

Consent – notice of special defence

This chapter focuses on the notice of special defence of consent. The law and statutory directions in relation to consent itself can be found [here](#).

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.

1. In [Little v HM Advocate \[2025\] HCJAC 17, 2025 SLT 512](#), the Appeal Court refused an application to reinstate a ground of appeal that sought to argue that in terms of section 3 of the 2009 Act the absence of reasonable belief is an essential element of the offence itself, and in every case the jury required to be satisfied of it before they could return a verdict of guilt. It was sought to argue that removing the issue from the jury's consideration offended against the presumption of innocence, in breach of the common law and Article 6.2 ECHR. The application was refused, and the court stated the point was inarguable. In their decision the court looked at the history of the defence and the need for a notice. They stated at paragraph [28] that it is not entirely clear that there is always an evidential burden placed on the accused, confirming at paragraph [29]:

“That having been said, very often a matter will only be known to an accused person and evidential burdens are not unusual. They do not subvert the onus of proof. Even if there is such a burden it is only to the effect of requiring an issue to be raised on the evidence. It is then for the Crown to disprove it, usually by means of inference.”

2. There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, essentially when there is no evidence to support it. Where there is no evidence of consent or facts from which it could reasonably be inferred, no amount of cross-examination or references to it in a speech to the jury or elsewhere make it so; [Bakhjam v HM Advocate \[2018\] HCJAC 11, 2018 JC 127](#) at paragraph [35]. So far as consent is concerned, in an offence in which consent is an essential ingredient of the crime, even in the absence of a special defence there is an onus on the Crown to prove that the complainer did not consent; [Bakhjam](#) at paragraph [33].

3. In the rare case of a special defence specifying reasonable belief in consent, it is appropriate to withdraw it when there is no evidence on which it can reasonably be considered to arise. The case-law suggests that honest or reasonable belief in consent is rarely a live issue. As the Lord Justice Clerk (Dorrian) explained in [LW v HM Advocate \[2023\] HCJAC 18, 2023 JC 184](#), at paragraph [18] with reference to *Maqsood*:

“...[Reasonable belief] 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.”

4. In [Thomson v HM Advocate \[2024\] HCJAC 30, 2024 SLT 1040](#) at paragraph [43], the Lord Justice General (Carloway) adopted the approach taken in *Maqsood*. He also endorsed [Briggs v HM Advocate \[2019\] HCJAC 63, 2019 SCCR 323](#) and the proposition that where an act of rape is denied by the accused as having occurred at all, no issue of honest or reasonable belief arises. In *Thomson*, the court went on, at paragraph [45], to explain that:

“...If a complainer says she did not consent and the accused say she did, it is not for defence counsel to invent a middle, speculative ground.”

5. See generally the law section for rape at common law and under section 1 of the 2009 Act. 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 practice for the trial judge to clarify the position outwith the presence of the jury before parties address the jury ([Lucas v HM Advocate \[2009\] HCJAC 77, 2009 SCCR 892](#)).

6. If the accused's notice specifies only consent but the judge is persuaded that the question of the accused's belief in the complainer's consent arises on the evidence at trial, the trial judge should give directions on that. In that situation, counsel must seek to amend the special defence, to include reference to the accused's belief, prior to the Crown speech ([Thomson v HM Advocate \[2024\] HCJAC 30, 2024 SLT 1040](#) at paragraph [45]).

7. At some point in final directions a judge will probably wish to identify the evidence (usually that of the accused or a statement by the accused, but it could be from part of the evidence of the complainer or some other source) on which the defence found. A judge could mention it in directing the jury on the special defence or on examining an individual charge or charges. It may be better to do so under reference to a charge/s. This should serve to make clear that, in this context, it is not so much that there is evidence "to support" the special defence, it is evidence negating an essential ingredient of the Crown case.

Possible form of direction on notice of special defence of 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.

As is explained in the written directions, the only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. A notice of special defence does not change the burden of proof. The defence do not need to lead evidence in support of it. It is for the Crown to prove the absence of consent, not for the accused to prove its presence.

In this case the accused says [or insert evidential basis as appropriate] that the complainer consented to what happened.

To support that the defence rely on.....

If you believe that or it leaves you in reasonable doubt of the accused's guilt, you must acquit.

On the other hand the Crown says the complainer did not consent to what happened. They rely on [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."