# Written Directions for Jurors in Scottish Courts

## General

Towards the end of the trial I will give you the legal directions you will need when you begin considering 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 law which arise in the case.

The law tells us what an offence is 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 further 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;
- Which evidence you accept and which you reject;
- Which evidence you believe and which you disbelieve;
- Which evidence you find reliable and which unreliable;
- What reasonable inferences or conclusions you can draw from evidence which you accept; and
- What verdict should be reached in light of it.

**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. You must accept those facts as conclusively proved and take them 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 or 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 or expertise.

**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's 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.

## Hearsay and exceptions

There are exceptions to the rule against hearsay which I will tell you about in my directions at the end of the trial in more detail if necessary. For example:

- Evidence of what a witness says they heard someone say may be allowed to explain the witness's 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; and
- Evidence of what an accused person was heard to say is evidence in the case. I will direct you further about this if necessary.

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, does not go to prove any fact stated 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. I will direct you further 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 give 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: these are 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 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;
- the passage of time;
- differing powers of recall; or
- 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 available 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 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 you should consider all of the evidence.

It is for you to decide what weight - what importance - you give 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 is 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 or affected by it. 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 trial you must as the oath or affirmation which you took said, return a true verdict according to the evidence.

# Part B: Four fundamental principles

The following rules of law apply in every criminal trial in Scotland:

## 1. The presumption of innocence

The first rule is this. Every accused person 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 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:**

It is not every fact in the case, and it is not every word in a charge, that needs evidence from two sources. But there are two essential facts 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?

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 your verdict will be not guilty;
- If you do not fully accept that evidence but it raises a reasonable doubt then again your verdict will be not guilty; 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 (attached at the top of this chapter) are formatted on separate pages which can be handed out if required.

The directions on:

- Addressing false assumptions: rape and other sexual offences; and
- Lack of criminal responsibility by reason of a mental disorder

will require to be edited by judges in light of the particular circumstances of the case. The other additional directions generally should not need to be adapted.

## 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.

## 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, you must consider each charge separately. You must return a separate verdict 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 a docket

You will only be returning a verdict on the charges. The clerk also read a notice which is attached to the indictment. This is sometimes referred to as a 'docket'. The purpose of this notice is to inform the defence that the Crown may lead evidence relating to it 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 or charges on the indictment I will tell you more about that at a later stage, if 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 change 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.

## 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.

## Addressing false assumptions: rape and other sexual offences

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.

## Addressing false assumptions: domestic abuse

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.

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

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.

## CCTV footage etc.

You may be shown some CCTV or mobile phone footage during the evidence and witnesses may or may not tell you what they think can be seen or heard.

Speaking generally, if this happens, you can accept or reject what any witness says about what and who can be seen or heard according to what you make of the recording.

You can make up your own mind about what and who can be seen or heard on the recording and what you can take from it.

In deciding that, you can have regard to all of the evidence in the case.

## Lack of criminal responsibility by reason of a mental disorder

You have had read to you a notice of special defence that the accused lacked criminal responsibility by reason of a mental disorder in relation to charge(s) [x]. You may hear more about that.

Lack of criminal responsibility is a complete defence. If you find it established that the accused lacked criminal responsibility on a charge you would acquit him/her/them of it.

While the Crown has to prove beyond reasonable doubt that the accused committed the crime(s) charged, the burden of proving a lack of criminal responsibility is on the accused. That is because the law presumes that a person is of sound mind.

If the accused seeks to show that he/she/they suffered from a mental disorder to such a degree that he/she/they lacked criminal responsibility, then he/she/they must prove that on a balance of probabilities.

Proof on a balance of probabilities is a lower standard than proof beyond reasonable doubt. It means it is more probable, or more likely, than not.

The accused does not need to prove a lack of criminal responsibility by corroborated evidence.

If the issue does arise on the evidence and, on balance, you thought it was more probable than not that the accused lacked criminal responsibility then you would acquit him/her/them of charge(s) [x].

I will give you full directions at the conclusion of the trial on the definition of lack of responsibility, in the context of the evidence in this case, should it arise.