressing or alarming the person

This crime consists of the accused:

- intentionally engaging in a sexual activity in the child's presence for the purpose of obtaining sexual gratification or humiliating distressing or alarming the child (or both),
- where the child was under 13 years of age at the time.

These two things,

- engaging in a sexual activity and
- that the child was under the age of 13 when the conduct is said to have occurred

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this

crime is alleged to have been committed, and they do not need to be corroborated.

[Alternative Modus**]**

- This crime consists of the causing the child to be present while a third party engages in such an activity for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the child (or both)
- Where the child was under 13 years of age at the time

These two things,

- causing the child to be present when the sexual activity occurs and
- that the child was under the age of 13 when the conduct is said to have occurred

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION **TO THIS CHAPTER]**

Several points call for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the child's presence. Causing need not involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

When is something done "sexually" or what is a "sexual" activity? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Engaging in a sexual activity in the child's presence covers the accused engaging in such an activity in a place in which he/she can be observed by the child, and it also covers a third party engaging in such an activity in a place in which he/she can be observed by the person.

What is involved in "sexual gratification"? That simply means that the accused must have acted so

as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the presence of the person. It is enough for the Crown to show that the person was present, and could have seen what happened. It need not be shown that he/she did.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. that it was sexual

3. the purpose of that conduct was to obtain sexual gratification, or to humiliate, distress or alarm the child (or both),

4. the child was under the age of 13 years at the time.

Section 23: Causing a young child to look at a sexual image

Charge…. is a charge of causing a young child to look at a sexual image, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally causing the child to look at a sexual image for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the person (or both), where the child was under 13 years of age at the time.

These two things,

- causing the child to look at a sexual image and
- and that the child was under the age of 13 years when the conduct is said to have occurred

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION TO THIS CHAPTER]

Several points call for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the result which happened. Causing need not involve compulsion. Taking the child by surprise, e.g., by putting an offending image among slides being shown would be enough.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is involved in "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the presence of the child. It is enough for the Crown to show that the child was present, and could have seen what happened. It need not be shown that he/she did.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

What is a "sexual image"? In this context, it is an image produced in any way, still or moving, of the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or of the genitals of the accused, or of a third party, or of an imaginary person. A sexual activity covers penetration, touching or any other activity which a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. intentionally causing the child to look at a sexual image,

2. doing so to obtain sexual gratification himself/herself, or to humiliate, distress or alarm the child

3. the child was under 13 years at the time.

Section 24: Communicating indecently with a young child

Charge…. is a charge of communicating indecently with a young child, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally sending, by any means, a sexual written communication, or directing, by any means, a sexual verbal communication to the child, for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child (or both), where the child has not reached the age of 13 years at the time.

A communication is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

These two things,

- sending a sexual written communication, or directing a sexual verbal communication and
- that the child was under the age of 13 when the conduct is said to have occurred

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Alternatively,

[if these circumstances do not exist, e.g. it was not sent or directed by the accused]

This crime also can take the form of the accused intentionally causing the child to see or hear, by any means, a sexual written communication or verbal communication for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child (or both), where he/she was under the age of 13 years at the time.

These two things,

- causing the child to see or hear a sexual written or verbal communication and
- that the child was under the age of 13 when the conduct is said to have occurred

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is involved in "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the presence of the child. It is enough for the Crown to show that the child was present, and could have seen what happened. It need not be shown that he/she did.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant.

A "written communication" is one in any written form. It is wide enough to cover writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form. It includes a communication which comprises the sound of sexual activity, actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. To prove this crime the Crown does not need to show that what was sent or directed was actually received. It is sufficient if it was dispatched, if the accused has done all he needs to do for the child to receive it.

"Causing", where the accused has not sent or directed the communication, simply means that there must be some direct connection between whatever the accused did and the result which happened, namely the seeing or hearing of it by the child.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally sending a written or verbal communication

2. its content was sexual

3. he/she did to obtain sexual gratification, or to humiliate, distress or alarm the child, and

4. the child was under the age of 13 at the time.

Section 25: Sexual exposure to a young child

Charge…. is a charge of sexual exposure to a young child, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally exposing his/her genitals in a sexual manner to the child, with the intention that he/she will see them, for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child (or both), where the he/she was under the age of 13 years at the time.

The exposure requires to be in a sexual manner. The exposure is sexual of a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

These two things

- exposure of the accused's genitals to the child, intending that he/she sees them and
- the child being under 13 when the conduct is said to have occurred,

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to produce humiliation, distress or alarm.

The exposure must have been to the child in particular, and done with the intention that he/she sees them. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? It simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the exposure to the child. It is not enough for the Crown to show that he/she was present, and could have seen what happened.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

It is no defence to this charge that the accused believed the child had reached the age of 13 years. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally exposed his/her genitals to the child intending that he/she sees them,

2. the exposure was in a sexual manner

3. his/her doing so was to obtain sexual gratification himself/herself, or to humiliate, distress or alarm the child,

4. the child was under the age of 13 at the time.

Section 26: Voyeurism towards a young child

[as amended by s 34A of the Criminal Justice and Licensing (Scotland) Act 2010]

Charge…. is a charge of voyeurism towards a young child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of voyeurism towards a young child consists of the accused:

[can be adapted as appropriate]

- observing the child doing a private act, to obtain sexual gratification for himself/herself, or to humiliate, distress or alarm the child (or both), or
- operating equipment with the intention of enabling himself/herself, or anyone else, to observe the child doing a private act, again to obtain sexual gratification for himself/herself or for the other observing party, or to humiliate, distress or alarm the child (or both), or
- recording the child doing a private act, with the intention that the accused or anyone else, will look at an image of the child doing a private act, to obtain sexual gratification for himself/herself or for the other observing party, or to humiliate, distress or alarm the child (or both), or
- operating equipment beneath the child's clothing, with the intention that the accused, or anyone else, will see the child's genitals or buttocks, exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the child (or both), or
- recording an image beneath the person's clothing of the child's genitals or buttocks, exposed or covered with underwear, or of the underwear, in circumstances where these would not otherwise be visible, with the intention that the accused, or anyone else, will look at the image, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the child (or both), or
- installing equipment, or constructing or adapting a structure or part of a structure with the intention of enabling the accused, or anyone else, to do any of these things.

where the child was under the age of 13 years.

These two things,

- an act of the sort described in the charge, and
- the child being under the age of 13 at the time

have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE]

There is no dispute that the complainer was under the age of 13 years on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF THE COMPLAINER THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

[If required] 'operating equipment' is defined in section 10(2) and 'structure' defined in section 10(3). (ADAPT THE DEFINITION AS APPROPRIATE)

Intention is critical. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the presence of the child.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

What is meant by a "private act"? The child is doing a private act if he/she is in a place which in the circumstances would reasonably be expected to provide privacy, and

• his/her genitals, buttocks or breasts are exposed or covered only with underwear, or

• he/she is using the lavatory, or

• he/she is doing a sexual act of a kind not ordinarily done in public.

It is no defence to this charge that the accused believed the child was 13 years old or older. Consent is irrelevant.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about the evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. that conduct was for the purpose of obtaining sexual gratification for himself/herself (or

another), or to humiliate, distress or alarm the child

3. the child was under the age of 13 at the time.

Section 28: Having sexual intercourse with an older child

Charge…. is a charge of having sexual intercourse with an older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of having sexual intercourse with an older child consists of the intentional or reckless penetration, to any extent, by the accused's penis of the child's

- vagina
- anus
- mouth

where:

1. the accused has reached the age of 16 years

2. the child has reached the age of 13 years but is not yet 16.

These three things,

- penile penetration,
- that the accused was 16 years of age or over at the time and
- that the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE IS STATED IN THE CHARGE AND NO CHALLENGE TO THAT OR THE STATED AGE OF THE ACCUSED

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. Please see paragraph 5.7 below on "Deeming Provisions".

Several points call for comment:

Consider whether to give a direction under section 288DA (delay in reporting)

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

[If required see section 39(7) of the 2009 Act]: For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) defence, if raised. See paragraph 5.6.1 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. intentional or reckless penile penetration by the accused

2. the accused was 16 or over at the time

3. the child had reached the age of 13 but was not yet 16 the time.

Section 29: Engaging in penetrative sexual activity with or towards an older child

Charge…. is a charge of engaging in penetrative sexual activity with or towards an older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of engaging in penetrative sexual activity with or towards an older child consists of the intentional or reckless penetration to any extent by any part of the accused's body, including his penis, or anything else, of the child's

- vagina
- anus

where:

1. the accused had reached the age of 16 years

2. the child had reached the age of 13 but is not yet 16.

These three things,

- penetration of the sort described,
- that the accused had reached the age of 16 years at the time and
- the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points call for comment:

Take in definition of Penetration under Part 4 of the 2009 Act. See paragraph 5.1.2 below.

When is something done "sexually"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

It is important to note that the penetration can be by any part of the accused's body, or by an object of any sort. This offence applies to vaginal or anal penetration.

[If required see section 39(7) of the 2009 Act]: For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) defence, if raised. See paragraph 5.6.1 below. See also section 39(2) for restrictions to these defences.

Consider whether to give a direction under section 288DA (delay in reporting)

Take in Guidance about Evidence. See paragraph 5.5 below.

Summary

So, for the Crown to prove this charge, it must show:

1. the child was penetrated vaginally or anally by some part of the accused's body or by anything else

2. that activity was sexual

3. that penetration was intentional or reckless

4. the accused had reached the age of 16 years at the time

5. the child had reached the age of 13 but was not yet 16 at the time.

Section 30: Engaging in sexual activity with or towards an older child

Charge…. is a charge of engaging in sexual activity with or towards an older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of engaging in sexual activity with or towards an older child consists of:

- the intentional or reckless sexual penetration by any means, including penetration by the accused's penis, and to any extent, of the child's vagina, anus or mouth
- intentionally or recklessly touching the child sexually
- engaging in any other form of sexual activity in which the accused intentionally or recklessly has physical contact with the child, including bodily contact, contact by means of an implement, and whether through clothing or not
- intentionally or recklessly ejaculating semen on to the child
- intentionally of recklessly emitting urine or saliva on to the child sexually

where:

1. the accused had reached the age of 16 years

2. the child had reached the age of 13 years but is not yet 16.

These three things,

- an act of the sort described,
- that accused had reached the age of 16 years at the time
- the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge or that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points for comment:

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

(In case not involving penetration adapt last three paragraphs to define intention and recklessness)

When is penetration "sexual", or when is an activity "sexual"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

[If required see section 39(7) of the 2009 Act**]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must establish by corroborated evidence each of the following:

1. conduct of the sort described in the charge by the accused

2. it was sexual

3. the accused had reached the age of 16 years

4. the child had reached the age of 13 but was not yet 16 at the time.

Section 31: Causing an older child to participate in a sexual activity

Charge…. is a charge of causing an older child to participate in a sexual activity, and alleges a contravention of the section of the Act referred to in the charge.

The crime of causing an older child to participate in a sexual activity consists of the accused intentionally causing the child to participate in a sexual activity where

1. the accused had reached the age of 16 years

2. the child had reached the age of 13, but is not yet 16.

These three things,

- causing the person to participate in a sexual activity,
- the accused having reached the age of 16
- the child had reached the age of 13, but was not yet 16 years of age at the time

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THAT OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the child's resulting conduct. Causing need not involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Physical contact between the accused and the child may be involved, but not necessarily so. Persuasion is enough.

When is something done "sexually" or what is a "sexual" activity? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

[If required see section 39(7) **of the 2009 Act]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. it was sexual

3. the accused had reached the age of 16 years at the time

4. the person named in the charge had reached the age of 13 but was not yet 16 at the time.

Section 32: Causing an older child to be present during a sexual activity

Charge…. is a charge of causing an older child to be present during a sexual activity, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused

intentionally engaging in a sexual activity in the child's presence for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the child (or both)

where

1. the accused had reached the age of 16 years at the time, and

2. the child had reached the age of 13 but was not yet 16 at the time.

These three things,

- engaging in a sexual activity, or causing the child to be present while it occurs
- the accused having reached the age of 16 years and
- the child had reached the age of 13 but was not yet 16 at the time.

all have to be proved by corroborated evidence.

[Alternative Modus]

This crime consists of the accused causing a child to be present while a third party engages in such a sexual activity for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the child (or both) where:

1. the accused had reached the age of 16 years at the time, and

2. the child had reached the age of 13, but is not yet 16 at the time.

These three things,

- causing the child to be present while the sexual activity occurs
- the accused having reached the age of 16 years and
- the child had reached the age of 13, but was not yet 16 at the time

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points call for comment:

"Causing" simply means that there must be some direct connection between what the accused did and the child's resulting presence. Causing need not involve compulsion.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

When is something done "sexually" or what is a "sexual" activity? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

Engaging in a sexual activity in the child's presence covers the accused engaging in such an activity in a place in which he can be observed by the child, and it also covers a third party engaging in such an activity in a place in which he can be observed by the child.

What is "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the presence of the child. It is enough for the Crown to show that the child was present, and could have seen what happened. It need not be shown that he/she did.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed is irrelevant.

[If required see section 39(7) **of the 2009 Act]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is

irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. it was sexual

3. the purpose of that conduct was to obtain sexual gratification, or to humiliate, distress or alarm the child (or both),

4. the accused had reached the age of 16 years at the time

5. the child had reached the age of 13 but was not yet 16 at the time.

Section 33: Causing an older child to look at a sexual image

Charge…. is a charge of causing an older child to look at a sexual image, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally causing the child to look at a sexual image for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the child (or both), where

1. the accused had reached the age of 16 years, and

2. the child had reached the age of 13 but is not yet 16.

These three things,

- causing the child to look at a sexual image,
- the accused was 16 or over at the time
- the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not needto be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points in the definition I have just given you call for comment:

What is a "sexual image"? In this context, It is an image produced in any way, still or moving, of the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or of the genitals of the accused, or of a third party or of an imaginary person. A sexual activity covers penetration, touching or any other activity which a reasonable person would, in all the circumstances of the case, consider it to be sexual.

"Causing" means that there must be some direct connection between what the accused did and the result which happened. Causing does not need to involve compulsion. Taking the child by surprise, e.g., by putting an offending image among slides being shown would be enough.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? That means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction from causing the person to see the image. Whether or not a reasonable person would have got such gratification is neither here nor there. Whether or not the accused did get such gratification from what he did does not matter so long as that was his purpose. .

How do you judge the accused's purpose?

Consider what the image was and ask yourselves the question, "Why did he/she cause the complainer to look at the image?"

If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed is irrelevant.

[If required see section 39(7) of the 2009 Act]: For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally causing the child to look at a sexual image,

2. doing so to obtain sexual gratification himself/herself, or to humiliate, distress or alarm the child

3. the accused was 16 or over

4. the child had reached the age of 13 but was not yet 16 at the time.

Section 34: Communicating indecently with an older child

Charge…. is a charge of communicating indecently with an older child, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally sending, by any means, a sexual written communication, or directing, by any means, a sexual verbal communication to the child, for the purpose of obtaining sexual gratification, or humiliating distressing or alarming him/her (or both), where

- the accused had reached the age of 16 years
- the child had reached the age of 13 but is not yet 16 at the time.

A communication is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

These three things,

- sending a sexual written communication, or directing a sexual verbal communication
- that the accused was 16 or over and
- that the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a

matter of inference from the proved facts and circumstances. Those elements do not need to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

[Alternatively, if these circumstances do not exist, e.g. it was not sent or directed by the accused]

This crime also can take the form of the accused intentionally causing the child to see or hear, by any means, a sexual written communication or verbal communication for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child (or both), where

1. the accused had reached the age of 16 years
2. the child had reached the age of 13 but is not yet 16 at the time.

These three things,

- causing the child to see or hear a sexual written or verbal communication
- that the accused was 16 or over and
- that the child had reached the age of 13 but was not yet 16 at the time

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not need to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points call for comment:

A "written communication" is one in any written form. It is wide enough to cover writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form. It includes a communication which comprises the sound of sexual activity, actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. To prove this crime the Crown does not need to show that what was sent or directed was actually received. It is sufficient if it was dispatched, if the accused has done all he needs to do for the child to receive it.

"Causing", where the accused has not sent or directed the communication, simply means that there must be some direct connection between whatever the accused did and the result which happened, namely the seeing or hearing of it by the child.

The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? It means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfactionfrom the sending of a sexual written communication, or the directing of a sexual verbal communication to the person"... Whether or not a reasonable person would have got such gratification is neither here nor there. Whether or not the accused did get such gratification from what he did does not matter so long as that was his purpose

How do you judge the accused's purpose?

Consider the nature of the communication and ask yourselves the question, "Why did the accused send it/direct it/cause it to be seen/heard by the complainer?"

If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

[If required see section 39(7) of the Act]: For the avoidance of doubt, it is not a defence to this

charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally sending a written or verbal communication

2. its content was sexual

3. he/she did to obtain sexual gratification, or to humiliate, distress or alarm the child

4. the accused had reached the age of 16 years

5. the child had reached the age of 13 but was not yet 16 at the time.

Section 35: Sexual exposure to an older child

Charge…. is a charge of sexual exposure to an older child, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the accused intentionally exposing his/her genitals in a sexual manner to the child, with the intention that he/she will see them, for the purpose of obtaining sexual gratification or humiliating distressing or alarming the child (or both), where

1. the accused had reached the age of 16 years, and
2. the child had reached the age of 13 is not yet 16.

The exposure requires to be in a sexual manner. The exposure is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

These three things,

- exposure by the accused of his/her genitals to the child, intending that the child sees them
- the accused having reached the age of 16 years, and
- the child had reached the age of 13 but was not yet 16 at the time,

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to

be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points call for comment:

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to produce humiliation, distress or alarm.

The exposure must have been to the child in particular, and done with the intention that the child sees them. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? That simply means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction. That is a subjective matter. Whether or not a reasonable person would have got such gratification is neither here nor there. That gratification must have come from the exposure to the child. It is not enough for the Crown to show that he/she was present, and could have seen what happened.

How do you judge the accused's purpose? If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

[If required see section 39(7) **of the 2009 Act]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA *(delay in reporting)*

Summary

So, for the Crown to prove this charge, it must show:

1. the accused intentionally exposed his/her genitals to the child intending that he/she sees them,

2. the exposure was in a sexual manner,

3. his/her doing so to obtain sexual gratification himself/herself, or to humiliate, distress or alarm the child (or both),

4. the accused was 16 or over at the time,

5. the child had reached the age of 13 but was not yet 16 at the time.

Section 36: Voyeurism towards an older child

As amended by s 34A of the Criminal Justice and Licensing (Scotland) Act 2010

Charge…. is a charge of voyeurism towards an older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of voyeurism towards an older child consists of the accused:

[can be adapted as appropriate]

- observing the child doing a private act, to obtain sexual gratification for himself/herself, or to humiliate, distress or alarm him/her (or both), or
- operating equipment with the intention of enabling himself/herself, or anyone else, to observe the child doing a private act, again to obtain sexual gratification for himself/herself, or for the other observing party, or to humiliate, distress or alarm the child (or both), or
- recording the child doing a private act, with the intention that the accused or anyone else, will look at an image of the child doing a private act, to obtain sexual gratification for himself/herself, or for the other observing party, or to humiliate, distress or alarm the child (or both), or
- operating equipment beneath the child's clothing, with the intention that the accused, or anyone else, will see his/her genitals or buttocks, exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the child (or both), or
- recording an image beneath the child's clothing of the person's genitals or buttocks, exposed or covered with underwear, or of the underwear, in circumstances where these would not otherwise be visible, with the intention that the accused, or anyone else, will look at the image, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the child (or both), or
- installing equipment, or constructing or adapting a structure or part of a structure with the intention of enabling the accused,
- or anyone else, to do any of these things,

where:

1. the accused had reached the age of 16 years, and

2. the child had reached the age of 13 but is not yet 16.

These three things,

- an act of the sort described in the charge,
- the accused being 16 or over at the time and
- the child had reached the age of 13, but was not yet 16 at the time

all have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not need to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge and that the accused had reached the age of 16.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provision 1 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7.1 below.

Several points in the definition call for comment:

[If required] 'operating equipment' is defined in section 10(2) and 'structure' defined in section 10(3).(ADAPT AS NECESSARY)

What is meant by a "private act"? The child is doing a private act if he/she is in a place which in the circumstances would reasonably be expected to provide privacy, and

• his/her genitals, buttocks or breasts are exposed or covered only with underwear, or

• he/she is using the lavatory, or

• he/she is doing a sexual act of a kind not ordinarily done in public.

Intention is critical. The accused must have acted intentionally, not just recklessly. Intention is a state of mind, something to be inferred or deduced from what is proved to have been said or

done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

What is "sexual gratification"? It means that the accused must have acted so as to obtain some form of personal sexual gratification or satisfaction from observing a person doing a private act.. Whether or not a reasonable person would have got such gratification is neither here nor there. Whether or not the accused did get such gratification from what he/she did does not matter so long as that was his/her purpose.

How do you judge the accused's purpose?

Consider what the accused did and ask yourselves, “Why did he/she do that?”

[A judge may wish to specify the conduct libelled in posing the question]

If it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether he/she was in fact humiliated, distressed or alarmed is irrelevant.

[**If required see** section 39(7) **of the 2009 Act]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the child had not yet reached the age of 13 years. Consent is irrelevant.

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. that conduct was for the purpose of obtaining sexual gratification for himself/herself (or another), or to humiliate, distress or alarm the child (or both)

3. the accused was 16 or over at the time, and

4. the child had reached the age of 13 but was not 16 at the time.

Section 37(1): Older children engaging in sexual conduct with each other

Charge…. is a charge of engaging, while an older child, in sexual conduct with or towards another older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of engaging in sexual conduct with or towards another older child consists of:

- the intentional or reckless penile sexual penetration by the accused, to any extent, of the other child's vagina, anus or mouth

[or, as appropriate]

- intentionally or recklessly touching the other child's vagina, anus or penis sexually with his/her mouth

where the accused and the other child have both reached the age of 13 years, but are not yet 16 at the time of the offence.

These two things,

- an act of the sort described,
- the accused and the other child were had reached the age of 13 but were not yet 16 at the time,

both have to be proved by corroborated evidence.

That the accused acted intentionally and the purpose for which the activity was done must be a matter of inference from the proved facts and circumstances. Those elements do not require to be corroborated.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer and the accused were 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provisions 1 and 3 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7 below.

Several points call for comment:

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

When is penetration "sexual", or when is touching "sexual"? Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to

be sexual. So that is an objective test. Any degree of penetration is enough, and is sufficient to complete the offence. The penetration has to be intentional or reckless.

Touching sexually with the mouth includes touching with the tongue or teeth.

[If required see section 39(7) **of the 2009 Act]:** For the avoidance of doubt, it is not a defence to this charge that the accused believed the other child had not yet reached the age of 13 years.

Consent is irrelevant.

Deal with Section 39(1) defences, if raised. See paragraph 5.6 below.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. conduct of the sort described in the charge by the accused

2. both the accused and the other child named in the charge had reached the age of 13 but were not yet 16.

Section 37(4): Older children engaging in consensual sexual conduct with each other

Charge…. is a charge of engaging, while an older child, in sexual conduct with or towards another older child, and alleges a contravention of the section of the Act referred to in the charge.

The crime of engaging in sexual conduct with or towards another older child consists of:

- the intentional or reckless penile sexual penetration by the accused, to any extent, of the other child's vagina, anus or mouth

[or, as appropriate]

- intentionally or recklessly touching the other child's vagina, anus or penis sexually with his/her mouth

where the accused and the other child have both reached the age of 13 years but were not yet 16.

Where the person consents to what took place, both parties are guilty of this offence.

These things,

- an act of the sort described,
- that the accused and the person had reached the age of 13 but were not yet 16 at the time

[**if appropriate**: (in relation to the case against the other child when that other child is also accused)

- and the consent of this accused to what the other accused did]

have to be proved by corroborated evidence.

That the accused acted intentionally must be a matter of inference from the proved facts and circumstances and does not require corroboration.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT AGE OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer and the accused were 13, 14 or 15 [as appropriate] on/between the date(s) set out in the charge.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Reference should also be made to Deeming Provisions 2 and 4 set out in sections 40 and 41 of the 2009 Act. See paragraph 5.7 below.

Several points call for comment:

Take in definition of Part 4 penetration. See paragraph 5.1.2 below.

When is penetration "sexual", or when is touching "sexual"? Penetration, touching or any other activity is sexual if a reasonable person would, in all circumstance of the case, consider it to be sexual. So that is an objective test. Touching sexually with the mouth includes touching with the tongue or teeth.

Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

[Recklessness rarely arises and if it does not then reference to it can be omitted. If it does then the following can be adapted].

Recklessness is also something to be inferred from what has been proved to have been said or done, and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

You judge intention and recklessness by looking objectively at what has been proved to have happened. You have to be satisfied that the accused's act of penetration was either intentional or reckless.

What is meant by the person "consenting", and so becoming criminally liable? Consent means free agreement which must continue throughout the sexual act under consideration. If the Crown establishes that was the person's position, then that would be relevant to implicating him/her in this offence. If there is no free agreement, e.g., if he/she was incapable of giving consent because of the effect of alcohol or drugs, or because he/she was asleep or unconscious, he/she could not be found guilty. Similarly if he/she had agreed to conduct that was different from what occurred during this incident, or if it happened after he/she had withdrawn his/her consent, he/she could not be found guilty.

[It may be appropriate in charges alleging a contravention of section 37(4) to deal with the lack of a defence as set out in section 39(7)(b)]

Deal with Section 39(1) and 39(3) defences, if raised. See paragraph 5.6 below. See also section 39(2) and 39(7) for restrictions to these defences.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

(To be adapted according to the circumstances, setting out separately the requirements in relation to each accused, if more than one)

So, for the Crown to prove this charge, it must show

1. conduct of the sort described in the charge by the accused

2. that the accused and the other child (or other accused) named in the charge had reached the age of 13 but were not yet 16 at the time.

Alternatively, in the case of a child accused on the basis of consent

So, for the Crown to prove this charge it must show

1. conduct of the sort described in the charge by (e.g.) the first accused

2. that the second accused consented to what (e.g.) the first accused did

3. that (for example) the second accused consented to what (for example) the first accused did

These directions can be adapted to suit the circumstances.

Section 42: Sexual abuse of trust

Charge…. is a charge of sexual abuse of trust, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the intentional engaging in sexual activity with or directed towards the

complainer, where the accused has reached the age of 18 years, where the accused is in a position of trust towards the complainer, and where the complainer is under 18 years of age.

Consent is irrelevant to the issue of whether this offence has been committed. [796]

These four things,

- that the accused was 18 years or over
- he/she engaged in a sexual activity involving the complainer
- the accused was in a position of trust towards the complainer, and
- the complainer was under 18 years of age

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[WHERE COMPLAINER'S AGE STATED IN THE CHARGE AND NO CHALLENGE TO THAT OR THE STATED AGE OF THE ACCUSED]

There is no dispute that the complainer was under 18 years of age on/between the date(s) set out in the charge and that the accused had reached the age of 18.

[PLEASE NOTE THAT WHERE THERE IS A DISPUTE ABOUT THE AGE OF EITHER PARTY, THIS DIRECTION WILL REQUIRE ADAPTATION. SEE PARAGRAPH 13 OF THE LAW SECTION OF THIS CHAPTER]

Several points call for comment:

What does it mean to be in "a position of trust"? That can arise in any one of five situations, including:

[select whichever of the following is appropriate]

1. The complainer is detained in an institution by court order or by statute and is under 18 and the accused looks after persons under 18 in that institution.
2. The complainer is resident in a home or other place in which accommodation is provided by a local authority under an Act relating to children and the accused looks after persons aged under 18 in that place.
3. The complainer is accommodated and cared for in—

1. (a) a hospital,

1. (b) accommodation provided by an independent health care service,

1. (c) accommodation provided by a care home service,a residential establishment, or

1. (d) accommodation provided by a school care accommodation service or a secure accommodation service,

and the accused looks after persons under 18 in that place.

4. The complainer is receiving education at—

(a) a school and the accused looks after persons under 18 in that school, or

(b) a further or higher education institution and the accused looks after the person concerned in that institution.

5. The accused —

(a) has any parental responsibilities or parental rights in respect of the complainer,

(b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,

(c) had any such responsibilities or rights but no longer has such responsibilities or rights, or

(d) treats the complainer as a child of their family,

and the complainer is a member of the same household as the accused.

[Definitions for 'care home service', 'hospital' are in section 44 which can be consulted if necessary]

What is involved in "looking after" a person? That covers regularly caring for, teaching, training, supervising, or being in sole charge of the person.

An activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test. The accused must have acted intentionally. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. the accused engaged in a sexual activity with, or directed towards, the complainer

2. the accused was 18 or over

3. he/she was in a position of trust, as I have defined that

4. the complainer was under 18 at the time of the alleged conduct.

Section 45 Defences, if raised

Section 45(1)(a)

In this case it is said by the defence that the accused reasonably believed that the complainer had reached the age of 18 years. That would be a defence. It is said that there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his/her police statement, or from defence witnesses) which leads to the conclusions that he/she believed the complainer was over 18 years of age, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer had reached the age of 18 and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(1)(b)

In this case it is said by the defence that the accused reasonably believed that the complainer was not someone in relation to whom he/she was in a position of trust. That would be a defence. You will recollect the definition I gave of the circumstances in which a position of trust exists, in the context of this case. It is said there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his/her police statement, or from defence witnesses) which leads to the conclusions that the accused believed that he was not in a position of trust towards him/her, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer was not a person in relation to whom he/she was in a position of trust and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(2)(a)

It is a defence to this charge that the person was the spouse or civil partner of the accused. On the evidence, if you accept it, that defence is open to this accused.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(2)(b)

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before the position of trust came into being. (Adapt the following as appropriate) That does not apply where the accused had fulfilled or exercised any parental

responsibilities or parental rights, past, or present, in respect of the complainer, or the complainer is treated by the accused as one of his/her family, and in all these instances the complainer is a member of the same household.

To decide this issue you will need to look carefully at the evidence about the relationship between the parties, and decide. It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply, not for the accused to show it does.

Section 46: Sexual abuse of trust of a mentally disordered person

Charge…. is a charge of sexual abuse of trust of a mentally disordered person, and alleges a contravention of the section of the Act referred to in the charge.

This crime consists of the intentional engaging in sexual activity with or directed towards a mentally disordered person (the complainer) where the accused is in a position of trust towards the person.

These three things,

- that the accused engaged in a sexual activity involving the complainer
- that the accused was in a position of trust towards the complainer, and
- that the complainer was a mentally disordered person

all have to be proved by corroborated evidence.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

Several points call for comment:

What does it mean to be in "a position of trust"? That arises where the accused:

[can be adapted as appropriate]

- provides care services to the complainer, or
- manages or is employed in, or contracted to provide services in or to a hospital, independent health care service, or state hospital, in which the complainer is being given medical treatment.

Care services are provided when anything is done by way of such services, by an employee of, or in the course of a service provided or supplied by a care service by any contract including that of employment.

[If further definition is necessary reference should be made to section 47 of the Public Service Reform (Scotland) Act 2010*.]*

If a complainer is mentally disordered, consent and capacity to consent are irrelevant. A person who is suffering from a mental disorder is incapable of consenting to conduct, where, because of the disorder, he/she was unable

- to understand what the conduct was, or
- to form a decision as to whether to engage in the conduct, or as to whether it should take place, or
- to communicate any such decision.

A mental disorder means a mental illness, a personality disorder, or a learning disability.

An activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. So that is an objective test.

The accused must have acted intentionally. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Take in Guidance about Evidence. See paragraph 5.5 below.

Consider whether to give a direction under section 288DA (delay in reporting)

Summary

So, for the Crown to prove this charge, it must show:

1. the accused engaged in a sexual activity with, or directed towards, the complainer

2. the accused was in a position of trust vis-à-vis the complainer, as I have defined that

3. the complainer was a mentally disordered person

Section 47 Defences, if raised

Section 47(1)(a)

In this case it is said by the defence that the accused reasonably believed that the complainer did not have a mental disorder. That would be a defence. It is said there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his police statement, or from defence witnesses) which leads to the conclusions that he/she believed the complainer did not suffer from a mental disorder, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer did not have a mental disorder and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply, it is not for the accused to prove that it does.

Section 47(1)(b)

In this case it is said by the defence that the accused reasonably believed that the complainer was not someone in relation to whom he/she was in a position of trust. That would be a defence. You will recollect the definition I gave of the circumstances in which a position of trust exists, in the context of this case. It is said that there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his police statement, or from defence witnesses) which leads to the conclusions that he/she believed he was not in a position of trust towards him/her, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer was not a person in relation to whom he/she was in a position of trust and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

Section 47(2)(a)

It is a defence to this charge that the person was the spouse or civil partner of the accused. On the evidence, if you accept it, that defence is open to this accused.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to show it does.

Section 47(2)(b)

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before (the accused began providing care services to the complainer / the complainer was admitted to hospital-adapt as appropriate)

To decide this issue you will need to look carefully at the evidence about the relationship between the parties, and decide.

It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to show it does.

(IN MOST CASES)

In this case, however, I direct you that no issue of reasonable belief arises for consideration.

5. GENERAL DIRECTIONS

5.1 Penetration

Paragraph 5.1.1 below deals with penetration for offences in sections 1 to 11 of the 2009 Act. Paragraph 2.1.2 below deals with penetration for offences in relation to sections 18 to 39 of the Act.

5.1.1: for offences in Part 1 (sections 1 to 11) of the 2009 Act

Any degree of penetration is enough, and is sufficient to complete the offence. Penetration continues from the moment of entry until the moment of withdrawal of the penis (or other object as appropriate). If the penetration was consented to initially, but that consent was later withdrawn, continuing penetration after that is penetration without the person's consent.

The penetration has to be intentional or reckless.

[References to recklessness may be omitted if the issue does not arise].

Intention is a state of mind, something to be inferred or deduced from what is proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

Recklessness is also something to be inferred from what is proved to have been said or done, and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

You judge intention and recklessness by looking objectively at what has been proved to have happened. You have to be satisfied that the accused's act of penetration was either intentional or reckless.

5.1.2: for offences relating to children in Part 4 (sections 18 to 39) of the 2009 Act

Any degree of penetration is enough, and is sufficient to complete the offence. The penetration has to be intentional or reckless. Intention is a state of mind, something to be inferred or deduced from what has been proved to have been said or done. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act.

[References to recklessness may be omitted is the issue does not arise].

Recklessness is also something to be inferred from what is proved to have been said or done, and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

You judge intention and recklessness by looking objectively at what has been proved to have happened. You have to be satisfied that the accused's act of penetration was either intentional or reckless.

5.2 Corroboration - omnibus charges

Where a complaint or indictment is divided into omnibus charges, please see chapter on Corroboration - Omnibus charges.

5.3 Consent

(General definition)

The person must not have consented to what took place. His/her lack of consent is a central element in this crime.

In the context of sexual activity consent involves **free** agreement which must continue throughout the sexual act under consideration. It is consent at the time of the particular act that matters. The person must be in a position to give or withhold consent. So, if sexual intercourse, for example, occurs when a complainer asleep or unconscious, she cannot give consent. So also with a complainer who is so intoxicated that she cannot give consent.

Some examples may give you the flavour of what is involved in lack of consent: There is no free agreement, and so no consent:

- if the person, at the time of the incident, was incapable of consenting because of the effect of alcohol or drugs.

- if the person only agreed or submitted to the conduct:

    - because of violence, or threats of violence, to him/her or to another person, made at the time of the conduct or beforehand; or
    - because he/she was unlawfully detained by the accused; or
    - because he/she had been mistaken as to the nature or the purpose of the conduct through the accused's deception; or
    - because the accused impersonated somebody known to her/him; or
    - where the only consent given was by somebody other than himself/ herself.

[In some cases it may be appropriate to illustrate what is meant by lack of consent by reference to section 13 of the Act, when a formulation of this sort set out in the suggested directions set out above in section 1 rape may be apt, or capable of adaptation]

5.4 Reasonable belief [in charges brought under Part 1 of the 2009 Act: sections 1-11 only].

> This direction will only be required in the rare situations where, although the jury accepts that the complainer was not consenting, a reasonable person could nevertheless think that she/he was (see Maqsood paragraph 17 cited in the Law section above). The following directions are designed to deal with that sort of situation in a charge of rape under section 1. They will require to be adapted according to the sexual offence libeled in the charge.

"If you accept that the complainer was not consenting to sexual intercourse, but you consider that the accused nevertheless reasonably believed that she was consenting, or if you are left in reasonable doubt, you would acquit him. That is because a man who has sexual intercourse with a woman reasonably believing that she was consenting, although in fact she was not, is not guilty of rape. However, simply having an honest belief that the person consented would not be enough. His belief must be held on reasonable grounds. In this case the defence suggest that there is evidence before you that would entitle you to conclude that he reasonably held that belief.

(Here that evidence could be summarised)

To decide if the accused's belief that the person was consenting was reasonable, you should have

regard, among other matters, to

1. whether he took any steps to find out if she was consenting, and

2. what steps these were."

If you accept evidence that the accused believed that the complainer was consenting and that his belief was reasonably held, or if you are left in reasonable doubt, you would acquit.

5.5 Guidance about evidence

The complainer is an essential witness for the Crown. In deciding whether or not you can accept her/his evidence you should have regard to the other evidence in the case.

Whilst it is not necessary that you should find the evidence of the complainer to be credible and reliable in every detail before you could convict the accused on this charge you would have to regard her/his evidence as credible and reliable in its essentials, namely that the accused penetrated [as appropriate] her vagina with his penis [at least to some extent] and that she did not consent.

5.6 Defences re older children

5.6.1: Section 39(1) defence of reasonable belief

[This defence is available in respect of charges under sections 28 to 37(1) and 37(4) of the 2009 Act].

In this case it is said by the defence that the accused reasonably believed that the person named in the charge had reached the age of 16 years. That would be a defence. It is said there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his/her police statement, or from defence witnesses) which leads to the conclusions that he/she believed the person named in the charge was over 16 years of age, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer had reached the age of 16 and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

5.6.2 Section 39(3) defence

[This defence is available in respect of charges under 30(2)(a)-(e) and 31 to 36 of the 2009 Act]

It is a defence to a charge of engaging in sexual activity with or towards an older child that at the time when the conduct took place the difference between the ages of the participants did not exceed two years. It is also a defence if the younger participant was born within two years of the elder one, counting from day to day.

Where charge is under Section 30(2)(a) add (adapted as appropriate)

But that does not apply to the parts of the charge relating to sexual penetration of the vagina, anus or mouth by the (other) accused's penis or of the vagina or anus by the (other) accused's mouth, tongue or teeth.

Where charge is under Section 30(2)(b) or (c) add (adapted as appropriate)

But that does not apply to the parts of the charge involving sexual touching or activity consisting of the vagina, anus or penis of either party being touched sexually by the other's mouth, or the (other) accused's vagina, anus or mouth being penetrated by the penis of the complainer/accused.

(Subject to the above, on the evidence, that defence is open to this accused)

It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to show it does.

5.7 Deeming provisions – Sections 40 and 41

5.7.1: Deeming Provision 1

This provision applies in respect of charges offences under sections 28 to 37(1) of the 2009 Act inclusive.

If you consider that the Crown has not proved beyond reasonable doubt that the person named in the charge was a child who had reached the age of 13 years at the relevant time, but you are satisfied that it has been established beyond reasonable doubt that the person named in the charge had not reached the age of 16 years at the time, then the law deems the person named in the charge to be a person who had reached the age of 13 years at the relevant time.

5.7.2: Deeming Provision 2

This provision applies in respect of charges under section 37(4) of the 2009 Act.

If you consider that the Crown has not proved beyond reasonable doubt that the other participant who is also accused was a child who had reached the age of 13 years at the relevant time, but you are satisfied that it has been established beyond reasonable doubt that he/she had not reached the age of 16 years at the time, then the law deems him/her to be a person who had reached the age of 13 years at the relevant time.

5.7.3: Deeming Provision 3

This provision applies in respect of charges under section 37(1) of the 2009 Act.

If you consider that the Crown has not proved beyond reasonable doubt that the accused was a child who had not reached the age of 16 years at the relevant time, but you are satisfied that it has been established beyond reasonable doubt that he/she had reached the age of 13 years at the time, then the law deems him/her to be a person who had not reached the age of 16 years at the relevant time.

5.7.4 Deeming Provision 4

This provision applies to charges under section 37(4) of the 2009 Act.

If you consider that the Crown has not proved beyond reasonable doubt that the other participant who is also accused was a child who had not reached the age of 16 years at the relevant time, but you are satisfied that it has been established beyond reasonable doubt that he/she had reached the age of 13 years at the time, then the law deems him/her to be a person who had not reached the age of 16 years at the relevant time.

[791] *HM Advocate v SM* (No 1) 2019 JC 176, *Briggs v HM Advocate* 2019 SCCR 323

[792] *Maqsood v HMA* [2019] SCCR 59

[793] see *Maqsood* paragraph 19

[794] See also *Schyff v HMA* 2015 HCJAC 67 and 2015 SCL 783.

[795] see *Iqbal v Friel* 1993 SLT 1218 and section 41A of the Registration of Birth, Deaths and Marriages Act 1965

[796] *CW v HMA* 2016 SCCR 285 at para 26

Terrorism Act 2006

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LAW

NOTE

In the event of conviction for the terrorism offences set out in sections 41 to 43 of the Counter Terrorism Act 2008, the court must inform the accused of the notification requirements contained in sections 47-53 of that Act. See the Sentencing Checklist section B15 page

105-106.

The 2006 Act relies on a number of definitions which appear in the Terrorism Act 2000. This includes the definition of terrorism (see section 20(1)).

1. Reverse burden of proof in the Act

Some of the sections in the 2006 Act provide for specific defences to the crimes created. Unlike the 2000 Act, there is no guidance as to what type of burden is imposed by these provisions (see the commentary on section 118 of the 2000 Act in the chapter on that Act).

Reference can be made to the House of Lords case, *Sheldrake v Director of Public Prosecutions Attorney General's Reference(No 4 of 2002)* [2005] 1 AC 264, the leading guidance on this issue. It involved two cases; Sheldrake was concerned with a reverse burden in a road traffic context and it was the AG Reference which was concerned with the Terrorism Act 2000, specifically section 11.
Lords Rodger and Carswell considered that section 11 did impose a legal burden, but the majority led by Lord Bingham read it down in terms of the Human Rights Act 1998, section 3, as imposing only an evidential burden.

The High Court of Justiciary has examined the nature of the statutory defence for carrying knives etc and found that a legal burden can legitimately be imposed; *Donnelly v HM Advocate* 2009 SCCR 512 and *Glancy v HM Advocate* 2012 SCCR 52, which is also the position for the statutory defence for possession of indecent images of children under the Civic Government (Scotland) Act section 52A(2)(b), *McMurdo v HM Advocate* 2015 SLT 277. On the other hand in *Urquhart v HM Advocate* 2016 JC 93, the court found that the defence under section 38(2) of the Criminal Justice and Licensing (Scotland) Act 2010 ought to impose only an evidential burden given the breadth of the conduct which could comprise the offence under 38(1).

Some of the offences mentioned in section 118 of the 2000 Act refer to "reasonable cause to suspect." That phrase does not appear in the 2006 Act

defences.

The reasoning in the above cases may be of some relevance but the decisions provide an uncertain guide and form only part of what will have to be considered when directions are required on the statutory defence to a particular provision under the 2006 Act. As Lord Bingham put it in Sheldrake at para 22:

"The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

By the time a judge or sheriff is reading this, it may be too late, but the best procedure to adopt may well be for either Crown or defence to seek a ruling at preliminary hearing under section 72(6)(b)(iv)[797] or first diet under section 71(2) and 79(2)(b)(vi) on what burden is to apply to a particular statutory defence and when there is no appellate guidance. The discussion in *Sheldrake* identifies the range of factors which must be considered against the background of the particular nature of a particular provision. Some of these factors, for example the relative difficulty in discharging the burden of proof, can only be known by the parties and perhaps particularly the Crown. If a decision is made at PH or first diet it can be appealed so that, before the trial, the judge or sheriff will know how to direct on the statutory defence. That seems preferable and more proportionate than allowing what may be a long trial for terrorism to lead to an unjust acquittal or conviction because the wrong directions were given. The undesirability of a re-trial in such circumstances is obvious. If the matter has not already been discussed, it should be addressed at the earliest opportunity in the course of a trial.

There is limited guidance on the nature of the burden imposed in the sections contained in the 2006 Act.

His Lordship also expressed the view (without hearing any argument, as the parties agreed) that the burden imposed on the defendant by subsection (6) was a merely evidential one.

In Faraz [2012] EWCA Crim 2820*; [2013] 1 Cr. App. R. 29*, the Court of Appeal approved Calvert-Smith J's approach, saying that it was not arguable that a publication that, to the knowledge of the defendant, carried a real risk that it would be understood by a significant number of readers as encouraging terrorist offences was entitled to exemption, in consequence of art.10, just because it expressed political or religious views. However, the Court did not specifically deal with the question of burden. It said at paragraph 15:

"The appellant did not give evidence to raise the statutory defence (s.2(9)) that the publications did not represent his views. His defence was that upon a proper reading or viewing they did not encourage acts of terrorism."

Faraz should be read subject to Humza Ali [2018] EWCA Crim 547*; [2018] 1 W.L.R. 6105* but that case did not deal with the question of burden either.

See generally Archbold Criminal Pleading Evidence and Practice 2021 Ed. Paragraph 25-183.

The previous version of the proposed directions on section 1(6) and section 2(9) proceeded on the basis that the burden is a legal one. Since there is no appellate decision on the matter, an alternative direction on the basis of an evidential burden is set out below.

2. The general definition of Terrorism

This is found in section 1 of the 2000 Act;

"*Terrorism: interpretation*

(1) In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [F1 or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) *In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.*"

The scope of the definition is very wide indeed and it is plain from the parliamentary debates which preceded its enactment that it was intended to encompass both those forms of terrorism which were known of in 1999 but also new forms which might emerge. It may well capture the actions of freedom fighters pursuing what might be considered a just cause in a foreign country.[798]

It is put this way in Archbold, at para 25-13a

"On its face, any use or

threat of violence for a political, religious, racial or ideological cause designed to influence a government or intimidate the public is caught by the definition. In certain circumstances, this could include violence by, e.g., animal rights activists."

The definition was examined by the Supreme Court in *R v Gul* 2014 AC 1260. Having examined paras 27-28 from *R v F*, the Supreme Court went on in *Gul* to offer a useful, albeit abbreviated, synopsis of the scope of the section 1 definition at para 27 before examining its width in paras 28 and 29 and reaching its conclusions at paras 38 and 39:

"27. The effect of section 1(1) of the 2000 Act is to identify terrorism as consisting of three components. The first is the "use or threat of action", inside or outside the UK, where that action consists of, inter alia, "serious violence", "serious damage to property", or creating a serious risk to public safety or health: section 1(1)(a)(2)(4). The second component is that the use or threat must be "designed to influence the government [of the UK or any other country] or an [IGO] or to intimidate the public": section 1(1)(b)(4). The third component is that the use or threat is "made for the purpose of advancing a political, religious, racial or ideological cause": section 1(1)(c).

28. As a matter of ordinary language, the definition would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or IGO in order to advance a very wide range of causes. Thus, it would appear to extend to military or quasi-military activity aimed at bringing down a foreign government, even where that activity is approved (officially or unofficially) by the UK Government.

29. It is neither necessary nor appropriate to express any concluded view whether the definition of "terrorism" goes that far, although it is not entirely easy to see why, at least in the absence of international law considerations, it does not. For present purposes it is enough to proceed on the basis that, subject to these considerations, the definition of terrorism in section 1 in the 2000 Act is, at least if read in its natural sense, very far reaching indeed. Thus, on occasions, activities which might command a measure of public understanding, if not support, may fall within it: for example, activities by the victims of oppression abroad, which might command a measure of public understanding, and even support in this country, may well fall within it."

"38. We return to

the language used in section 1 of the 2000 Act. Despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of section 117, it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this court. For the reasons given by Lord Lloyd, Lord Carlile and Mr Anderson, the definition of "terrorism" was indeed intended to be very wide. Unless it is established that the natural meaning of the legislation conflicts with the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is not suggested) or any other international obligation of the United Kingdom (which we consider in the next section of this judgment), our function is to interpret the meaning of the definition in its statutory, legal and practical context. We agree with the wide interpretation favoured by the prosecution: it accords with the natural meaning of the words used in section 1(1)(b) of the 2000 Act, and, while it gives the words a concerningly wide meaning, there are good reasons for it.

39. We are reinforced in this view by the further consideration that the wide definition of terrorism was not ignored by Parliament when the 2000 Act was being debated. It was discussed by the Home Secretary who also, in answer to a question, mentioned the filter of section 117: see Hansard (HC Debates), 14 December 1999, cols 159, 163. This is not a case in which it is appropriate to refer to what was said in Parliament as an aid to statutory interpretation, but it provides some comfort for the Crown's argument. Of rather more legitimate relevance is the fact that Parliament was content to leave the definition of "terrorism" effectively unchanged, when considering amendments or extensions to the 2000 Act, well after the 2007 report of Lord Carlile, which so clearly (and approvingly) drew attention to the width of the definition of terrorism: see eg the Crime and Security Act 2010 , the Terrorist Asset-Freezing etc Act 2010 and the Terrorism Prevention and Investigation Measures Act 2011 ."

3. Directing the jury on Section 1

In a particular case, not all of the criteria may be relevant and some judgment may be required as to how to focus the issues for the jury.

It may be best to start by offering the whole definition as suggested in the specimen directions *infra*, before re-stating those criteria which are relevant in the particular case.

The importance of carefully employing the statutory language when giving directions on a section 57 offence is demonstrated in *Siddique v HM Advocate* 2010

JC 110.

The Jury Manual Committee are not aware of any authoritative definition, or even obiter discussion, of the meaning of "ideological." If the issue arises, recourse could be had to the definition of ideology in the Oxford English Dictionary ("OED") which offers a number of meanings, but the relevant meaning would seem to be this:

"4. A systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct. [Also: the forming or holding of such a scheme of ideas]."[799]

OED defines ideological, in what seems to be the relevant sense, in this way:

"3.Of or relating to a political, economic, or other ideology (see ideology n 4); based on a principle or set of unshakeable beliefs."[800]

When considering the directions to be given in any particular trial, it may be helpful to consult the Explanatory Notes to the Act and the Home Office Guidance on the 2006 Act.[801]

As usual, the Guidance points out that it has no legal force but nevertheless it may be helpful as a starting point.

For example, the phrase "in existing circumstances" which appears in sections 1(3)(b), 2(4)(b), 3(8)(b) and 20(7) is explained in this way:

1. "Glorifying statements: Subsection 1(3) provides an example of statements that may be understood as indirectly encouraging terrorism or Convention offences. It provides that:
2. statements that glorify terrorism constitute an indirect encouragement to terrorism or Convention offences but only if
3. [illegible]

Part (b) is a deliberate and
important qualification of the concept of glorification. It has two limbs, firstly, the audience must reasonably understand that they should emulate the conduct, in other words, that they should do something similar. Secondly, the concept of "in existing circumstances" means that it must be possible for them to emulate the conduct glorified in this day and age. This means that the glorification of distant historical events is unlikely to be caught."

4. Statutory Provisions: the Terrorism Act 2006

Section 1

"(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) A person commits an offence if–

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he–

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which–

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both–

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner of its publication.

(5) It is irrelevant for the purposes of subsections (1) to (3)–

(a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,

(b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

(6) In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of acts of terrorism or Convention offences, it is a defence for him to show–

(a) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(b) that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

Section 2

Dissemination of terrorist publications

(1) A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so–

(2) For the purposes of this section a person engages in conduct falling within this subsection if he–

(a) distributes or circulates a terrorist publication;

(b) gives, sells or lends such a publication;

(c) offers such a publication for sale or loan;

(d) provides a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan;

(e) transmits the contents of such a publication electronically; or

(f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

(3) For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within subsection (2), if matter contained in it is likely–

(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or

(b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.

(4) For the purposes of this section matter that is likely to be understood by a person as indirectly encouraging the commission or preparation of acts of terrorism includes any matter which–

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts; and

(b) is matter from which that person could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by him in existing circumstances.

(5) For the purposes of this section the question whether a publication is a terrorist publication in relation to particular conduct must be determined–

(a) as at the time of that conduct; and

(b) having regard both to the contents of the publication as a whole and to the circumstances in which that conduct occurs.

(6) In subsection (1) references to the effect of a person's conduct in relation to a terrorist publication include references to an effect of the publication on one or more persons to whom it is or may become available as a consequence of that conduct.

(7) It is irrelevant for the purposes of this section whether anything mentioned in subsections (1) to (4) is in relation to the commission, preparation or instigation of one or more particular acts of terrorism, of acts of terrorism of a particular description or of acts of terrorism generally.

(8) For the purposes of this section it is also irrelevant, in relation to matter contained in any article whether any person–

(a) is in fact encouraged or induced by that matter to commit, prepare or instigate acts of terrorism; or

(b) in fact makes use of it in the commission or preparation of such acts.

(9) In proceedings for an offence under this section against a person in respect of conduct to which subsection (10) applies, it is a defence for him to show–

(a) that the matter by reference to which the publication in question was a terrorist publication neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(b) that it was clear, in all the circumstances of the conduct, that that matter did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

(10) This subsection applies to the conduct of a person to the extent that–

(a) the publication to which his conduct related contained matter by reference to which it was a terrorist publication by virtue of subsection (3)(a); and

(b) that person is not proved to have engaged in that conduct with the intention specified in subsection (1)(a).”

Section 5

Preparation of terrorist acts

“(1) A person commits an offence if, with the intention of–

(a) committing acts of terrorism, or

(b) assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.

(2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

(3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.”

Section 3

(1) This section applies for the purposes of sections 1 and 2 in relation to cases where–

(a) a statement is published or caused to be published in the course of, or in connection with, the provision or use of a service provided electronically; or

(b) conduct falling within section 2(2) was in the course of, or in connection with, the provision or use of such a service.

(2) The cases in which the statement, or the article or record to which the conduct relates, is to be regarded as having the endorsement of a person (“the relevant person”) at any time include a case in which–

(a) a constable has given him a notice under subsection (3);

(b) that time falls more than 2 working days after the day on which the notice was given; and

(c) the relevant person has failed, without reasonable excuse, to comply with the notice.

(3) A notice under this subsection is a notice which–

(a) declares that, in the opinion of the constable giving it, the statement or the article or record is unlawfully terrorism-related;

(b) requires the relevant person to secure that the statement or the article or record, so far as it is so related, is not available to the public or is modified so as no longer to be so related;

(c) warns the relevant person that a failure to comply with the notice within 2 working days will result in the statement, or the article or record, being regarded as having his endorsement; and

(d) explains how, under subsection (4), he may become liable by virtue of the notice if the statement, or the article or record, becomes available to the public after he has complied with the notice.

(4) Where–

(a) a notice under subsection (3) has been given to the relevant person in respect of a statement, or an article or record, and he has complied with it, but

(b) he subsequently publishes or causes to be published a statement which is, or is for all practical purposes, the same or to the same effect as the statement to which the notice related, or to matter contained in the article or record to which it related, (a "repeat statement");

the requirements of subsection (2)(a) to (c) shall be regarded as satisfied in the case of the repeat statement in relation to the times of its subsequent publication by the relevant person.

(5) In proceedings against a person for an offence under section 1 or 2 the requirements of subsection (2)(a) to (c) are not, in his case, to be regarded as satisfied in relation to any time by virtue of subsection (4) if he shows that he–

(a) has, before that time, taken every step he reasonably could to prevent a repeat statement from becoming available to the public and to ascertain whether it does; and

(b) was, at that time, a person to whom subsection (6) applied.

(6) This subsection applies to a person at any time when he–

(b) having become aware of its publication, has taken every step that he reasonably could to secure that it either ceased to be available to the public or was modified as mentioned in subsection (3)(b).

(7) For the purposes of this section a statement or an article or record is unlawfully terrorism-related if it constitutes, or if matter contained in the article or record constitutes–

(a) something that is likely to be understood, by any one or more of the persons to whom it has or may become available, as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences; or

(b) information which–

(i) is likely to be useful to any one or more of those persons in the commission or preparation of such acts; and

(ii) is in a form or context in which it is likely to be understood by any one or more of those persons as being wholly or mainly for the purpose of being so useful.

(8) The reference in subsection (7) to something that is likely to be understood as an indirect encouragement to the commission or preparation of acts of terrorism or Convention offences includes anything which is likely to be understood as–

(a) the glorification of the commission or preparation (whether in the past, in the future or generally) of such acts or such offences; and

(b) a suggestion that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.

(9) In this section "working day" means any day other than–

(a) a Saturday or a Sunday;

(b) Christmas Day or Good Friday; or

(c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in any part of the United Kingdom.

Section 20

Interpretation of Part 1

(1) Expressions used in this Part and in the Terrorism Act 2000 (c. 11) have the same meanings in this Part as in that Act.

(2) In this Part–

"act of terrorism" includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see section 1(5) of that Act);

"article" includes anything for storing data;

"Convention offence" means an offence listed in Schedule 1 or an equivalent offence under the law of a country or territory outside the United Kingdom[(and see subsection (2A))]1;

"glorification" includes any form of praise or celebration, and cognate expressions are to be construed accordingly;

"public" is to be construed in accordance with subsection (3);

"publish" and cognate expressions are to be construed in accordance with subsection (4);

"record" means a record so far as not comprised in an article, including a temporary record created electronically and existing solely in the course of, and for the purposes of, the transmission of the whole or a part of its contents;

"statement" is to be construed in accordance with subsection (6).

(a) paragraph 1 (hijacking of spacecraft);

(b) paragraph 2 (destroying, damaging or endangering safety of spacecraft);

(c) paragraph 3 (other acts endangering or likely to endanger safety of spacecraft);

(d) paragraph 4 (endangering safety at spaceports).

(3) In this Part references to the public–

(a) are references to the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public; and

(b) except in section 9(4), also include references to a meeting or other group of persons which is open to the public (whether unconditionally or on the making of a payment or the satisfaction of other conditions).

(4) In this Part references to a person's publishing a statement are references to–

(a) his publishing it in any manner to the public;

(b) his providing electronically any service by means of which the public have access to the statement; or

(c) his using a service provided to him electronically by another so as to enable or to facilitate access by the public to the statement;

(5) In this Part references to providing a service include references to making a facility available; and references to a service provided to a person are to be construed accordingly.

(6) In this Part references to a statement are references to a communication of any description, including a communication without words consisting of sounds or images or both.

(7) In this Part references to conduct that should be emulated in existing circumstances include references to conduct that is illustrative of a type of conduct that should be so emulated.

(8) In this Part references to what is contained in an article or record include references–

(a) to anything that is embodied or stored in or on it; and

(b) to anything that may be reproduced from it using apparatus designed or adapted for the purpose.

(9) The Secretary of State may by order made by statutory instrument–

(a) modify Schedule 1 so as to add an offence to the offences listed in that Schedule;

(b) modify that Schedule so as to remove an offence from the offences so listed;

(c) make supplemental, incidental, consequential or transitional provision in connection with the addition or removal of an offence.

(10) An order under subsection (9) may add an offence in or as regards Scotland to the offences listed in Schedule 1 to the extent only that a provision creating the offence would be outside the legislative competence of the Scottish Parliament.

(11) The Secretary of State must not make an order containing (with or without other provision) any provision authorised by subsection (9) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

Schedule 1

Schedule 1 lists the following broad headings with more detailed provision found in each paragraph in the schedule.

para. 1 Explosives offences

para. 2 Biological weapons

para. 3 Offences against internationally protected persons

para. 4 Hostage-taking

para. 5 Hijacking and other offences against aircraft

para. 6 Offences involving nuclear material or nuclear facilities

para. 6A [Importation of nuclear materials]

para. 7 Offences under the Aviation and Maritime Security Act 1990

para. 8 Offences involving chemical weapons

para. 9 Terrorist funds

para. 10 Directing terrorist organisations

para. 11 Offences involving nuclear weapons

para. 12 Conspiracy etc.

POSSIBLE FORM OF DIRECTION ON TERRORISM ACT 2006

Section 1

Encouragement of terrorism

Charge is a charge of encouragement of terrorism. It alleges a contravention of the Act referred to in the charge.

The definition of “terrorism” has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate] including outside the United Kingdom, in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or

(b) it involves serious damage to property, or

(c) it endangers a person's life, other than that of the person committing the action, or

(d) it creates a serious risk to the health or safety of the public or a section of the public, or

(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government with intimate any national government or any of the devolved governments in the United Kingdom and Northern Ireland, or
- to influence an international governmental organisation, or
- to intimidate the public or public,, or
- to intimidate a section of the public or public.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause, or
- a religious cause, or
- a racial cause, or
- an ideological cause.

Section 1 makes it an offence for a person to:

1) publish, or cause someone else to publish, a statement that is likely to be understood by some members of the public to whom it is divulged, as a direct or indirect encouragement or inducement to the commission, preparation or instigation of acts of terrorism[or, as appropriate of a Convention offence as listed in schedule 1 is libelled (see section 20(2)]

and

2) at the time the person either intended that result, or was reckless as to whether that will be the result.

Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the conduct. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

Some of these expressions need explanation. [Please select as appropriate.]

“Publish a statement”. In this context publishing covers any means of communication to the public, including (eg) using a website or providing a website for others to access. A statement is not limited to words. It is a communication of any description. It can cover sounds and images.

“Acts of terrorism” include actions taken for the benefit of proscribed organisations.

“Direct encouragement” to the commission, preparation or instigation of acts of terrorism is clear enough.

“Indirect encouragement” means making a statement glorifying, (ie) praising or celebrating in any way, the commission or preparation, in the past, in the future or generally, of acts of terrorism,

and

from which the public could reasonably be expected to infer they should now emulate such conduct in existing circumstances.

“public” and “members of the public” means the public of the UK or of a country or territory outside the UK and any section of the public.

[**Note**: see section 20(3) set out above for further detail of these phrases]

In deciding how a statement is likely to be understood, and what inferences could reasonably be expected to be drawn from it, you must look at

a)the contents of the whole statement, and

b)the circumstances and manner of its publication.

It does not matter whether the publication relates to the commission, preparation or instigation of one or more particular acts of terrorism, or acts of terrorism of a particular type, or to acts of terrorism generally. Neither does it matter whether anyone is in fact encouraged or induced by the statement to commit, prepare or instigate any such act.

So, for the Crown to prove this charge, it must show:

1. the accused published or caused the publication of a statement of the nature that I have defined,
2. the statement is likely to be understood as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism, and
3. the accused intended that result, [or if appropriate] was reckless as to whether or not that would be the result.

(If section 1(6) defence raised)

NOTE: This defence is only available in a case where the accused acted recklessly [section 1(2)(b)(ii)] rather than intentionally [section 1(2)(b)(i)]. The issue may arise because that is the Crown case or because it would be open to the jury to convict the accused on that basis. So, where the jury are or may be required to consider a reckless act, the following directions are suggested.

REMEMBER: Warning in the chapter on the **General Introductory Directions re reverse burden of proof**

If a legal burden:

As Appropriate:

The Crown case is that, at the time he published the statement [or caused it to be published], the accused was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism by the statement

OR if you are not satisfied that the accused acted intentionally [you will have to consider whether, at the time he published the statement [or caused it to be published], he was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism

OR the defence say that it is not proved that the accused published the statement with the intention of encouraging or inducing an act of terrorism. If you do not find that proved, you would have to consider whether, at the time he published the statement [or caused it to be published], he was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism.

1. However, it is said by the defence that the statement neither expressed his views nor had his endorsement,

and

2. it was clear in all the circumstances of its publication it did not have his endorsement,

Alternative direction if an evidential burden:

The Crown case is that, at the time he published the statement [or when he caused it to be published], the accused was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism by the statement

OR if you are not satisfied that the accused acted intentionally in publishing the statement, you will have to consider whether, at the time he published the statement [or when he caused it to be published], he was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism

OR the defence say that it is not proved that the accused published the statement with the intention of encouraging or inducing an act of terrorism. In that event you would have to consider whether, at the time he published the statement [or when he caused it to be published], he was reckless as to whether members of the public would be directly or indirectly encouraged or otherwise induced to commit, prepare or instigate acts of terrorism.

However, the defence say that;

and

In these circumstances, the Crown has to prove beyond reasonable doubt that the statement did express his views or did have his endorsement and it was clear in all the circumstances of its publication that it did express his views or did have his endorsement. If the Crown fails to do so, you must acquit.

These matters can be inferred or deduced from what has been proved to have been said and/or done.

If any piece of evidence leaves you in reasonable doubt about whether the Crown has overcome this defence, you will acquit him.

Section 2

dissemination of terrorist publications

Charge is a charge of disseminating terrorist publications. It alleges a contravention of the Act referred to in the charge.

The definition of “terrorism” has three components, each of which must be present.

First, the use or threat of action anywhere [as appropriate] including outside the United Kingdom, in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or

(b) it involves serious damage to property, or

(c)it endangers a person's life, other than that of the person committing the action, or

(d) it creates a serious risk to the health or safety of the public or a section of the public, or

(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

This section makes it an offence for a person to:

(a) distribute or circulate a terrorist publication, or

(b) give or sell or lend a terrorist publication, or

(c) offer a terrorist publication for sale or loan, or

(d) provide a service to others enabling them to obtain, read, listen to or look at a terrorist publication, or acquire one by gift, sale or loan, or

(e) transmit a terrorist publication electronically, or

(f) have a terrorist publication in their possession with a view to its being distributed, circulated, given, sold or lent, or offered for sale or loan, transmitted electronically, or enabling others to access it,

if at the time of the conduct the person:

(a) intended an effect of the conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism, or

Intention or recklessness is something to be inferred from what is proved to have been said or done and from the nature of the conduct. An intentional act is one carried out deliberately. It is the opposite of an accidental or careless act. Reckless acts show total indifference to and complete disregard of the consequences.

“Publication” has a very wide meaning. It covers an article or record of any description that contains any matter to be read, listened to, looked at or watched, or any combination of any of these.

A “terrorist publication” is one containing matter that is likely;

(a) to be understood by all or some of those to whom it becomes available, or may become available, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism, or

(b) to be useful in the commission or preparation of acts of terrorism and to be understood by some or all of those persons as wholly or mainly for that purpose.

“Acts of terrorism”. Actions taken for the purposes of terrorism include actions taken for the benefit of proscribed organisations.

“Direct encouragement” to the commission, preparation or instigation of acts of terrorism is clear enough.

“Indirect encouragement” means making a statement glorifying, (ie) praising or celebrating in any way, the commission or preparation, in the past, in the future or generally, of acts of terrorism,

and

from which the public could reasonably be expected to infer they should now emulate such conduct in existing circumstances.

In deciding whether a publication is a terrorist publication in relation to particular conduct, you must look at

1. the time at which the conduct occurred
2. all the circumstances in which that conduct occurred and
3. the contents of the publication as a whole.

It does not matter whether the (distribution etc) relates to the commission, preparation or instigation of one or more particular acts of terrorism, or acts of terrorism of a particular type, or to acts of terrorism generally.

Neither does it matter whether anyone is in fact encouraged or induced by any article to commit, prepare or instigate any such acts, or in fact makes use of it in the commission or preparation of such acts.

So, for the Crown to prove this charge, it must show:

Where section 2(9) defence raised

REMEMBER: Warning in the chapter on the **General Introductory Directions re reverse burden of proof**

NOTE: In terms of section 2(10) this defence is only available where the publication is likely to be understood as an encouragement or inducement of acts of terrorism (section 2(3)(a)) and where either the accused's intention was that an effect of dissemination was the provision of assistance in the commission or preparation of acts of terrorism (section 2(1)(b) or the accused was reckless as to whether his conduct would have that effect (section 2(1)(c)). The issue may arise because that is the crown case or because it would be open to the jury to convict the accused on one of these bases. So, where the jury are or may be required to consider them, the following directions are suggested.

If a legal burden:

As appropriate:

1. **[where the Crown case proceeds under section 2(1)(b) or (c) and the publication falls under section 2(3)(a)]**

As appropriate:

In this case the Crown case is that the accused intended that an effect of his conduct would be to provide assistance in the commission or preparation of acts of terrorism or (as appropriate) was reckless as to whether his conduct had that effect.

OR if you are not satisfied that the accused intended that his conduct would encourage or induce acts of terrorism, you will have to consider whether he intended that an effect of his conduct was the provision of assistance in the commission or preparation of such acts or (as appropriate) whether he was reckless as to whether his conduct had that effect.

OR the defence say that it is not proved that the accused intended that his conduct would encourage or induce acts of terrorism. If you do not find that proved, you will have to consider whether he intended that an effect of his conduct was the provision of assistance in the commission or preparation of such acts or (as appropriate) whether he was reckless as to whether his conduct had that effect. However it is said by the defence that:

1. the publication neither expressed his views nor had his endorsement,
2. and it was clear in all the circumstances of the conduct that it did not express his views and did not have his endorsement,

This means that the accused has to satisfy you, on the basis of evidence in the case, which may come from him but need not do so, on a balance of probabilities that that was the case. Evidence to support his position does not need to be corroborated. If you think he has proved that on a balance of probabilities, you must acquit him of this charge. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means that it is more probable or more likely than not.

[Alternative direction if an evidential burden:]

Where crown case proceeds under section 2(1)(b) or (c) and the publication falls under section 2(3)(a)]

In this case the crown case is that the accused intended by his conduct that an effect would be to provide assistance in the commission or preparation of acts of terrorism or was reckless as to whether it would have that effect.

OR if you are not satisfied that the accused intended that his conduct would encourage or induce acts of terrorism, you will have to consider whether he intended that an effect of his conduct was the provision of assistance in the commission or preparation of such acts or (as appropriate) whether he was reckless as to whether his conduct had that effect.

OR the defence say that it is not proved that the accused intended that his conduct would encourage or induce acts of terrorism. If you do not find that proved, you will have to consider whether he intended that an effect of his conduct was the provision of assistance in the commission or preparation of such acts or (as appropriate) whether he was reckless as to whether his conduct had that effect.

However it is said by the defence that:

1. the publication neither expressed his views nor had his endorsement,

and

2. it was clear, in all the circumstances of his conduct, that it did not express his views and did not have his endorsement,

In these circumstances, it falls on the Crown to prove beyond reasonable doubt that the statement did express his views or had his endorsement and it was clear in all the circumstances of his conduct that it did express his views or did have his endorsement. If the Crown fails to do so, you must acquit.

These matters can be inferred or deduced from what has been proved to have been said and/or done.

If any piece of evidence leaves you in reasonable doubt about whether the crown has overcome this defence, you will acquit him.

Section 5

Preparation of terrorist acts

This charge alleges a contravention of section 5(1)(a) of the Terrorism Act 2006 and alleges that the accused was, between the dates specified, preparing to commit an act or acts of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [as appropriate] including outside the United Kingdom, in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or

(b) it involves serious damage to property, or

(c) it endangers a person's life, other than that of the person committing the action, or

(d) it creates a serious risk to the health or safety of the public or a section of the public, or

(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause;, or
- a religious cause;, or
- a racial cause; or
- an ideological cause

It is not necessary that the accused or any other person took any active steps to carry out any terrorist act. The section strikes at preparation for, as opposed to execution of, an act of terrorism.

The crown must prove that the accused intended to commit an act or acts of terrorism. Intention is matter of inference and only capable of being proved by evidence of surrounding facts and circumstance.

So, for the Crown to prove this charge, it must show:

1. that the accused intended **(either)** to commit an act or acts of terrorism or **(as appropriate)** to assist another to commit such acts

and

2. that he took some steps in preparation for giving effect to that intention.

[797] *"any other matter which, in the opinion of the court, could be disposed of with advantage before the trial"*

[798] R v F [2007] QB 960at paras 27-28

[799] Oxford English Dictionary, 2021. Oxford English Dictionary Online. Available at: <http://www.oed.com.nls.idm.oclc.org> [Accessed 12 March 2021]

[800] Oxford English Dictionary, 2021. Oxford English Dictionary Online. Available at: <http://www.oed.com.nls.idm.oclc.org> [Accessed 12 March 2021]

[801] found here on the gov.uk website

Terrorism Act 2000: Sections 15-18 and 54, 57, 58

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In the event of conviction for the terrorism offences set out in sections 41 to 43 of the Counter Terrorism Act 2008, the court must inform the accused of the notification requirements contained in sections 47-53 of that Act. See the Sentencing Checklist section B15 page 105-106.

Reverse burden of proof in the Act

1 A number of provisions of the 2000 Act provide that it is a defence if the accused proves something. Section 118 provides that for certain provisions the creation of the statutory defence creates only an evidential burden and not a legal burden on the accused.

"Section 118.— Defences.

(1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.

(2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court–

(a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or
(b) may accept a fact as sufficient evidence unless a particular matter is proved.

(4) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection (3)(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond reasonable doubt.

(5) The provisions in respect of which subsections (2) and (4) apply are–

(a) sections 12(4), 39(5)(a), 54, 57, 58, 58A, 58B, 77 and 103 *of this Act, and*
(b) sections 13, 32 and 33 of the Northern Ireland (Emergency Provisions) Act 1996 (possession and information offences) as they have effect by virtue of Schedule 1 to this Act."

2 In *R v G & R v J* [2010] 1 AC 43, at para 63, Lord Rodger explained in a case concerned with section 57 of the 2000 Act, one of those listed in section 118, that section 118:

"... gives statutory expression to the familiar concept of an evidential burden on a defendant to raise a defence, which the Crown must then disprove beyond reasonable doubt."

3 The High Court of Justiciary considered section 57 and the effect of section 118 and the decision in *R v G & J* in *Siddique v HM Advocate* 2010 JC 110.

4 It does not follow that for offences other than those listed in section 118(5) (a) there is necessarily a legal burden on the accused. In such cases, unless there is authoritative case-law, a judge will have to determine whether the burden on the accused in the particular offence is legal or evidential. The House of Lords case, *Sheldrake v Director of Public Prosecutions Attorney General's Reference* (No 4 of 2002) [2005] 1 AC 264, is the leading guidance on this. It involved two cases; *Sheldrake* was concerned with a reverse burden in a road traffic context and it was the *AG Reference* which was concerned with the Terrorism Act 2000, specifically section 11. Lords Rodger and Carswell considered that section 11 did impose a legal burden, but the majority led by Lord Bingham read it down in terms of the Human Rights Act 1998, section 3, as imposing only an evidential burden.

5 It does not follow that this will be the correct approach for all of the sections of the 2000 Act which impose a burden on the accused but which are not specified in section 118. Section 11 is in very unusual terms for a criminal statute. It has far-reaching implications for the accused which were of particular concern to Lord Bingham who considered that it would create potentially insuperable difficulty in providing the necessary proof. Paragraphs 47-51 of his opinion capture the essence of his decision. It is important to note that the section 11 defence was not about what the accused knew, suspected or had reasonable cause to suspect.

6 The High Court of Justiciary has examined the nature of the statutory defence for carrying knives etc and found that a legal burden can legitimately be imposed [802] which is also the position for the statutory defence for possession of indecent images of children under Civic Government (Scotland) Act 1982 section 52A(2)(b) [803]. On the other hand in *Urquhart v HM Advocate* [2015] HCJAC 101 the court found that the defence under section 38(2) of the Criminal Justice and Licensing (Scotland) Act 2010 ought to impose only an evidential burden given the breadth of the conduct which could comprise the offence under 38(1).

7 The reasoning in these cases is plainly relevant but the decisions provide an uncertain guide and form only part of what will have to be considered when directions are required on the statutory defence to a particular provision under the 2000 Act. As Lord Bingham put it in *Sheldrake* at para 22:

"The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

8 By the time a judge or sheriff is reading this, it may be too late, but the best procedure to adopt may well be for either Crown or defence to seek a ruling at preliminary hearing under section 72(6) (b) (iv) or first diet under section 71(2) and 79(2)(b) (vi) on what burden is to apply to a particular statutory defence which is not covered by section 118 and when there is no appellate guidance. The discussion in Sheldrake identifies the range of factors which must be considered against the background of the particular nature of a particular provision. Some of these factors, for example the relative difficulty in discharging the burden of proof, can only be known by the parties and perhaps particularly the Crown. If a decision is made at PH or first diet it can be appealed so

that, before the trial, the judge or sheriff will know how to direct on the statutory defence. That seems preferable and more proportionate than allowing what may be a long trial for terrorism to lead to an unjust acquittal or conviction because the wrong directions were given. The undesirability of a retrial in such circumstances is obvious.

9 Some of the offences in this group of sections refer to "reasonable cause to suspect." Whilst the case involved section 17 specifically, the conclusions of the Supreme Court in *R v Lane and another* [2018] 1 WLR 3647 may well apply wherever this phrase appears in these sections. The court agreed with the Court of Appeal that the phrase "has reasonable cause to suspect" in section 17(b) does not mean that the accused must actually suspect, and for reasonable cause, that the money may be used for the purposes of terrorism. It is sufficient that on the information known to the accused there exists, assessed objectively, reasonable cause to suspect that ...

The general definition of terrorism

10 This is found in section 1 of the 2000 Act.

*"*Section 1 - Terrorism: interpretation.
(1)In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government [F1or an international governmental organisation] or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.

(2)Action falls within this subsection if it—

(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3)The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

11 The scope of the definition is very wide indeed and it is plain from the parliamentary debates which preceded its enactment that it was intended to encompass both those forms of terrorism which were known of in 1999 but also new forms which might emerge. It may well capture the actions of freedom fighters pursuing what might be considered a just cause in a foreign country.

12 It is put this way in Archbold, at para 25-13a:

"On its face, any use or threat of violence for a political, religious, racial or ideological cause designed to influence a government or intimidate the public is caught by the definition. In certain circumstances, this could include violence by, e.g., animal rights activists."

13 The definition was examined by the Supreme Court in *R v Gul* 2014 AC 1260. Having examined paras 27-28 from *R v F*, the Supreme Court went on in *Gul* to offer a useful, albeit abbreviated, synopsis of the scope of the section 1 definition at para 27 before examining its width in paras 28 and 29 and reaching its conclusions at paras 38 and 39:

"27. The effect of section 1(1) of the 2000 Act is to identify terrorism as consisting of three components. The first is the "use or threat of action", inside or outside the UK, where that action consists of, inter alia, "serious violence", "serious damage to property", or creating a serious risk to public safety or health: section 1(1)(a)(2)(4). The second component is that the use or threat must be "designed to influence the government [of the UK or any other country] or an [IGO] or to intimidate the public": section 1(1)(b)(4) . The third component is that the use or threat is "made for the purpose of advancing a political, religious, racial or ideological cause": section 1(1)(c) .

28. As a matter of ordinary language, the definition would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or IGO in order to advance a very wide range of causes. Thus, it would appear to extend to military or quasi-military activity aimed at bringing down a foreign government, even where that activity is approved (officially or unofficially) by the UK Government.

29. It is neither necessary nor appropriate to express any concluded view whether the definition of "terrorism" goes that far, although it is not entirely easy to see why, at least in the absence of international law considerations, it does not. For present purposes it is enough to proceed on the basis that, subject to these considerations, the definition of terrorism in section 1 in the 2000 Act is, at least if read in its natural sense, very far reaching indeed. Thus, on occasions, activities which might command a measure of public understanding, if not support, may fall within it: for example, activities by the victims of oppression abroad, which might command a measure of public understanding, and even support in this country, may well fall within it."
...
"38. We return to the language used in section 1 of the 2000 Act. Despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of section 117 , it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this court. For the reasons given by Lord Lloyd, Lord Carlile and Mr Anderson, the definition of "terrorism" was indeed intended to be very wide. Unless it is established that the natural meaning of the legislation conflicts with the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is not suggested) or any other international obligation of the United Kingdom (which we consider in the next section of this judgment), our function is to interpret the meaning of the definition in its statutory, legal and practical context. We agree with the wide interpretation favoured by the prosecution: it accords with the natural meaning of the words used in section 1(1)(b) of the 2000 Act, and, while it gives the words a

concerningly wide meaning, there are good reasons for it.

*39. We are reinforced in this view by the further consideration that the wide definition of terrorism was not ignored by Parliament when the 2000 Act was being debated. It was discussed by the Home Secretary who also, in answer to a question, mentioned the filter of section 117 : see Hansard (HC Debates), 14 December 1999, cols 159, 163. This is not a case *1284 in which it is appropriate to refer to what was said in Parliament as an aid to statutory interpretation, but it provides some comfort for the Crown's argument. Of rather more legitimate relevance is the fact that Parliament was content to leave the definition of "terrorism" effectively unchanged, when considering amendments or extensions to the 2000 Act, well after the 2007 report of Lord Carlile, which so clearly (and approvingly) drew attention to the width of the definition of terrorism: see eg the Crime and Security Act 2010 , the Terrorist Asset-Freezing etc Act 2010 and the Terrorism Prevention and Investigation Measures Act 2011."*

Directing the jury on section 1

14 It can be seen that within each of the three components provided by subsections 1(b), 1(c) and (2) there are alternative criteria, any one of which meets the requirement of the respective subsection and it is necessary to make this clear to the jury. In a particular case, not all of the criteria may be relevant and some judgment may be required as to how to focus the issues for the jury. It may be best to start by offering the whole definition as suggested in the specimen directions infra, before restating those criteria which are relevant in the particular case.

15 The importance of carefully employing the statutory language when giving directions on a section 57 offence is demonstrated in *Siddique v HM Advocate* 2010 JC 110. The Jury Manual Committee is not aware of any authoritative definition, or even obiter discussion, of the meaning of "ideological." If the issue arises, recourse could be had to the definition of ideology in the Oxford English Dictionary ("OED") which offers a number of meanings, but the relevant meaning would seem to be this:

"4. A systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct. [Also: the forming or holding of such a scheme of ideas]." [804]

OED defines ideological, in what seems to be the relevant sense, in this way:

"3.Of or relating to a political, economic, or other ideology (see ideology n 4); based on a principle or set of unshakeable beliefs." [804]

"Section 15 - Fund-raising.
(1) A person commits an offence if he—

(a) invites another to provide money or other property, and
(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

(2) A person commits an offence if he—

(a) receives money or other property, and
(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the

purposes of terrorism.

(3)A person commits an offence if he—

(a) provides money or other property, and
(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

(4) In this section a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration."

16 In order to "invite" in terms of the 2000 Act, it is suggested that it is not necessary that the accused is personally involved in terrorism. See R v Choudary and another [2018] 1 WLR 695 at para 44. Whilst that case was concerned with the word "invites" in section 12 of the 2000 Act, the Court of Appeal's decision would seem apt to section 15.

17 In response to an argument that "to invite" implies that the maker of the invitation is already engaged in something, or intends to do that "something" himself, the court concluded:

"44. We accept such an implication may arise in ordinary conversation, depending on the context (an invitation to a party for example). However it is possible to invite someone to do something which the person issuing the invitation is not doing and does not intend to do (an invitation to counsel to lodge written submissions, to take a different example). If resort needs to be had to dictionaries to make the point, the first definition provided for the word "invite" in the Oxford English Dictionary is "to make a polite, formal or friendly request to (someone) to go somewhere or do something."

"Section 16 - Use and possession.

(1) A person commits an offence if he uses money or other property for the purposes of terrorism.

(2) A person commits an offence if he—

(a) possesses money or other property, and
(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism."

*"*Section 17 - Funding arrangements.

A person commits an offence if—

(a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and
(b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."

18 The phrase "has reasonable cause to suspect" in section 17(b) does not mean that the accused must actually suspect, and for reasonable cause, that the money may be used for the purposes of terrorism. It is sufficient that on the information known to the accused there exists, assessed objectively, reasonable cause to suspect that that may be the use to which it is put; opinion of the

Supreme Court given by Lady Hale in *R v Lane and another* [2018] 1 WLR 3647.

"Section 17A - Insurance against payments made in response to terrorist demands

(1)The insurer under an insurance contract commits an offence if—

(a) the insurer makes a payment under the contract, or purportedly under it,
(b)the payment is made in respect of any money or other property that has been, or is to be, handed over in response to a demand made wholly or partly for the purposes of terrorism, and
(c) the insurer or the person authorising the payment on the insurer's behalf knows or has reasonable cause to suspect that the money or other property has been, or is to be, handed over in response to such a demand.

(2) If an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a director, manager, secretary or other similar officer of the body corporate, or
(b) any person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(3)The reference in subsection (2) to a director, in relation to a body corporate whose affairs are managed by its members, is a reference to a member of the body corporate.

(4) If an offence under this section is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a partner, or
(b) any person who was purporting to act in that capacity, that person, as well as the partnership, is guilty of the offence and liable to be proceeded against and punished accordingly.

(5) In this section "insurance contract" means a contract under which one party accepts significant insurance risk from another party ("the policyholder") by agreeing to compensate the policyholder if a specified uncertain future event adversely affects the policyholder.]

"Section 18 - Money laundering.
(1) A person commits an offence if he enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property—

(a) by concealment,
(b) by removal from the jurisdiction,
(c) by transfer to nominees, or
(d) in any other way.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

19 This provision was given indirect consideration by the Supreme Court in *R v Lane and another* [2018] 1 W.L.R. 3647 which was primarily concerned with section 17, but in giving the opinion of

the whole court, Lady Hale said this:

"21. Similarly, section 18 of the same Act creates an offence of money laundering in relation to terrorist property. The offence contains no requirement of a mental element as a definition of the offence. Rather, by subsection (2), it provides that it is a defence for a person charged to prove that "he did not know and had no reasonable cause to suspect" that he was dealing with terrorist property. Thus the mental element provided for is consistent with that in the adjacent section 17, namely objectively assessed reasonable cause to suspect, although the onus of proof is reversed. This section also compellingly reinforces the construction of section 17 arrived at by the judge and the Court of Appeal. The contention of the appellants that section 18 can be read as providing a defence to a defendant who shows that he did not in fact suspect the terrorist nature of the property with which he was dealing is simply not consistent with the words used. If that is what had been the intention, section 18 would no doubt have provided a defence for an accused who "did not know or suspect", using the juxtaposition of knowledge and suspicion which appears in the next following section 19". [Emphasis added]

20 Lady Hale went on to examine the implications of the phrase "*he did not know and had no reasonable cause to suspect*" in para 24 and certain remarks therein will be relevant when a judge has to direct on an offence comprised where the accused "did not know and had no reasonable cause to suspect."

"24. In the present case it would be an error to suppose that the form of offence-creating words adopted by Parliament result in an offence of strict liability. It is certainly true that because objectively-assessed reasonable cause for suspicion is sufficient, an accused can commit this offence without knowledge or actual suspicion that the money might be used for terrorist purposes. But the accused's state of mind is not, as it is in offences which are truly of strict liability, irrelevant. The requirement that there exist objectively assessed cause for suspicion focuses attention on what information the accused had. As the Crown agreed before this court, that requirement is satisfied when, on the information available to the accused, a reasonable person would (not might or could) suspect that the money might be used for terrorism. The state of mind of such a person is, whilst clearly less culpable than that of a person who knows that the money may be used for that purpose, not accurately described as in no way blameworthy. It was for Parliament to decide whether the gravity of the threat of terrorism justified attaching criminal responsibility to such a person, but it was clearly entitled to conclude that it did. It is normal, not unusual, for a single offence to be committed by persons exhibiting different levels of culpability. The difference in culpability can, absent other aggravating features of the case, be expected to be reflected in any sentence imposed if conviction results."

"Section 14 - Terrorist property.

(1)In this Act "terrorist property" means—

(a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation),
(b) proceeds of the commission of acts of terrorism, and
(c) proceeds of acts carried out for the purposes of terrorism.

(2) In subsection (1)—

(a) a reference to proceeds of an act includes a reference to any property which wholly or partly,

and directly or indirectly, represents the proceeds of the act (including payments or other rewards in connection with its commission), and
(b) the reference to an organisation's resources includes a reference to any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation."

"Section 121 - Interpretation.
In this Act—

"act" and "action" include omission,

"article" includes substance and any other thing,

"British Transport Police Force" means the constables appointed under section 53 of the British Transport Commission Act 1949 (c. xxix),

"counter-terrorism financial investigator" is to be read in accordance with section 63F;

"customs officer" means an officer of Revenue and Customs,

"dwelling" means a building or part of a building used as a dwelling, and a vehicle which is habitually stationary and which is used as a dwelling,

"explosive" means—

(a) an article or substance manufactured for the purpose of producing a practical effect by explosion,
(b) materials for making an article or substance within paragraph (a),
(c) anything used or intended to be used for causing or assisting in causing an explosion, and
(d) a part of anything within paragraph (a) or (c),

"firearm" includes an air gun or air pistol,

"immigration officer" means a person appointed as an immigration officer under paragraph 1 of Schedule 2 to the Immigration Act 1971,

"the Islands" means the Channel Islands and the Isle of Man,

"organisation" includes any association or combination of persons,

"premises", except in section 63D, includes any place and in particular includes—

(a) a vehicle,
(b) an offshore installation within the meaning given in section 44 of the Petroleum Act 1998, and
(c) a tent or moveable structure,

"property" includes property wherever situated and whether real or personal, heritable or moveable, and things in action and other intangible or incorporeal property,

"public place" means a place to which members of the public have or are permitted to have access,

whether or not for payment,

"road" has the same meaning as in the Road Traffic Act 1988 (in relation to England and Wales), the Roads (Scotland) Act 1984 (in relation to Scotland) and the Road Traffic Regulation (Northern Ireland) Order 1997 (in relation to Northern Ireland), and includes part of a road, and

"vehicle", except in sections 48 to 52 and Schedule 7, includes an aircraft, hovercraft, train or vessel."

"Section 54 - Weapons training

(1) A person commits an offence if he provides instruction or training in the making or use of—

(a) firearms, ...
(b) explosives, or
(c) chemical, biological or nuclear weapons.

(2) A person commits an offence if he receives instruction or training in the making or use of—

(a) firearms, ...
(b) explosives, or
(c) chemical, biological or nuclear weapons.

(3) A person commits an offence if he invites another to receive instruction or training and the receipt

(a) would constitute an offence under subsection (2)

(5) It is a defence for a person charged with an offence under this section in relation to instruction or training to prove that his action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism."

"Section 57 - Possession for terrorist purposes

(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(3) In proceedings for an offence under this section, if it is proved that an article -

(a) was on any premises at the same time as the accused, or
(b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it."

21 Aside from the statutory definition of 'article' it has been held that it is wide enough to cover a document which incites another to commit an act of terrorism [806]. The Crown require to prove beyond reasonable doubt that the circumstances in which the accused possesses the article raises a reasonable suspicion that the possession was for the purpose specified in section 57(1). The circumstances of possession by the accused are a crucial element of the offence [807]. If the Crown prove this, then and only then does the defence in section 57(2) require to be considered. If evidence is led in support of that defence, then the Crown require to establish the defence is not applicable beyond reasonable doubt [808]. The dicta in these English authorities were adopted in *Siddique v HMA* 2010 SCCR 236.

"Section 58 - Collection of Information

"(1) A person commits an offence if—

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.

(2) In this section 'record' includes a photographic or electronic record.

(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession."

When preparing directions in specific cases, Lord
Roger's comments in *R v G* 2010 1 AC 43 on section 58 are essential reading.
See paragraphs 39-50.

22 Extrinsic evidence can be used to explain the nature of information and that it was intended to be used for the commission of an act of terrorism. It is not legitimate to lead such evidence to demonstrate that an ex facie innocuous document was intended for such a purpose [809].

See the definition of terrorism under section 1 under "The general definition of terrorism" above.

See section 118 as referenced under "Reverse burden of proof in the Act" above.

1. DIRECTION

General

In the definition of terrorism, if required, explosive and firearm are defined as follows:-

'explosive' –
(a) an article or substance manufactured for the purpose of producing a practical effect by explosion,
(b) materials for making an article or substance within paragraph (a),
(c) anything used or intended to be used for causing or assisting in causing an explosion, and
(d) a part of anything within paragraph (a) or (c)

'firearm' - includes an air gun or air pistol

Section 15, subsection 1

The charge against the accused alleges that he invited another to provide money or other property intending that it should be used, or in circumstances where he had reasonable cause to suspect that it may be used, for the purposes of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:
(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

The word "invites" has its normal meaning [and would include asking, requesting and encouraging a person to provide or give something.]

The invitation must relate to the provision of money or other property for the purposes of terrorism as I have defined it. The provision of money or other property is a reference to its being given, lent or otherwise made available,

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case

"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

The Crown also have to prove that the invitation is made with the intention that the money or property should be used for the purposes of terrorism or the invitation is made by the person in circumstances in which he has reasonable cause to suspect the money or property may be used for the purposes of terrorism.

What a person intends can be inferred or deduced from what's been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary intention, then you still require to consider whether he had reasonable cause to suspect. This is an objective test. In other words you must consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

It is not necessary that the accused actually did suspect, it is enough if, on the information available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

Subsection 2

The charge against the accused alleges that he received money or other property intended that it should be used or has reasonable cause to suspect that it may be used for the purposes of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:
(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following::

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or

- an ideological cause.

For the commission of the offence, a person must receive money or other property for the purposes of terrorism as I have defined it. The Crown also have to prove that the receipt of the money or other property was with the intention that the money or property should be used for the purposes of terrorism or in circumstances in which he has reasonable cause to suspect the money or property may be used for the purposes of terrorism.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case

"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

What a person intends can be inferred or deduced from what has been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary intention, then you must still consider whether he had reasonable cause to suspect. This is an objective test.

You should consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

It is not necessary that the accused actually did suspect, it is enough if, on the information available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

Subsection 3

The charge against the accused alleges that he provided money or other property knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:
(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or

- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

For the commission of the offence, a person must provide money or other property for the purposes of terrorism as I have defined it. The provision of money or other property refers to its being given, lent or otherwise made available, whether or not for consideration.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case
"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

The Crown also have to prove that the provision of the money or other property was in the knowledge that the money or property will or may be used for the purposes of terrorism or in circumstances in which he has reasonable cause to suspect the money or property will or may be used for the purposes of terrorism.

What a person knows can be inferred or deduced from what has been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary knowledge, then you must still consider whether he had reasonable cause to suspect. This is an objective test.

You should consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the money or property will or may be used for the purposes of terrorism.

It is not necessary that the accused actually did suspect, it is enough if, on the information available to the accused, a reasonable person would suspect that the money or property will or may be used for the purposes of terrorism.

Section 16, Subsection 1 (uses)

The charge against the accused alleges that he used money or other property for the purposes of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

For the commission of the offence, a person must use money or other property for the purposes of terrorism as I have defined it.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case
"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

[If in the circumstances of the case it is considered that some elaboration of the potential meaning of the word using is required, a judge could say something along these lines:
Using involves actions which would fall into the normal meaning of the word and could include such actions as spending, storing or investing money, and storing, distributing, exhausting, managing, operating or exploiting property.]

Subsection 2 (possesses)

The charge against the accused alleges that he possessed money or other property with either intending or having reasonable cause to suspect that it may be used for the purposes of terrorism. The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or

(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following::

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere. (if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

For the commission of the offence, a person must possess money or other property for the purposes of terrorism as I have defined it.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case
"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

Whether a person possesses something does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

The Crown also have to prove that the accused possessed the money or other property intending that the money or property should be used for the purposes of terrorism or in circumstances in which he has reasonable cause to suspect the money or property may be used for the purposes of terrorism.

What a person intends can be inferred or deduced from what has been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary intention, then you must still consider whether he had reasonable cause to suspect. This is an objective test.

You should consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

It is not necessary that the accused actually did suspect, it is enough if, on the information

available to the accused, a reasonable person would suspect that the money or property may be used for the purposes of terrorism.

Section 17

The charge relates to funding arrangements for terrorism. The offence is committed if a person enters into or becomes concerned in an arrangement resulting in money or other property is made available to is to be made available to another either knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere. (if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

The Crown have to prove firstly that the accused entered into or became concerned in an arrangement as a result of which money or other property was made available or was to be made available to another.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case.

"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

Entering into means such things as becoming involved or joining or participating in and arrangement means such things as an agreement, understanding, bargain, pact or deal.

'Being concerned in' requires the accused's active involvement in the arrangement. That can take many forms, at the centre or on the fringes. For instance, it can cover financiers, couriers carrying money or property, go-betweens, look- outs, advertisers, those who store money or property. It covers the arrangement itself, or any link in the chain whereby money or property is made or will be made available to another. The accused must be involved in some way like that. The Crown must also prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an arrangement whereby money or other property was made available or was to be made available to another.

The arrangement must result in the money or property being made available at the time or in the future to another.

The Crown also have to prove that the money or other property was made available or is to be made available to another in the knowledge that the money or property will or may be used for the purposes of terrorism or in circumstances in which he has reasonable cause to suspect the money or property will or may be used for the purposes of terrorism.

What a person knows can be inferred or deduced from what has been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary knowledge, then you must still consider whether he had reasonable cause to suspect. This is an objective test.

You should consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the money or property will or may be used for the purposes of terrorism.

It is not necessary that the accused actually did suspect, it is enough if, on the information available to the accused, a reasonable person would suspect that the money or property will or may be used for the purposes of terrorism.

Section 17A

The charge is making insurance payments in response to terrorist demands.

An offence is committed if:

1. an insurer makes a payment under an insurance contract, or purportedly makes payment under such a contract,
2. that payment is made in respect of any money or other property that has been or is to be handed over in response to a demand wholly or partly for the purposes of terrorism
3. the insurer or the person authorising the payment on behalf of the insurer knows or has reasonable cause to suspect that the money or other property has been or is to be handed over in response to such a demand.

This offence covers the situation in which an insurer makes a payment under an insurance contract and that payment is in respect of money or property which is to be handed over or has been handed over in response to a demand made at least in part for the purposes of terrorism and the person making or authorising that payment has the necessary knowledge or has reasonable cause to suspect. The aim behind this provision is to prohibit such insurance payments being

made.

'Insurance contract' means a contract under which one party accepts significant insurance risk from another party ("the policyholder") by agreeing to compensate the policyholder if a specified uncertain future event adversely affects the policyholder.

[If in the circumstances of the case a definition of property is required, select from the following and apply to the circumstances of the case
"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere. (if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

The Crown also have to prove that the handing over of the money or other property was in the knowledge that the money or property has been or is to be handed over in response to a demand wholly or partly for the purposes of terrorism or in circumstances in which the insurer or the person authorising the payment has reasonable cause to suspect the money or property has been or is to be handed over in response to such a demand.

What a person knows can be inferred or deduced from what has been proved to have been said and/or done.

If you are not satisfied that the accused had the necessary knowledge, then you must still consider whether he had reasonable cause to suspect. This is an objective test.

You should consider all the circumstances and decide whether, on the information available to the accused, a reasonable person would suspect that the payment has been or is to be handed over in response to such a demand.

It is not necessary that the accused actually did suspect, it is enough if, on the information available to the accused, a reasonable person would suspect that the payment has been or is to be handed over in response to such a demand.

[In the event of the circumstances of subsections 2 to 4 being alleged directions appropriate to the particular circumstances libelled will require to be provided.]

"(2) If an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a director, manager, secretary or other similar officer of the body corporate, or
(b) any person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) The reference in subsection (2) to a director, in relation to a body corporate whose affairs are managed by its members, is a reference to a member of the body corporate.

(4),If an offence under this section is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a partner, or
(b) any person who was purporting to act in that capacity,

that person, as well as the partnership, is guilty of the offence and liable to be proceeded against and punished accordingly."

Section 18

[Please consider the discussion at the start of this chapter on the reverse burden. Alternative versions of directions are given to be used according to whether a judge decides that the burden is evidential or legal.]

The charge which the accused faces alleges the laundering of terrorist property.

A person commits this offence if he enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property—

(a) by concealment,
(b) by removal from the jurisdiction,
(c) by transfer to nominees, or
(d) in any other way.

Terrorist property means money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), proceeds of the commission of acts of terrorism, and proceeds of acts carried out for the purposes of terrorism.

[If in the circumstances of the case a more detailed definition of property is required, select from the following and apply to the circumstances of the case
"Property" includes property wherever situated and whether real or personal, heritable or moveable and other intangible or incorporeal property so it really means property of any kind or description.]

Reference to proceeds of an act includes a reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including payments or other rewards in connection with its commission), and
Reference to an organisation's resources includes a reference to any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

Entering into means such things as becoming involved or joining or participating in and arrangement means such things as an agreement, understanding, bargain, pact or deal.

'Being concerned in' requires the accused's active involvement in the arrangement. That can take many forms, at the centre or on the fringes. For instance, it can cover financiers, couriers carrying money or property, go-betweens, look- outs, advertisers, those who store money or property. It covers the arrangement itself, or any link in the chain whereby money or property is made or will be made available to another. The accused must be involved in some way like that.

The Crown must also prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an arrangement facilitating the retention or control by or on behalf of another person terrorist property as I have defined it. The manner in which terrorist property is retained or controlled is endless and covers what is alleged in the present charge.

A person facilitates something if he enables, helps or assists in something. The arrangement must facilitate the retention or control of terrorist property by or on behalf of another. The arrangement has to be a means whereby that property is retained or controlled.

The arrangement has to involve the retention or control of terrorist property by any means. This can be carried out in any way including concealing, removal to another country, or transfer to others.

If the defence is relied on:-
In this instance the accused says that/the defence suggest that there is evidence which suggests he/the accused did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

Legal burden direction

What a person knows can be inferred or deduced from what has been proved to have been said and/or done. Whether the accused had no reasonable cause to suspect is an objective test. In considering whether the accused had no reasonable cause to suspect you should consider all the circumstances and decide whether on the information available to the accused he had no reasonable cause to suspect that the arrangement you have heard about related to terrorist property.

Suspect has its normal meaning.

Proof that the accused had no such knowledge or reasonable cause to suspect rests with the accused. That means he has to satisfy you on the basis of evidence in the case, which may come from the accused but need not do so, on a balance of probabilities that this was the case. Evidence to support his position does not need to be corroborated. If you think he has proved that on the balance of probabilities, you must acquit him. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means "it is more probable or more likely than not."

Evidential burden direction

In this instance the accused says/the defence suggest that there is evidence which suggests that the accused did not know and had no reasonable cause to suspect that the arrangement related to terrorist property. The accused having raised this matter, it falls on the Crown to prove beyond reasonable doubt that he did know or had reasonable cause to suspect that the arrangement related to terrorist property. If the Crown fails to do so, you must acquit.

What a person knows can be inferred or deduced from what has been proved to have been said and/or done. Whether the accused had no reasonable cause to suspect is an objective test.
In considering whether the accused had no reasonable cause to suspect you should consider all the circumstances and decide whether on the information available to the accused he had no reasonable cause to suspect that the arrangement you have heard about related to terrorist

property.
Suspect has its normal meaning.

The accused does not need to offer corroboration and if a single piece of evidence leaves you in reasonable doubt about whether the crown has proved that accused knew or had reasonable cause to suspect that the arrangement related to terrorist property, you will acquit him.

Section 54

Subsections (1) and (2)

The charge is one of provision/receipt of instruction or training to make use of firearms, explosives, or chemical, biological, or nuclear weapons. Reference to firearm includes air weapons. Explosive includes an article or substance manufactured for the purpose of producing an explosion, materials for making such an article or substance, or anything used or intended to be used for causing or assisting in causing an explosion.

[if subsection (1)] The provision of instruction includes making it generally available or available to one or more specific persons. This covers provision by publishing in written materials or the internet for example.

Subsection (3)

The charge is one of inviting another to receive instruction or training in the making or use of firearms, explosives, or chemical, biological, or nuclear weapons. Such an invitation can be either a general one or to one or more specific persons. This invitation can take any form verbal, written, and even for general consumption on the likes of the internet.

The definition of “terrorism” has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

a. it involves serious violence against a person, or
b. it involves serious damage to property, or
c. it endangers a person's life, other than that of the person committing the action, or
d. it creates a serious risk to the health or safety of the public or a section of the public, or
e. it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat
is designed to do any one or more of the following::

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if
the use of firearms or explosives are involved this factor is satisfied without
any further evidence),

Thirdly, that use or threat is
made for the purpose of advancing any one or more of the following:

- a political cause;, or
- a religious cause;, or
- a racial cause; or
- an ideological cause.

So
to find this charge proved you would need to be satisfied that:

Sub-section
(1)

- that the accused provided instruction or training in the making or use of firearms, explosives or chemical, biological or nuclear weapons

Sub-section
(2)

- that the accused received instruction or training in the making or use of firearms, explosives or chemical, biological or nuclear weapons

Subsection
(3)

- that the accused invited another person to receive instruction or training in the making or use of firearms, explosives or chemical,

biological or nuclear weapons

If
the defence in terms of subsection (5) is raised

In
this case the accused says/the defence found on evidence that his actions/involvement in such instruction or training was wholly for a purpose other than assisting, preparing for or participating in terrorism.

First,
please note, that the defence refers to the instruction or training being wholly for another purpose (specify). This means that if it is partly for another purpose, the defence does not exist.

In
this case evidence has been led to enable you to consider this defence. This means that the Crown must satisfy you beyond reasonable doubt that this defence does not apply. If you are not so satisfied, you must assume that the defence is satisfied and acquit the accused.

How
should you approach this in your deliberations? You should first, consider whether the Crown have proved beyond reasonable doubt that the accused has provided instruction or training/ received instruction or training etc [depending on whether the charge is a contravention of section 54(1), (2), or (3)] If you are not satisfied of that then you must acquit the accused.

If,
however, you are satisfied on that issue, and that evidence has been led to the effect that the action or involvement of the accused was wholly for a purpose other than assisting, preparing, or participating in terrorism, you will acquit the accused unless the Crown satisfy you beyond reasonable doubt that the position of the accused in that regard is not established.

It
follows that if you conclude that the accused's actions or involvement are partly for the purpose of assisting, preparing for or participating in terrorism, then this defence fails.

The
accused does not need to offer corroboration and if a single piece of evidence leaves you in reasonable doubt that his actions/involvement in the provision, receipt, or invitation to receive (as appropriate) such instruction or training was for the purpose of assisting, preparing for or participating in *terrorism* you will acquit.

For the definitions of Chemical, Biological and Nuclear weapons see section 55.

Section 57

The charge the accused faces is that he had possession of an article, namely..... in circumstances which give rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

Reference to an article includes a substance and any other thing. It also includes a document if such a document would incite someone to commit an act of terrorism. The reason for this is that instigation includes incitement.

Now I wish to deal with the issue of possession. The Crown must prove possession of the item by the accused beyond reasonable doubt. Possession does not amount to ownership. Possession simply requires that the accused knew or was aware of the presence of the item and had control over it. Control does not only cover something within easy reach. A person can still control something which is stored elsewhere. Control means having a say in what happens to the item.

However, the legislation has introduced two alternative situations in which an accused person is assumed to have possession of an article. In relation to this charge a person is assumed to have possession of the item if you are satisfied beyond reasonable doubt that either of the following situations applies:

1. That the item was on any premises at the same time as the accused, or
2. That the item was on premises occupied by the accused or which he habitually used, otherwise than as a member of the public.

If
you are satisfied that either of these two situations existed are e, you are entitled to assume that the accused
did have possession of the article.
However, that assumption will not apply if there is evidence which you
accept that the accused did not know of its presence on the premises or that he had no control over it. This, in effect, means that if there is evidence before you which suggests that the accused did not know of the article's presence on the premises or that he had no control over it, the Crown have again to satisfy you beyond reasonable doubt that he did know of its presence or he had control over it.

Reasonable suspicion

Turning to the issue of reasonable suspicion, it is a crucial element of the Crown case that the circumstances of possession of the article give rise to a reasonable suspicion that this possession was for the relevant purpose, namely connected with the commission, preparation, or instigation of an act of terrorism. You must be satisfied of this beyond reasonable doubt.

The charge refers to an act of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United Kingdom] in which the action falls within any of the following descriptions:

a. it involves serious violence against a person, or
b. it involves serious damage to property, or
c. it endangers a person's life, other than that of the person committing the action, or
d. it creates a serious risk to the health or safety of the public or a section of the public, or
e. it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence),

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

So
for this charge to be proved you would have to be satisfied that:

- that the accused had possession of the article. That means he knew he had the article and had control over it. You are entitled to assume that he had possession of it if either of the two situations I have described are established unless you accept evidence that shows that he did not know of its presence on the premises or that he had no control over it.
- That the circumstances in which the accused possessed the article gave rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(If the subsection 2 defence is raised)

In
this case the accused says his possession of the item was not for a purpose connected with the commission, preparation, or instigation of an act of terrorism. I have already advised you as to what is covered by reference to ‘terrorism’.

In this case evidence has been led to enable you to consider this defence. This means that the Crown must satisfy you beyond reasonable doubt that this defence does not apply. If you are not so satisfied, you must assume that the defence is satisfied and acquit the accused.

How should you approach this in your deliberations?

You should first consider whether the Crown have proved beyond reasonable doubt that the circumstances of possession of the article give rise to a reasonable suspicion that this possession was for the relevant purpose, namely connected with the commission, preparation, or instigation of an act of terrorism as I have defined it.

If you are not satisfied of that then you must acquit the accused.

If, however, you are satisfied on that issue, and since evidence has been led to the effect that the possession of the accused of the article was not for a purpose connected with the commission, preparation, or instigation of an act of terrorism, you will acquit the accused unless the Crown satisfy you beyond reasonable doubt that the accused's explanation/ the evidence founded on by the defence should be rejected.

Section 58

The charge the accused faces is that he collected/made a record of information of a kind likely to be useful to a person committing or preparing to commit an act of terrorism / possessed a document or record containing information of a kind likely to be useful to a person committing or preparing to commit an act of terrorism.

A record includes not only anything written but also a photographic or electronic record.

Turning to the issue of whether a person possesses such an item, the Crown must prove possession of the item by the accused beyond reasonable doubt. Possession does not amount to ownership. Possession simply requires that the accused knew or was aware of the presence of the item and had control over it. Control does not only cover something within easy reach. A person can still control something which is stored elsewhere. Control means having a say in what happens to the item.

The
accused must be proved to have known that the information he collected/made a record of/possessed contained information of a kind likely to be useful to a person committing or preparing an act of terrorism. It is not necessary that he knew everything that was in the document/ record, only that he knew the kind or the nature of information that it contained. That may
often be apparent from the title of the document or from just a cursory glance at its contents.

The charge refers to an act of terrorism.

The definition of "terrorism" has three components, each of which must be present.

First, the use or threat of action anywhere [where appropriate: including outside the United

Kingdom] in which the action falls within any of the following descriptions:

(a) it involves serious violence against a person, or
(b) it involves serious damage to property, or
(c) it endangers a person's life, other than that of the person committing the action, or
(d) it creates a serious risk to the health or safety of the public or a section of the public, or
(e) it is designed seriously to interfere with or seriously to disrupt an electronic system.

Secondly, that use or threat is designed to do any one or more of the following:

- to influence the government which includes any national government or any of the devolved governments in the United Kingdom and Northern Ireland; or
- to influence an international governmental organisation; or
- to intimidate the public anywhere; or
- to intimidate a section of the public anywhere.

(if the use of firearms or explosives are involved this factor is satisfied without any further evidence).

Thirdly, that use or threat is made for the purpose of advancing any one or more of the following:

- a political cause; or
- a religious cause; or
- a racial cause; or
- an ideological cause.

So to find this charge proved you would have to be satisfied that:

- the accused collected/made a record of/ had control of a record/ which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism,
- the accused knew he had that record, and
- the accused knew the kind of information it contained.

(if the subsection 3 defence is raised)

In this case the accused says he/she had reasonable excuse for his possession of the items mentioned in the charge/ for his collection on the information referred to in the charge.
In this case evidence has been led to enable you to consider this defence. This means that the Crown must satisfy you beyond reasonable doubt that this defence does not apply. If you are not so satisfied, you must assume the defence is satisfied and acquit the accused.

How should you approach this in your deliberations? You should first, consider whether the Crown have proved beyond reasonable doubt that the accused collected or made a record etc [Section 58(1)(a)]/ possessed a document or record etc. [810].

If you are not satisfied of that then you must acquit the accused.

If, however, you are satisfied on that issue, and since evidence has been led to the effect that the accused had a reasonable excuse for his action/possession, you will acquit the accused unless the Crown satisfy you beyond reasonable doubt that the accused's explanation/ the evidence founded on by the defence should be rejected.

[802] *Donnelly v HM Advocate* 2009 SCCR 512 and *Glancy v HM Advocate* 2012 SCCR 52

[803] *McMurdo v HM Advocate* 2015 SLT 277

[804] Oxford English Dictionary, 2021. Oxford English Dictionary Online. [online] Available at: <www-oed-com.nls.idm.oclc.org> [Accessed 12 March 2021]

[805] Oxford English Dictionary, 2021. Oxford English Dictionary Online. [online] Available at: <www-oed-com.nls.idm.oclc.org> [Accessed 12 March 2021]

[806] *R v Zafar* 2008 QB 810, 2008 2 WLR 1013, 2008 4 All ER 46

[807] *R v G & R v J* [2010] 1 AC 43 at paras 51-56

[808] R v G, R v J, supra

[809] *R v K* 2008 QB 827, 2008 3 All ER 526, 2008 2WLR 1026

[810] Section 58(1)(b)

The Verdicts Open to the Jury

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1. LAW

LAW

General References

Renton & Brown, *Criminal Procedure*, 6th ed, paras. 18–79/8 to 18–79/10/1; 18–89; and 18–90.

Legal Principles

1 Where there are multiple charges, each charge must be considered and dealt with separately. "[I]t is always proper and desirable that the jury be specifically informed by the presiding Judge of the alternative verdicts which they can return."[811] Except for exceptional circumstances, the appropriate standard direction is that there are three verdicts open to them [on each charge and in respect of each accused]: guilty, not guilty and not proven.[812] In such exceptional circumstances the judge may give a special direction in law which limits the options before the jury.[813] Exceptional circumstances might occur, for example, where the accused admits to having committed a lesser alternative offence but denies the principal charge, in which case the judge may direct the jury to find the accused guilty (at the very least) of the lesser charge. Similarly, a judge may direct a jury to acquit on a charge if, as a matter of law, there is insufficient evidence to support a conviction, albeit that no submission of no case to answer has been made. A guilty verdict may be accompanied by a qualification, such as "under provocation", or with deletions from the charge.[814]

2 It is not necessary to inform the jury specifically that "not proven" is a verdict of acquittal and that the accused cannot be tried again for the same offence,[815] but it is thought to be good practice to do so. It is dangerous to attempt to explain any difference between the not proven and not guilty verdicts.[816] It is a misdirection to tell the jury that not proven is appropriate in circumstances where the Crown has not established guilt, whereas not guilty may be appropriate where the jury believes the accused has exculpated himself.[817]However, it has been held not to be a misdirection that a jury might return a not proven verdict where the Crown have not established guilt beyond reasonable doubt but where there are still "lingering doubts" as to the accused's guilt, or where the words "not guilty" would "stick in their throats".[818]

3 Although the matter has been little discussed, examples may be Found of juries being invited to add riders to their verdicts. Some of these are referred to in the commentary to the case of *HMA v Tracey*, referred to below.[819] However the trial judge in that case was of opinion that juries should not be invited to add riders to their verdicts,[820] although that does not apply to findings of diminished responsibility or provocation.[821] If direction is given, the wording quoted at para [14] may be adapted to suit.

[811] *MacDermid and Neill v HMA*, 1948 JC 12, 15 per LJ-G Cooper, 1948 SLT 202

[812] *Harkin v HMA*, 1992 SCCR 501, 504D-E per LJ-C Ross, 1992 SLT 785

[813] *MacDermid and Neill, supra*

[814] See Chapter on Deletions from a charge below

[815] *Macdonald v HMA*, 1989 SCCR 29.

[816] *Fay v HMA*, 1989 JC 129, 1989 SLT 129; *McDonald v HMA*, 1995 SCCR 663, 1995 SLT 723

[817] *Cussick v HMA*, 2001 SCCR 683, 2001 SLT 13 I6. For interest, reference may be had to *McNicol v HMA*, 1964 JC 25, 1964 SLT 15I and the article in 2002 SLT (News) 149

[818] *Larkin v HMA*, 1993 SCCR 715; cf McDonald*, supra*.

[819] See note on riders

[820] 2008 SCCR 93 2008 SLT 274

[821] *supra* at para [18].

Verdicts may be Unanimous or by Majority

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1. LAW

LAW

Legal Principles

1 Verdicts may be unanimous or by a majority. At least eight jurors must be in favour of a guilty verdict before a conviction may be returned.[822] This holds true even if one or more jurors have been excused.[823] It is apparently competent for a juror to abstain.[824] It is a misdirection to say that a majority of eight is required for any verdict, as one or other of the acquittal verdicts must be returned if there are fewer than eight jurors in favour of a guilty verdict.[825] Indeed, a jury should not be directed as to the majority required for an acquittal verdict at all, as this is likely to be confusing.[826] Care should be taken to avoid giving the jury the impression that there is some restriction on the circumstances in which they can return either of the verdicts of acquittal.[827] In a very rare case, where it may be appropriate to do so, if a jury is being invited to add a rider to a verdict of guilty great care must be taken to ensure that no illogicality results.[828]

2 Difficulties may arise where a jury returns and professes to be split between the three verdicts of guilty, not proven and not guilty (assuming there is no question of alternative verdicts to deal with). If the trial has to proceed with a reduced number of jurors (not less than 12), then they cannot return a majority verdict of guilty unless eight of them are in favour of that verdict; and in such cases if the remaining jurors inform the court that (a) fewer than eight are in favour of a verdict of guilty and (b) there is not a majority in favour of any other verdict, they shall be deemed to have returned a verdict of not guilty.[829] But if the jury is not, for any reason, reduced in size and remain split (eg seven guilty, four not proven, four not guilty) then it is unclear what (further) directions (if any) should be given.[830]

[822] *McPhelim v HMA*, 1960 JC 17.

[823] Criminal Procedure (Scotland) Act 1995, s90(2)

[824] *Allison v HMA*, 1994 SCCR 464.

[825] *Affleck v HMA*, 1987 SCCR 150; *Glen v HMA*, 1988 SCCR 37.

[826] Affleck, *supra*; and commentary by Sheriff G H Gordon QC, at 152; *Sweeney v HMA*, 2002 SCCR

131 at para [13].

827 Sweeney, *supra*, at para [15].

828 *McPherson v HMA*, 2005 GWD 38-709, 2005 HCJAC 130

829 Criminal Procedure (Scotland) Act 1995, s. 90(2).

830 See Affleck, *supra*, and commentary by Sheriff G H Gordon QC, at 152.

Alternative Verdicts

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1. Law

1.1. Legislative framework

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1.4.2. Other offences

1.5. Common law offences and the power to convict of a common law offence as an alternative to a statutory offence

Law

See generally *Renton & Brown Criminal Procedure*, 6th ed, paras 8-79 to 8-84, 18-79.41

1 There are a number of statutory provisions allowing a court to convict an accused of an alternative crime to that charged in the indictment. In such cases the alternative is implied in the libelled charge. There is also a general power provided by paragraph 14 of schedule 3 to the 1995 Act to convict of a common law offence on a charge containing a statutory offence. The relevant content of schedule 3 is set out at the end of this chapter.

2 It is not necessary as a matter of course for a judge or sheriff to charge on alternatives. Whether to do so in a relevant case is a matter for her / his judgment, taking account of what has been canvassed in the evidence, any matters raised in parties' speeches and any submissions from parties. [For more, see the guidance on seeking submissions / addressing issues in parties speeches in the chapter on Judicial Management of jury trials- stages of the trial process. See also Provocation.]

3 In *Duncan v HM Advocate* 2018 SCCR 319 the court examined a line of authority [831] and explained how judges should approach the question of alternative verdicts. The Lord Justice General stated, at paragraph [27]

"The general principle is that the obligation on the trial judge is to charge on verdicts in accordance with the manner in which the case has been presented to the jury by the parties (the "live issues"). The judge should not speculate or embark upon areas of possible alternative verdicts which have neither been canvassed in the evidence nor formed part of the speeches to the jury.The judge ought not to present an alternative verdict, which has not been canvassed by the parties, unless the prospect of that verdict is an obvious one. That is what Lord Bingham said in R v Coutts [832]*. The principle is based upon that of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness."*

And at para 28:

"The need to direct on a matter not raised by parties ought to be a rare event, given the functions of parties' representatives, but it remains possible that the trial judge will regard an alternative, such a culpable homicide in a murder trial or reset in a theft case, as obviously open to the jury on the evidence, even if it has not been addressed in the speeches. If the judge does take the view, that he or she ought to give a direction on an alternative verdict not addressed by the parties, he or she should do so, even if, by that time, it may be too late to seek the views of the parties on the appropriateness of giving the direction. That procedure is in the nature of the adversarial jury system."

4 The consequence of a particular defence may in certain circumstances (e.g. some rape or sexual assault and homicide cases) be to reduce the crime to a lesser one. However a specific concession made to the court that a particular defence is not being advanced will normally relieve the trial judge of directing upon that matter.[833] In such a situation, there may still be occasions in which the court may nevertheless decide to leave such a defence, and its associated alternative verdict, for the jury's consideration. The normal position, however, will be that the court should accept the concession and direct the jury accordingly. It will only be in quite exceptional circumstances that such a course could be regarded as resulting in an unfair trial.

5*Gardener & Glynn v HM Advocate* 2010 SCCR 116 was a case where an alternative verdict was not obvious and reasonably available on the evidence. At trial the Crown sought a conviction on the basis of concert, and the trial sheriff directed the jury that they could convict the accused only if they were satisfied that there was joint criminal responsibility, otherwise both must be acquitted. The Appeal Court said that if the evidence disclosed an obvious and sufficiently corroborated case (based on individual responsibility) which was reasonably open to the jury, the sheriff might be required to direct the jury on that alternative basis, despite the position adopted by the Crown. But since the evidence to support a case based on individual responsibility depended on adminicles of evidence which were

a. "subtle and disparate",
b. had not been identified by or relied on by the Crown at the trial, and,
c. could not readily be characterised as "an obvious alternative" or "a live issue at the trial",[834]

it would not have been appropriate for the sheriff to scrutinise the evidence to compile such a case. To have done so would have gone beyond the proper function of a judge, and would have

come close to acting as a prosecutor

6 Even though an accused admits a lesser offence, it does not follow that the jury must be given the opportunity of returning a verdict on that, since accused persons are frequently prepared to admit to some minor criminal conduct that is far removed from the serious charge they face. Proportionality is relevant, and an alternative which is trivial or insubstantial compared to the real issue in the case need not be put to the jury. But when the defence to a specific charge involves the admission of a lesser offence, that defence should be left to the jury.

7 In deciding whether or not to put an alternative verdict to the jury, all matters arising from the evidence have to be considered, and a decision taken on whether giving no direction on an alternative would force the jury to make an unrealistic choice between convicting of a serious charge and a complete acquittal which would disadvantage the accused unfairly.

Legislative framework

8 Statutory implied alternatives are available in the following types of case:

- Sexual offences (different rules apply depending on whether the offence was committed before or after 1 December 2010);
- Domestic abuse;
- Road traffic offences; and
- Certain common law offences by virtue of Schedule 3 of the Criminal Procedure (Scotland) Act 1995

The relevant provisions are produced below:

Sexual offences

Offences committed before 1 December 2010

9 In relation to charges of rape committed before 1 December 2010, section 14 of the Criminal Law (Consolidation) (Scotland) Act 1995 provides as follows:

> If, in the trial of an indictment for rape or an offence under section 5(1) of this Act, the jury –
>
> a. are not satisfied that the accused is guilty of the charge or of an attempt to commit the charge; but
> b. are satisfied that the accused is guilty of an offence under section 5(2) or (3) or 7(2) or (3) of this Act, or of an indecent assault,
>
> the jury may acquit the accused of the charge mentioned in paragraph (a) above, and find him guilty of such offence as is mentioned in paragraph (b) or of an indecent assault, and the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence or for indecent assault.

10 Section 50(1) of the Sexual Offences (Scotland) Act 2009 provides that, where the court or jury are not satisfied that the accused committed the offence charged, it may be open to convict the accused of a specified alternative offence. Schedule 3 specifies the available alternatives.

Section 50(2) to (5) provides for circumstances where the accused is charged with an offence against a child and doubt as to the age of either the accused or the complainer opens up the possibility of the accused being found guilty of an alternative offence. Where those subsections apply the court or jury may convict the accused of one of the alternative older child offences listed in subsections (3) and (4).

For ease of reference and to assist judges when working offline, section 50 and the table set out in Schedule 3 has been replicated in the Appendix to the Jury Manual: Alternative verdicts under the Sexual Offences (Scotland) Act 2009.

It is important that judges should be realistic and avoid proposing alternatives which are not a live issue or the charge, and the jury's task, will become unduly complex. The observations of the court in *Duncan v HM Advocate* 2018 SCCR 319, explaining that introducing an alternative which was not referred to by parties should be a rare event, should be borne firmly in mind. See paragraphs 27 and 28 of *Duncan* as quoted above.

A trial judge ought to present an alternative verdict which was not canvassed by the parties only where:

1. It was obviously open to the jury on the evidence; and
2. The public interest necessitated that the direction be given.

Domestic abuse cases

11 In terms of section 8 of the Domestic Abuse (Scotland) Act 2018, a person charged with domestic abuse under section 1(1) of that Act, may be convicted of:

1. threatening or abusive behaviour under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
2. stalking, in terms of section 39 of the 2010 Act

The power in section 8 is additional to the general power to convict of an alternative common law offence per Schedule 3 to the 1995 Act at paragraph 14. Accordingly an accused could be convicted of a common law offence as an alternative in appropriate circumstances.

Road traffic offences

12 The following implied alternative verdicts are provided by virtue of the Road Traffic Offenders Act 1988;

Theft of a motor vehicle.

Section 23(3) provides: "If on the trial on indictment in Scotland of a person for stealing a motor vehicle the jury are not satisfied that he is guilty of stealing the motor vehicle but are satisfied that he is guilty of an offence under section 178 of (the Road Traffic Act 1988) (taking vehicle without authority etc.) they may find him guilty of an offence under that section."

Other offences

13 Section 24 of the 1988 Act provides for specific statutory alternatives for certain offences.

Please note that subsection (6) preserves certain other powers including that of convicting of a common law offence:

> (1) Where -
>
> (a) a person charged with an offence under a provision of the Road Traffic Act 1988 specified in the first column of the Table below (where the general nature of the offences is also indicated) is found not guilty of that offence, but
>
> (b) the allegations in the indictment or information (or in Scotland complaint) amount to or include an allegation of an offence under one or more of the provisions specified in the corresponding entry in the second column,
>
> he may be convicted of that offence or of one or more of those offences.

14 Which alternatives are available under the Table in subsection (1) will depend on when the primary offence occurred. Judges will require to consider the updated version of section 24 in Westlaw.

Alternatives for section 1 may include sections 2, 2B and 3.

Alternatives for section 1A may include sections 2, 2C and 3.

Alternatives for sections 2, 2B and 2C may include section 3.

Alternatives for sections 3ZC and 3ZC may include section 103(1) (b).

Alternatives for section 3A may include sections 2B, 3, 4(1), 5 (1) (a), 7(6) and 7A(6).

Alternatives for section 4(1) may include section 4(2).

Alternatives for section 5(1) (a) may include section 5(1) (b).

Alternatives for section 5A (1) (a) and (2) may include section 5A (1) (b) and (2).

Alternatives for section 28 may include section 29.

see also the appendix Alternative verdicts under the Road Traffic Offenders Act 1988.

15 Section 24 continues:

> (2) Where the offence with which a person is charged is an offence under section 3A of the Road Traffic Act 1988, subsection (1) above shall not authorise his conviction of any offence of attempting to drive.
>
> (3) Where a person is charged with having committed an offence under section 4(1) or 5(1)(a) of the Road Traffic Act 1988 by driving a vehicle, he may be convicted of having committed an offence under the provision in question by attempting to drive.
>
> (4) [England and Wales only]
>
> (5) Where, in Scotland, by virtue of this section a person is convicted under solemn procedure of an offence triable only summarily, the penalty imposed shall not exceed that which would have been competent on a conviction under summary procedure.
>
> (6) This section has effect without prejudice to section 6(3) of the Criminal Law Act 1967 (alternative verdicts on trial on indictment), sections 195, 138(4), 256 and 293 of and Schedule 3 to the Criminal Procedure (Scotland) Act 1995 and section 23 of this Act.

Common law offences and the power to convict of a common law offence as an alternative to a statutory offence

16 The Criminal Procedure (Scotland) Act 1995, Section 64(6), provides that Schedule 3 to the 1995 Act has effect in relation to indictments under the Act.

> **Schedule 3**;
>
> paragraph 7: In an indictment which charges a crime importing personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the aggravation that the assault or other injurious act was committed with intent to commit such crime.
>
> paragraph 8(2): Under an indictment or a complaint for robbery, theft, breach of trust and embezzlement or falsehood, fraud and wilful imposition, an accused may be convicted of reset.
>
> paragraph 8(3): Under an indictment or a complaint for robbery, breach of trust and embezzlement, or falsehood, fraud and wilful imposition, an accused may be convicted of theft.
>
> paragraph 8(4): Under an indictment or a complaint for theft, an accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud and wilful imposition, or may be convicted of theft, although the circumstances proved may in law amount to robbery.

paragraph 8(5): The power conferred by sub-paragraphs (2) to (4) above to convict a person of an offence other than that with which he is charged shall be exercisable by the sheriff court before which he is tried notwithstanding that the other offence was committed outside the jurisdiction of that sheriff court.

paragraph 9(1): Where two or more crimes or acts of crime are charged cumulatively, it shall be lawful to convict of any one or more of them.

paragraph 9(2): Any part of the charge in an indictment or complaint which itself constitutes an indictable offence or, as the case may be, an offence punishable on complaint, shall be separable and it shall be lawful to convict the accused of that offence.

paragraph 9(3): Where any crime is charged as having been committed with a particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation.

paragraph 10(1): Under an indictment or, as the case may be, a complaint which charges a completed offence, the accused may be lawfully convicted of an attempt to commit the offence.

paragraph 10(2): Under an indictment or complaint charging an attempt, the accused may be convicted of such attempt although the evidence is sufficient to prove the completion of the offence said to have been attempted.

paragraph 10(3): Under an indictment or complaint which charges an offence involving personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that the assault or other injurious act was committed with intent to commit such offence.

paragraph 14: Where – (a) any act alleged in an indictment or complaint as contrary to any enactment is also criminal at common law; or (b) where the facts proved under the indictment or complaint do not amount to a contravention of the enactment, but do amount to an offence at common law, it shall be lawful to convict of the common law offence.

[831] *R v Coutts* [2006] 1 WLR 2154, *Ferguson v HM Advocate* 2009 SLT 67, *Mackay v HM Advocate* 2008 SCCR 371 and *Templeton v HM Advocate* 1961 JC 62

[832] supra

[833] *SB v HM Advocate* 2015 HCJAC 56, para 35

[834] supra, at para [18].

Deletions from a Charge

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1. LAW

LAW

General references

Renton & Brown, *Criminal Procedure*, 6th ed paras. 18–89 and 18–90.

Legal Principles

1 The jury may, if they decide to convict, convict of the whole charge or less than the whole. They may delete any words or phrases from the relative charge which have not been established to their satisfaction provided that what remains still constitutes a crime by our law. They may not, however, delete all of the specification in a charge, and if they purport to do this, the judge should refuse to accept this and may require the jury to reconsider the verdict.[835]

2 It has been held that where any deletions to a charge made by the jury require to be altered for grammatical reasons, the alteration should be made before the jury are asked to confirm their verdict.[836] Accordingly, this might be borne in mind when the judge gives his original directions on the competency of deletions.

3 It is common practice to inform the jury that they have to be satisfied of all the elements included in a charge, and they can delete any element about which they are not satisfied. Particular emphasis of the power to delete elements of a libel may require to be made in instances when a charge contains a number of composite elements which each separately constitute a crime. In such circumstances the jury will still be invited to deliver one verdict upon the charge notwithstanding it contains elements which nonetheless constitute separate crimes and thus it is essential that the jury are made aware that they can delete certain elements from the libel if they are not satisfied that that element of the charge has been proved.[837] Where there is a great discrepancy between what is spoken to by the complainer and what the corroborating witnesses spoke to, there is room for the jury to consider whether they should accept that all the elements in the charge have been proved, and a direction to that effect is essential.[838]

4 It is not competent for a jury to add a locus to a charge when returning a verdict.[839]

[835] *Took v HMA*, 1988 SCCR 495. See also *White v HMA*, 1990 JC 33, 1989 SCCR 553.

[836] *Mackay v HMA*, 1997 SCCR 743.

[837] *Afzal v HMA* [2013] HCJAC 103

[838] *Chalmers v HMA*, 2002 SCCR 940

[839] *TG v HMA* 2018 SCCR 341

Problems with Verdicts

1 On occasion, the verdict delivered by the jury will raise a problem. The verdict might be ambiguous or inconsistent in its own terms or when considered in light of the verdict on another charge. Alternatively, the verdict might be one which was not available to the jury in the particular circumstances of the case. Or it may simply be that, in the course of the verdict being delivered, confusion or error becomes apparent.[840] In such situations the trial judge has a duty to address the issue to ensure that the jury reaches a verdict which is competent, unambiguous and which accurately reflects the decision of the jury as a whole.[841] The duty is summarised in Renton and Brown:[842]

> "*The judge has a duty to ensure that the jury's verdict is not inconsistent or incompetent, and that there is no confusion among the jurors as to what the verdict is. When, therefore, the foreman announces a verdict which is incompetent, inconsistent, or contrary to the judge's directions either in respect of one charge or one accused, or when seen in the context of other verdicts on an indictment where there is more than one charge or accused, or where the result of deletions made by the jury is that the charge is irrelevant and/or lacking in specification, or where the reaction of other jurors to what the foreman says suggests that they do not agree with it, the judge should take personal charge of the matter and do what is necessary to clarify the verdict or the jury's intention before the verdict is recorded. This may or may not involve his giving them further directions or inviting them to retire to reconsider their verdict.*"

It is important, therefore, to be alert to situations in which these requirements are not met and, when they arise, to consider what, if any, action is required.

2 Inconsistent or ambiguous verdicts can result from a number of situations. Particular problems can arise where the jury returns a guilty verdict which is inconsistent with the narrative of the charge. That can happen where the jury makes deletions which leave insufficient specification of how the crime was committed.[843] In that situation, the basis for the conviction will be unclear[844] and, if the deletions were accurately pronounced by the spokesperson, it may be that an acquittal ought to have followed. In *Goldie* (above)[845] the appellant was found guilty of murder but under deletion of the act which, on the evidence, had caused death (a push). On appeal, it was held that the basis of the conviction could not reasonably be discerned from what remained of the libel, and that the judge ought to have directed the jury further and invited them to reconsider their verdict.[846]

3 Problems can also arise where the jury returns a verdict which was not open to it in the circumstances of the case. That situation is sometimes encountered in a Moorov case in which the jury returns inconsistent verdicts on two mutually dependent charges. In *Whyte v HM Advocate* 2000 SLT 544 the jury sought advice on their "dissimilar verdicts" in a question to the trial judge. Having confirmed that the jury had not reached a final verdict, the trial judge allowed deliberations to continue under further direction. That approach was approved on appeal notwithstanding the fact that convictions were ultimately returned on both charges. The position in Whyte might be distinguished from that in which a jury has reached a final verdict which results in an acquittal on one Moorov charge and a conviction on the other. In such cases judges might conclude that, by necessary implication, the jury has rejected the evidence of one complainer and

that an acquittal on both charges should be directed by the court. Some support for that approach might be found in the decision in *Kerr v HM Advocate* 1992 SCCR 281 which was not a Moorov case but concerned a jury which had voted: 7 for guilty; 4 for not proven; and 4 for not guilty. It was held that the jury should not have been asked to continue its deliberations when, in fact, their decision had been reached and the only question arising was the effect of that decision. On the other hand, in a classic Moorov case it might be thought that inconsistent verdicts disclose an ambiguity in the verdict rather than a mere question over the effect of the jury's decision. On that analysis the proper course of action might be to give the jury an appropriate direction and invite them to consider the matter further.[847]

4 The position is, perhaps, clearer where the inconsistency is disclosed by a unanimous conviction on one charge and a majority conviction on the other, suggesting that one or more of the jury did not understand, or follow, the judge's direction. In that situation, no action need be taken on the basis that at least a majority of the jurors must have accepted the evidence of both complainers as credible and reliable.[848]

5 Such problems are not confined to Moorov cases. In *White v HM Advocate* 1989 SCCR 553 the jury was directed to treat charges of possession of controlled drugs, and possession with intent to supply, as alternatives. The jury convicted on both charges. On appeal, the charges relating to simple possession were quashed. It was held that the jury ought to have been invited to reconsider their verdict; it was not sufficient that the Crown had agreed not to move for sentence. And in *Glover v HM Advocate* where two accused were charged, inter alia, with engaging in sexual contact with one another, it was held that it did not make sense for the jury to have convicted one accused and acquitted the other. In respect of that and other problems with the verdict the court observed the sheriff's failure to take action at the time by, for instance, querying the verdict with the jury and inviting submissions from parties.

6 In *Blackwood v HM Advocate*, which involved a single charge of assault and robbery, the jury was directed that alternative verdicts of assault or theft were available to them. The jury returned a verdict of guilty of "assault and theft". The sheriff declined to accept the verdict and, after further direction, the jury convicted the appellant of assault and robbery. On appeal, it was held that the sheriff had taken the correct approach by viewing the event, as it was libelled, as a single episode and declining to accept the jury's initial verdict.

7 With these authorities in mind, it is clear that when deciding whether to accept a verdict, it is necessary to assess it in the context of the case as it has been presented, as well as the judge's directions,[849] and the verdicts on any other charges to which there is an inextricable link. A verdict which appears to be competent in its own terms may not be when viewed in the context of the case as a whole.

8 Where a problem with a verdict is identified, the following approach might be drawn from the authorities:

i. any problem must be addressed before the verdict is recorded;[850]
ii. before deciding how to proceed, it may assist to hear parties on the issue;
iii. in the first instance it may be prudent to clarify the terms of the verdict with the spokesperson to ensure that the problem is not simply an error of communication;
iv. in the event of doubt, it should be established whether the jury has concluded its

deliberations and reached a final verdict;

v. in some cases it may be sufficient for the judge to direct the jury on the terms in which the verdict is to be recorded, but only where the jury's intention is clear and unambiguous;

vi. where the verdict is ambiguous, inconsistent or contrary to the charge, it will usually be necessary to explain the problem to the jury and to invite them to continue their deliberations under further direction; and

vii. in such circumstances, care should be taken to avoid influencing the jury in any way.

Nonetheless, there will not necessarily be a miscarriage of justice if, after further direction, the jury returns a verdict of guilty on a charge in respect of which an intention to acquit was initially expressed, at least where the further direction was required to address an incompetent or ambiguous verdict.[851]

[840] As happened in *Cameron v HM Advocate* 1999 SCCR 476, and in *Blackwood v HM Advocate* [2016] HCJAC 23

[841] *Cameron*.

[842] 18.89

[843] See: *Took v HM Advocate* 1988 SCCR 495; *Glover v HM Advocate* 2014 SCCR 68; and *Goldie v HM Advocate* 2020 SCCR 87.

[844] Potentially rendering the trial unfair in terms of Article 6 of the ECHR which requires that the accused and public be able to understand the verdict: *Taxquet v Belgium* (2012) 54 EHRR 26.

[845] see also *Kerr v HM Advocate,* below.

[846] see also: *Took v HM Advocate*, above

[847] Support for that approach can be found in obiter comment in Whyte.

[848] *HJL v HM Advocate* 2003 SCCR 120; and *Goldie's Legal Representative v HM Advocate* 2012 S.C.C.R. 783.

[849] see *Cameron v HM Advocate* in which an acquittal on one charge necessitated an acquittal on a second charge.

[850] *McGarry v HM Advocate* 1959 J.C. 30; *McGeary v HM Advocate* 1991 SCCR 203; *Cameron v HM Advocate*; *Amiri v HM Advocate* (Unreported [2009] HCJAC Appeal No: XC845/06).

[851] *Whyte v HM Advocate*; and *Blackwood v HM Advocate*. The position may be different where the jury is given an opportunity to reconsider after having concluded its deliberation and reached a competent verdict; see *Kerr v HM Advocate*.

Verdicts: Concluding Remarks

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1. LAW

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THE VERDICTS OPEN TO THE JURY above;

VERDICTS MAY BE UNANIMOUS OR BY MAJORITY above;

ALTERNATIVE VERDICTS above; and

DELETIONS FROM A CHARGE above.

POSSIBLE FORM OF DIRECTION ON VERDICTS: CONCLUDING REMARKS (except in case of insanity)

“Consider all the evidence the Crown relies on, and the submissions made by the Procurator Fiscal. Give equal consideration to the defence case. In reaching your verdict you’ve to assess the quality, strength and effect of the evidence and decide if the case against the accused has been proved or not. It’s your decision, what conclusion you reach. If you believe

• the accused, or the exculpatory part of what he said to the police

• evidence supporting the special defence

• any other evidence exculpating the accused,

you must acquit him. Even if you don’t, but that evidence leaves you with a reasonable doubt about the Crown case, you must acquit him. But if you’re satisfied beyond reasonable doubt that he’s guilty, your duty is to convict him.”

“You must return a verdict on each charge separately. And, where there are more than one accused on a charge you must return a separate verdict on each accused on that charge.

"There are three verdicts you can return on any charge: Guilty, not guilty, or not proven.

"Not guilty and not proven are verdicts of acquittal and have the same effect. An accused acquitted of a charge cannot be prosecuted again on that charge, save in exceptional circumstances, and it makes no difference whether the acquittal verdict is not guilty or not proven.

"It's not necessary that your verdict is unanimous, it can be by a majority. But for any verdict of guilty, there must be at least eight of you, an absolute majority of your whole number (originally, not of those who remain) in favour of that.

If your verdict is guilty, you could delete any part of the charge not proved to your satisfaction, eg . That's not a hint, it's only an illustration of what you can do. But what's left must define the crime, and describe how it was carried out. If that's the course you are going to take, when the clerk asks you if you've reached a verdict on that charge, you should say "Our verdict is guilty subject to deletions". The clerk will then ask you what the deletions are.

If your verdict is guilty of the charge as it stands, you should say "guilty as charged" and if your verdict is an acquittal you should say "not guilty" or "not proven" as you have decided.

• (Alternative verdict where two charges libelled arise out of same circumstances)

You will have noted that charge [no] and charge [no] are said to arise out of exactly the same set of circumstances. In law, you can't convict a person of two different charges which are based on exactly the same set of facts. That wouldn't be fair. So if you are finding the accused guilty of these charges, you have to choose between them, and convict him of one charge and acquit him of the other.

• (Alternative verdict)

With charge (X) the defence say you should return a verdict of guilty of .

The Crown asks you to find the accused guilty of the charge as libelled. So, in practical terms, your verdict on this charge will be guilty of one or the other. An acquittal wouldn't be open. But again, for any verdict of guilty there must be at least eight of you in favour of that.

When you retire to consider your verdicts, choose somebody to preside over your discussions, and to speak for you when you come back into court. The Clerk will then ask who speaks for you. He will then ask that person if you've reached verdicts, then, in relation to each charge, what your verdict is, and whether it's unanimous or by a majority. You won't be asked what your majority was. It would be useful for the spokesperson to write down your verdict before you come back into court and to check with you all that it has been correctly recorded.

You can return your verdicts at any time, but don't rush to judgement. Your decisions are important for the Crown and for the accused.[852] So, please give the case full and careful consideration. Will you now retire and consider your verdicts?"

Depending on the time of day when the jury is retiring consideration might be given to an additional form of words such as: "You must take such time, however long or short, as you require to consider and deliberate your verdicts. You are under no pressure of time from the court to do so. If you find that you have not completed your deliberations within a reasonable time this

afternoon we will adjourn and you can cease your deliberations until tomorrow".

[852] Depending on the time of day when the jury is retiring consideration might be given to an additional form of words such as: "You must take such time, however long or short, as you require to consider and deliberate your verdicts. You are under no pressure of time from the court to do so. If you find that you have not completed your deliberations within a reasonable time this afternoon we will adjourn and you can cease your deliberations until tomorrow".

FOREWORD

to the Amendments to the Jury Manual issued in January 2011

by

The Right Hon. Lord Hamilton Lord Justice General

I am delighted to contribute this foreword to the 2011 edition of the Judicial Studies Committee Jury Manual. I continue to be very grateful to the Judicial Studies Committee and to the Jury Manual sub-committee for all the excellent work they contribute in producing this valuable judicial compendium and resource.

The Jury Manual began life over twenty years ago and was originally a much shorter and more informal collection of styles of charges exchanged among High Court judges. Today it is a formidable document which contains very useful information and guidance to judges who have the responsibility of charging juries in serious criminal trials. There is no greater judicial responsibility than that of charging a jury. The skill required must be built up over a judicial career but this publication provides valuable assistance. It represents the collective wisdom of the very experienced members of the Jury Manual sub-committee. As such it constitutes a very useful tool for a judge to consult and consider. But this can never detract from every charge in every case being unique. Accordingly the sole responsibility for stating the law and formulating accurately and comprehensively the appropriate directions to deliver must lie with the judge or sheriff presiding over the case. The Jury Manual is a good starting place for a charge but it is not intended to be, nor can it ever be, an authoritative statement of the law, except where the Appeal Court has specifically approved one of its many helpful formulations. The onerous and demanding responsibility of stating the law and fitting it to the facts of the case must, constitutionally, rest on the shoulders of the presiding judge or sheriff and not the Jury Manual sub-committee.

I am also particularly pleased to add this foreword to the 2011 edition because it is the first Jury Manual to be uploaded to the Judicial Studies Committee website and made available digitally to the wider profession and the public. I am convinced that this innovation will strengthen the confidence of the public that the judicial process is not only open and transparent but that the judiciary is well equipped with effective and useful training tools to enable it to perform this important public duty effectively in serious criminal trials.

Arthur C Hamilton

Edinburgh

2010

FOREWORD

to the Amendments to the Jury Manual issued in January 2011

by

The Hon. Lord Brodie Chairman, Judicial Studies Committee

This set of amendments to the Jury Manual updates the material in the June 2010 edition of the Jury Manual and incorporates additional inserts distributed after the publication of that edition. The amendments have been produced by a sub-committee of the Judicial Studies Committee and reflect refinements to the considered drafts produced by Sheriff John Horsburgh QC. Sheriff Horsburgh has worked exhaustively over many years to produce the material which forms a basis for both the law and the possible forms of direction in the Jury Manual. He is to be warmly commended for his contribution to this indispensable guide and particularly congratulated for his role in producing this set of amendments which includes a chapter on the Sexual Offences (Scotland) Act 2009. Sheriff Lindsay Foulis is succeeding Sheriff Horsburgh to the sub-committee in 2011 and will doubtless bring his own style and energy to the task of updating the Jury Manual.

The new chapter on the Sexual Offences (Scotland) Act 2009 posits a view on how the provisions in the 2009 Act are likely to operate and provides possible forms of direction for charging the jury in relation to offences under the 2009 Act. The vast majority of the 2009 Act came into force on the 1st of December 2010 but its provisions apply only to offences committed after this date; the common law and existing statutory provisions will continue to apply to offences committed prior to that date so existing law and frequently invoked styles of directions will still be employed for the foreseeable future.

Another development is that the Jury Manual has been converted to a double-sided format to reduce the future environmental impact of distributing the Jury Manual in hard copy. As this initiative involves reprinting the entire Jury Manual, the sub-committee have taken the opportunity to correct minor typographical errors throughout and to update the case index at the front of the Manual.

All chapters of the Jury Manual have been reconsidered, and several have been amended in the light of recent legislation and judicial decisions. Every attempt is made to maintain a neutral tone in describing these developments.

Recent interest in the Jury Manual from non-judicial parties and reference to the Jury Manual in Appeal Court judgements has focused attention on the legal status of the guidance contained within. The nature of the Jury Manual is that of an aide-memoire. It is imperative that all members of the judiciary are aware that the Jury Manual has no binding legal authority and is for guidance only. The statements of the law at the beginning of each chapter merely reflect the sub-committee’s considered understanding of the law and are not authoritative. References are made throughout the Jury Manual to sources of legal authority and it is expected that members of the judiciary will study the judgements, legislation and commentary referred to throughout the Jury Manual.

Similarly, as Lord Macphail stated in his 2005 foreword:

"...each direction is advisedly headed, 'Possible form of direction on' the subject matter of the chapter. It cannot be emphasised sufficiently that the directions, like the statements of the law, are designed to be no more than a useful first port of call for a trial judge when preparing a charge...to repeat the Manual's directions verbatim would nearly always be a mistake, because every charge requires careful preparation to ensure that it is adapted to the circumstances of the case before the court, and that it will be understood by the fifteen men and women in the jury box. For a charge to be effective, the judge must be free to direct the jury in such terms and in such a style as he or she thinks fit, provided that he or she does so in accordance with the law. The purpose of the Jury Manual is to help the trial judge to avoid error by providing a practical guide to the relevant law and a range of possible forms of direction which cover the points which must be made but leave it to the judge to determine how best to explain them to the jury."

Users of the Manual must also be aware of the practical limitations of the current publication process. The Jury Manual is revised on an annual basis with the final revisals being approved in the autumn of each year. The present set of amendments therefore reflects the sub-committee's considered understanding of the law as at September 2010. Developments in the law between September 2010 and the publication date of January 2011 are not reflected in these amendments.

Special commendation should be given to Afsi Barekat, the Legal Assistant who is Secretary to the Jury Manual sub-committee. Her meticulous co-ordination and review of the text of the Jury Manual, has been an arduous task for which the Judicial Studies Committee thanks her warmly.

The sub-committee is already compiling the next set of amendments and would welcome any comments or suggestions for the improvement of the Jury Manual. These remarks should be conveyed to the Director of the Judicial Studies Committee.

Philip H Brodie

Edinburgh

2010

FOREWORD

to the Amendments to the Jury Manual issued in April 2007

by

The Hon. Lord Macphail Chairman, JSC Jury Manual Sub-committee

This set of amendments to the Jury Manual attempts to update the material in the edition of the Jury Manual which was issued in October 2005. The amendments have been produced by a sub- committee of the Judicial Studies Committee. As before, the principal burden has been borne by Sheriff John Horsburgh QC who has tirelessly produced many drafts for the sub-committee's consideration.

The new material includes a valuable paper on Jury Management by Lord Wheatley, who was Chairman of the Judicial Studies Committee from 2002 to 2006. The paper contains much helpful advice derived from long experience of presiding over jury trials both in the High Court and in the sheriff courts, and we are most grateful to Lord Wheatley for allowing us to reproduce it.

Another innovation is a Jury Directions Checklist which we hope may be of some use as an aide- mémoire to a trial judge when preparing a charge. In Part II there are new chapters on expert evidence as to credibility and reliability, and on directions as to the accused's previous convictions where these have been disclosed under section 275A of the Criminal Procedure (Scotland) Act 1995 after the court has allowed questioning or evidence under section 275. In Part III we have revised and updated the chapter on rape. Recent legislation from the Scottish Parliament is reflected in new chapters in Part IV on offences relating to racially aggravated harassment, indecent photographs of children, the sexual grooming of children and paying for a child's sexual services. All the other chapters of the Manual have been reconsidered, and several have been amended in the light of recent legislation and judicial decisions.

The statements of the law at the beginning of each chapter merely represent our own understanding of the law and are not in any sense authoritative. We have attempted to set out the law concisely and without criticism or proposals for reform, and we have not tried to resolve difficult questions. We have pointed out to the reader the places where authoritative statements of the law and more extensive discussion of current problems may be found.

Similarly, each direction is advisedly headed, "Possible form of direction on" the subject matter of the chapter. It cannot be emphasised sufficiently that the directions, like the statements of the law, are designed to be no more than a useful first port of call for a trial judge when preparing a charge. In some cases they provide a range of options from which a selection may be made as a starting-point for the framing of directions. The only matter on which adherence to a traditional form of words is authoritatively required is the explanation of the criminal standard of proof. That apart, to repeat the Manual's directions verbatim would nearly always be a mistake, because every charge requires careful preparation to ensure that it is adapted to the circumstances of the case before the court, and that it will be understood by the fifteen men and women in the jury box. For a charge to be effective, the judge must be free to direct the jury in such terms and in such a style as he or she thinks fit, provided that he or she does so in accordance with the law. The purpose of the Jury Manual is to help the trial judge to avoid error by providing a practical guide to the relevant law and a range of possible forms of direction which cover the points which must be made but leave it to the judge to determine how best to explain them to the jury.

The sub-committee is most grateful to Aileen Shields, who has arranged for the printing and distribution of these amendments, to Morag McCracken, Legal Assistant, who is the Secretary to the sub-committee and to Helen Stevenson also of the JSC who typed and formatted the revisals. We are already planning a further set of amendments. We would welcome any comments or suggestions for the improvement of the Manual, which should be sent to the Director.

Iain Macphail

Edinburgh

April 2007

FOREWORD

to the Charging the Jury Manual issued in October 2005

by

The Hon. Lord Wheatley Chairman, Judicial Studies Committee

This manual replaces the Charging the Jury Manual issued in October 2004. It contains all the material in the former manual and also the amendment issued on 19 May this year giving revised directions on dock identifications, where identification is an issue following the Privy Council case of Holland v HM Advocate 2005 SCCR 417.

As previously a CD-Rom version of the Jury Manual has been prepared for ease of access to the manual when working at home or in another court.

The updating of the material in this manual has been carried out by a sub-committee of the JSC, chaired by Lord Macphail and including Sheriffs Stoddart and Crowe and myself. Much of the work has been undertaken by Sheriff John Horsburgh who has revised the various suggested forms of directions. It is regretted that this new edition has taken longer to produce than we would have wished, but our allocation of resources remains meagre. We hope to produce regular updates from now on, and will achieve this if we are provided with sufficient assistance from the Justice Department.

The object of this exercise has been to make the language simpler and clearer for jurors. As I indicated in the foreword to the last edition the directions contained in this manual will often require to be expanded or varied to meet the circumstances of each case. They should not be regarded as always sufficient or appropriate in every case; and they should not be followed uncritically or verbatim. The suggested directions are no substitute for a proper and accurate understanding of the relevant law, conveyed to jurors in the judge's own words and in a way which assists them in the task they have.

On the other hand, while adapting the words in the manual or preparing one's own charge, care has to be taken "to adhere as far as possible to the traditional formula and to avoid experiments in reformulation" – see Lord Justice Clerk Thomson in Mckenzie v HM Advocate 1959 JC32, 37. As can be seen for example in section 2.1.3 paragraph 2, the Appeal Court has repeatedly said there is not an alternative way of saying that the jury must be satisfied beyond reasonable doubt. Any attempt at reformulation of this basic principle is likely to end up in the Appeal Court.

Previous editions of the manual have been well received and any comments and criticisms have been taken account of in successive editions. To counter the criticism that there were no pictures, Sheriff TAK Drummond QC has been commissioned to provide a few cartoons which are scattered throughout the text.

When preparing your charge to the jury you may wish to incorporate various sections from the manual into the text of your charge. This can be done electronically either by working off the version of the Jury Manual on the intranet or the CD-Rom as follows:-

To copy and paste text

• Click on T Select text icon on the toolbar

• Highlight text which requires to be copied

• Click on edit, then copy

• Open up Word

• Click on edit, then paste (text will require to be formatted to delete the formatting instructions which are invisible on the pdf version).

In conclusion I would like to thank all of those who have been involved in producing this manual, especially those mentioned in this forward, the members of the Jury Manual sub-committee and the staff in the Judicial Studies Committee, in particular Erica Jones, Legal Assistant who was Secretary to the sub-committee, Amy McVey, our summer student, who prepared the helpful index of cases, Aileen Shields who is arranging for printing and distribution by Astron and Anne MacKenna who typed and formatted the text.

John Wheatley

Edinburgh

October 2005

FOREWORD

to the Charging the Jury Manual issued in January 2000

by

The Rt. Hon. Lord Ross Chairman, Judicial Studies Committee for Scotland 1997 - 2000

When charging a jury, each judge or sheriff is entitled to adopt his or her preferred style. Moreover, each case has its own peculiarities which may require that preferred style to be modified in order to deal with the particular facts and legal issues which have emerged in the course of the trial. In addition, decisions on the order in which directions are to be given and the actual language used will often vary from case to case. But although each judge and sheriff has a wide discretion in this area, it has for some time been recognised that it is helpful to provide judges and sheriffs with some guidance on charging juries.

For many years now, various forms of notes on charging juries have been circulating among judges and sheriffs. While the provenance of some of these notes is unclear, others are based on material originally prepared by the former Lord Justice-General, Lord Emslie, around 1980 and later revised around 1988. More recent material has been drafted by individual judges and sheriffs in order to deal with novel issues and this has then been passed around from hand to hand. Further drafts were produced on behalf of the Sheriffs Association by its Bench Book working group, but these were never circulated. In view of the diffuse (and in some cases inevitably outdated) nature of all of the material to hand at the end of 1997, the Judicial Studies Committee decided that steps should be taken to ensure that all judges and sheriffs were provided with a completely new set of notes on Charging the Jury, not least of all because of numerous changes in the law in recent years and of the issuing of a number of important decisions by the Appeal Court.

The preparation of these notes has required a considerable amount of work. The Committee is extremely grateful to the Hon Lord Davidson for agreeing (at the invitation of the Lord Justice- General) to undertake the major part of the drafting in a small working group along with myself as Chairman, the Hon. Lord Philip and Sheriff Stoddart. The drafts were then discussed, revised and edited by the group into the final form of these notes.

I hope they will be of assistance to judges and sheriffs. It has been thought helpful, under various headings, to list general references, the applicable legal principles and thereafter to suggest possible forms of direction. It must be understood, however, that the latter are in no sense prescriptive and are not intended to be used verbatim when charging a jury. Judges and sheriffs should always prepare their own charges in their own words, but what appears in these notes should provide the necessary starting point for that task. In any event, the possible forms of direction will always have to be adapted to fit the issues in the particular case. Likewise, it should be kept in mind that the legal principles identified in the text are no more than the working group’s understanding of the present state of the law, and are not intended to be authoritative statements thereof.

The Judicial Studies Committee wishes to express its warm thanks to all those who participated in this project and particularly to those judges and sheriffs who assisted the working group by allowing them to use their existing material and by making available actual charges to juries. I am happy to commend these new notes to all judges and sheriffs. Needless to say, the Committee will be pleased to consider suggestions for ways in which the notes may be improved. It is intended to keep them updated from time to time, in order to take account of changes in the law or relevant decisions of the Appeal Court.

Donald M Ross

Edinburgh

10 January 2000

Possible form of Introductory General Direction

Introduction

"You've now heard all the evidence, and speeches for the Crown and the defence. I've now to explain the legal rules you've to apply in deciding this case.

Jury's function

Your function is different from mine. You are the judges of the facts. You decide what's been proved and what hasn't. To do that you consider all the evidence.

Nature of evidence

What does evidence consist of? First, you've to understand what's evidence and what's not:

• [What's been agreed by each side and recorded in a joint minute of admissions is evidence. You must accept that as proved fact (where applicable).] [Judges should have regard to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.]

• What a witness says in the witness box is evidence.

• Questions or suggestions put to witnesses aren't evidence. They only become evidence if the witness agrees with what's put. But, if all a witness did was to agree with what's put, you'll need to take care in deciding what weight to give that.

• Matters put to a witness who can't remember them, or who doesn't know about them, aren't evidence.

• What's said in the speeches isn't evidence.

Assessing witnesses

When it comes to witnesses, you've to judge the quality of the evidence of each one of them. There are two aspects to the evidence of any witness, credibility and reliability. A credible witness is an honest one, doing his best to tell the truth. But a witness may be doing his best and yet be unreliable because his memory isn't accurate. Before you can accept a piece of evidence from a witness, you must be satisfied that it is honest, and that his evidence is reliable. In doing that you can look at the content of witnesses' evidence, their body language in giving it, and compare what they say with other evidence in the case.

You should judge all the witnesses in the same way, whether they're lay people, police officers, doctors, scientists or the accused, or children.

(As appropriate) In this case evidence from some of the witnesses has been presented to you otherwise than by the witness providing his/her evidence from the witness box. Evidence has been given by way of live television link/ by the presentation before you of a recording of the evidence from (specify witness) given at a commission/ by the evidence in chief from (specify witness) being

presented to you in the form of a prior statement. In this case (specify witness) has given evidence from the witness box whilst screened off from the accused and/or with support of a person sitting close by. These special arrangements are made so that the witness can, as far as is possible, be placed at ease when giving their evidence. Notwithstanding these arrangements the evidence from these witnesses is to be judged in the same way as the evidence from anyone else who gave evidence without such arrangements.

A word about inconsistencies in evidence. Quite often witnesses give differing accounts of the same event, especially if things happen quickly or unexpectedly. That's natural, because our abilities to observe and recall can vary. If their accounts on crucial matters are substantially similar, minor differences of detail don't matter. But if there are differences on important matters, you'll have to decide which version you accept, and whether these matters have been proved.

Where there are conflicts in the evidence of different witnesses, you can accept one witness's evidence, and reject another's. Where there are conflicts in a single witness' evidence, you can accept part of it and reject part. If you reject a piece of evidence because a witness is lying or unreliable, put it out of your minds completely. It doesn't mean the opposite's true. You just ignore the evidence you reject.

Assessing wholly circumstantial evidence (where appropriate)

Broadly speaking there are two types of evidence. There's direct evidence. An example of that is evidence from eye-witnesses who saw the crime charged being committed. With evidence like that, whether you hold its commission proved, and/ or the accused responsible for its commission, depends on whether or not you think these eye witnesses are credible and reliable. I've said a little about assessing witnesses already.

The other type of evidence is circumstantial evidence. Circumstantial evidence is simply evidence about various facts and circumstances relating the crime and to the accused, which when they're taken together, may connect the accused with its commission. Where circumstantial evidence is based on accurate observation, and the correct conclusion is drawn from the facts and circumstances, it can be as good as, or even better than, direct eye-witness evidence. Individually each fact may establish very little, but in combination they may justify the conclusion that the accused was involved. It's really a matter for you to judge, applying your common sense.

In this case the Crown has led evidence about certain facts and circumstances. It says, when you take them together, they link the accused to the commission of the crime charged, beyond reasonable doubt. The defence say you shouldn't draw such a conclusion/you're being asked to speculate of guess, and that's not allowed. So you'll have to decide

1) what facts you find proved

2) what weight you give to each of these

3) taking these facts together, how powerful and convincing is this body of evidence 4) what conclusion you can draw from it, and 5) in particular, whether you can infer the accused's involvement in the commission of this crime.

Jury's recollection paramount

You'll have to make a number of decisions about the evidence in this case. So, remember this:

• It's only your recollection of the evidence that counts. If the recollections of the facts by the Crown, the defence or me don't accord with yours, disregard ours and hold by your own.

• (where required) In some respects my notes and recollection of the evidence apparently differ from 's, e.g. … I may be mistaken, or he may be. That's why it's so important you go by your own recollection of the evidence, not anyone else's.

• Your view of the evidence is the only one that matters. Any views about what's important in that evidence the Crown or the defence have expressed are merely personal to them. They needn't be taken into account by you.

• I don't intend to go over the evidence in detail, that's not my function. If I refer to it, that's only to draw it to your attention, not because I have any views about its importance, but to help you reach a verdict which is correct in law. Anything I say about the evidence, or how I say it, needn't be taken into account by you.

Avoidance of irrelevant influences

It's very important you should reach your verdict on the basis of the evidence and reasonable inferences from that. Don't speculate or guess. Don't be swayed by emotional considerations, or any prejudices. Put sympathy aside, for anyone said to be a victim of the alleged offence(s) and for the accused. Your function now is a judicial one. Your verdict, whatever it is will have consequences for others. These will be for others to deal with, so you should put them out of your mind.

Joint minutes

[Judges should have regard to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.]

As I told you when i addressed you at the start, while the evidence is entirely for you, there is one exception to this and that is in circumstances when the parties have agreed certain facts.

The facts set out in the Joint Minute(s) [of Agreement] are conclusively proved and you must take them into account when considering your verdict.

[*Where appropriate*
I shall say more about the significance of these agreed facts when I direct you on the charges.]

[Remember, when giving directions in relation to the specific charges to refer to particular matters from the joint minute, such as:

"It is proved that the parties had sexual intercourse on the date specified / the accused stabbed the complainer / what was found were drugs."]

The four general rules

Some rules of law apply in every case.

The first is this. Throughout the trial every accused is presumed innocent until proved guilty. He's not required to prove his innocence.

Secondly, it's for the Crown to prove the guilt of the accused of the charge he faces. If that's not done an acquittal must result. The Crown have the burden of proving guilt.

Thirdly, the Crown must establish guilt beyond reasonable doubt. That's a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation. It's the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it's more than a suspicion of guilt, and more than a probability of guilt. This doesn't mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you've to be satisfied of the guilt of the accused beyond reasonable doubt.

Fourthly, the law lays down that nobody can be convicted on the evidence of one witness alone, no matter how credible or reliable. The law requires a cross-check, corroboration.

There must be evidence you accept as credible and reliable, coming from another separate source which confirms or supports the principal source of evidence. That can be:

• direct, coming from another eye-witness or a document, or

• indirect, facts and circumstances, which can be spoken to by one witness only. Individually they may establish little, but in combination they may support the principal source of evidence, or

• there may be a combination of direct and indirect evidence.

Be clear about this. Every incidental detail of a charge, such as the narrative of how the crime was committed, doesn't need evidence from two sources. But there are two essential matters that must be proved by corroborated evidence. These are:

• that the crime charged was committed, and

• that the accused was responsible for committing it.

Defence evidence

These rules about the presumption of innocence, burden of proof, standard of proof, and corroboration, apply only to the Crown case. They don't apply to the defence. (There's an exception to that rule which arises in this case, and I'll deal with that later.)

• (where accused gives evidence)

In this case the accused has given evidence. Treat his evidence in the same way as you treat the evidence of any other witness. There's no standard of proof to be met

by the defence. The accused's evidence doesn't need corroboration. If you believe any evidence which clears him, acquit him, even if that evidence stands alone. Even if you don't completely believe it, but it leaves you with a reasonable doubt about his guilt, acquit him.

• **(where accused has not given evidence – standard case)**

In this case the accused has neither given evidence nor led evidence from any other source. He doesn't need to prove his innocence; that's presumed for the purposes of the trial. He can leave it to the Crown to prove his guilt. Don't assume the Crown case is proved just because there's been no defence evidence.

(Where the accused has not given evidence, and where there is circumstantial evidence peculiarly within the accused's knowledge or from which an inference of his involvement could be drawn, see PRESUMPTION OF INNOCENCE, above)

These rules apply in every case. I now want to deal with some which apply to the particular circumstances of this case."

Multiple charges

The indictment sets out the charges which the accused faces. You'll need to return a verdict on each charge separately. There must be sufficient evidence on each charge for a conviction on that charge. You can't say "because we're satisfied the accused is guilty of one charge, he must be guilty of the other". That means you'll need to consider the evidence that relates to each charge separately. But that doesn't mean that because a piece of evidence is relevant to one charge, it isn't relevant to another charge. The same piece of evidence can be relevant to more than one charge. That's a matter for you to judge and take into account.

Multiple accused

With this/some of/all of (the) charge(s) there's more than one person accused. You'll need to return a verdict against each accused separately. That means you'll have to consider the evidence against each accused separately. That doesn't mean because a piece of evidence is relevant to one accused it isn't relevant to another accused. The same piece of evidence can be relevant to more than one accused. But the accused don't necessarily stand or fall together. You could reach different verdicts on each of them. You could convict one/some and acquit the other(s). You could acquit them both/all, or convict them both/all. It depends on your view of the individual's guilt or innocence.

Consider all the evidence the Crown relies on, and the submissions made by PF. Give equal consideration to the defence case. As a matter of law there is sufficient evidence to entitle you to convict the accused on the charge(s) brought. The question for you though is whether the particular evidence led in support of the charge(s) does in fact persuade you beyond reasonable doubt of the accused's guilt. **[see SEPARATE FUNCTION OF JUDGE AND JURY, above].**

It's your decision, what conclusion you reach. If you believe

• the accused, or the exculpatory part of what he said to the police

• evidence supporting the special defence

• any other evidence exculpating the accused,

acquit him. Even if you don't, but that evidence leaves you with a reasonable doubt about the

Crown case, acquit him. But if you're satisfied beyond reasonable doubt that he's guilty, your duty is to convict him.

Where there is a joint minute or minute of agreed facts

[Judges should have regard to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings]

In this case there is a minute of admissions/joint minute and you have been given copies of it. It contains facts that are not in dispute and accordingly you must accept these and should not consider whether to accept or reject this evidence as you would consider the other evidence in this case. These are facts that you can rely on.

A paper on Jury Management by Lord Wheatley, Chairman, Judicial Studies Committee, 2002-2006

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1. Jury trials - A paper on Jury Management by Lord Wheatley (Chairman, Judicial Studies Committee, 2002 - 2006)

Jury trials - A paper on Jury Management by Lord Wheatley (Chairman, Judicial Studies Committee, 2002 - 2006)

Juries are essential to our system of criminal justice, and their purpose is to make the more significant decisions in our criminal courts. It is right therefore that each judge who engages in jury trials should consider very carefully how he or she should embark upon their dealings with the jury in each case. It should perhaps be remembered that jurors are peremptorily summoned from their daily lives and asked to perform one of the most important tasks in our legal system without any kind of training. They are compelled to sit in their jury box, to rise and return when told to do so, they are in general discouraged from asking questions, and they are asked to consider and decide the guilt or innocence of their fellow citizens on a basis of issues which many lawyers struggle to understand. Yet, in the main, they appear to embark upon their duties with enthusiasm and concentration. They are often extremely perceptive, and their decisions are of course the correct ones. It is also worth remembering that a very significant percentage of disinterested members of the public will form their view of the quality of our legal system through their service as jurors. It is therefore most important that from the very beginning the judge embarks upon a relationship with each jury, and each member of the jury, with the purpose of making their task as clear, simply and easily understood as possible. In particular the judge's responsibility from the very outset is to see that when the jury retire to consider their verdict they have the clearest possible understanding of the decision or decisions which they have to reach.

The ways in which such a successful relationship can be built up are various, and will always depend upon the individual personality of the presiding judge. However, the first time the judge talks to the jury is usually when he makes his introductory remarks about the nature of the proceedings shortly after the jury has been empanelled and sworn in. During that talk the judge will normally describe the various functions which are to be discharged by the various persons in the court, and the emphasis – properly made at the very beginning – that it will be the decision of the jury which will lead to the verdict in the case. Accordingly, these introductory remarks should be selected with great care, and judges may like to consider introducing, with restraint, some personal elements into their opening remarks such as informing the jury that they bring any matter which affects their convenience or comfort to the attention of the court, advising them that they will be kept aware of the state of progress of the case at all relevant times and its likely termination, and noting privately the addresses of any jurors who may encounter problems in getting to court. Saying good morning to jurors at the start of the day is normally much better than saying nothing. An increasing number of judges always allow the jury to leave the court first at any break in proceedings and have everyone in court before the jury return, in order to emphasise to the jury (and to others) the significance of their role. Consideration and understanding directed to

the jury at all times from the Bench should assure the jury of their importance, and also give the message to others in the court that they should respect the jury's position. Many judges take an interest in the welfare of the jury, confirming with the Clerk of Court that water is available in court, that coffee or tea is available at all times in the retiring room, and that there is a special room for those members of the jury who wish to smoke. Further, experience shows that juries, particularly once they become aware of the significance of their function, deeply resent being excluded from proceedings. By no means all objections must be treated by excluding the jury; many can be resolved by a low profile and conciliatory approach.

When the trial starts, the judge in a jury trial has numerous duties which can be difficult to carry out all at the same time. Firstly, although all proceedings are tape recorded, the judge should take his own notes, which should be as comprehensive as possible. Consideration has to be given as to whether the question or the answer will be noted or an amalgamation of both. Sometimes issues which appear to be unimportant at the time, assume considerable significance at a later stage. The advantages of taking comprehensive notes means that the judge can assist in the resolution of any disagreements about what witnesses may or may not have said at an earlier point in the case, and it is of course also useful in those cases where the judge feels obliged to make some reference to the evidence. Many judges now routinely note the time in the course of taking notes, although this of benefit on only rare occasions. Some judges have a system of noting labels and productions in any case when they are referred to and this can be of considerable significance in some cases. At the same time the judge has to keep his or her eye on the witness, the accused, counsel, the public and the jury. A witness may be making inappropriate eye contact with the accused, or the accused with the jury. Jurors may be in danger of falling asleep. Members of the public may be trying to intimidate the jury. Counsel or agents may behave inappropriately. The judge also has to decide on any breaks that may be necessary in the course of a case. Many judges are now persuaded that at least a mid-morning coffee break is both desirable and necessary. However, it is worth emphasising that it is in the area of any adjournments that most court time is wasted and the challenge to the court's authority is most damaging. Any adjournments should always be to a fixed point in time, and the judge should see that he or she is on the Bench when that time comes. Any further extensions of time that may be needed can then be considered in open court, and if appropriate granted by the court, rather than being left to comfortable accommodations between counsel or agents which are then casually intimated to the Clerk of Court.

As well as keeping notes, the judge requires to see that the needs of the tape recording equipment are being served. The court should ensure that no more than one person is talking at any given time, in order that the tape recording can clearly record what is happening; that distances or directions are adequately described for the benefit of the notes, and that the identity of any person pointed to by a witness is clear. Beyond that the general principle in a jury trial is that the judge should intervene as little as possible.

However, there are certain circumstances where a judge has no option but to intervene. In general, a judge will intervene to clarify ambiguities, to make sure the witness has understood the question (not all questions are fairly or clearly put), when the questioner and the witness seem to be at cross purposes; when the question is unfair, based on a false hypothesis or the answer to it involves the disclosure of confidential information which is not relevant to the case; to ensure that the jury can see properly what has been demonstrated to them; and to ensure that the jury have copies of the productions which they need to have to follow the evidence.

Each judge invariably arrives at his or own style of charging a jury. The jury charging manual has been officially approved of by the Lord Justice Clerk, but there is no requirement that the

suggested directions provided in the manual should be followed slavishly. The choice of words in any charge should be such that the person delivering the charge feels comfortable with their use. Accordingly, while it is imperative that the essence of what is said in the jury charging manual is followed, the precise expression of those sentiments is a matter for the individual judge.

In addition to the careful consideration of the content of any charge, the delivery of that material is also important. The first item of importance is to decide what kind of notes each individual judge wants to have in front of him when delivering his charge. Many judges have developed their own framework charges which typically will contain all the standard directions which are given in the first part of a charge to the jury. Some judges have these notes typed out in capital letters with gaps between the paragraphs in order that their eye can easily pick up what they want to say while engaging in direct contact with the jury. As such framework charges can be adjusted and amended at will with parts inserted or deleted. Other judges keep specimen charges on their laptops and produce a separate charge for each case. And whatever system is adopted, it is important to bear in mind that the notes are an important prop and should contain all the material which requires to be given to a jury in the course of a charge. In particular, care should be taken to use words and expressions that are clear and unambiguous and simple, that conciseness so far as possible must be achieved, and that the exercise of communication should be as natural as possible.

Care too should be taken of the way in which the charge is delivered. The judge should be in such a position that he or she can see all members of the jury comfortably, and that they can see him or her. Attention should also be paid to the length and balance of sentences and paragraphs within the charge, and to the need to break up the charge in order to prevent the jury having to assimilate repetitive series of complex ideas.

In most cases the less said about the evidence the better. However, it may be desirable to make some reference to the evidence, for example in order to demonstrate where corroboration in any particular case may lie. However, there is no doubt as a general rule that the more the judge goes into the evidence, the likelier it is that he will provide grounds for an appeal.

Many judges adopt their own template for the structure of their charge, taking into account what is suggested in the jury manual. As indicated above, it is worth paying considerable attention to the way in which each individual judge elects to charge the jury. Attention should be paid to the length of sentences and paragraphs, and to the choice of simple clear language of the sort which is suitable and appropriate to the personality of the person delivering the charge. It should also be remembered that the jury are asked to assimilate a number of novel and complex ideas in the course of the speeches by the legal representatives of the prosecution and defence, and the charge by the judge. Care may therefore have to be taken to arrange the flow of these ideas in such a way that the jury are not overwhelmed by accumulative series of such notions. For example, some judges indicate at the start of their charge what they intend to do; for example they may indicate that the respective functions of the judge and jury must be borne in mind, but that the judge will start by saying a few words about the evidence in general terms, and in particular about credibility and reliability. Thereafter the judge might indicate that he or she will then turn to the law; that the legal directions which have to be given fall into two categories namely the general directions which apply in every case and the special directions which apply to the incident case. The general directions are then described. At the conclusion of that part of the charge, the judge might indicate that he is then going on to describe the specific directions which apply in the present case. This will involve defining the offences charged and addressing the jury on such matters as may be relevant such as the Moorov doctrine or acting in concert. If the

evidence is to be the subject of direction, the judge should emphasise that his or her views on the evidence are not what will determine the verdict, and as indicated above the narration or description of the evidence should ideally be confined to what is necessary to illustrate the legal directions which have been given. If the evidence is referred to, then equal prominence must be given to both aspects of the case, the prosecution evidence and the defence evidence. The judge may also suggest questions that the jury might wish to ask themselves in testing the evidence in the case. However, it cannot be emphasised strongly enough that any reference to the evidence should ideally be kept to a minimum. In conclusion the judge should give final directions on the verdicts available and the method by which the jury should return their verdict.

As a general rule, juries should not be sent out to consider their verdict after 3pm, although this rule is of less significance now that juries do not have to be confined in hotel rooms overnight if they have failed to reach a verdict.

Should the jury indicate that they wish further directions, it is strongly recommended that the Clerk of Court be directed to ask the jury to write the question out. When the court reconvenes, the presiding judge should read the question out to the jury and confirm that that is what they wish answered. On getting confirmation that is so, the judge should clarify the directions which the jury seek. If appropriate, (and this may not often be the case) parties' representatives may be asked if they have any comments. Once further directions have been given, it is good practice for the judge to ask the jury if they are satisfied with the further directions. Care should be taken that in giving further directions, nothing is said that might appear to contradict the general directions given earlier. If there is any doubt about the possibility of confusion arising, full directions on any related matters should also be given.

When the jury return a verdict, it is important that the judge takes a careful interest in the jurors as the verdict is delivered. The exercise for many jurors in many cases can be an extremely complex one, and the judge should be on the lookout for any signs of dissent or concern about the verdict being announced by the foreperson of the jury. Particular attention may have to be paid to the question of deletions made in charges. On occasions juries have returned verdicts with deletions which mean that their verdict does not reflect a crime recognised by the law of Scotland. If that is the case, then the judge should return a verdict of acquittal and have that recorded in the court record.

Finally, the judge should thank the jury for their services. A number of judges pay particular attention to this exercise. It should be recognised that the juries have performed a singularly important public duty; that they have given up their time to do so; that their task may well have been extremely difficult and indeed at times unpleasant; but that they and they alone are qualified to return the verdict, and that for their purposes and the purposes of the court, their decision must be regarded as the correct one. This will apply even if it is a majority verdict.

In some cases judges have indicated that jurors, following a particularly complex and difficult case, can be excused further attendance on jury service for a number of years. There is no warrant for doing this and no method by which such a direction can be implemented.

Illustrative directions on single complainer Moorov

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1. Introduction

1.1. Direction 1

1.2. Direction 2

1.3. Direction 3

1.4. Direction 4

Introduction

Please note: As drafted, some of the language used in the illustrative directions departs from the conventional expression "**time, character and circumstances.**" It is suggested that this phrase should be used instead of "time, place and circumstances" or "time, place, character and circumstances.". Moreover, references to "mutual corroboration", where they occur below, may not always be apposite to the circumstances of a single complainer case. Judges may instead wish to adapt that wording to reflect the position that what is being sought is corroboration arising from a different incident, or incidents, within an established single course of criminal conduct involving the same complainer.

Please also note that it is the evidence which the jury must evaluate for credibility and reliability. The illustrations do not reflect that. If using these illustrations, a judge should bear in mind that it is the evidence on the essential facts of commission and identification which needs to be accepted and no more than that. Accordingly some adjustment would be required.

Direction 1 – 3 charges involving single complainer (sexual)

Direction 2 - 2 omnibus charges involving single complainer (sexual)

Direction 3 - 1 charge and a docket (sexual)

Direction 4 - 1 omnibus charge of assault

Direction 1

"In relation to Charge 2, and as the Advocate Depute said, there is a particular principle in this case which could - depending upon your view of the evidence - apply to the issue of corroboration and I need now to give you directions about it.

You will recall that in the general directions I mentioned the need for corroboration of the Crown

case; that is the essential requirement that there must be two separate sources of evidence in regard to (a) whether the crimes charged were committed and (b) if they were, whether the accused was the perpetrator. You will have noticed, however, that there were no text messages or other evidence that directly referred to the Charge 2 incident. So, in effect, [the complainer] was the only source of direct evidence about that incident.

There is, however, a special principle that can apply in such a situation, and it is called mutual corroboration. In this trial, this principle is capable of applying to corroborate the evidence of [the complainer] about Charge 2. Mutual corroboration can apply where it is alleged that the accused committed a series of crimes each as part of a single course of criminal conduct systematically pursued by him.

In such cases, the evidence of single witness concerning one allegation may be corroborated by evidence from a different and separate credible and reliable source about a different allegation, provided that the accused is identified as the perpetrator in relation to each allegation.

The principle can only apply, however, where the allegations are so closely linked by:

1. *their character,*
2. *the circumstances of their commission, and*
3. *the time of commission*

as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused. If they are, then evidence of a single witness about the commission of one crime can be sufficiently corroborated by evidence from a different credible and reliable source about the commission of the other crime. In looking at the evidence, it is the underlying similarity of the conduct which you have to consider in deciding whether or not the doctrine applies. It does not matter that the allegations have different names or are more or less serious.

In this case the Crown seeks to rely upon this principle only in relation to Charge 2. It asks you first to accept the evidence of the complainer as credible and reliable in her evidence about the occasion in or about January 2018 when she says the accused penetrated her vagina with his penis when she was asleep.

It then asks you to look at the other charges in relation to which there is a source of evidence separate and distinct from the complainer. The Crown says there are two charges of that sort – Charges 1 and 3.

In relation to Charge 1, the Crown says that a source of evidence separate from the complainer is what the accused himself said in the WhatsApp messages on 29 April 2017 and 19 June 2017 (CP3). The Crown says that the statements made by the accused in those messages, taken in context, amount to admissions that the two incidents of anal intercourse which occurred in the bedroom of the house at [locus] (Charge 1) were without consent and without any reasonable belief in the existence of consent.

In relation to Charge 3, the Crown again relies upon WhatsApp messages, this time from CP4 on 7 May 2018. Again the crown says that the source of those messages was the accused, and that they amount to admissions.

So, if you accept the complainer as credible and reliable in relation to Charge 2, you will have to consider whether you can find corroboration for her account, in one or more of these other sources of evidence – the messages from the accused himself.

More particularly, if you accept – as the Crown suggests – that one or more of these other sources is a credible and reliable source of evidence independent of the complainer about the commission of the alleged crimes to which they relate, you then will have to decide if by reason of the character, circumstance and time of each charge, the crimes referred to in either or both of Charges 1 and 3 are so closely linked to the crime in Charge 2 that you can infer that the accused was pursuing a single course of criminal conduct.

It's not enough if all that's shown is that the accused had a general disposition to commit this kind of offence, and you have to apply this principle with caution. The doctrine of mutual corroboration must always be applied with caution, and the smaller the number of sources of evidence you are prepared to accept, the greater that caution must be. The minimum number of sources of evidence for the proof of any allegation is two.

You must ask yourself what factors if any in the evidence you regard as supporting an inference that there was a single course of conduct. _____

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Direction 2

Corroboration and potential sources of evidence
"The primary source of evidence in relation to all the allegations on this indictment is the evidence of X. If you do not find her evidence both credible and reliable in relation to an allegation, then you would stop there and acquit the accused in relation to that allegation.

In relation to any allegation, if you find her evidence credible and reliable you will have to find another credible and reliable source of evidence that supports or confirms her account.

Both charges allege conduct on a number of occasions – that is a number of crimes in each charge.

Every allegation of a crime, that is of criminal conduct, requires to be proved by corroborated evidence.

In this case it makes sense to start from the most recent allegations and work backwards when looking at potential sources of evidence.

The most recent allegation made was of a rape on [X date]. The primary source of evidence is the evidence of X.

A potential source of corroboration for her evidence that the accused penetrated her vagina with his penis is what Mr [X] said the accused told him.

A potential source of corroboration for her evidence that she did not consent is the evidence of [X] about her distressed condition the following day.

Another potential source of corroboration of X's evidence is the audio recording. The recording is a separate source of evidence. It is a matter of agreement that the voices on it are those of the accused and the complainer. If you were using it as a separate source of evidence in this sense you would have to be satisfied on the basis of your own consideration of it that it was a recording of penile/vaginal penetrative sexual intercourse which took place without X's consent.

The primary source of evidence about this allegation is the evidence of X.

A potential source of corroboration for her evidence that the accused penetrated her vagina with his penis is what Mr X said the accused told him.

Another potential source of corroboration of X's evidence is the audio recording. The recording is a separate source of evidence. If you were using it as a separate source of evidence in this sense you would have to be satisfied on the basis of your own consideration of it that it was a recording of penile/vaginal penetrative sexual intercourse which took place without X's consent."

Earlier allegations of rape

"The evidence of X is the primary source of evidence in relation to each of these allegations.

The only potential source of corroboration in relation to these allegations is the doctrine of mutual corroboration.

Sometimes crimes are committed, and for various reasons there's little or no eye-witness evidence. In such cases a special principle can apply.

It can apply where an accused person is charged with a series of similar crimes.

The principle is this: If you are satisfied that the crimes charged are so closely linked by:

1. *their character,*
2. *the circumstances of their commission,*
3. *the time of commission*

as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then, the evidence of one witness about the commission of one crime is sufficiently corroborated by evidence from a separate source of evidence about the commission of at least one of the other crimes.

It does not matter that some or all of the crimes are alleged in the same charge, or in different charges.

In looking at the alleged crimes, it is the underlying similarity of the conduct which you have to consider in deciding whether the doctrine applies. It does not matter that the charges have different names or are more or less serious, subject to what I am about to say to you.

Evidence about one incident against a complainer may corroborate evidence concerning another incident against the same complainer. A source of evidence concerning one alleged crime may corroborate the testimony of a witness giving evidence about another alleged crime.

In this case the potential sources of evidence separate from X are the audio recordings. Before you could consider using them in this way you would have to be satisfied on the basis of your own impression of them that they are recordings of non-consensual intercourse between the accused and the complainer.

If you are satisfied about that, you can consider whether they corroborate the testimony of X when she was speaking about incidents that took place before 10 September 2018.

If you accept X's evidence about these earlier allegations as credible and reliable, and you accept that the recordings from September 2018 are recordings of non-consensual intercourse between her and the accused, you then go on to consider the following matters.

You then have to decide if by reason of the character, circumstances, and time of each crime, the crimes are so closely linked that you can infer that the accused was pursuing a single course of crime. It's not enough if all that's shown is that he had a general disposition to commit a particular kind of offence. You have to apply this principle with caution. The doctrine of mutual corroboration must always be applied with caution. The fewer sources of evidence there are that you are prepared to accept, the greater that caution must be."

[Summary of Crown/defence positions on Moorov]

"In this case, there's enough evidence in law that the crimes alleged are sufficiently close in time, character, and circumstance for the principle to apply. But you have to decide:

1. *if that evidence is credible and reliable*
2. *if the necessary link in time, character and circumstances has been established, and*
3. *if the principle should be applied."*

Direction 3

"Sometimes crimes are committed, and for various reasons there is little or no eye- witness evidence. In such cases a special principle can apply.

It can apply where: it is alleged that the accused committed a series of crimes. That can be by a series of different charges, or, a series of allegations made within a single charge, or in a combination of a charge or charges and a docket.

The evidence of one witness concerning one allegation may be corroborated by evidence from a different and separate credible and reliable source about a different allegation, and the accused is identified as the perpetrator in relation to each allegation. The allegations must be linked together by time, character and circumstance.

The principle is this: if you are satisfied that the allegations are so closely linked by:

- *their character,*
- *the circumstances of their commission,*
- *and*
- *the time of commission*

as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then, the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of each of the other crimes. In looking at the charges, it is the underlying similarity of the conduct which is described by the witnesses which you have to consider in deciding whether the principle applies. It does not matter that the allegations have different names or are more or less serious.

In this case the way the Crown are seeking to use the principle is this. It asks you to accept the evidence of the complainer as credible and reliable in her evidence about occasions when she says the accused had sex with her when she was asleep.

It then asks you to look at allegations in relation to which there is a source of evidence separate from the complainer. It says there are two allegations of that sort.

In relation to the allegation involving the vibrator, it says the separate source of evidence is what the accused himself said in one of the recorded conversations.

In relation to the allegation in the docket, it says the separate source of evidence is the video recording, and what it shows. The Crown says what happened in South Africa was a similar crime to what is charged in the indictment, because it involved penetration, and the complainer was asleep at the time.

If you accept the complainer as credible and reliable, you have to consider whether you can find corroboration for her account, in one or both of those sources of evidence. You must regard one or both as credible and reliable sources of evidence as to the commission of the alleged crimes to which they relate, namely, respectively, the incident with the vibrator and the conduct alleged in the docket.

If you accept one or both of those as credible and reliable sources of evidence as to the commission of the alleged crimes to which they relate, you then have to decide if by reason of the character, circumstance, and time of each charge, the crimes are so closely linked that you can infer that the accused was pursuing a single course of crime. It's not enough if all that's shown is that he had a general disposition to commit this kind of offence. You have to apply this principle with caution. The doctrine of mutual corroboration must always be applied with caution. The fewer sources of evidence you are prepared to accept, the greater that caution must be. The minimum number of sources of evidence for the proof of any allegation is two.

The Crown says that principle can be applied in this case. The advocate depute says there was a course of conduct on the part of the accused in carrying out penetrative assaults against his wife when she was asleep, using fingers, a vibrator and his penis.

You must ask yourself what factors if any in the evidence you regard as supporting an inference that there was a single course of conduct. You must also ask yourself whether there are any differences as to the conduct described which would indicate that you should not draw such an inference."

[summary of Crown and defence positions in the particular case]

"In this case, there's enough evidence in law that the crimes alleged are sufficiently close in time, character, and circumstance for the principle to apply. But you have to decide:

- *if that evidence is credible and reliable*
- *if the necessary link in time, character and circumstances has been established, and*
- *if the principle should be applied.*

In this case you must first decide whether you regard the complainer's evidence about the allegations in charge 1 as credible and reliable. If you did not, you would stop there. You would simply acquit the accused.

If you did regard her evidence as credible and reliable, you would go on to consider whether there was credible and reliable evidence from a source other than the complainer in relation to the allegation of sexual assault by penetration involving the vibrator, and/or the allegation in the docket. If there was no such evidence, you would have to acquit.

Before you could use that evidence to support X evidence, you would have to be satisfied that it related to conduct that was so closely related to the conduct described by X in time, character and circumstances that you could infer that the two offences formed part of a single course of criminal conduct. You would have to consider whether you should apply the principle.

In this case you could convict of sexual assault by penetration involving the vibrator without recourse to the doctrine of mutual corroboration. You would express a verdict of that sort by [insert]

Direction 4

(Note that this was a case where the judge had already given full Moorov directions on other charges)

"The only eyewitness speaking to charge 2 is the complainer S C but there was evidence, if you accept it from J C of an alleged admission. The accused, he said, accepted head-butting the complainer and I think that was in relation to the incident of head-butting after the shopping trip.

Now, if you accepted the evidence of S C on that charge and you accepted the evidence of J C that there was an admission to the head-butt after the shopping trip, then that would be available as corroboration in two ways.

It could be available as corroboration simply of one incident of head-butting, that is the one after the shopping trip, but you could use the admission, if you accepted it, to corroborate the rest of the charge, the other instances of assault, pushing, head-butting and so on, if you were satisfied that the head-butting after the shopping was but one incident of a course of conduct systematically pursued by the accused against S C.

In other words, she speaks to the whole of the charge, various incidents of assault, there is corroboration of one of them and if you are satisfied that all the episodes referred to in the charge were parts of a systematic course of conduct pursued by the accused, you could use the evidence of J C to corroborate all of it on the same basis as I have mentioned in relation charges 1, 3 and 4, albeit it is all contained in the one charge."

Provision of overnight accommodation for the jury

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1. Provision of overnight accommodation for the jury

Provision of overnight accommodation for the jury

Section 99(4) of the 1995 Act provides for judges to give such instructions as they consider appropriate as regards the making of arrangements for the overnight accommodation of the jury and their continued seclusion if such accommodation is provided. A detailed analysis of this provision is to be found in *Thomson v HM Advocate* 1997 SCCR 121.

Given the highly exceptional nature of such arrangements in modern practice, the possible need for overnight seclusion of the jury should be identified long before the jury retire to consider their verdict and, if it seems at all likely that overnight seclusion will be required, the clerk of court should be asked to make contingency plans for the accommodation and transport of the jury and relevant court staff.

Jurors should not feel that they are under any pressure to reach a verdict by a particular time, but given the exceptional nature of overnight seclusion and the fact that jurors are likely to be taken aback by such a suggestion and the need to rearrange their private lives and make practical arrangements for overnight bags etc, it is thought preferable in any case where the jury will require to be secluded until they give their verdict that this is communicated to them at the latest at the time of the judge's charge. That may be expressed in the following or similar terms:

> *"I have decided in the, circumstances of this case that you will require to remain secluded, that is to have no direct contact with persons outside your number, other than any necessary contact with or supervised by court staff until you have reached your verdict. This means that if you are still considering your verdict at [5pm] this afternoon you will be asked to break off your discussions and arrangements will be made for you to be taken to a hotel. I will give you further information about that if that becomes necessary"*

The question of the time of day at which they should break off their discussions if they have not reached a verdict should be considered in the same way as in the more normal case where the jury may return home for the night or weekend, although the more complex practical arrangements may necessitate an earlier adjournment than would otherwise be the case and, equally, the advance notice to the jurors of such arrangements should reduce the difficulty which has sometimes arisen in practice in addressing with jurors how close they are to a verdict. Nonetheless, judges may still wish to explore carefully with the jury whether overnight adjournment is actually required.

As regards such matters judges may wish to consider *Sayers v HM Advocate* 1981 SCCR 312, where the relevant part of the judge's charge is reported in full. In *McKenzie v HM Advocate* 1986 SCCR

94, the trial judge had followed in broad terms the approach adopted by the trial judge in *Sayers*, and the appeal court held the approach to be appropriate.

In *McKenzie* there were two accused and nine charges for the jury to deliberate upon. The trial lasted over three weeks. The jury retired at 12.25 p.m. and at 6.05 p.m. the judge recalled them to court. He said:

> *"Ladies and gentlemen, I have called you back into court to ascertain what progress is being made. Now let me say at once that justice requires that you have as much time as you need to reach your verdicts. No pressure is being put on you. I am certainly not seeking to hurry you. You have had a long time secluded and a long time in deliberation, but if there are reasonable prospects of your being able to reach a verdict within, say, the next half an hour, say about a quarter to seven, then I would ask you to return to the jury room to continue your deliberations. If, however, you are going to need rather longer than that then I would propose that you go for the night to a hotel where you will be secluded again and you will be under the care of the officers of court. In that event you would break off your deliberations now or within a matter of 5 or 10 minutes perhaps, whatever you consider was a suitable interval, and would go to a hotel for the night and would then come back to the jury room tomorrow morning at 10 o'clock and resume your deliberations. Can you give me any idea? Please understand I am not in any way trying to hurry you, I just want to be sure you have ample time."*

The jury then retired to consider whether they were likely to finish in the time mentioned but returned at 6.40 p.m. to say that they expected to conclude their deliberations within the hour. They were then sent out to continue their deliberations and brought back a verdict at 7.25 p.m. An appeal against conviction failed. The High Court held that the steps which a trial judge should take in applying the section were a matter for their discretion and that in this case the discretion had been properly applied. In the course of his opinion, Lord Justice-Clerk Ross observed (at page 98):

> *"It is not really possible for the trial judge to explain why he is seeking to ascertain what progress is being made without disclosing that one option is to direct the jury to break off their deliberations and to proceed to a hotel where overnight accommodation will be made available for them. It is quite intelligible that some jurors may find the prospects of spending the night in a hotel away from home an unpalatable one, but equally if the jury have been deliberating for some considerable time, other jurors may be wondering whether they are required to carry on indefinitely or whether an alternative course of action is possible. In these circumstances it is, in our opinion, essential that the trial judge should explain to the jury that no pressure is being put upon them and that the interests of justice require that they should be given as much time as they need to reach their verdict. It is plain from the transcript in this case that the trial judge did emphasise these matters to the jury."*

A judge must not suggest to the jury that overnight adjournment will be inconvenient, far less a hassle, since that would pressurise them.[853] The jury must be told they are under no pressure to reach a verdict by any particular time,[854] certainly when the issue of overnight accommodation is raised.[855]

Sheriff Sir Gerard Gordon, QC, suggests that the essential question is whether what the judge said or omitted to say was likely to make a reasonable jury or juror feel under pressure and whether it appeared that in fact any juror did feel under pressure.[856]

It is thought that the current position can be summarised as follows:

1. If the judge thinks it may be necessary to send the jury to a hotel, she/he should tell the clerk to make contingency plans preferably well in advance of the jury retiring. If accommodation cannot be secured there is no point in contemplating secluding the jury overnight
2. The jury should be told, no later than at the time of charge, that if they are still considering their verdict at a particular time they will be asked to break off their discussions and arrangements will be made for them to be taken to a hotel
3. Assuming accommodation and transport can be made available, the judge will then be in a position to recall the jury to the courtroom (at the time of her or his choosing) to enquire what progress is being made. At this point, whatever else is said, the jury must be told that no pressure is being put on them to reach a verdict. Thereafter, it is probably the safest course to follow as nearly as possible what was said and done in Sayers and McKenzie: first, to enquire whether a verdict is reasonably imminent; and secondly, to remind the jury that if it is not, they will have to go to an hotel overnight. The judge should not suggest to the jury that going to a hotel or adjourning overnight will cause inconvenience to anyone.
4. Such cases will be so exceptional that it is preferable that the initial approach to the jury is not delegated to the clerk of court.
5. If the jury indicate (after further discussion) that a verdict is reasonably imminent, they can be sent out again to continue their discussions, if that can be accommodated.
6. If the jury indicate there is no prospect of a verdict in a reasonable time and it is appropriate that the jurors remain secluded, then, in the knowledge that accommodation is available, the jury can be directed to cease their discussions and go to the hotel and not to resume their discussions until the case has called again in court the next morning. At that point (and only then) should the diet be adjourned.

[853] *Love v HM Advocate*, 1995 SCCR 501

[854] *Sinclair v HM Advocate* 1996 SCCR 221

[855] *Robertson v HM Advocate* 1996 SCCR 243

[856] see commentary to Sinclair at 225

Alternative verdicts under the Road Traffic Offenders Act 1988

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1. Section 23

2. Section 24

Section 23

Offence Charged	Alternative
Culpable homicide *(in connection with the driving of a mechanically propelled vehicle)*	Section 1 of the Road Traffic Act 1998 (*causing death by dangerous driving*) Section 1A (*causing serious injury by dangerous driving*) Section 2 (*dangerous driving*) Section 3A (*causing death by careless driving when under influence of drink or drugs*)
Stealing a motor vehicle *(on indictment)*	Section 178 (*taking motor vehicle without authority etc.*)

Section 24

Offence Charged	Alternative
Section 1 (*causing death by dangerous driving*)	Section 2 (*dangerous driving*) Section 2B (*causing death by careless, or inconsiderate, driving*) Section 3 (*careless, and inconsiderate, driving*)
Section 1A (*causing serious injury by dangerous driving*)	Section 2 (*dangerous driving*) Section 2C (*causing serious injury by careless, or inconsiderate, driving*) Section 3 (*careless, and inconsiderate, driving*)
Section 2 (*dangerous driving*)	Section 3 (*careless, and inconsiderate, driving*)
Section 2B (*causing death by careless, or inconsiderate, driving*)	Section 3 (*careless, and inconsiderate, driving*)

Section 2C (*causing serious injury by careless, or inconsiderate, driving*)	Section 3 (*careless, and inconsiderate, driving*)
Section 3ZC (*causing death by driving: disqualified drivers*)	Section 103(1)(b) (*driving while disqualified*)
Section 3ZD (*causing serious injury by driving: disqualified drivers*)	Section 103(1)(b) (*driving while disqualified*)
Section 3A (*causing death by careless driving when under influence of drink or drugs*)	Section 2B (*causing death by careless, or inconsiderate, driving*) Section 3 (*careless, and inconsiderate, driving*) Section 4(1) (*driving when unfit to drive through drink or drugs*) Section 5(1)(a) (*driving with excess alcohol in breath, blood or urine*) Section 7(6) (*failing to provide specimen*) Section 7A(6)

	(*failing to give permission for laboratory test*)

Section 4(1) (*driving or attempting to drive when unfit to drive through drink or drugs*)	Section 4(2) (*being in charge of a vehicle when unfit to drive through drink or drugs*)
Section 5(1)(a) (*driving or attempting to drive with excess alcohol in breath, blood or urine*)	Section 5(1)(b) (*being in charge of a vehicle with excess alcohol in breath, blood or urine*)
Section 5A(1)(a) and (2) (*driving or attempting to drive with concentration of specified controlled drug above specified limit*)	Section 5A(1)(b) and (2) (*being in charge of a vehicle with concentration of specified controlled drug above specified limit*)
Section 28 (*dangerous cycling*)	Section 29 (*careless, and inconsiderate, cycling*)

Alternative verdicts under Schedule 3 to the Sexual Offences (Scotland) Act 2009

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1. Introduction

2. Schedule 3 table

Introduction

Section 50(1) of the Sexual Offences (Scotland) Act 2009 provides for the alternative verdicts set out in Schedule 3 and replicated in the table below.

In addition, section 50(3) and 50(4) state the following;

Section 50(3)

a. A is charged with an offence under sections 18 to 26, and

b. but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence ("the alternative older child offence") of—
   i. having intercourse with an older child,
   ii. engaging in penetrative sexual activity with or towards an older child,
   iii. engaging in sexual activity with or towards an older child,
   iv. causing an older child to participate in a sexual activity,
   v. causing an older child to be present during a sexual activity,
   vi. causing an older child to look at a sexual image,
   vii. communicating indecently with an older child,
   viii. causing an older child to see or hear an indecent communication,
   ix. sexual exposure to an older child,
   x. voyeurism towards an older child,
   xi. engaging while an older child in sexual conduct with or towards another older child,
   xii. engaging while an older child in consensual sexual conduct with another older child.

Section 50(4)

a. A is charged with an offence under section 28, 29 or 30, and
b. but for a failure to establish beyond reasonable doubt that A had not attained the

age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence ("the alternative older child offence") of—

i. engaging while an older child in sexual conduct with or towards another older child,

ii. engaging while an older child in consensual sexual conduct with another older child.

Schedule 3 table

Offence Charged	Alternative
Section 1 (*Rape*)	Sexual assault by penetration Sexual assault Having intercourse with an older child Assault at common law Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child An offence under section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 *(incest)* An offence under section 2of that Act *(intercourse with step-child)*

Section 2 (*Sexual assault by penetration*)	Sexual Assault Engaging in penetrative sexual activity with or towards an older child Engaging in sexual activity with or towards an older child Assault at common law Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child
Section 3 *(Sexual Assault)*	Engaging in sexual activity with or towards an older child Assault at common law Assault with intent to commit rape at common law Assault with intent to commit the offence of

	rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child
Section 4 *(Sexual Coercion)*	Coercing a person into being present during a sexual activity Coercing a person into looking at a sexual image Communicating indecently Causing a person to see or hear an indecent communication Causing an older child to participate in a sexual activity Assault at common law Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child

Section 5 *(Coercing a person into being present during a sexual activity)*	Sexual coercion Coercing a person into looking at a sexual image Communicating indecently Causing a person to see or hear an indecent communication Sexual exposure Assault at common law
Section 6 *(Coercing a person into looking at a sexual image)*	Sexual coercion Coercing a person into being present during a sexual activity Communicating indecently Causing a person to see or hear an indecent communication Sexual exposure Assault at common law
Section 7(1) (*Communicating indecently)*	Sexual coercion Coercing a person into being present during a sexual activity Coercing a person into looking at a sexual image Causing a person to see or hear an indecent communication Sexual exposure

Section 7(2) (*Causing a person to see or hear an indecent communication*)	Sexual coercion Coercing a person into being present during a sexual activity Coercing a person into looking at a sexual image Communicating indecently Sexual exposure
Section 8 (*Sexual Exposure*)	Public indecency at common law Breach of the peace at common law
Section 9 (*Voyeurism*)	Breach of the peace at common law
Section 18 (*Rape of a young child*)	Sexual assault on a young child by penetration Sexual assault on a young child Having intercourse with an older child Engaging in penetrative sexual activity with or towards an older child Engaging in sexual activity with or towards an older child Engaging while an older child in sexual conduct with or towards another older child Assault at common law Assault with intent to commit rape at common law

	Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child
Section 19 (*Sexual assault on a young child by penetration*)	Sexual assault on a young child Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child Engaging in penetrative sexual activity with or towards an older child Engaging in sexual activity with or towards an older child Assault at common law

Section 20 *(Sexual assault on a young child)*	Engaging in sexual activity with or towards an older child Engaging while an older child in sexual conduct with or towards another older child Engaging while an older child in consensual sexual conduct with another older child Assault at common law Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child
Section 21 *(Causing a young child to participate in sexual activity)*	Causing a young child to be present during a sexual activity Causing a young child to look at a sexual image Communicating indecently with a young child Causing a young child to see or hear an indecent communication Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image

	Communicating indecently with an older child Causing an older child to see or hear an indecent communication Assault at common law
Section 22 *(Causing a young child to be present during sexual activity)*	Causing a young child to participate in a sexual activity Causing a young child to look at a sexual image Communicating indecently with a young child Causing a young child to see or hear an indecent communication Sexual exposure to a young child Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 23 *(Causing a young child to look as at sexual image)*	Causing a young child to participate in a sexual activity Causing a young child to be present during a sexual activity Communicating indecently with a young child Causing a young child to see or hear an indecent

	communication Sexual exposure to a young child Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 24(1) *(Communicating indecently with a young child)*	Causing a young child to participate in a sexual activity Assault with intent to commit rape at common law Assault with intent to commit the offence of rape under section 1 of the 2009 Act Assault with intent to commit the offence of rape of a young child Abduction with intent to commit rape at common law Abduction with intent to commit the offence of rape under section 1 of the 2009 Act Abduction with intent to commit the offence of rape of a young child Causing a young child to be present during a sexual activity Causing a young child to look at a sexual image Causing a young child to see or hear an indecent

	communication Sexual exposure to a young child Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 24(2) *(Causing a young child to see or hear an indecent communication)*	Causing a young child to participate in a sexual activity Causing a young child to be present during a sexual activity Causing a young child to look at a sexual image Communicating indecently with a young child Sexual exposure to a young child Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child

Section 25 *(Sexual exposure to a young child)*	Sexual exposure to an older child Public indecency at common law Breach of the peace at common law
Section 26 *(Voyeurism towards a young child)*	Voyeurism towards an older child Breach of the peace at common law
Section 28 *(Having intercourse with an older child)*	Engaging in penetrative sexual activity with or towards an older child Engaging in sexual activity with or towards an older child Engaging while an older child in sexual conduct with or towards another older child
Section 29 *(Engaging in penetrative sexual activity with or towards an older child)*	Engaging in sexual activity with or towards an older child Engaging while an older child in sexual conduct with or towards another older child
Section 30 *(Engaging in sexual activity with or towards an*	Engaging while an older child in sexual conduct with or towards another older child

older child)	Engaging while an older child in consensual sexual conduct with another older child
Section 31 *(Causing an older child to participate in a sexual activity)*	Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication
Section 32 *(Causing an older child to be present during a sexual activity)*	Causing an older child to participate in a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 33 *(Causing an older child to look at a sexual image)*	Causing an older child to participate in a sexual activity Causing an older child to be present during a

	sexual activity Communicating indecently with an older child Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 34(1) *(Communicating indecently with an older child)*	Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Causing an older child to see or hear an indecent communication Sexual exposure to an older child
Section 34 (2) *(Causing an older child to see or hear an indecent communication)*	Causing an older child to participate in a sexual activity Causing an older child to be present during a sexual activity Causing an older child to look at a sexual image Communicating indecently with an older child Sexual exposure to an older child
Section 35	

(Sexual exposure to an older child)	Public indecency at common law Breach of the peace at common law
Section 36 *(Voyeurism towards an older child)*	Breach of the peace at common law