

General directions

Introduction

Please note this chapter is under review and some practical guidance on how to charge a jury can be found in the JI publication: [How to charge a jury](#).

From July 2020, following discussion and agreement among the Lord Justice General, Lord Justice Clerk and Jury Manual Committee, jurors are provided with certain written materials at the start of the trial. These are:

1. A written note of their duties and responsibilities; and
2. A document setting out the general directions that apply in every case, as well as, if appropriate, specific directions on certain matters particular to the case.

Although in [Lyttle v HM Advocate 2003 SLT 925](#) it was held that nothing said in the opening introductory remarks could be prayed in aid to make good a deficiency in the charge, that pre-dated the issuing in every case of the approved standard written directions. The information then given to the jury was only labelled "introductory remarks" and not highlighted as legal directions which the jury had to follow.

Lyttle has now been reconsidered in the case of [SB v HM Advocate \[2021\] HCJAC 11](#) where Lord Turnbull, delivering the Opinion of the Court, said:

"It is therefore clear that the import of the decision in the case of *Lyttle* is confined to the practice with which it was concerned. It was concerned with the then practice of making what were truly introductory remarks, in the sense of introducing the personnel and the general procedure. The case was not concerned with information which was encapsulated in writing and was introduced as legal directions which the jury had to follow.

In conducting a trial in accordance with the recently introduced procedures a judge will no doubt think carefully about the issues and areas of law which he or she wishes to include in the charge. The content of the charge will vary according to the length of the trial and the issues raised. In many cases it may be sufficient to draw the attention of the jury to their copies of what was delivered earlier and to remind them that they must follow both those directions and what is said in the charge itself. In other cases the judge may feel it necessary, or appropriate, to recap some of what was said or to revisit

some aspects of the earlier directions in more detail. The evidence led and the speeches of the crown and defence will doubtless inform the extent to which anything more need be said in relation to the written directions. In any charge, the directions as a whole must be tailored to the circumstances of each case."

It is thus clear that the directions now provided in writing should be incorporated into the eventual charge by reference (and in some cases recap) in due course so that the issue of possible discrepancy raised in *Lyttle* will not arise.

Content of introductory / general directions

Whilst there is no requirement to repeat at length all the written directions during the course of the Charge. It should, however, be remembered that the introductory directions are just that. While they cover much of what is to be found in the opening part of a charge they will not be sufficient of themselves in every case.

In preparing and delivering the charge:

1. The jury should be reminded that they have copies of what was delivered earlier and it should be stressed that they must follow both those directions and what is said in the charge;
2. Judges and sheriffs should be alive to the fact that the conduct of the trial, the exact nature of the issues raised and perhaps even the length of the trial will mean that some repetition, refinement or elaboration is needed of what was said at the start, both in relation to the more general directions and any further matters such as, for example, concert, prior statements, special defences or dockets. It should always be borne in mind that the directions must be tailored to the circumstances of each case.
3. The evidence and submissions of the parties will inform the extent to which anything more need be said in relation to matters touched upon in the introductory directions. In a *Moorov* case, for example, directions on corroboration would have to be very specific. In some cases, such as an assault where the only issue is self-defence, the introductory directions on corroboration may suffice. Where corroboration is an issue, such as in a wholly circumstantial case or one where corroboration of a witness was to be found in circumstantial evidence, more maybe required.

4. Whatever requires to be repeated or elaborated upon, reference should still be had to the suggested general directions which still appear as an appendix to the Jury Manual.

The separate functions of judge and jury

Stair Memorial Encyclopaedia, Vol 17, paragraph 763;

[Renton and Brown, *Criminal Procedure*, 6th ed, paragraphs 18-79 to 18-79.11.](#)

1. Legal principles

Unless circumstances of some special character are alleged, all questions relating to the credibility of witnesses are prima facie for the arbitrament of the jury ([Macmillan v HM Advocate 1927 JC 62](#) per Lord Justice General Clyde and Lord Justice Clerk Alness). Care should be taken not to confuse the issue by mixing the question of reliability of evidence with that of sufficiency ([Sweet v HM Advocate Appeal Court 6 June 2002](#) at paragraph [12]; the sheriff misdirected the jury by suggesting they did not have to consider the issue of corroboration. In fact, corroboration was vital to this case because the only contested evidence was conflicting medical opinion as to how the complainer sustained her injuries. The jury were also inadequately directed on the issue of reliability which was more pertinent to the evidence of medical witnesses than that of credibility). In general, no difficulty arises from directing the jury that as a matter of law there is sufficient evidence to support a conviction. However, there may be circumstances in which it is inappropriate. In [McPhee v HM Advocate \[2009\] HCJAC 54, 2009 JC 308](#) (see also [Douglas v HM Advocate \[2013\] HCJAC 56](#) at paragraphs [17], [24], and [31]), it was observed that the practice of trial judges telling juries in bald and unqualified terms that there is sufficient evidence in law to convict may in some circumstances be unhelpful and particularly confusing. There is usually no need for any general positive statement of legal sufficiency. In some cases it has the potential to confuse, e.g. a jury may reject a corroborating witness's evidence, and then have to consider sufficiency in the absence of that.

2. Referring to the evidence

The primary duty of the judge is to direct upon the law; and it is usually necessary for her or him to refer to the evidence to which the relevant law applies. It is, however, a matter for discretion, in the light of the whole conduct of the trial, to determine the

extent to which it is appropriate to refer to the evidence ([Shepherd v HM Advocate 1997 SLT 525](#) at 528 per Lord McCluskey (opinion of the court). See also [Liehne v HM Advocate \[2011\] HCJAC 51, 2011 SLT 1114](#)). In [Simpson v HM Advocate 1952 JC 1](#) the Lord Justice General Cooper said (at page 3) that:

“It is always the right, and it may often be the duty, of a presiding judge to review and comment upon the evidence; but in so doing it is essential that the utmost care should be taken by the presiding judge to avoid trespassing upon the jury’s province as masters of the facts.”

In long or complicated cases there may be an obligation to refer to some of the evidence so that the jury can focus on the critical issues for their decision.

This *could* apply in cases involving the deaths of infants in which there is often a dearth of direct evidence, the jury’s decision being dependent on inferences to be drawn from medical evidence. In some such cases, in particular, an obligation may lie upon the trial judge to provide the jury with a succinct balanced review of the central factual matters for the jury’s determination ([Liehne v HM Advocate, Hainey v HM Advocate \[2013\] HCJAC 47, 2014 JC 33](#). See also *Skilled Witnesses and Expert Witnesses*). A more recent decision in a case involving death of an infant, [Younas v HM Advocate \[2014\] HCJAC 114, 2015 JC 180](#) takes a rather different approach which represents current appellate thinking. A number of issues pertinent to the treatment of evidence in the charge, are well summarised in the rubric:

“1) there was no general requirement on a judge to rehearse or summarise the evidence in a charge to a jury (paras [55], [56]); (2) the mere fact that medical evidence had been given at some length during the course of a trial did not mean that a jury had been presented with complex testimony of a technical nature, such as might require special direction by the trial judge, and the fact of there being conflicting views held by members of the medical profession on a cause of death did not, of itself, render a case complex or difficult, and the evidence in the case could not be described as of such intricacy or complexity that it required any special treatment by the trial judge (paras [61]–[66]); (3) the trial judge had provided the jury with a route or path to verdict which was simple and straightforward and would have enhanced the informed observer’s understanding of the reasons for the verdict and accordingly the requirement for a reasoned verdict had been met (paras [67], [68]); (4) there was no reason to give the jury any special direction on how to treat the evidence of the child witness, nor would it have been appropriate to do so,

and his evidence ought to have been assessed in the same way as that of any other witness ([73]).”

The Lord Justice General’s Practice Note of 18 February 1977, recorded:

“Accurate assessment of the quality of, and of the weight which ought to be given to certain competent and admissible evidence which is of material consequence in the determination of a jury’s verdict is often a matter of real difficulty and delicacy on which the jury is entitled to receive such guidance and assistance as the presiding judge can properly afford.”

A court of appeal is not in a position to review this discretion of the presiding judge on matters which concern the best way of conducting the case before him”

([Hamilton and Others v HM Advocate 1938 JC 134](#) at 144 per Lord Justice General Normand; approved in *Shepherd* at 528).

Provided the trial judge does not trespass into the jury’s territory by, in essence, expressing a personal view on the evidence, it may be helpful in certain cases for the jury to be directed upon where they can find the testimony upon which they would be entitled to convict ([Beck v HM Advocate \[2013\] HCJAC 51, 2013 JC 232](#)). In some cases, perhaps particularly in sexual offence cases where issues of corroboration are not straightforward or have not been adequately addressed by parties, there may be an obligation to identify where corroboration can be found; [Garland v HM Advocate \[2020\] HCJAC 46, 2021 JC 118](#), particularly at paragraph [20]. If evidence is referred to for reasons other than to illustrate specific points of law, it requires to be done in a balanced manner putting both Crown and defence case to the jury. There is no requirement to rehearse all points made, but rather to present the substance of the parties’ cases to the jury ([Snowden v HM Advocate \[2014\] HCJAC 100, 2014 SCCR 663](#) at [50]-[51]).

[Siddique v HM Advocate \[2010\] HCJAC 7, 2010 JC 110](#) illustrates the importance, in a statutory charge, of giving precise directions on the definition and meaning of the crime charged, and on the elements necessary to be proved by the prosecution, in terms which reflect closely the words of the statute. That is particularly necessary where there is also a statutory defence, which can operate properly only on the basis of a strict application of the statutory language.

3. Credibility and reliability

"A person who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed. Credibility may be judged on the moment, whereas reliability may be only capable of being addressed having regard to the person's "track record", so to speak." ([Jenkins v HM Advocate 2011 SCCR 575](#) at paragraph [44])

The language is somewhat outdated because these are judgments to be made of pieces of evidence and not character. When directing the jury in the closing charge, it should be recalled that the jury can accept and reject different parts of a witness's evidence and, as stated in the written directions, the jury ought to be assessing the **evidence** for credibility and reliability.

This may require specific direction when a Crown witness was previously a person who was alleged to have also been involved in the offences which the accused faces. It has been decided that there is no rule of law which requires a judge to give the jury a *cum nota* warning in every case in which a *socius criminis* was called as a Crown witness. Delivering the Opinion of the Court in [Docherty v HM Advocate 1987 JC 81](#) at 95, Lord Justice General Emslie observed:

"[T]rial judges need only give to juries in all cases, whether or not any *socius criminis* has been adduced as a witness for the Crown, the familiar directions designed to assist them in dealing with the credibility of witnesses and any additional assistance which the circumstances of any particular case may require. If, for example, the credibility of any Crown witness, including a *socius criminis*, is in any particular case attacked by the defence on the ground of alleged interest to load and convict the accused or, indeed, on any other ground, the trial judge will normally be well advised to remind the jury that in assessing the credibility of the witness concerned, they should take into consideration the criticisms which have been made of the witness in the course of the presentation of the defence case."

Whether some particular direction should be given in relation to the evaluation of the credibility of some particular witness must be a matter for the discretion of the trial judge to be exercised in the light of the particular circumstances of the case in question. Relevant to the exercise of that discretion would plainly be the matter of what had been said about a particular witness's evidence in the course of the speeches to the jury ([O'Donnell v HM Advocate \[2011\] HCJAC 84, 2011 SCCR 536](#)).

3(a) Identifying a piece of evidence which is essential to the Crown case

It may be necessary to direct the jury that in order to convict they must accept a particular piece of evidence or chapter of evidence ([McIntyre v HM Advocate 1981 SCCR 117](#); [Spiers v HM Advocate 1980 JC 36](#)). In framing any such direction it is important to recall that a jury does not have to accept all of the evidence of a witness, it is usually a particular fact or facts which are essential for conviction.

Many of the specimen directions throughout the Jury Manual do include a version of this direction but others do not and it is the responsibility of the presiding judge to determine whether or not to give such a direction. Sometimes it will be necessary. Sometimes it will not be appropriate. Judges will always have to make an assessment in the particular circumstances of the case.

A direction to this effect is contained in the specimen directions on mutual corroboration (see Corroboration: the Moorov doctrine) and it is suggested that having said it once in explaining mutual corroboration will be sufficient and it need not be repeated on each charge. In such a case a judge could summarise the position on the charge as being that:

"The Crown founds on the evidence of the complainer and invites mutual corroboration from other complainers on other charges."

Lord Justice General Emslie's forthright views in this regard were perhaps qualified by Lord Justice General Hamilton when he stated that there are some circumstances in which it is appropriate and common to give a direction that acceptance of particular evidence is a necessary precondition for conviction of a crime ([Touati v HM Advocate \[2007\] HCJAC 73, 2008 JC 214](#) at paragraph [23]).

There are also illustrations of the appeal court deprecating excessive use of such directions, for example in cases founded on multiple sources of evidence ([Leandro v HM Advocate 1994 SCCR 703](#); [Fraser v HM Advocate \[2008\] HCJAC 26, 2008 SCCR 407](#) at paragraph [175]).

In refusing an appeal based on the proposition that the judge ought to have directed that acceptance of certain evidence was essential for conviction, Lord Justice General Hope explained:

"The trial judge made it clear, and indeed he was right to do so, that the jury had to be satisfied upon looking at the evidence as a whole. For the judge to have isolated [X's] evidence, important though it no doubt was, as evidence about which the jury had to be particularly satisfied would have been to distort the picture which they had to look at, as they had to look at the evidence as a whole. It would have suggested that other parts of the evidence necessary for a conviction need not be subjected to the same scrutiny" (*Leandro v HM Advocate* 1994 SCCR 703 at 709).

It can be seen that judgement is always required about the particular nature of the Crown case. Such a direction is commonly given in sexual offence cases because some part of a complainer's evidence, e.g. re lack of consent, may be essential for proof.

Even in sexual offence cases, the evidence may be such that this direction is not appropriate. Examples might include where there is clear CCTV footage showing a crime being committed or an admission of guilt by the accused along with circumstantial evidence, or eyewitnesses who describe the accused having sex with a sleeping complainer.

The jury is bound to accept and to apply such directions in law as the trial judge sees fit to give them. It is assumed that juries act upon original, and upon corrected, directions ([McIntosh v HM Advocate \(No 2\) 1997 SLT 1320](#) at 1324 per Lord Justice Clerk Ross (opinion of the court)).

"When the High Court lays down what a trial judge ought to do when directing a jury on a particular point, the High Court expects that trial judges will follow the advice given to them" ([Smith v HM Advocate 1994 JC 56](#) at 60 per Lord Justice Clerk Ross)

It is not for the trial judge to indicate to the jury what weight should be placed on particular parts of the evidence ([McKenna v HM Advocate 2003 SLT 769](#) at paragraph [17]). There is always a risk that a judge in his charge may stray into comments about a witness's testimony and that these will be put, as it were, under the microscope on appeal. For these reasons these comments are best avoided. Thus, it will be wise to avoid describing parts of a witness's evidence as "curious" ([Thomson v HM Advocate \[2005\] HCJAC 17, 2005 GWD 14-241](#)). In this regard particular care requires to be taken in the event of failure to cross examine. Reference is made to the succeeding section.

If the trial judge unduly impresses on the jury her or his own views about the facts, in some circumstances that defect cannot be cured by other directions to the effect that the facts are for the jury ([McDade v HM Advocate 1994 JC 186](#) at 189-191 per Lord Justice Clerk Ross (opinion of the court); [Hunter and Others v HM Advocate 1999 JC 117](#) at 121-122 per Lord Justice Clerk Cullen; [Silverman v HM Advocate 1999 JC 117](#) at 121H; [Fulton v HM Advocate \[2005\] HCJAC 4, 2005 SCCR 159](#) at paragraphs [24] and [25]; [Harkness v HM Advocate 2006 SCCR 342](#), where the sheriff's comments about credibility and reliability were either adverse to the appellant or supportive of the Crown, and for the most part strongly so. The balance was so tipped against the appellant that the standard direction, that if the jury did not agree with anything the sheriff said on the facts they should ignore it, was not sufficient). In addition to considering the transcript of the judge's charge the Appeal Court may decide to listen to the tape recording of the charge if it is suggested that emphasis had been placed on certain words and phrases in a way which might be regarded as unfavourable to the accused ([Clark v HM Advocate 2000 JC 637](#) at paragraph [6]; *Thomson v HM Advocate*)

"The purpose of charging a jury is to give the jury the necessary directions in law to provide a framework for their consideration of the facts and in particular to give them proper directions on the matters which were in issue in the trial. It is not the function of the trial judge to speculate about possible lines of defence which have not been advanced in any way by the accused." ([Hobbins v HM Advocate 1997 SLT 428](#) at 432-433 (Lord Sutherland), [Johnston v HM Advocate 1998 SLT 788](#), and [Mackay v HM Advocate \[2008\] HCJAC 16, 2008 SCCR 371](#) at paragraph [16])

Failure to cross-examine

See [Burgess v HM Advocate \[2010\] HCJAC 68, 2011 JC 32](#); [Rauf v HM Advocate 1997 SCCR 41](#); [McPherson v Copeland 1961 JC 74](#); [Mailley v HM Advocate 1993 JC 138](#).

1. Failure to cross examine a witness as to a contrary scenario or account does not render later testimony from an accused inadmissible (*McPherson v Copeland*; *Mailley v HM Advocate*). Rather it may expose the accused in particular to adverse comment as to credibility. This is based on the assumption that an accused, if frank and straightforward, would give a full account of all pertinent matters within his/her knowledge to his/her legal adviser in advance of the trial. It neither matters whether

the accused has been cross examined to the effect that his/her account is not credible or reliable for that reason nor whether there has been any comment in this regard in the speech to the jury.

N.B. Judges should be astute to check the minutes and any checklist in commission cases. The presiding judge will often record an undertaking from the Crown that they will not comment on a failure to put the defence case to a child or other vulnerable witness at commission.

2. Similar principles may apply to a witness other than the accused. However, the assumption that a full account will have been provided is not as secure. Such a witness may not have been precognosced fully or at all. Something unexpected may emerge which may require the giving of specific directions as in *Burgess v HM Advocate*.

Use of the word 'victim'

1. Whilst every judge charging a jury is encouraged to develop a style of their own and not to slavishly follow a text prepared by others, there are matters which have to be covered and words, the use of which is discouraged. One such word is 'victim'. In [Hogan v HM Advocate \[2012\] HCJAC 12, 2012 JC 307](#), at paragraph [34] Lord Justice General Hamilton observed that the use of 'victim' was inappropriate. This opinion gained further support in the dicta of Lord Eassie in [Wishart v HM Advocate \[2013\] HCJAC 168, 2014 JC 190](#) at paragraph [7]:

"In the context of criminal proceedings it will generally be the case that until guilt is admitted or proved it will not be appropriate to refer to a complainer as being a "victim". The very purpose of the criminal process is, of course, first to establish whether the alleged crime has been committed and secondly whether the accused was the perpetrator. In general it is only once the first of these purposes has been achieved positively to the prosecutor that it may properly be said there is a victim of the crime charged. It is therefore important that in most aspects of the criminal process care is taken to avoid referring to a person making an allegation of criminal conduct towards him or her as a "victim" other than in a context in which guilt is proved or is assumed for valid reasons. A particularly important part of the criminal process is, of course, the giving of instructions to the jury in cases prosecuted under solemn procedure, where correspondingly particular care should be taken. In that

respect, users of the “jury manual” should bear in mind the important note issued with the last amendment drawing attention to the observations in *Hogan v HM Advocate*”.

The presumption of innocence

Stair Encyclopaedia, Vol 10, paragraph 754.

1. The accused is presumed to be innocent of the charges brought against him/her. The presumption of innocence is not a presumption based on factual inferences. It has no positive effect, being no more than a means of expressing the rule that the Crown enjoys no initial evidential advantage, but, in order to succeed, requires to break down the presumption by proving the accused’s guilt beyond reasonable doubt (*Stair Encyclopaedia*, at paragraph 754).
2. One consequence of the presumption of innocence, is that, as a general rule, the accused is not obliged to prove anything. In certain exceptional cases a limited onus rests on the accused; for example, when s/he pleads diminished responsibility, or puts forward a special defence of insanity, or if s/he is charged under a statutory provision which imposes an onus upon him/her.
3. There may be certain cases, “in which the proved facts may raise a presumption of guilt, and in which, in the absence of some explanation by the person accused – where the person accused is the one person who can know the real truth – a jury may be entitled to proceed to draw an inference of guilt” ([HM Advocate v Hardy 1938 JC 144](#) at 147 per Lord Justice Clerk Aitchison; see also *McIntosh v HM Advocate* (No 2) at 1324 per Lord Justice Clerk Ross. See also [Larkin v HM Advocate \[2005\] HCJAC 28, 2005 SLT 1087](#) at paragraphs [10] and [11], and [Mack v HM Advocate 1999 SLT 1163](#). The decision of *McIntosh v HM Advocate* (No 2) dealt with defence counsel repeatedly putting allegations to Crown witnesses “in the most aggressive and hostile manner conceivable” during cross- examination; these allegations must have come from the accused. *McIntosh* was described in *Hogan v HM Advocate* as turning very much on its own circumstances). The circumstances in which it is permissible to comment upon an accused’s failure to give evidence are extremely rare and judges should exercise extreme caution in giving directions on this issue ([Paterson v HM Advocate 2000 SLT 833](#); *Hogan v HM Advocate*). Where defence counsel makes careless and undisciplined remarks about the absence of evidence from a co-

accused, adequate directions on the proper approach to the co-accused's right to silence should be given ([Shevlin v HM Advocate 2002 SLT 739](#)).

The burden of proof on the Crown throughout and the standard of that proof

Stair Encyclopaedia, Vol 7, paragraphs 124-125; Vol 10, paragraphs 746-761.

"The burden of proof that the accused committed the crime libelled against him rests upon the prosecutor throughout the trial. The standard required is proof beyond reasonable doubt. This onus is not transferred or affected by any common law defence pleas other than insanity or diminished responsibility." (Renton and Brown, *Criminal Procedure*, 5th ed, para 18-02, quoted in [Lindsay v HM Advocate 1997 JC 19](#) at 21 per Lord Justice General Hope)

1. In a case where the complainer and the accused are the only eye-witnesses, the jury may be directed that they had to choose between competing accounts, provided they have been given clear general directions about onus of proof and reasonable doubt ([McD v HM Advocate 2002 SCCR 896](#))} Use of words suggesting that the defence has to raise a reasonable doubt can suggest to a jury that the defence has to do something, which is not the case. A suggestion to the effect that if a reasonable doubt points to innocence, then the accused is entitled to the benefit of such a doubt is potentially misleading ([Black v HM Advocate \[2010\] HCJAC 126, 2011 JC 180](#)).

"[U]nder present day practice it is common for judges to direct juries that a reasonable doubt is a doubt which would cause them in the conduct of their own affairs to hesitate or pause before taking a decision. Such a direction is a sound direction, but it obviously need not be given in every case ..." ([DA v HM Advocate \[2007\] HCJAC 8, 2007 JC 170](#) at paragraph [5]; [MacDonald v HM Advocate 1996 SLT 723](#) at 728 per Lord Justice Clerk Ross. See also [Buchanan v HM Advocate 1998 SLT 13](#); [Kelly v HM Advocate 1999 JC 35](#)).

"[I]t is desirable to adhere as far as possible to the traditional formula and to avoid experiments in reformulation" ([McKenzie v HM Advocate 1959 JC 32](#) at 37 per Lord Justice Clerk Thomson; [Dickson v HM Advocate \[2005\] HCJAC 39, 2005 SCCR 344](#) at paragraph [20]; See also [Adam v HM Advocate \[2005\] HCJAC 60, 2005 SCCR 479](#) at

paragraph [9] where it was held that the words “and reconsider” added after the word “pause” in the traditional formula did not alter the standard of proof in a manner adverse to the accused. That was because pausing or hesitating did not alter the standard of proof in a manner adverse to the accused. That addition did not set an unduly high standard for reasonable doubt and thus lower the standard of proof incumbent on the Crown. In [Gilmour v HM Advocate \[2007\] HCJAC 48, 2007 SLT 893](#) the trial judge had defined a reasonable doubt as a real doubt in the jury’s mind, not an insubstantial or fanciful one. He went on to say, “for a verdict of guilty you need not be absolutely certain of guilt – and I emphasise absolutely certain – but you must be reasonably certain, because if you are not reasonably certain you have a reasonable doubt”. This was conceded to be a misdirection, for the reasons given in [A v HM Advocate 2003 SLT 497](#) (below). However, this was not held to have caused a miscarriage of justices, since the trial judge had repeatedly emphasized that the jury must acquit if there was reasonable doubt in their minds).

2. To add the words ‘and reconsider’ after the words ‘hesitate and pause’ has been held not to set an unduly high standard for reasonable doubt, and thus lower the standard incumbent on the Crown, or to alter the standard in a sense adverse to the accused. It does not, for example, add an implication that a reasonable doubt is one which would dissuade a juror from a particular course of action (Adam v HM Advocate at paragraph [9]; [Urquhart v HM Advocate \[2009\] HCJAC 18, 2009 SCCR 339](#) at paragraph [6]). The use of the expression “cogent reason” in the context of contrasting that to a far-fetched, fanciful or impulsive doubt, or a gut reaction, or a sympathetic or emotional response was held not to carry a risk of misleading a jury into applying a higher standard than reasonable doubt, but might in other circumstances give rise to the risk of applying the wrong standard ([Aiton v HM Advocate \[2009\] HCJAC 15, 2010 JC 54](#) at paragraphs [41] and [42]).

Indeed in [Armstrong v HM Advocate \[2005\] HCJAC 139, 2006 SCCR 21](#) at paragraph [8] the Appeal Court reminded trial judges of the desirability of adhering to the traditional formula, and that substantial departures from, or unnecessary elaborations, of it are simply liable to generate appeals. It is not an accurate expression of the standard of proof to tell the jury that they are entitled to convict if they were reasonably sure of the accused’s guilt. That is not an alternative way of saying that they must be satisfied beyond reasonable doubt (A v HM Advocate at paragraphs [10] to [13]. In [Meyl v HM Advocate \[2005\] HCJAC 34, 2005 SCCR 338](#) at paragraph [14] it was said that what was set out in A v HM Advocate at paragraph

[12] did not prescribe a mandatory form of direction, but indicated what would be sufficient for a trial judge to fulfil his duty). The standard of proof beyond reasonable doubt is not the same as that of reasonable certainty.

The absence of burden of proof on the accused (except in certain special cases)

1. Apart from exceptional cases, such as a plea of diminished responsibility, a special defence of insanity or an onus imposed by statute, there is no onus on the accused to prove anything, and there is no requirement that any evidence led by the defence requires to be corroborated ([Lambie v HM Advocate 1973 JC 53](#)).

Reverse burden of proof

2. Where a persuasive burden is imposed on an accused to establish a statutory defence, the defence must be proved on a balance of probabilities, and there is no need for corroboration ([King v Lees 1993 JC 19](#) at 23 (opinion of the court)). The same standard of proof is required to establish a common law special defence of insanity at the time of the offence, but corroborated evidence is probably required (*Stair Encyclopaedia*, Vol 7, paragraph 125 note 4). If a persuasive burden rests with the accused a jury is adequately directed by being informed that this burden is lower than that applicable to the Crown. It is open to the presiding judge to further advise the jury that the defence will have proved a fact if the jury conclude it is “more probable than not” or “more likely than not” that the fact existed ([Robertson v HM Advocate \[2012\] HCJAC 63, 2012 SCCR 450](#)).

3. Offences where a persuasive burden rests with the accused to establish a defence include those relating to:

- Communications devices in prison
- Firearms
- Incest
- Indecent images of children
- Offensive weapons (see chapters on Prohibition of the Carry of Offensive Weapons and Having, in a Public Place, Article with Blade or Point)
- Protection of vulnerable groups

- Sexual offences
- Terrorism.

Problems may arise with the reverse burden of proof. The different approaches to the thorny issues of legal and evidential burdens taken in the obiter opinions in [R v Lambert](#) [2001] UKHL 37, [2002] 2 AC 545, and [R v Johnstone](#) [2003] UKHL 28, [2003] 1 WLR 1736; and those considered by the House of Lords in [Sheldrake v DPP](#) [2004] UKHL 43, [2005] 1 AC 264 have not really been resolved in a way that eases the task of trial courts. Unless the Crown or the defence give notice under [section 71\(1\)\(d\) of the 1995 Act](#) to raise the issue pre-trial, or unless the jury speeches make clear the parties are agreed on the nature of the burden – at the moment the trial court is only left with [Attorney General's Ref \(No. 1 of 2004\)](#) [2004] EWCA Crim 1025, [2004] 1 WLR 2111 at paragraph [52] as a general guide as to whether a legal burden on the accused should be read down to become simply an evidential burden. For the Scottish position particularly in respect of possession of bladed articles and also probably offensive weapons see [Donnelly v HM Advocate](#) 2009 SCCR 512 and [Glancy v HM Advocate](#) [2011] HCJAC 104, 2012 SCCR 52. In that event a direction in the style of what is generally said about special defences would be appropriate.

In brief, *Attorney General's Reference* says:

1. At present, *Johnstone* is the latest word on the subject.
2. Reverse legal burdens are probably justified where the Crown has to prove the essential ingredients of the case, but there are significant reasons why it is fair and reasonable to deny the accused the normal protection of the presumption of innocence.
3. Where an exception is proportionate, it is sufficient if the exception is reasonably necessary.
4. An evidential burden on an accused does not contravene Art 6(2).
5. The court has to decide what will be the realistic effects of the reverse burden.
6. If an Act creates an offence plus an exception, that strongly indicates no breach of Art 6(2).
7. The easier an accused can discharge a burden, the more likely it is that it is justified. The ultimate question is: "Would the exception prevent a fair trial?" If

it would the provision must be read down if possible or declared incompatible.

8. The need for a reverse burden is not necessarily reflected by the gravity of the offence.
9. [*Salabiaku v France* \(1991\) 13 EHRR 379](#) at paragraph [28] gives guidance on the European approach.

Corroboration needed for commission and identification

1. The requirement of corroboration is based on the rule that it is unsafe to rely on the evidence of a single witness. The basic rule is that no-one can be convicted on the testimony of one witness alone. There are two matters which must be proved by corroborated evidence: first, that the crime charged was committed and, secondly, that it was committed by the accused. Proof of these two matters involves proof of the appropriate mens rea but it is always a matter of inference from the primary facts and corroboration of mens rea is not required, it may be inferred from a single source of evidence.

2. As explained by a full bench of 7 judges in [*Lord Advocate's Reference No 1 of 2023* \[2023\] HCJAC, 2024 JC 140](#), the law does not require corroboration of individual elements or ingredients of a crime. What requires to be corroborated is the case against the accused (at paragraph [235]):

“Where there is direct (eyewitness) evidence of the crime, that evidence can be corroborated by another eyewitness or by facts and circumstances spoken to by at least one other witness. None of these individual facts and circumstances needs to be spoken to by more than one witness, and the offence to which the witness speaks need not be divided into several constituent parts. That applies equally in a wholly circumstantial case. Where there is one eyewitness, the facts and circumstances spoken to by one or more other witnesses are corroborative if they confirm or support the eyewitness evidence of the crime. They do not themselves, looked at in isolation, require to point towards the commission of the crime as if they were the equivalent of a second eyewitness. If they did that, they would, without the existence of the direct testimony, be sufficient as a wholly circumstantial case, provided that there was more than one witness in the case. **What requires to be proved by corroborated evidence is the case against the accused. That is, first, that the**

crime, which is libelled, was committed and secondly, that it was the accused who committed it. There is no requirement to prove the separate elements in a crime by corroborated evidence."

3. In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on the essential matters, namely identification and commission ([Fox v HM Advocate 1998 JC 94](#) at 126F and 134E; [Chatham v HM Advocate \[2005\] HCJAC 49, 2005 SCCR 373](#) at paragraph [7]; [CR v HM Advocate \[2022\] HCJAC 23, 2022 JC 235](#)).

4. The judge should tell the jury, in such detail as appears appropriate, what evidence the Crown relies upon, or is available, to prove the essential matters requiring corroboration on each charge (i.e. commission and identification), and whether that evidence is sufficient in law to entitle them to convict the accused of the charge. Care has to be taken to ensure that evidence proceeding from the same source spoken to by more than one witness is not misconstrued as corroboration. This could arise where two witnesses speak to hearing the accused admit the crime in simple terms ([Callan v HM Advocate 1999 SLT 1102](#)). If the Crown relies on circumstantial evidence to corroborate direct evidence, the judge should direct the jury as to whether or not that circumstantial evidence is capable of supplying the necessary corroboration in that it supports or confirms the direct evidence, and is not merely neutral ([Fox v HM Advocate](#); [Walker v Smith 1975 SLT \(Notes\) 85](#); [Scott v HM Advocate \[2007\] HCJAC 68, 2008 SCCR 110](#); [HM Advocate v Al-Megrahi 2002 JC 99](#) at paragraph [34]; and [HM Advocate v Smith \[2008\] HCJAC 7, 2008 SCCR 255](#)).

5. If all the evidence relied upon by the Crown is circumstantial, a circumstance which by itself is neutral may acquire an incriminating character when it is placed in context ([Smith v Lees 1997 JC 73](#) at 109 per Lord McCluskey). To that end motive for an accused may, in certain circumstances be evidence to support the responsibility of an accused for an otherwise unexplained event ([Geddes v HM Advocate \[2015\] HCJAC 10, 2015 JC 229](#) at paragraph [92]). Where there are a considerable number of relevant circumstances it is not realistic or helpful for the trial judge to go through all the many possible permutations of circumstances that the jury might or might not accept ([Murray v HM Advocate \[2006\] HCJAC 10](#)).

6. Corroboration is not an easy concept for lay persons to understand, and legal terms such as "direct evidence", although easily understood by professionally

qualified lawyers, should be clearly explained, where relevant, to enable jurors properly to grasp the legal requirement of corroboration and apply it correctly to their decisions on the facts of the case (see generally *Callan v HM Advocate*).

7. NB Relevant and recent case law of general application illustrating the current law on how and where corroboration can be found is examined in detail in the chapter "Corroboration generally/ Corroboration in rape etc."

Please note that there are other chapters which may be of assistance when considering corroboration:

Corroboration: Evidence of Distress

Corroboration: the Howden Doctrine

Corroboration: the Moorov Doctrine

Corroboration: Special Knowledge Confession

Corroboration: Omnibus/ Composite charges

8. In the case of common law crimes and other crimes requiring mens rea it is necessary to direct the jury that if they consider the act in question was carried out by the accused that it was done with criminal intent. Failure to direct the jury specifically that they could convict only if such acts were committed with the necessary mens rea could constitute a material misdirection in certain circumstances ([McNee v HM Advocate Appeal Court 30 October 2002](#) at paragraph [7]).

The different kinds of evidence

1. The general rule is that any fact that may be proved in any case may be established:

- by oral evidence, which consists of what is said by any witness when testifying before the court;
- by documentary evidence, which is afforded by any document produced to the court;
- by real evidence, which is any material produced to the court for inspection; or
- by any combination of these forms of evidence (*Stair Encyclopaedia*, Vol 10, para 522).

Usually in the course of the general directions, the judge will contrast direct and indirect evidence, giving examples of each.

2. Where evidence in the case is presented to the jury in the form of a minute of admissions or a minute of agreed facts such facts are “deemed to have been duly proved” (see [section 256\(3\) of the Criminal Procedure \(Scotland\) Act 1995](#)).

Accordingly there can be no question of the jury having a choice of accepting or rejecting all or any part of the agreed facts and the jury should be given specific directions to this effect (see [Kerr v HM Advocate 2004 SCCR 319](#) at paragraph [9]). It is important that the joint minute clearly sets out agreed facts rather than simply referring to the likes of content of a document is “a true and accurate record”. If a joint minute is in such terms the intention of parties should be clarified before the joint minute is read to the jury (see [Liddle v HM Advocate \[2012\] HCJAC 68, 2012 SCCR 478](#) paragraph [16]). The trial judge should always take the opportunity to check that the terms agreed reflect only evidence which may be competently admitted. Please refer to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.

The duty to acquit if any piece of evidence, including the evidence of the accused, even if not believed in part, casts reasonable doubt about his/her guilt

1. Where a special defence is pled, all that requires to be said of the special defence, where any evidence in support of it has been given, either in the course of the Crown case or by the accused or by any evidence led for the defence, is that if that evidence is believed, or creates in the minds of the jury a reasonable doubt as to guilt the Crown case must fail and that they must acquit (*Lambie v HM Advocate* at page 59). Failure to take such a course may result in encouraging appeals on the ground of alleged misdirection, in which a conviction may be periled upon a favourable construction being given to the charge as a whole ([Dunn v HM Advocate 1986 SCCR 340](#) at page 126 per Lord Justice Clerk Ross; [Meighan v HM Advocate 2002 SLT 914](#) at paragraph [13]). Where there has been defence evidence it is best to specifically refer to it and to direct that if it creates a reasonable doubt the jury must acquit ([Douglas v HM Advocate Appeal Court 26 October 2000](#) at paragraph [5]).

2. Where the accused gives evidence and his/her evidence constitutes a defence to the charge, then the jury must be told that if they believe him or her then they must

acquit them. Even if they do not wholly believe the accused but his/her evidence leaves a reasonable doubt in their mind about his/her guilt, then they must acquit (*Lyttle v HM Advocate* at paragraph [20]; [Elsherkisi v HM Advocate \[2011\] HCJAC 100, 2011 SCCR 735](#)).

The need to consider each charge separately, including any charge libelled in alternate forms

1. If there is more than one charge, the jury must be directed to consider each charge separately but evidence relevant to one charge may be thought relevant to another ([Gibson v HM Advocate \[2008\] HCJAC 52, 2008 SCCR 857](#)). If there are alternative forms of a charge, the jury cannot convict of both alternatives. A general conviction in respect of alternate charges is incompetent ([McCullochs v Rae \(1915\) 7 Adam 602](#)).
2. On occasions the libel of a charge on indictment may involve a number of events which in themselves constitute separate crimes. One example may be a charge of historic sexual abuse where the charge libels that certain acts occurred on various dates. In such circumstances it may be necessary to regard a charge as comprising distinct offences which should be addressed separately by the jury in returning their verdict with a view to ensuring that the verdict is comprehensible and the reasons therefore are clear (see [Murphy v HM Advocate \[2012\] HCJAC 66, 2012 SCCR 611](#) at paragraph [19], and [Cordiner v HM Advocate 1993 SLT 2](#) as examples. It is however not the position that in circumstances where the charge contains distinct offences the jury is required to deliver separate verdicts for each separate offence libelled).
3. As the court will not convict anyone twice for one and the same crime, a prosecutor cannot, in general, demand a conviction against an accused person for more than one offence arising out of the same *species facti*, or libel the offences cumulatively as separate crimes (Renton and Brown, *Criminal Procedure*, 6th ed, paragraphs 8-64; [Dickson v HM Advocate 1995 SLT 703](#); [Diamond v HM Advocate \(No. 1\) 1999 SLT 973](#)).

What then?

Having given the introductory general directions, the next stage of the charge to the jury is usually for the judge to explain the significance of the instance and other constituent parts of the indictment. The jury must be told the number of charges on

the indictment upon which a verdict is required and that they must deliver a separate verdict on each charge in respect of each accused. If any charge is libelled in the alternative, then the jury must be told they cannot convict of both. The jury must be told to consider the evidence on each charge separately in respect of the accused; if there is a plurality of accused, the jury must consider separately the evidence against each and deliver a separate verdict against each (see also *Johnston v HM Advocate*).

It might then be appropriate to explain to the jury just where the judge proposes to go from here. He might explain that he does not propose to “sum up” the case at all, but merely to explain the law applicable to each charge and to “focus the issues” for the jury. Or he might choose to say that he is going to summarise the evidence, without going to great lengths. But whatever else is done, it is necessary in all cases to define the crime(s) charged, by specifying the overt acts which must be established, together with whatever criminal intent is necessary to constitute the particular crime or crimes.

Other miscellaneous points

Where a minute of admissions has been entered into, it is tendered to the court. That is normally done in the course of the Crown case. When it is tendered the minute must be read to the jury. In the Sheriff Court, the clerk of court reads it to them. In the High Court, the Advocate Depute’s junior does so. At some point in the charge to the jury it will be necessary to explain the significance of this and that facts admitted are held to be proved. Please refer to the JI Briefing Paper on Joint minutes of agreement in solemn proceedings.

One matter which can arise during a trial is reference to irrelevant matters or to the prior history of an accused. It is for the trial judge to determine whether such matters so compromise the prospects of a fair trial that desertion is inevitable. In most instances considerable weight is placed on the views of the trial judge who has the benefit of presiding over the trial and judging the context in which the issues arise. A number of options are available namely:

1. to ignore the offending evidence and do nothing, lest the matter be emphasised;
2. to direct the jury to ignore that evidence and, as here, to advise the jury that they should do so because it has “no bearing on the matter before” them; and

3. to desert the diet because of the inevitability of an unfair trial as a result ([*Fraser v HM Advocate* \[2013\] HCJAC 117, 2014 JC 115](#)).