

Dockets

Law: Section 288BA

Section 288BA of the Criminal Procedure (Scotland) Act 1995 provides for dockets to be appended to an indictment charging a sexual offence. Dockets under section 288BA of the 1995 Act are distinct from dockets at common law (for which see Common Law Dockets).

[Practice Note No.2 of 2016](#) provides that the docket should be given to the jury and read out at the same time as the charge is read to them.

A docket must specify an act or omission connected with the offence charged which means that:

- (i) it must be "*specifiable by way of reference to a sexual offence*". This means that the act specified in the docket must be one which can properly be described as a sexual offence (see [RKS v HM Advocate 2020 HCJAC 19](#) at paragraph 23); and
- (ii) it must relate to the same event, or series of events, as the offence charged.

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 which 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 (paragraph 20) and there should not be any difficulty for the trial judge in formulating appropriate directions suitable to the circumstances (paragraph 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 in which 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, was not 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 2019 SCCR 61](#) paragraph 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."

Law: Common law dockets

Dockets at common law are distinct from dockets in sexual offence cases, under section 288BA of the 1995 Act. In [*Nelson v HM Advocate 1994 JC 94*](#) a bench of five judges considered whether it was permissible to lead evidence of a crime not on the indictment. The appellant was charged with being concerned in the supply of controlled drugs. Evidence was led that the appellant had run to the toilet to escape police and swallowed a drug. The evidence was objected to on grounds that it showed the commission of the offence of obstructing the police which was not on the indictment. The court held:

- (1) That although the rule was that it was not competent to lead evidence of anything done or omitted to be done by the pannel which constituted a crime and which did not appear on the indictment, it would not be in the interests of justice for the rule to be applied too generally in circumstances which did not warrant its application for the rule was founded in the principles of relevancy and fair notice;
- (2) That, accordingly, the Crown could lead any evidence relevant to the proof of a crime charged, even although it might show or tend to show the commission of another crime not charged, unless fair notice required that that other crime should be charged or otherwise referred to expressly in the complaint or indictment;
- (3) That such a requirement existed if the evidence sought to be led tended to show that the pannel was of bad character, and that other crime was so different in time, place or character from the crime charged that the libel did not give fair notice to the pannel that evidence relating to that other crime might be led, or if it was the intention as proof of the crime charged to establish that the pannel was in fact guilty of that other crime;
- (4) That, in the present case, fair notice had been given of the intention to lead evidence of what happened when the appellant was seen by the police officers as reference was made in the indictment to the date and location; and

(5) That the pannel's actings in attempting to conceal from the police officers possession of controlled drugs were relevant to the question of whether he was guilty of the crimes libelled and it was not necessary for the Crown to prove that the pannel was guilty of the offence of obstruction, which was not what the evidence sought to establish as a fact; and appeal refused.

Nelson was followed in [RS v HM Advocate \[2026\] HCJAC 19](#), where the ground of appeal was that the trial judge had erred in given directions relating to a docket under s288BA rather than a common law docket. Lord Matthews, after referring to dockets for charges of sexual offence under s288BA, stated at paragraph 24:

"This is to be contrasted with common law dockets, which have become increasingly prevalent in recent years. In *Nelson v HM Advocate* 1994 JC 94 at page 104C-D the Lord Justice General (Hope) said the following

"The Crown can lead any evidence relevant to the proof of a crime charged, even although it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise 8 referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character, and that other crime is so different in time, place or character from the crime charged that the libel does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime."

Thus a docket may contain evidence which suggests that an accused is of bad character in the sense that he has done something which is not the subject of a specific charge. The law allows this as long as the appropriate notice is given. This would seem to have been recognised by senior counsel who did not rely on any question of bad character in his oral submissions (although this had been referred to in the written case) but emphasised rather the confusing picture which he submitted was drawn for the jury."

See also [HM Advocate v Al Megrahi 2000 SCCR 177](#); [HM Advocate v Joseph 1929 JC 55](#) and [Dumoulin v HM Advocate 1974 SLT \(Notes\) 42](#), in each of which the Crown gave notice of criminal behaviour alleged to have been committed outwith Scotland.

Possible form of direction in relation to Section 288BA of the 1995 Act: Dockets

Before turning to the charges themselves, I wish to say something about the last part of the indictment, the part beginning "Take notice" etc. That is known as a "docket".

As I said to you at the start of the trial the docket is not a separate charge. It is included to give notice to the defence that certain evidence might be led. You will not be asked for a verdict on the acts set out in the docket.

Normally, the Crown cannot lead evidence which suggests that an accused might have committed a crime which is not charged on the indictment. However, such evidence is allowed if the conduct alleged in the docket is connected with a sexual offence charged on the indictment. That means that the conduct must relate to the same event as the sexual offence charged, or it must relate to a series of events which includes the sexual offence charged on the indictment.

In this case the Crown have led *[specify the evidence the Crown have led under the docket]* for the purpose of *[specify purpose eg corroboration or relevancy]*.

The defence say *[specify defence position]*.

You should consider that evidence along with the other evidence in the case when considering your verdict on the charge(s) on the indictment to which it is connected, if you accept there is such a connection.

[Where necessary judges should give further direction on the purpose to which evidence led in support of the docket may be put.]

Possible direction in relation to common law dockets

Before turning to the charges themselves, I wish to say something about the last part of the indictment, the part beginning "Take notice etc". That is known as a "docket".

As I said to you at the start of the trial the docket is not a separate charge. It is included to give notice to the defence that certain evidence might be led. You will not be asked for a verdict on the acts set out in the docket.

In this case the Crown have led *[specify the evidence the Crown have led under the docket]* for the purpose of *[specify purpose eg corroboration or relevancy]*.

The defence say *[specify defence position]*.

You should consider that evidence along with the other evidence in the case when considering your verdict(s) on the charge(s).

[Where necessary judges should give further direction on the purpose to which evidence led in support of the docket may be put.]