

Alternative verdicts

Law

See generally *Renton & Brown Criminal Procedure*, 6th ed, [paragraphs 8-79 to 8-84](#), [18-79.41](#)

1. There are a number of statutory provisions allowing a court to convict an accused of an alternative crime to that charged in the indictment. In such cases the alternative is implied in the libelled charge. There is also a general power provided by [paragraph 14 of schedule 3 to the 1995 Act](#) to convict of a common law offence on a charge containing a statutory offence. The relevant content of schedule 3 is set out at the end of this chapter.
2. It is not necessary as a matter of course for a judge or sheriff to charge on alternatives. Whether to do so in a relevant case is a matter for her / his judgment, taking account of what has been canvassed in the evidence, any matters raised in parties' speeches and any submissions from parties. [For more, see the guidance on seeking submissions / addressing issues in parties speeches in the chapter on Judicial Management of jury trials- stages of the trial process. See also Provocation.]
3. In [Duncan v HM Advocate \[2018\] HCJAC 60, 2018 JC 9](#) the court examined a line of authority ([R v Coutts \[2006\] UKHL 39, \[2006\] 1 WLR 2154](#), [Ferguson v HM Advocate 2009 SLT 67](#), [Mackay v HM Advocate \[2008\] HCJAC 16, 2008 SCCR 371](#) and [Templeton v HM Advocate 1961 JC 62](#)) and explained how judges should approach the question of alternative verdicts. The Lord Justice General stated, at paragraph [27]

"The general principle is that the obligation on the trial judge is to charge on verdicts in accordance with the manner in which the case has been presented to the jury by the parties (the "live issues"). The judge should not speculate or embark upon areas of possible alternative verdicts which have neither been canvassed in the evidence nor formed part of the speeches to the jury. The judge ought not to present an alternative verdict, which has not been canvassed by the parties, unless the prospect of that verdict is an obvious one. That is what Lord Bingham said in [R v Coutts](#). The principle is based upon that of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness. It follows that

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And at paragraph [28]:

"The need to direct on a matter not raised by parties ought to be a rare event, given the functions of parties' representatives, but it remains possible that the trial judge will regard an alternative, such a culpable homicide in a murder trial or reset in a theft case, as obviously open to the jury on the evidence, even if it has not been addressed in the speeches. If the judge does take the view, that he or she ought to give a direction on an alternative verdict not addressed by the parties, he or she should do so, even if, by that time, it may be too late to seek the views of the parties on the appropriateness of giving the direction. That procedure is in the nature of the adversarial jury system."

4. The consequence of a particular defence may in certain circumstances (e.g. some rape or sexual assault and homicide cases) be to reduce the crime to a lesser one. However a specific concession made to the court that a particular defence is not being advanced will normally relieve the trial judge of directing upon that matter ([SB v HM Advocate \[2015\] HCJAC 56, 2015 JC 289](#) paragraph [35]). In such a situation, there may still be occasions in which the court may nevertheless decide to leave such a defence, and its associated alternative verdict, for the jury's consideration. The normal position, however, will be that the court should accept the concession and direct the jury accordingly. It will only be in quite exceptional circumstances that such a course could be regarded as resulting in an unfair trial.

5. [Gardener & Glynn v HM Advocate \[2009\] HCJAC 92, 2010 SCCR 116](#) was a case where an alternative verdict was not obvious and reasonably available on the evidence. At trial the Crown sought a conviction on the basis of concert, and the trial sheriff directed the jury that they could convict the accused only if they were satisfied that there was joint criminal responsibility, otherwise both must be acquitted. The Appeal Court said that if the evidence disclosed an obvious and sufficiently corroborated case (based on individual responsibility) which was reasonably open to the jury, the sheriff might be required to direct the jury on that alternative basis, despite the position adopted by the Crown. But since the evidence to support a case based on individual responsibility depended on adminicles of evidence which were

(a) "subtle and disparate",

(b) had not been identified by or relied on by the Crown at the trial, and,

(c) could not readily be characterised as “an obvious alternative” or “a live issue at the trial” (at paragraph [18]).

it would not have been appropriate for the sheriff to scrutinise the evidence to compile such a case. To have done so would have gone beyond the proper function of a judge, and would have come close to acting as a prosecutor

6. Even though an accused admits a lesser offence, it does not follow that the jury must be given the opportunity of returning a verdict on that, since accused persons are frequently prepared to admit to some minor criminal conduct that is far removed from the serious charge they face. Proportionality is relevant, and an alternative which is trivial or insubstantial compared to the real issue in the case need not be put to the jury. But when the defence to a specific charge involves the admission of a lesser offence, that defence should be left to the jury.

7. In deciding whether or not to put an alternative verdict to the jury, all matters arising from the evidence have to be considered, and a decision taken on whether giving no direction on an alternative would force the jury to make an unrealistic choice between convicting of a serious charge and a complete acquittal which would disadvantage the accused unfairly.

7.1 Where alternative verdicts are open to the jury, judges should ensure that the clerk is clear on the manner in which the verdict is to be taken from the jury. The particular approach may depend on the circumstances of the case. However, it is vital to ensure that the verdict is taken in a way which does not prevent the jury from returning a verdict on an alternative charge open to it.

Legislative framework

8. Statutory implied alternatives are available in the following types of case:

- Sexual offences (different rules apply depending on whether the offence was committed before or after 1 December 2010);
- Domestic abuse;
- Road traffic offences; and
- Certain common law offences by virtue of Schedule 3 of the Criminal Procedure (Scotland) Act 1995

The relevant provisions are produced below:

Sexual offences

Offences committed before 1 December 2010

9. In relation to charges of rape committed before 1 December 2010, [section 14 of the Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#) provides as follows:

If, in the trial of an indictment for rape or an offence under section 5(1) of this Act, the jury –

(a) are not satisfied that the accused is guilty of the charge or of an attempt to commit the charge; but

(b) are satisfied that the accused is guilty of an offence under section 5(2) or (3) or 7(2) or (3) of this Act, or of an indecent assault,

the jury may acquit the accused of the charge mentioned in paragraph (a) above, and find him guilty of such offence as is mentioned in paragraph (b) or of an indecent assault, and the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence or for indecent assault.

Offences committed after 1 December 2010

10. [Section 50\(1\) of the Sexual Offences \(Scotland\) Act 2009](#) provides that, where the court or jury are not satisfied that the accused committed the offence charged, it may be open to convict the accused of a specified alternative offence. Schedule 3 specifies the available alternatives.

Section 50(2) to (5) provides for circumstances where the accused is charged with an offence against a child and doubt as to the age of either the accused or the complainer opens up the possibility of the accused being found guilty of an alternative offence. Where those subsections apply the court or jury may convict the accused of one of the alternative older child offences listed in subsections (3) and (4).

For ease of reference and to assist judges when working offline, section 50 and the table set out in Schedule 3 has been replicated in the Appendix to the Jury Manual: Alternative verdicts under the Sexual Offences (Scotland) Act 2009.

It is important that judges should be realistic and avoid proposing alternatives which are not a live issue or the charge, and the jury's task, will become unduly complex. The observations of the court in [Duncan v HM Advocate \[2018\] HCJAC 60, 2018 JC 9](#),

explaining that introducing an alternative which was not referred to by parties should be a rare event, should be borne firmly in mind. See paragraphs [27] and [28] of *Duncan* as quoted above.

A trial judge ought to present an alternative verdict which was not canvassed by the parties only where:

1. It was obviously open to the jury on the evidence; and
2. The public interest necessitated that the direction be given.

Domestic abuse cases

11. In terms of [section 8 of the Domestic Abuse \(Scotland\) Act 2018](#), a person charged with domestic abuse under section 1(1) of that Act, may be convicted of:

- (1) threatening or abusive behaviour under [section 38\(1\) of the Criminal Justice and Licensing \(Scotland\) Act 2010](#);
- (2) stalking, in terms of [section 39 of the 2010 Act](#).

The power in section 8 is additional to the general power to convict of an alternative common law offence per [Schedule 3 to the 1995 Act at paragraph 14](#). Accordingly, an accused could be convicted of a common law offence as an alternative in appropriate circumstances.

Road traffic offences

12. The following implied alternative verdicts are provided by virtue of the [Road Traffic Offenders Act 1988](#);

Theft of a motor vehicle

[Section 23\(3\)](#) provides: "If on the trial on indictment in Scotland of a person for stealing a motor vehicle the jury are not satisfied that he is guilty of stealing the motor vehicle but are satisfied that he is guilty of an offence under section 178 of (the Road Traffic Act 1988) (taking vehicle without authority etc.) they may find him guilty of an offence under that section."

Other offences

13. [Section 24 of the 1988 Act](#) provides for specific statutory alternatives for certain offences.

Please note that subsection (6) preserves certain other powers including that of convicting of a common law offence:

(1) Where -

(a) a person charged with an offence under a provision of the Road Traffic Act 1988 specified in the first column of the Table below (where the general nature of the offences is also indicated) is found not guilty of that offence, but

(b) the allegations in the indictment or information (or in Scotland complaint) amount to or include an allegation of an offence under one or more of the provisions specified in the corresponding entry in the second column,

he may be convicted of that offence or of one or more of those offences.

14. Which alternatives are available under the Table in subsection (1) will depend on when the primary offence occurred. Judges will require to consider the updated version of section 24 in Westlaw.

Alternatives for section 1 may include sections 2, 2B and 3.

Alternatives for section 1A may include sections 2, 2C and 3.

Alternatives for sections 2, 2B and 2C may include section 3.

Alternatives for sections 3ZC and 3ZC may include section 103(1) (b).

Alternatives for section 3A may include sections 2B, 3, 4(1), 5 (1) (a), 7(6) and 7A(6).

Alternatives for section 4(1) may include section 4(2).

Alternatives for section 5(1) (a) may include section 5(1) (b).

Alternatives for section 5A (1) (a) and (2) may include section 5A (1) (b) and (2).

Alternatives for section 28 may include section 29.

see also the appendix [Alternative verdicts under the Road Traffic Offenders Act 1988](#).

15. Section 24 continues:

(2) Where the offence with which a person is charged is an offence under section 3A of the Road Traffic Act 1988, subsection (1) above shall not authorise his conviction of any offence of attempting to drive.

(3) Where a person is charged with having committed an offence under section 4(1) or 5(1)(a) of the Road Traffic Act 1988 by driving a vehicle, he may

be convicted of having committed an offence under the provision in question by attempting to drive.

(4) [England and Wales only]

(5) Where, in Scotland, by virtue of this section a person is convicted under solemn procedure of an offence triable only summarily, the penalty imposed shall not exceed that which would have been competent on a conviction under summary procedure.

(6) This section has effect without prejudice to section 6(3) of the Criminal Law Act 1967 (alternative verdicts on trial on indictment), sections 195, 138(4), 256 and 293 of and Schedule 3 to the Criminal Procedure (Scotland) Act 1995 and section 23 of this Act.

Common law offences and the power to convict of a common law offence as an alternative to a statutory offence

16. The [Criminal Procedure \(Scotland\) Act 1995, Section 64\(6\)](#), provides that [Schedule 3 to the 1995 Act](#) has effect in relation to indictments under the Act.

Schedule 3

Paragraph 7: In an indictment which charges a crime importing personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the aggravation that the assault or other injurious act was committed with intent to commit such crime.

Paragraph 8(2): Under an indictment or a complaint for robbery, theft, breach of trust and embezzlement or falsehood, fraud and wilful imposition, an accused may be convicted of reset.

Paragraph 8(3): Under an indictment or a complaint for robbery, breach of trust and embezzlement, or falsehood, fraud and wilful imposition, an accused may be convicted of theft.

Paragraph 8(4): Under an indictment or a complaint for theft, an accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud and wilful imposition, or may be convicted of theft, although the circumstances proved may in law amount to robbery.

Paragraph 8(5): The power conferred by sub-paragraphs (2) to (4) above to convict a person of an offence other than that with which he is charged shall be exercisable by the sheriff court before which he is tried notwithstanding that the other offence was committed outside the jurisdiction of that sheriff court.

Paragraph 9(1): Where two or more crimes or acts of crime are charged cumulatively, it shall be lawful to convict of any one or more of them.

Paragraph 9(2): Any part of the charge in an indictment or complaint which itself constitutes an indictable offence or, as the case may be, an offence punishable on complaint, shall be separable and it shall be lawful to convict the accused of that offence.

Paragraph 9(3): Where any crime is charged as having been committed with a particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation.

Paragraph 10(1): Under an indictment or, as the case may be, a complaint which charges a completed offence, the accused may be lawfully convicted of an attempt to commit the offence.

Paragraph 10(2): Under an indictment or complaint charging an attempt, the accused may be convicted of such attempt although the evidence is sufficient to prove the completion of the offence said to have been attempted.

Paragraph 10(3): Under an indictment or complaint which charges an offence involving personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that the assault or other injurious act was committed with intent to commit such offence.

Paragraph 14: Where – (a) any act alleged in an indictment or complaint as contrary to any enactment is also criminal at common law; or (b) where the facts proved under the indictment or complaint do not amount to a contravention of the enactment, but do amount to an offence at common law, it shall be lawful to convict of the common law offence.