

Rape

Law

See generally [*Lord Advocate's Reference \(No 1 of 2001\)* 2002 SLT 466](#); [*HM Advocate v Fraser* \(1847\) Ark 280](#).

Autonomy

1. Particularly where consent is in issue, it is important that judges explain to juries that sexual offences, both at common law and under the 2009 Act, are intended to criminalise conduct which interferes with another person's sexual autonomy. Such a direction has two benefits:

1. It will ensure that juries understand the nature of the offence they are considering;
2. It should prevent erroneously held conventional wisdom about the nature of crimes of rape and sexual assault and "rape myths" intruding on decision making.

2. In [*PF Edinburgh v Aziz* \[2022\] HCJAC 46, 2023 JC 51](#) the appeal court examined the issue of autonomy in considering an offence of communicating indecently, section 7 of the 2009 Act, and noted that it underpinned the common law on sexual offences just as it underpins the Act. In paragraph 20 of the opinion of the court, the Lord Justice General categorised the different ways in which the law has sought to protect the sexual autonomy of adults, children and the vulnerable.

In its analysis of the development of the common law and the 2009 Act, at paragraphs [20] to [24], it is clear that the court was not innovating but drawing on long-established principles.

Common law

3. In [*Dickie v HM Advocate* \(1897\) 2 Adam 331](#) Lord Justice Clerk MacDonald observed in an appeal arising from a charge of indecent assault that:

"Every woman is entitled to protection from attack upon her person."

4. In giving the leading opinion of a bench of seven judges in [*Lord Advocate's Reference \(No 1 of 2001\)* 2002 SLT 466](#) Lord Justice General Cullen explained, at paragraph [40]:

"....The criminal law exists in order to protect commonly accepted values against socially unacceptable conduct. What does the law of rape seek to protect in the modern world? It may be said with considerable force that it should seek to protect a woman against the invasion of her privacy by sexual intercourse, that is to say where that takes place without her consent. What happens with her consent on one occasion should not determine what is acceptable on another. In the present day, in which there is considerable sexual freedom, both in and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases?"

5. The Lord Justice General (Carloway) referred to autonomy as an important principle in [*GW v HM Advocate* 2019 JC 109](#) in which he quoted, at paragraph [31], remarks made by Lady Hale in [*R v Cooper* \[2009\] 1 WLR 1786](#) at paragraph [27]:

'...[I]t is difficult to think of an activity which is more person - and situation - specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place, autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention... '

Sexual offences at common law

6. Given the overlap in the meaning of consent under the 2009 Act and at common law as explained by Lord Brodie, with whom the Lord Justice General and Lord Turnbull expressed agreement in [*HM Advocate v SM \(No 1\)* 2019 JC 176](#), comparable directions may **sometimes** be appropriate at common law.

Lord Brodie explained that, at common law, when "acquiescence in intercourse is so reluctant by reason of the force or external circumstances... it does not amount to consent in any real sense." He agreed with reasoning from New Zealand in *R v Daniels* [1986] 2 NZLR 106 that:

"...submission to the inevitable or out of despair when trapped is not real consent, even if the submission involves the degree of physical assistance given here by the girl."

He concluded, at paragraph [16]:

"...In making their proposals which led to the enactment of the 2009 Act the Scottish Law Commission saw a need to provide a definition for consent but there is no suggestion that in what they described as refining the law that they were departing from what was understood to be meant by consent as a matter of the pre-existing common law. **An agreement is not free if it only arises as the result of very pressing circumstances brought about by the acts of the other party, just as consent is not real if it is only the result of such circumstances.**"

[Emphasis added]

7. Definition:

"(i) The general rule is that the actus reus of rape is constituted by the man having sexual intercourse with the woman without her consent;
(ii) in the case of females who are under the age of 12 or who for any other reason are incapable of giving such consent, the absence of consent should, as at present, be presumed; and
(iii) mens rea on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting." (*Lord Advocate's Reference (No 1 of 2001)*, per Lord Justice General Cullen at paragraph [44]).

'Reckless' should be understood "in the subjective sense" as describing "the man who failed to think about or was indifferent as to whether the woman was consenting." (*Lord Advocate's Reference*, supra, per LJ-G Cullen at paragraphs [29] and [44]).

A convenient short hand for the intent described in paragraph (iii) used in many opinions, is "absence of honest belief" e.g. [*Briggs v HM Advocate* 2019 SCCR 323](#), [*HM Advocate v SM \(No 1\)*](#).

Corroboration

8. In [*Lord Advocate's Reference \(No 1 of 2023\)* 2023 SLT 1115, 2024 JC 140](#) a bench of seven judges restated the law on corroboration in sexual offence cases, and

generally, that on any charge only two matters require corroboration: (1) the crime was committed and (2) that the accused committed it.

9. There is no need to find corroboration for separate elements of the crime. For example, in a rape case, there is no need to provide corroboration for penetration and, separately, for lack of consent. It is the testimony of the complainer that requires to be corroborated, not individual facts, ingredients or elements of an offence. In a case of rape or sexual assault, a piece of circumstantial evidence, such as a complainer's distress witnessed by another witness, or injuries, can corroborate the commission of the crime (see Corroboration generally/corroboration in rape etc).

[*Lord Advocate's References \(Nos 2 & 3 of 2023\) \[2024\] HCJAC 43, 2024 SLT 1207*](#) went further than the first reference of 2023 and establishes that a witness speaking to a complainer's de recenti statement can provide corroboration of the complainer's evidence on both the commission of the crime and identification of the accused as perpetrator. This is so even in the absence of distress.

10. Judges must bear in mind the memo by the Lord Justice General and Lord Justice Clerk of 15 November 2023 "Defining rape and identifying what requires corroboration" in the Appendices to the Jury Manual.

Consent

11. It is not normally necessary to define consent at common law but if an issue arises, there is guidance in [*HM Advocate v SM \(No 1\)*](#). Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances ([*HM Advocate v SM \(No 1\)*](#), [*Briggs v HM Advocate*](#)).

In such circumstances, a judge can and should direct the jury accordingly; [*Cowan v HM Advocate \[2024\] HCJAC 35, 2025 JC 25*](#).

In *Cowan*, the trial judge sustained a section 97A submission and removed the word "intoxicated" from the libel leaving the modus of rape specified as "asleep or unconscious and incapable of giving or withholding consent." The evidence of the complainer was that the appellant had penetrated her in a situation where there was no intimate contact between them before she found him penetrating her in his bed. There was some ambiguity in her evidence as to whether she was still asleep when this commenced or whether it commenced when she had just woken up. The Advocate depute had conceded that because he had not asked the complainer

whether or not she had consented, his case was periled only on her being asleep or unconscious. The judge agreed that this was the only route to verdict open and directed the jury accordingly. The appellant appealed on sufficiency. The court explained, with reference to [HM Advocate v Afzal \[2019\] HCJAC 37](#) and [Van der Schyff v HM Advocate \[2015\] HCJAC 67, 2015 SCL 783](#), that the real issue was whether the Crown had proved that the complainer was penetrated without consent. Despite the Crown's approach it was open to the jury to infer that she was not consenting even if they were not satisfied that she was asleep or unconscious. It followed that:

"The jury should have been given directions in that regard as well as directions about her capacity or incapacity to consent. It was an obvious and fair route to verdict, of which the jury were deprived. The parties could have been alerted to this by the trial judge during the discussion on the submission under section 97A."

It was in any event open to the jury to find that the complainer had been asleep when penetration commenced. The appeal was refused.

Another recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no "free agreement" in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T:drive, "Appeal opinions, pre-trial" folder under the file name; Anderson-Sect288C-proof of consent.

11A. In [Kirkup v HM Advocate \[2025\] HCJAC 9, 2025 SLT 234](#) the court, comprising the Lord Justice Clerk (Dorrian) and Lord Matthews explained at paragraph [25]:

"The Sexual Offences (Scotland) Act 2009 has no effect on the requirements of, or defences to, assault. Section 3(2)(c) concerns the definition of a **sexual** assault, which need not involve any **attack** but can be committed simply by touching or otherwise making physical contact with a complainer. In these cases, consent will be a defence. The crime of assault remains unaltered and consent is no defence to an attack on the person of another."

The position is the same with sexual crimes at common law such as rape. Whether in a sexual context or otherwise, it is not a defence that the complainer consented to an action which constitutes assault unless that action was inherent in or associated with the sexual activity; *Kirkup* above; [Smart v HM Advocate 1975 JC 30](#) at paragraph [33].

In *Kirkup*, in the context of a charge of rape under section 1, the court determined that even if the complainer consented to being choked and slapped to the head, these actions constituted the crime of assault. The court declined to resolve in advance whether slapping to the body, if consented to, would constitute assault. The appeal court left it to the trial judge to determine on the evidence how to direct the jury on that matter. An averment of assault specifying an action in a sexual encounter will constitute the crime of assault if it has potential to cause serious harm, even if there was consent; *Kirkup* paragraphs [25] to [27].

11B.1. In [*HM Advocate v LM* \[2025\] HCJAC 3, 2025 SLT 385](#) a Crown sentence appeal, the Appeal Court looked closely at grooming and identified some of its hallmarks. The complainer, a 15-year-old girl at the time of the offending, gave evidence that she perceived herself to be consenting to sexual activity with the respondent. The Crown relied on evidence showing that the respondent had engaged in a course of manipulative behaviour to distort the complainer's perception, which vitiated her consent. The jury convicted the respondent of rape and sexual assault on the basis that the complainer had not consented.

11B.2. The Appeal Court held that the trial judge's approach to sentencing had failed to recognise the pattern of grooming behaviour blatantly apparent from the evidence, and the way in which grooming can affect the perceptions of the groomed (paragraph 39). In cases where there is perceived consent on the part of an older child, and even enthusiastic participation in what has taken place, care should be taken to assess all of the facts and circumstances surrounding the offending.

11B.3. At paragraph [36] the Court stated:

"It is now recognised that a jury may conclude that the free agreement required for true consent is not present where vulnerabilities of the victim are taken advantage of. Factors such as (i) a significant age gap, (ii) a disparity in positions of power/authority/trust, (iii) other vulnerabilities of the victim for example due to chaotic lifestyles or difficult family relationships, (iv) the sexual inexperience of the victim, (v) the nature and pattern of the perpetrator's conduct towards the victim before sexual activity occurred, (vi) evidence of premeditation on the part of the perpetrator, (vii) evidence that the perpetrator used manipulation techniques towards the victim, (viii) evidence that the perpetrator exerted influence over the victim, (ix) the overall character, nature and persona of the victim, including their level of

understanding and knowledge of the position they were in and the significance of what they were being asked to do should all be properly explored and taken into account when determining whether free agreement has truly been given.”

11B.4. Under reference to English ([*R v Taylor* \[2022\] EWCA Crim 1207](#); [*R v Ali* \[2015\] 2 Cr App R 33](#)), and Scottish caselaw ([*HM Advocate v JB* 2021 JC 194](#); [*NP v HM Advocate* \[2022\] HCJAC 24](#); [*HM Advocate v CB* 2023 JC 59](#); [*DS v HM Advocate* \[2017\] HCJAC 12, 2017 SCCR 129](#); [*JW v HM Advocate* \[2018\] HCJAC 10, 2018 SCCR 74](#); and [*Kelly v HM Advocate* \[2018\] HCJAC 17, 2018 SCCR 104](#)), the Court recognised the term has been used by the court to describe a broad variety of offending, ranging from the most severe and egregious sexual offending against very young children (eg *HM Advocate v CB*) to cases where there has been, on the face of it, enthusiastic and willing participation by the complainer (eg *NP v HM Advocate*) (paragraph [33]).

11B.5. At paragraph [34], the Court concluded that it was obvious from the case law that grooming usually consists of a pattern of manipulative behaviour which exhibits a number of very common features or hallmarks, giving the following as examples:

“(i) It is a common theme in cases of grooming for victims to be in a vulnerable position. The vulnerability may simply arise from the victim’s age and stage of development. Whilst younger children may be particularly vulnerable, older children as they mature and explore their own identities may be susceptible to sexual grooming in the manner seen in *NP*, *R v Hubbard* [2002] 2 Cr App R (S) 101 and *R v MacNicol* [2004] 2 Cr App R (S) 2 where their youth and sexual inexperience is taken advantage of by those who are in a position of trust or authority. Young people who might not otherwise be particularly vulnerable but are pubescent and coming to terms with their sexuality are often targets of grooming.

(ii) Typically, the offending manifests as a course of conduct. The court will be less likely to accept that a sexual offence is aggravated by an element of grooming where the offending takes place spontaneously.

(iii) The offending will often follow a pattern of escalation. The offending may begin by small gestures of perceived kindness (such as lifts home, gifts or compliments) or by communications that seem, on the face of it, relatively innocent, but which then start probing into the victim’s personal life and, later, sex life. Perpetrators will often try to escalate the intensity of the relationship

by forming, strengthening and misusing a bond of trust. In cases of physical sexual abuse, the abuse will often begin with less invasive sexual offending such as kissing and touching. It will often escalate to more serious behaviours such as penetrative actions and, in the most serious of cases, sexual intercourse.

(iv) The use of emotional manipulation techniques by perpetrators against victims is common. The emotional dependency which has been engendered in the victim may be utilised to continue the abuse, and to make the victim afraid that what they may wrongly perceive as emotional support may be withdrawn. Perpetrators may make their victims feel guilty or that they are somewhat responsible for what has happened. Perpetrators will often tell their victims that they, the perpetrator, will get into trouble or go to prison should anyone find out about the offending. Perpetrators may also use manipulation techniques to engineer a scenario where it is very difficult for their victims to leave or stop submitting themselves to the abuse. Frequently the perpetrator's manipulation techniques are used to distort the victim's perception and encourage them to engage in criminal activity. As a result the victim may perceive their compliance as consent in circumstances where consent may not have been freely given.

(v) In almost all cases there is an element of secrecy which is employed and enforced by the perpetrator. Perpetrators often tell their victims that they must not tell anyone about the offending. The sexual offending itself takes place in private, and often unconventional places where their activities are unlikely to be detected. This could be in a car, in secluded areas such as woodland or in places far from where the perpetrator and the victim reside.

(vi) The behaviour is usually planned and systematic, and may involve a lengthy process.

(vii) In very many cases there will be a breach of trust by someone in a position of authority or responsibility towards the child, such as a coach, teacher, relative, close family friend or clergyman."

11B.6. The Appeal Court noted at paragraph [35] that the way in which grooming can affect the perception of the groomed was clearly articulated in *R v Taylor* [2022] EWCA Crim 1207, at paragraph [30] per Holroyde LJ:

"The important point, in cases such as this, is that even a clear and unequivocal assertion of willing consent by a complainant may have to be seen in the context of other evidence, and surrounding circumstances, which may cause the jury to conclude that the assertion is an unreliable guide to what was actually happening. It must be remembered that the conduct of an abuser may cause his victim not merely to acquiesce but also to perceive her own acquiescence as consent. Conduct which may be described as grooming, or analogous to grooming, is after all intended so to distort the victim's perception as to encourage her to engage in sexual activity which is inappropriate and wrong."

11B.7. Similarly, in *R v Ali* [2015] 2 Cr App R.33 Fulford, LJ, stated at paragraph [57] that:

"One of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent on the part of the victim."

And at paragraphs [58] and [63]:

"Although ... grooming does not necessarily vitiate consent, it starkly raises the possibility that a vulnerable or immature individual may have been placed in a position in which he or she is led merely to acquiesce rather than to give proper or real consent. One of the consequences of grooming is that it has a tendency to limit or subvert the alleged victim's capacity to make free decisions, and it creates the risk that he or she simply submitted because of the environment of dependency created by those responsible for treating the alleged victim in this way. Indeed, the individual may have been manipulated to the extent that he or she is unaware of, or confused about, the distinction between acquiescence and genuine agreement at the time the incident occurred.

...

Although SS gave evidence which, at face value, appeared to indicate that she had consented, as the judge observed this needed to be viewed in the context of her account of her meeting Ali, the way he treated her, how often they met, her consumption of alcohol, and the particular events that led to sex between them on the first occasion."

11B.8. As is stated in *LM*, care should be taken to assess all of the facts and circumstances surrounding the offending where grooming is relied on to vitiate consent. A suggested direction is included in the directions for section 1 rape under the 2009 Act. This direction can be adapted for common law rape.

Honest belief

12. Beyond the definition of the crime appropriate to the particular circumstances of the case, no further direction on honest belief is required unless that issue is a live one at the trial.

13. It is only live in circumstances in which the evidence is such that the jury may determine that, although the complainer did not consent, there is evidence suggesting that the accused honestly believed that the complainer consented: see [*Doris v HM Advocate* 1996 SCCR 854](#) and [*Magsood v HM Advocate* \[2018\] HCJAC 74, 2019 JC 45](#).

14. In examining issues relating to mutual corroboration, in [*Duthie v HM Advocate* \[2021\] HCJAC 23, 2021 SCCR 100](#), a full bench confirmed, at paragraph [18] of the opinion of the court given by the Lord Justice General, that absence of honest or reasonable belief is not a fact which requires to be proved by corroborated evidence. **Following [*Lord Advocate's Reference \(No 1 of 2023\)*](#), all that is required to be corroborated is the commission of the crime and identification of the accused.**

15. The passage from [*Magsood*](#) where the court considers when an honest belief in consent is a live issue so as to require direction thereon, is consistent with [*Doris v HM Advocate*](#). In the absence of any foundation in the evidence for any defence of honest belief the court should refrain from giving them any directions on it and, if raised by parties when it is not a live issue, direct the jury to disregard that issue. A contemporary endorsement of this principle, in a case of rape under the 2009 Act, is found in [*AA v HM Advocate* \[2021\] HCJAC 9, 2021 JC 190](#) at paragraphs [5] to [7]. A direction on honest belief is unnecessary where there is evidence that intercourse was obtained by force ([*Blyth v HM Advocate* 2006 JC 64](#) at paragraph [10]). As was pointed out in *Doris* (at 857E), a direction of honest belief in rape cases should only be given when an issue about honest belief has been raised in evidence ([*Kim v HM Advocate* 2005 SLT 1119](#) at paragraph [10]. The cases of *Blyth* and *Kim* suggest that evidence from the accused alone that he believed the complainer was consenting is insufficient to raise the matter as a discrete issue). In [*Thomson v HM Advocate* \[2024\] HCJAC 30, 2025 JC 71](#) in which the appellant faced charges of rape at common law

and under the 2009 Act the Lord Justice General explained, with reference to defence counsel having sought to introduce an issue of belief in his speech, at paragraph [45], that:

“...It was not appropriate to introduce a defence for which there was no evidential base. 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.”

The court stated that, procedurally, where the notice of special defence does not mention honest belief, it is out of the equation unless and until the court permits it to be introduced. If the defence wish to found on it in their speech, they ought to raise the issue before the Crown speech and seek permission to amend the special defence accordingly (at paragraph [45]).

16. The decision in [Briggs](#) suggests that in most if not all cases where the defence is denial that sex took place, the question of whether the accused lacked honest belief in consent does not arise. *Briggs* was approved and applied on this point in [Thomson v HM Advocate \[2024\] HCJAC 30, 2025 JC 71](#), per the Lord Justice General at paragraph [44.]

Whilst the charge was under the 2009 Act the opinion in [LW v HM Advocate \[2023\] HCJAC 18, 2023 JC 184](#) suggests that in a case where a complainer was asleep when penetrated, the circumstances in which an issue of honest belief could arise are likely to be few and far between.

If there is evidence such that reasonable belief is a live issue, but there has been significant violence, it may be permissible to deal with this issue by asking the jury to consider how the accused could have thought that the complainer was freely agreeing to intercourse if violence was used.

17. For the avoidance of doubt, to direct the jury that it must be proved that the accused *knew* the complainer was not consenting is a misdirection. It has never been a requirement that the accused must *know* that the complainer was not consenting. At common law being subjectively reckless is sufficient; see paragraph 7 above. To require that the accused knew the complainer was not consenting sets the bar too high. (See Lord Justice General and Lord Justice Clerk Memo of 15 November 2023 in Appendices to the Jury Manual).

Possible form of direction on rape

[NB The direction on corroboration for this offence has been amended in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#) and [Lord Advocate's References 2 & 3 of 2023](#).]

NB If there are multiple charges on which consent is in issue, it will not always be necessary to give a direction on autonomy on each charge and it is a matter of judgement on which charge, or charges or where else in the judge's charge such a direction might be given. Some judges solve the problem by giving a generic direction before defining the individual charges.

"Charge [] is a charge of rape.

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

In most cases:

The crime of rape is committed when a man has sexual intercourse with, that is when he penetrates the vagina of a woman with his penis without her consent.

ALTERNATIVELY - In a case in which honest belief is a live issue:

The crime of rape is committed when a man has sexual intercourse with, that is when he penetrates the vagina of a woman with his penis without her consent, where he has no honest belief that she is consenting.

There are several matters you have to be satisfied about.

Penetration

First, there must be deliberate penetration of the woman's vagina by the accused's penis. Any degree of penetration is enough. Ejaculation of semen is not necessary.

Lack of consent

Second, the intercourse must have been without the woman's consent.

A woman does not consent to a sexual act just because she did not protest or did not physically resist or did not suffer physical injury. There is no need for violence or force to be used although it may be.

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. Any person has a freedom to make a choice of whether or not to do so.

Relationships, similar cases or where there is said to be other consensual sexual activity:

The law is that a woman who is in a sexual relationship with a man can be raped/sexually assaulted by him. It does not matter that she consented to sexual activity on an earlier or later occasion.

[NB: It will be for judges to formulate an appropriate direction on consent depending upon the particular evidence in the case. In some cases it may be appropriate to illustrate what is meant by lack of consent. Some specimen directions are given below. Judges may wish to refer to the specimen directions on lack of consent for statutory rape and consider whether these could be adapted for common law rape.]

Withdrawal of consent

Only where appropriate:

Consent must be present throughout sexual conduct for it to be consensual. Consent may be withdrawn and, if it is, then conduct which takes place after that occurs without consent. If consent is withdrawn during intercourse and intercourse continues that is rape.

If complainer asleep/unconscious/so intoxicated

Only where appropriate:

The complainer must be in a position to give or refuse consent.

So, to have sexual intercourse with a woman who is asleep, or unconscious, is rape.

To have sexual intercourse with a woman who is so intoxicated that she cannot give consent is rape. It makes no difference whether the complainer took the alcohol or drugs herself or was plied them by another.

Honest belief

Only where appropriate:

[NB: This direction will only be required in the rare situations where, although the jury accepts evidence apt to prove that the complainer was not consenting, there is evidence which allows that the accused honestly believed that she was. The following directions are designed to deal with that sort of situation in a charge of common law rape.]

If you accept that the complainer was not consenting to sexual intercourse, but you consider that the accused nevertheless honestly believed that she was consenting, or you were left in reasonable doubt about that, you would acquit him. That is because a man who has sexual intercourse with a woman honestly believing that she was consenting, although in fact she was not, is not guilty of rape. Whether the accused had or did not have an honest belief is an inference to be drawn from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused held such an honest belief.

(Here that evidence could be summarised).

On the other hand the Crown remind you that...

(Here the Crown position could be summarised)

If you accept any evidence that the accused honestly believed that the complainer was consenting, or if you are left in reasonable doubt, you would acquit.

If complainer under 12

Only where appropriate:

In law, a girl under the age of 12 cannot give consent, so intercourse with her, even if she agrees, is rape.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how the rape is said to have been committed. That penetration was deliberate does not need corroboration.

Where the complainer is an essential witness:

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard her evidence as credible and reliable in its essentials: namely that the accused raped the complainer. In deciding whether you accept her evidence about this you should have regard to the other evidence in the case.

[Please note in cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused the complainer, may not be an essential witness, in which case the foregoing direction may not be necessary, or may need to be adapted.]

Distress

Only where appropriate: If there was evidence of distress:

[If anything more elaborate is required, reference can be made to "Corroboration: Evidence of Distress" in Part II of the Manual.]

Corroboration for the complainer's account can come from the evidence of others that she was distressed afterwards, provided her distress was genuine, was caused at least in part by what she said happened, and was not wholly due to other extraneous factors like shame or remorse.

Where there is evidence of a de recenti statement in the context of distress

[Where appropriate]

When a complainer gives an account to a witness shortly after the event when exhibiting such distress, it enhances and strengthens the corroborative effect of evidence of distress.

Moreover, if you find it to be a continuing reaction to what happened, the statement spoken to by [the witness] is itself corroboration of the complainer's account [of being raped] [by the accused].

Where there is evidence of a de recenti statement but no distress

You have heard evidence from [witness X] of what the complainer [insert name] said shortly after the {specify crime}. This is an exception to the normal exclusion of hearsay. If you accept the complainer said that:

Shortly after the {specify crime}, and as a continuing reaction to it, it is evidence to prove facts. What the witness reported the complainer saying can corroborate the complainer's evidence.

Where appropriate: if evidence of injury

Corroboration can also come from evidence of any injuries she sustained. Signs of violence may be the consequence of being raped and may support the complainer's account of being raped.

Other sources of corroboration

[NB: where appropriate judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "Corroboration generally/Corroboration in rape etc".]

Summary

NB In many cases it may be unnecessary to narrate paragraph 1 in which case paragraph 2 may require slight elaboration.

For the Crown to prove this charge, you must be satisfied that:

1. the accused penetrated the complainer's vagina with his penis and
2. that was without her consent

Only where appropriate:

3. the accused had no honest belief that she was consenting.

Consider whether to give Delayed Reporting direction. (section 288DA)

Consider whether to give Absence of physical resistance or physical force direction. (section 288DB)

Where appropriate consider whether to give Background of Domestic Abuse direction.

Where appropriate consider whether to give Lack of Emotion direction.