

Addressing false assumptions about rape, other sexual offences and domestic abuse

Law

Introduction

Misconceptions as to the nature of the crime of rape and other sexual offences, and of domestic abuse, can be addressed in plain language directions which accurately define the crime and the principles on which the law is based. It is now widely recognised, however, that additional directions may be needed to address other erroneous stereotypes, particularly where they entail false assumptions about the way in which a person may react to traumatic events.

Senators, temporary judges, and sheriffs, have attended training on the impact of trauma in the criminal justice system with a view to ensuring that judges are “trauma informed” in their work. All judges have access to the [Trauma Informed Judging Resource Kit](#) which is available on the Judicial Hub.

In certain sexual offence trials, specific directions about a complainer’s lack of communication about the offence and about the absence of physical resistance or physical force, are mandatory in terms of sections [288DA](#) and [288DB](#) of the Criminal Procedure (Scotland) Act 1995. The members of the Jury Manual Committee have considered to what extent, and on what basis, it is appropriate to develop specimen directions aimed at addressing other common misconceptions and stereotypes which could corrupt jury deliberations in cases involving sexual offences or domestic abuse.

This chapter provides guidance on a range of directions which might be given to address false assumptions which might arise in a trial. The guidance covers the statutory directions required by sections 288DA and 288DB of the 1995 Act, and analyses the basis on which it may be necessary, in terms of the court’s common law duties, to give other directions intended to address false assumptions, whether in cases involving sexual offences or domestic abuse. Possible forms of direction are also provided.

Statutory directions in certain sexual offences: s288DA and s288DB of the 1995 Act

Sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995 Act require judges, in certain sexual offence trials, to give directions on the complainer's lack of communication about the offence, and, where required, the absence of physical resistance or physical force. The provisions were introduced by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and commenced on 24th April 2017.

Sections 288DA and 288DB provide as follows:

s288DA Jury direction relating to lack of communication about offence

“(1) Subsection (2) applies where, in a trial on indictment for a sexual offence—

(a) evidence is given which suggests that the person against whom the offence is alleged to have been committed—

(i) did not tell, or delayed in telling, anyone, or a particular person, about the offence, or

(ii) did not report, or delayed in reporting, the offence to any investigating agency, or a particular investigating agency, or

(b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.

(2) In charging the jury, the judge must advise that—

(a) there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things, and

(b) this does not, therefore, necessarily indicate that an allegation is false.

(3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.

(4) For the purposes of this section—

“investigating agency” means—

(a) a police force maintained for the area where the offence is alleged to have been committed,

(b) any other person who has functions (to any extent) of investigating crime in the area where the offence is alleged to have been committed,

“sexual offence” has the same meaning as in section 210A, except that it does not include—

(a) an offence under section 170 of the Customs and Excise Management Act 1979, or

(b) an offence under section 52A of the Civic Government (Scotland) Act 1982.”

288DB Jury direction relating to absence of physical resistance or physical force

“(1) Subsection (2) applies where, in a trial on indictment for a sexual offence—

(a) evidence is given which suggests that the sexual activity took place without physical resistance on the part of the person against whom the offence is alleged to have been committed, or

(b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.

(2) In charging the jury, the judge must advise that—

(a) there can be good reasons why a person against whom a sexual offence is committed might not physically resist the sexual activity, and

(b) an absence of physical resistance does not, therefore, necessarily indicate that an allegation is false.

(3) Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved.

(4) Subsection (5) applies where, in a trial on indictment for a sexual offence—

(a) evidence is given which suggests that the sexual activity took place without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or

(b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.

(5) In charging the jury, the judge must advise that—

(a) there can be good reasons why a person may, in committing a sexual offence, not need to use physical force to overcome the will of the person against whom the offence is committed, and

(b) an absence of physical force does not, therefore, necessarily indicate that an allegation is false.

(6) Subsection (5) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (5) would otherwise apply to be material to the question of whether the alleged offence is proved.

(7) For the purposes of this section—

“sexual activity” means the sexual activity which is the subject of the alleged sexual offence,

“sexual offence” means—

(a) rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009),

(b) indecent assault,

(c) sodomy,

(d) clandestine injury to women,

(e) an offence under section 2 of the Sexual Offences (Scotland) Act 2009 (sexual assault by penetration),

(f) an offence under section 3 of that Act (sexual assault),

(g) an offence under section 4 of that Act (sexual coercion)."

The common law basis for directions addressing false assumptions

Scots law and the Convention

In [Wilson v HM Advocate 2021 SCCR 141](#), a case involving domestic sexual and physical assaults in which the court was focussed primarily on appropriate directions on hearsay, the Lord Justice General explained, at paragraph 54 that:

"... 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**"
[emphasis added].

The court examined the ECtHR decision in [Schatschaschwili v Germany \(2016\) 63 EHRR 14](#) in which case it was stated, at paragraph 101, again in the context of hearsay, that:

"101. The Court's primary concern under art.6(1) is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted³¹ and, where necessary, to the rights of witnesses."

Footnote 31 referred to [Gafgen v Germany \(2011\) 52 EHRR 1](#) at paragraphs [163] and [175]. In *Gafgen*, the court confirmed at paragraph 175, that victims of crime, their families and the public have an interest in the prosecution and punishment of criminals. The reference to punishment inevitably implies the conviction of the guilty.

As long ago as 1996, in [Doorson v Netherlands \(1996\) 22 EHRR 330](#), ECtHR concluded, against a background of other convention rights including art. 8, that principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

In [Judge v United Kingdom 2011 SCCR 241](#), as well as confirming that jury trial in Scotland was compliant with the implied article 6 requirement for a court to give reasons, the court endorsed the fairness of the regime under sections 274 and 275 of the 1995 Act, explaining that it was legitimate to seek to address rape myths which

unduly affected the dignity and privacy of complainers when they give evidence at trial. The court specifically endorsed the reasoning of Lord Justice Clerk Gill, in [Moir v HM Advocate 2005 1 JC 102](#), who had referred to the policy purpose of such legislation as including the prevention of juries giving undeserved acquittals out of prejudice against the complainer, rather than on an objective view of the evidence, and to prevent victims of sexual offences being deterred from reporting.

In his opinion in *Moir*, Lord Gill referred with approval to the reasoning of ECtHR in [SN v Sweden \(2004\) 39 EHRR 13](#) at paragraph 47 where the court had explained that there are special features of criminal proceedings concerning sexual offences which are often conceived of as an ordeal by the victim. There are recent and notorious illustrations of this in [Begg v HM Advocate 2015 SCCR 359](#) and [MacDonald v HM Advocate 2020 JC 244](#) where the court reiterated the importance of judges taking appropriate steps to maintain proper balance in the questioning of witnesses. In *MacDonald* the Lord Justice General observed that if such situations were to recur, **"the situation in sexual offence trials would be unsustainable"** (emphasis added).

These cases, and *Moir*, demonstrate that judges have a role to play in ensuring that there is balance in the way trials for sexual offences are conducted. It is not only Parliament which can take appropriate steps.

In [Donegan v HM Advocate 2019 JC 81](#) the Lord Justice Clerk noted, at paragraph 51 of the opinion of the court, that:

"It is not uncommon for victims of sexual assaults to delay making reports, to stagger reporting or make inconsistent statements in doing so. This is recognised to such a degree that measures are in place, namely sec 288DA of the Criminal Procedure (Scotland) Act 1995, to demystify myths and misunderstandings that a jury may otherwise have as to these matters."

At paragraph 56 the court observed that:

"... in line with the approach in other jurisdictions, notable steps have been taken in Scotland seeking to address and demystify for court users various supposed 'myths' associated with the reporting of and the reliability of rape allegations."

The position in England

In giving the opinion of the Court of Appeal in [CM \(Miller\) v R \[2010\] EWCA Crim 1578](#), Lord Leveson explained,

"23. In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, *R v MM* [2007] EWCA Crim 1558, *R v D* [2008] EWCA Crim 2557 and *R v Breeze* [2009] EWCA Crim 255). Subsequent to this conviction, the Judicial Studies Board published a new bench book which deals with this issue in this way:

"The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. **Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice**" (emphasis added).

The practice continues. In giving the opinion of the Court of Appeal in [R v Beale \[2019\] 2 Cr App R 19](#), LJ Hallett confirmed, at paragraph 35, that:

"We need no persuading that myths and stereotypes about rape complainants still persist, and if the evidence of a complainant is to be assessed fairly the trial judge should give the guidance suggested by the Judicial College. It is part of the trial judge's overall duty to ensure the trial is fair. The courts have a far greater understanding now of the need to ensure that complainants in sexual cases are treated properly and that no one who has been raped should

be deterred from coming forward for fear of how they will be treated in court...”

The reference to the guidance of the Judicial College is to the Criminal Courts Compendium, part 1, the relevant and most up to date parts of which are found at chapters 20.1-20.5. It is apparent that it is accepted practice that certain directions should be given by judges in England in sexual offence trials. The practice has been endorsed since at least 2008 and has not fallen foul of ECtHR.

In [R v B \[2022\] EWCA Crim 926](#) the appellant argued that the effect of English jury directions addressing myths and stereotypes and children and young people, was to bolster the complainant’s evidence and was unfair to the appellant. Giving the Court’s judgment, Stuart-Smith LJ concluded that no unfairness arose:

“72 ... In our judgment it is necessary to look at why such directions are given. As their terms make clear, they are to address the risk of stereotypical thinking that would be unfair to the complainant. Each section deals with a different problem. The section on avoiding myths and stereotypes is a necessary protection against stereotypical reactions to a witness' demeanour when giving evidence alleging that they have been sexually assaulted; and it encourages the Jury to make their own assessment of witnesses rather than bringing stereotypes or preconceptions into play. The section on Children and Young People is again a necessary protection, this time against the canard that an alleged victim's evidence of sexual abuse is unreliable because they have not disclosed it sooner or more fully.

73 We accept that the effect of each direction may be to bolster the evidence of a victim; but it only bolsters their evidence to the extent necessary to prevent unfairness to the victim caused by the stereotypical thinking against which it warns. We see nothing unfair to the Appellant in the giving of both directions in this case.”

The Law Commission included, in its May 2023 Consultation Paper, questions on whether additional directions countering rape myths should be considered by the English Judicial College (Law Commission, ‘[Evidence in Sexual Offence Prosecutions](#)’ Consultation Paper 259 (May 2023) questions 91, 92 and 94). In July 2025 it made recommendations to the Government for reform of sexual offences cases including reform of rules of evidence to address myths and misconceptions about sexual

violence. It included a recommendation for mandatory training for all legal practitioners on myths and misconceptions and additional directions to jurors to educate them about myths and misconceptions.

The Judicial Institute learned at the Commonwealth Judicial Education Institute (CJEL) conference in May 2023 that most Commonwealth countries with trial by jury use either the English style directions or their own: eg Canada which has directions for countering 15 myths which have been judicially recognised.

The Scottish Law Commission Report on Rape and Sexual Offences (2007)

The Scottish Law Commission recognised that jury directions might be developed addressing the application of what later became the 2009 Act, in their '[Report on Rape and Sexual Offences](#)' (December 2007). The Commission did not propose that the Bill should include jury directions addressing circumstances such as a complainer's lack of response/resistance or injury, as had been included in other jurisdictions whose legislation follows a similar model. However, the Commission stated "there is no reason to suppose that similar directions could not be developed for use by judges in Scotland." (paragraph 2.33 of the report).

The Lord Justice Clerk's Review

In its report, '[Improving the Management of Sexual Offence Cases Final Report](#)', Lord Justice Clerk Dorrian's Review Group included a recommendation, 4(a):

"Myths and preconceptions

A pilot programme should be developed to communicate information to juries regarding certain common rape myths and stereotypes, possibly in the form of a video, drawing upon the research findings referred to in the report, and the equivalent pilot programme commenced in England and Wales. In the meantime the current statutory directions to address rape stereotypes and myths should continue to be utilised whenever appropriate."

Included amongst the myths identified in the report were four in particular:

- i. that a person, and perhaps in particular a woman, who is sexually assaulted will always fight back, scream or shout for help;
- ii. that a sexual assault would be immediately reported;

- iii. that a genuine rape victim will always show emotion in the aftermath or on giving evidence; and
- iv. that false accusations are commonly made.

In due course a working group within the cross-justice sector governance group charged with examining the implications of the recommendations reported on recommendation 4(a) in May 2022. The group concluded that in any pilot scheme to evaluate such directions, they should come from the trial judge in the form of both written and oral directions drawing on the experience of such directions as already exist.

Conclusion

The court has considerable experience of rape myths being invoked in jury trials. Judges are also aware of research which convincingly demonstrates that rape myths intrude on jury deliberations (Rachel Ormston, James Chalmers, Fiona Leverick, Vanessa Munro, and Lorraine Murray, '[Scottish jury research: findings from a large-scale mock jury study](#)' (Scottish Government, 2019); and Cheryl Thomas, '[The 21st century jury: contempt, bias and the impact of jury service](#)' [2020] Crim LR 987). The research was evaluated by the Lord Justice Clerk at paragraphs 5.30 to 5.43 of the 2021 Review Report.

Further [research](#) has been carried out in New Zealand using real jurors in sex offence trials providing still more evidence: Tinsley et al, '["I Think She's Learnt Her Lesson": Juror Use of Cultural Misconceptions in Sexual Violence Trials](#)' 2021 (Victoria University of Wellington Law Review 52(2) 2022). The import of the paper was summarised by Professor Fiona Leverick in a [letter to Scottish Legal News](#) published on 5 May 2023.

It is incumbent on the court to use its powers to address such myths. Those powers include the giving of appropriate directions.

The Jury Manual Committee shared its conclusions with the then Lord Justice General and Lord Justice Clerk, Lord Carloway and Lady Dorrian, who agreed with them. They also agreed that the terms of the following directions were appropriate. Lord Beckett, now the Lord Justice Clerk, drafted and approved **the directions** as Chair of the Jury Manual Committee. They have since been reviewed and revised in the light of judicial experience.

Giving directions during evidence

In Lady Dorrian's Report, '[Improving the Management of Sexual Offence Cases Final Report](#)', at paragraph 5.57, it was explained that there is much to be said for relevant directions on rape myths to be given by the judge both in their introductory remarks at the start of the trial, **or otherwise as soon as such points arise**.

In early 2024, a convicted person sought to appeal on the basis that a judge was wrong to give rape myth directions at the conclusion of the playing at trial of a commission recording of a complainer. The appellant suggested that this would prompt the jury to commence premature decision-making and would give undue weight to the evidence of that particular witness.

Leave to appeal was refused at first and second sift. The second sifting judges explained that the question of the timing of such directions was a matter for the discretion of the trial judge. There was no merit in the grounds of appeal. The second sift judges also observed that the trial judge made it clear that these were matters for the jury's consideration when they came to consider their verdict ([Miller v HM Advocate \[2025\] HCJAC 3, 2024 JC 253](#)).

Accordingly, it is suggested that if giving rape myth directions during the evidence, it may be wise to remind the jury that these will be matters to be considered after hearing all of the evidence, speeches and charge when they are considering their verdict. At this point the judge needs to keep in mind that whilst questioning may have introduced rape myths, it is not known just what may or may not be said in speeches. In many cases, the asking of particular questions signals that rape myths will be invoked in a defence speech.

The directions given in that case included:

1. Delayed reporting:

"Now questions were asked in some of what we heard suggesting that there was a delay in reporting or a failure to report to the police what had happened and the implied suggestion was perhaps to the effect that, well, that that must mean that the complaint is untrue.

Well, **when you come to consider your verdict** you will no doubt consider why a report was not made earlier but you should not assume that that means it's untrue just because its delayed. The fact that a complaint is made late does

not necessarily make it untrue. Experience shows that it is very common for someone who has been sexually assaulted or the subject of domestic abuse not to tell anyone about it for a long time. Some sexual crimes are never reported at all.

So 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.

So when the time comes for you to consider all of these matters, if you are asked to do so, you should look at all the circumstances. Experience shows that different people react to situations in different ways. Some people may tell someone straight away others don't feel able to do so. That may be for reasons of shock, confusion, fear of getting into trouble, not being believed, or causing problems for other people. And you have heard in this case when the question was raised you got an explanation of why a report was not made to the police, fear. **So those would all be matters you would need to reflect on if you are being asked to conclude on the basis of delay that what was said was not true**" (emphasis added).

2. Following a rape myth direction on a prior inconsistent statement:

"... Now when the time comes for you to be considering your verdicts it will be for you to decide if any differences highlighted in this case are important and what impact, if any, that would have on your assessment of the actual evidence given by a witness or witnesses and those would all be matters for you to consider" (emphasis added).

Directions to a similar effect could be given in respect of any myths detailed in this chapter. Where such direction is given during the evidence it is prudent, as was done in this case, to give a general direction along the following lines before proceeding further:

"So these are just some legal directions that judges give based on the knowledge that the courts have accumulated over a long time now in certain cases in certain circumstances and I thought it was useful to give you these directions now in light of some of the nature of the questioning which we heard in the recording. But, ultimately it will be for you, the jury, to decide

what to make of the evidence once you've heard all of the evidence and of course at the moment we are only part of the way through the trial.

So, I am not asking you to prejudge anything whatsoever and I am certainly not telling you how you resolve all these questions. I am just giving you some directions which may eventually be of some value when you are making the assessments that you are going to have to make when you are considering your verdicts."

Possible forms of direction: addressing false assumptions

The Jury Manual provides eight possible forms of direction which are intended to address false assumptions. Some of the directions have been formulated as pre-trial directions whereas others are suggested for direction at the end of the trial. The trial judge, however, will be best placed to consider whether the direction should be given and, if so, the stage at which it should be given. The directions may require to be amended according to the charge or combination of charges on the indictment, or in light of the evidence and issues in the particular case.

Written directions

1. [Addressing false assumptions: rape and other sexual offences.](#)
2. [Addressing false assumptions: domestic abuse.](#)
3. [Addressing false assumptions: rape and other sexual offences, and domestic abuse.](#)

Directions 1, 2 and 3 are primarily intended to be given orally, and in writing, at the start of a trial involving sexual offences and/or domestic abuse but there may be circumstances in which it is appropriate to give them in the course of the evidence or as part of the judge's final directions. The directions, which are provided below, are also included in the **Written directions for jurors in Scottish courts, Part C, other directions to be used as appropriate.**

Statutory directions: s288DA and s288DB of the 1995 Act

4. [Delayed reporting.](#)
5. [Absence of physical resistance or physical force.](#)

Directions 4 and 5 deal with the absence of communication about the offence, and the absence of physical resistance or force. The directions are mandatory in certain sexual offence cases as provided for by sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995. It is suggested, however, that the common law would permit a direction on delayed reporting (Direction 4), where relevant, in other cases such as those involving domestic abuse.

Directions addressing other false assumptions

6. [Consent](#).
7. [Prior inconsistent statements](#).
8. [Lack of emotion when questioned](#).

Directions 6, 7 and 8 might be used in charging the jury at the end of the trial or, where appropriate, in the course of the evidence. The directions have been devised for use, as appropriate, in sexual offence cases and cases involving domestic abuse, but may be equally relevant in other cases in which similar issues arise for the jury's consideration.

POSSIBLE FORMS OF DIRECTION

1. Addressing false assumptions: rape and other sexual offences

[This direction should be given orally, and in writing, at the start of a trial involving a sexual offence but may be equally relevant as part of the judge's final directions in appropriate cases. The direction is included in the "Written directions for jurors in Scottish courts, Part C, other directions to be used as appropriate".]

Sometimes people make assumptions about the crime of rape [or sexual assault/sexual abuse] or about the circumstances in which it happens, and those assumptions may be false or may be based on misleading stereotypes. You must set any such assumptions to one side.

You have taken a legal oath or affirmation to well and truly try the accused and give a true verdict according to the evidence. So you must not let any false assumptions about [rape or other sexual offence(s)] affect your decision in this case.

I will give you the legal definition[s] of the crime[s] charged at the end of the trial and you must apply that definition [those definitions].

Let me explain what the courts have learned through experience about [rape and] sexual offences generally.

1. There is no typical crime of [rape or typical sexual offence].
2. There is no typical person who commits rape or other sexual offences.
3. There is no typical person who is [raped or sexually assaulted/abused].
4. [Rape or other sexual offences] can take place in almost any circumstances. It/They can happen between all different kinds of people, quite often when the people involved are known to each other or related.
5. There is no typical response to [rape/sexual offences]. People can react in many different ways to being [raped/sexually assaulted/abused]. These reactions may not be what you would expect or what you think you would do in the same situation. Some people may tell someone about it straight away, others may not feel able to do so until later whether out of fear or shame or for other reasons.
6. There is no typical response from a complainer who is asked about [rape/sexual offences]. People who have been [raped/sexually assaulted/abused] may present in many different ways when they are asked about it. They may be visibly emotional or show no obvious emotion.

So I repeat, each of you must make sure that you do not let any false assumptions or stereotypes about [rape/sexual offences] affect your verdict.

You must make your decision in this case **only on the evidence** and by applying the law as I will explain it to you.

2. Addressing false assumptions: domestic abuse

[This direction should be given orally, and in writing, at the start of a trial involving domestic abuse but may be equally relevant as part of the judge's final directions in appropriate cases. The direction is included in the "Written directions for jurors in Scottish courts, Part C, other directions to be used as appropriate".]

Sometimes people make assumptions about domestic abuse and about the circumstances in which it happens, and those assumptions may be false or may be based on misleading stereotypes. You must set any such assumptions to one side.

You have taken a legal oath or affirmation to well and truly try the accused and give a true verdict according to the evidence. So, you must not let any false assumptions about domestic abuse affect your decision in this case.

I will give you the legal definition(s) of the crime(s) charged at the end of the trial, and you must apply that definition [those definitions]. In the meantime, let me tell you what the courts have learned from experience about domestic abuse. People who are in an abusive relationship may struggle to extricate themselves from it for a whole range of reasons including fear, lack of resources, family responsibilities, cultural or societal concerns or their own conflicting emotions towards their abuser.

Further, their ability to react to events may be compromised or blunted by their experience. Abuse can be physical, but it can also be psychological, emotional or financial. Those subject to it may not even recognise themselves as having been abused, particularly where the behaviours develop over time. Whether that is relevant here will depend upon your assessment of any evidence that you hear.

Do not fall into the trap of assessing someone's behaviour by reference to how you think you may or may not have acted or reacted in their position. Put aside any assumptions you may have had and make your judgments in this case based only on the evidence you have heard.

3. Addressing false assumptions: rape and other sexual offences, and domestic abuse

[This direction should be given orally, and in writing, at the start of a trial involving both a sexual offence and domestic but may be equally relevant as part of the judge's final directions in appropriate cases. The direction is included in the "Written directions for jurors in Scottish courts, Part C, other directions to be used as appropriate".]

Sometimes people make assumptions about the crime of rape [or sexual assault/sexual abuse] or about the circumstances in which it happens, and those assumptions may be false or may be based on misleading stereotypes. You must set any such assumptions to one side.

You have taken a legal oath or affirmation to well and truly try the accused and give a true verdict according to the evidence. So, you must not let any false assumptions about [rape or other sexual offence(s)] affect your decision in this case.

I will give you the legal definition(s) of the crime(s) charged at the end of the trial, and you must apply that definition [those definitions].

Let me explain what the courts have learned through experience about [rape and] sexual offences generally.

1. There is no typical crime of [rape or typical sexual offence].
2. There is no typical person who commits rape or other sexual offences.
3. There is no typical person who is [raped or sexually assaulted/abused].
4. [Rape or other sexual offences] can take place in almost any circumstances. It/They can happen between all different kinds of people, quite often when the people involved are known to each other or related.
5. There is no typical response to [rape/sexual offences]. People can react in many different ways to being [raped/sexually assaulted/abused]. These reactions may not be what you would expect or what you think you would do in the same situation. Some people may tell someone about it straight away, others may not feel able to do so until later whether out of fear or shame or for other reasons.
6. There is no typical response from a complainer who is asked about [rape/sexual offences]. People who have been [raped/sexually assaulted/abused] may present in many different ways when they are asked about it. They may be visibly emotional or show no obvious emotion.

As with sexual offences, sometimes people also make false assumptions about domestic abuse.

Again, the courts have learned from experience about domestic abuse. People who are in an abusive relationship may struggle to extricate themselves from it for a whole range of reasons including fear, lack of resources, family responsibilities, cultural or societal concerns or their own conflicting emotions towards their abuser.

Further, their ability to react to events may be compromised or blunted by their experience. Abuse can be physical, but it can also be psychological, emotional or financial. Those subject to it may not even recognise themselves as having been abused, particularly where the behaviours develop over time. Whether that is relevant here will depend upon your assessment of any evidence that you hear.

Do not fall into the trap of assessing someone's behaviour by reference to how you think you may or may not have acted or reacted in their position.

So I repeat, each of you must make sure that you do not let any false assumptions or stereotypes about [rape/sexual offences], or about domestic abuse, affect your verdict.

You must make your decision in this case **only on the evidence** and by applying the law as I will explain it to you.

4. Delayed reporting: Possible form of direction

[This direction addresses delayed reporting and is mandatory in certain sexual offence trials: See 288DA of the Criminal Procedure (Scotland) Act 1995. Whilst that provision relates only to sexual offences, the preceding analysis demonstrates that the common law generally would permit the giving of such a direction in other cases such as domestic abuse.]

You heard 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.

The defence have suggested that a delay in reporting suggests the complaint is untrue...

[Where appropriate: You heard the complainer explain ...]

When you come to consider your verdict, you will have to consider why a report was not made earlier but you must not assume that because it was delayed it is untrue.

The fact that a complaint is made late does not necessarily make it untrue.

Experience shows that it is very common for a person who has been sexually assaulted/abused not to tell anyone about it for a long time and some sexual crimes are never reported.

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.

You should look at all the circumstances. Experience shows that different people react to situations in different ways. Some people may tell someone about it straight

away. But others do not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people.

[Where appropriate - delayed reporting in child abuse case – adapt if appropriate]

When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, who can they complain to?

Child sexual abuse will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, even though they are not.

A child may find it very difficult to speak out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships, or their only relationship.]

These are all matters for you to consider. I am explaining these points so that you will think about them in considering your verdicts.

You should consider all of the evidence and I remind you that it is for you the jury to decide what to make of the evidence and what inferences should be drawn from it.

5. Absence of physical resistance or physical force: Possible form of direction

[This direction addresses delayed reporting and is mandatory in certain sexual offence trials: See 288DB of the Criminal Procedure (Scotland) Act 1995. The definition of most sexual offences would have permitted the giving of such directions regardless of the section.]

Members of the jury, you will understand from the definition of the crime that there is no need for the accused to have used violence or force in committing rape/sexual assault. Nevertheless, 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 if these matters are of any significance. You will need to bear in mind that there can be good reasons

why unwanted 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.

Experience has shown that different people can respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event. Others may not. This may be out of fear, or because they are not a very forceful person, or for other reasons.

[*Where appropriate*: You will also have to consider the explanations given as to why there was no physical force or resistance. Eg The complainer told you that when the accused began touching he/she/they froze.]

You should consider all of the evidence and I remind you that it is for you the jury to decide what to make of the evidence and what inferences should be drawn from it.

6. Consent: Possible form of direction

[*This direction addresses consent under the 2009 Act and forms part of the direction on rape in terms of section 1 of the 2009 Act. The direction may also be relevant at common law, at least in general terms. (See: [HM Advocate v SM \(No 1\) 2019 JC 176](#) at paragraph 16 where the court concluded that the 2009 Act's definition of free agreement did not change what consent encompassed at common law.)*]

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 the complainer's freedom to choose restricted in some way?

Situation specific

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. It is free agreement at the time of the

sexual act that matters. Any person has a freedom to make a choice of whether or not to do so.

[Select as appropriate from the following directions:]

- **Within a relationship**

[Rape/sexual assault] can happen between all different kinds of people, quite often when the people involved are already known to each other, related or in an existing relationship.

The law is that a complainer who is in a sexual relationship with somebody can be [raped/sexually assaulted] by that person. A person is fully entitled not to consent on any occasion regardless of the relationship.

I have already explained that a person does not consent to sex in general but consents to this act of sex, at this time and in this place. A person is fully entitled not to consent on any occasion regardless of whether they consented to sexual activity on an earlier or later occasion.

- **No need for violence, protest, resistance or injury**

Experience shows that there is no typical [rape/sexual assault]. There is no need for the prosecution to prove that the accused used violence or force although [he/she/they] may have.

Experience also shows that there is no typical reaction to unwanted sexual activity. Some people may protest and physically resist throughout the event. But others may be unable to do so and may freeze or decide to give up any struggle.

[Consider whether the Absence of physical resistance or physical force direction (section 288DB) should be given at this stage]

A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but even if reluctantly given it is still consent. But when a person gives in to something due to threats, repeated demands, persistent psychological coercion, fear or because they simply feel unable to resist, that is not consent. A person can, in some circumstances, simply let the sexual activity take place because they feel that is the only way

they see the incident ending. In such a situation, it is open to you to conclude that there was no free agreement.

The prosecution do not need to prove that the complainer communicated [her/his/their] lack of consent to the accused by, for example, shouting at the accused or calling for help.

[*Where appropriate*: The fact that the complainer did not say 'no' does not mean that the complainer was consenting.]

- **Where there is evidence of exploitation/grooming**

In this case the Crown says that the complainer was [groomed/exploited] by the accused and that she did not freely agree to the [*specify activity*].

Let me explain what the courts have learned from experience about [exploitation/grooming] and the circumstances in which it can arise.

Typically, the perpetrator takes advantage of a power imbalance to control and manipulate the [child/vulnerable person]. Perpetrators may engage in a course of conduct to distort the [child/vulnerable person's] perception and continue the abuse.

The [child/vulnerable person] may not realise that they are being [exploited/groomed]. They may not resist or protest.

When considering free agreement, you should consider the relationship between the complainer and the accused, how it developed and the degree of influence that the accused may have had over the complainer. Just because the complainer perceived the activities to be consensual does not necessarily mean that the complainer freely agreed to them.

You should consider the whole circumstances, including:

- How the complainer and the accused's relationship developed.
- Whether the accused was in a position of authority or responsibility towards the complainer.
- How old or mature the accused and complainer were and any age difference between them.
- Whether the complainer was vulnerable due to their personal circumstances.

- The complainer's level of understanding and knowledge of the position they were in and the significance of what they were being asked to do.
- Whether there was a pattern of behaviour by the accused to obtain trust which escalated into misuse of that trust.
- Whether the accused used manipulation to continue the abuse.

You can take all of these matters into account when deciding if there was free agreement by the complainer.

[Use existing directions on the situations in which conduct takes place without consent (eg intoxication/incapacity etc) provided for by s13 of the 2009 Act as appropriate]

7. Prior inconsistent statements: Possible form of direction

[This direction addresses prior inconsistent statements. In law the only required direction is to inform the jury that the content of a statement put under section 263(4) of the 1995 Act does not go to prove fact unless adopted. The introductory written directions given to all jurors in all trials include this direction. It is not as a generality necessary for a judge to go further in exploring the approach taken by parties about the potential of prior inconsistent statements to undermine the evidence of a witness or witnesses. Nevertheless, in contemporary practice the putting of prior inconsistency is a prominent feature of cross-examination. In order to maintain balance and to ensure that the jury give witness testimony fair treatment, many judges consider that it can be necessary to give further directions on prior inconsistent statements when charging the jury at the conclusion of the trial.]

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.

[Where appropriate: The defence suggested that when the complainer said X it was being said for the first time and was making it up as he/she/they went along.]

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 or years. Powers of memory rarely improve over time.

There may be a good explanation for someone who is questioned by a different person, who may be asking different questions, 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.

Experience has shown that inconsistencies in accounts can happen whether a person is telling the truth or not. If someone has a traumatic experience such as the kind alleged in this case, their memory may be affected in different ways. It may affect that person's ability to take in and later recall the experience. Under stress and threat, the brain responds to help a person survive – rather than to process and store every detail of what is happening. To fight, to take flight and to freeze are all common reactions to traumatic events. [See: [Trauma Informed Judging Resource Kit](#).]

When someone who has suffered a traumatic event is asked to recount it later it is to be expected that there may be a lack of coherence, gaps in their memory and that their memories may change over time.

More generally, we know that some people may go over an event afterwards in their minds many times and their memory may become clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may then have difficulty in recalling the event accurately.

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.

8. Lack of emotion when questioned: Possible form of direction

[This direction could be used when directing the jury generally on how they go about the assessment of a witness's evidence or could be used if referring to a complainer's evidence on examining a particular charge on the indictment. It reinforces what we

know about the impact of trauma on how a witness might recount the complaint, either at the time of reporting or in court.]

A person who has been sexually assaulted/raped may present in many different ways when asked about it. They may be visibly emotional or show no obvious emotion. Witnesses react to giving evidence about rape/sexual assault in a variety of ways. Some people will show emotion. But other people will seem very calm or unemotional. The presence or absence of emotion when giving evidence is not a good indication of whether the person is telling the truth or not. You should not assume that the way the complainer gave evidence is an indication of whether or not her/his/their evidence is true.