

Incrimination

Law

1. [The Criminal Procedure \(Scotland\) Act 1995, section 78\(1\)](#) provides:

"It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless –

(a) a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated ..."

2. [Collins v HM Advocate 1991 JC 204](#):

"A notice of intention to lead evidence incriminating a co-accused is different from a special defence and does not require to be read out or to be referred to in the judge's charge ([McShane v HM Advocate 1989 SCCR 687](#)) In our experience it is not the practice for such notices of intention to incriminate to be read unless counsel specifically requests that that should be done. It is in any event clear that there is no requirement for such a notice to be read to the jury or referred to by the trial judge in his charge." (*Collins*, 209 per Lord Justice Clerk Ross).

3. [Henvey v HM Advocate 2005 SLT 384](#):

This full bench case was not directly concerned with a special defence but with the statutory defence under [section 28 of the Misuse of Drugs Act 1971](#) (proof of lack of knowledge). The court applied the reasoning of the House of Lords in [R v Lambert \[2001\] UKHL 37, \[2002\] 2 AC 545](#) in concluding that section 28 imposed only an evidential burden on the accused. There must be some evidence in the case capable of meeting the constituents of section 28 and, if there is, the Crown retains the burden of proving guilt beyond reasonable doubt/excluding the defence beyond reasonable doubt. The court in *Henvey* described the effect of the evidential burden in a way which has found its way into specimen directions on most special defences.

"It is for the Crown to meet the defence and satisfy you beyond reasonable doubt that it should be rejected." (*Henvey*, at paragraph [11].5)

4. There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, but it is only appropriate to do so if there is no evidence from

which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury ([Carr v HM Advocate \[2013\] HCJAC 87, 2013 SCCR 471](#)). It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury.

Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position out with the presence of the jury before parties address the jury ([Lucas v HM Advocate \[2009\] HCJAC 77, 2009 SCCR 892](#)).

5. There are circumstances where incrimination may not be an appropriate defence. An example discussed in [Flannigan v HM Advocate \[2011\] HCJAC 81, 2012 JC 98](#) is a charge of being concerned in the supply of drugs under [section 4\(3\)\(b\) of the Misuse of Drugs Act 1971](#). In *obiter* remarks per Lord Osborne, delivering the Opinion of the Court, it was observed that an offence under section 4(3)(b) is personal to the accused person concerned in the supply and that any offences committed by other persons who had also been concerned in such supply would be separate offences personal to them. Accordingly, a special defence of incrimination might be inappropriate in principle in relation to such offences. However, the court recognised that it would not always be inappropriate. For example, it may be appropriate where the position of the accused is that he has been misidentified as the person who did specific things in relation to the supplying of controlled drugs. Whether it is appropriate will depend on the facts and circumstances of the case.

6. Similarly, where an accused is charged with acting together with others and purports to incriminate another in the commission of the offence, the incrimination may not be a complete defence. In [McQuade v HM Advocate 1996 SLT 1129](#) Lord Justice General Hope, giving the opinion of the Court, held that the special defence of incrimination only applies where the evidence led by the accused has the effect of transferring blame from the accused to another person or persons. In other words where the evidence, if accepted, would have the effect of exculpating the accused and inculpating the co-accused (1132-1133).

7. It is thus still possible for the accused to bear criminal responsibility even if the accused implicates someone else as being involved, where the evidence does not

exculpate the accused. On the other hand, the evidence may exclude the accused's involvement entirely if for example the accused has been misidentified as the person doing a specific act. It will depend on the facts and circumstances of the case. A suggested direction where the Crown rely on the accused acting together with others and the accused relies on incrimination is provided below.

Possible form of direction on incrimination

"In this case the accused has lodged a special defence of incrimination. That was read out to you at the start of the trial, and you have a copy of it.

As is explained in the written directions, the only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. A notice of special defence does not change the burden of proof. The defence do not need to lead evidence in support of it. It is not for the accused to prove it but for the Crown to disprove it.

(where accused acting alone)

The accused says that, if this crime was committed, it was not committed by him/her/them, but by [X]. It is for the Crown to satisfy you beyond reasonable doubt that defence should be rejected.

To support that the defence rely on.....:

If you believe that or if it leaves you in reasonable doubt of the accused's guilt, you must acquit.

On the other hand the Crown says.

They rely on....

You should look at all the evidence, consider the points made for and against the incrimination, and then decide if the Crown has proved guilt beyond reasonable doubt."

OR

(where Crown allege accused acting with others)

The accused says that he/she/they had no involvement in the commission of this crime.

The defence rely on evidence [specify] that if the crime was committed it was not committed by the accused, but by X. If you believe that, or it leaves you in reasonable doubt of the accused's guilt, you must acquit.

It is for the Crown to satisfy you beyond reasonable doubt that the defence should be rejected or does not exculpate the accused.

[Where appropriate:

Whilst in some cases evidence supporting incrimination of another person, if believed, would result in acquittal that does not always apply.

In this case the Crown says that the circumstances of the commission of the crime show that the accused committed it by participating in a common plan to commit the crime with others.

It is possible in law for the accused to bear criminal responsibility in the carrying out of the common plan even if he can point to someone else being involved. In this case the Crown say that even if X was involved, that does not exclude the accused from being involved in carrying out the common plan.]

The Crown rely on.....

You should look at all the evidence, consider the points made for and against the incrimination, and its effect in this case, and then decide if the Crown has proved guilt beyond reasonable doubt."

(NB: In some cases the Crown's primary position may be that the accused acted alone and, as a secondary position, that the accused acted with others. The above directions will require to be adapted accordingly).

(where incriminee declines to answer)

"The defence ask you to take account of the evidence of [X], who has been incriminated.

You will remember that at the start of X's evidence I warned X that X need not answer any questions, the answers to which might incriminate him/her/them. X heeded that warning, and did not answer certain questions.

[X] has not said if he/she/they was responsible for committing this crime, or not. The fact that X chose not to answer does not necessarily support an inference that X was involved. X could have chosen not to answer for several different reasons.

Whether X's evidence has any bearing on the involvement of the accused is for you to decide."