Supreme Court of Judicature of Jamaica

CRIMINAL BENCH BOOK

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The Honourable Mr Justice F Algernon Smith CD
Retired Judge of Appeal

The Honourable Mr Justice Karl Harrison CD
Retired Judge of Appeal

Foreword by
The Honourable Mrs Justice Zaila R McCalla OJ
Chief Justice of Jamaica

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Foreword

Summation to a jury in the trial of a criminal case requires a thorough knowledge of the case, preparation of the summation and clear delivery to the jury. Jamaican judges have consistently executed this task and have satisfied those requirements in doing so. They have, however, carried out that task without the benefit of a bench book that collates in one place all the material that is usually required for achieving the purpose of a summation. Judges, up to this point, largely have had to put together for themselves the material that they need for carrying out the task of directing juries. This situation has added to the burden of their jobs and led to many variations in the way in which juries are directed.

It cannot be denied that a number of successful appeals against convictions have been as a result of misdirections to the jury by the trial judge. Some of those misdirections, no doubt have been as a result of the unavailability to the judge of ready access to guidance from a reliable legal publication dealing with the particular offence being tried.

There have been efforts in the past to put together in one place some of the usually required material and thanks must be extended to those judges who have unselfishly shared the results of their efforts with others. Nonetheless, there was no single place at which judges and practitioners could access the material required for summations so as to achieve consistency, predictability and transparency in summations.

The aim of this publication is to fill that void.

This Bench Book is the first collective effort to assist judicial officers by providing them with a single publication to which they can turn for guidance in crafting summations to juries in the criminal cases which are usually tried in our courts. The material provided in this publication is designed to save judicial time in the preparation of summations, and to assist in the delivery of consistently predictable, accurate and clear directions to the jury.

There are suggestions as to procedure which have not been traditionally in use in this jurisdiction and judges may find them helpful. However, it is recommended, that consultations with counsel should be a consistent element of implementing any of these innovations. Such consultations will prevent counsel being taken by surprise during summations and avoid grounds of appeal in relation to such elements.

This publication would not be possible without the input of a number of entities and persons. We extend our gratitude to the British High Commission for its continued and committed support to the justice system of this country over the years. In respect of this publication, special thanks must also

be given to the High Commission's Criminal Justice Team headed by the indefatigable Mr Francis Burak. Without whom this project would not have been completed in the time that it has been.

The Bench Book Committee consisting of The Honourable Mr Justice Patrick Brooks, CD, judge of appeal, and Puisne judges, The Honourable Mrs Justice Vivene Harris and The Honourable Mrs Justice Vinette Graham Allen have worked very hard to bring this project to fruition. They have been assisted by a number of judges at every level, but particular mention must be made of The Honourable Mrs Justice Stephane Jackson-Haisley (Ag) and Judge of the Parish Court His Honour Mr Dale Staple, who dedicated significant time and effort in honing the material provided by the authors.

Although there has been heavy reliance on the work of the Judicial College of England and Wales by use of material from its Compendium, there has been extensive input from the authors The Honourable Mr Justice F Algernon Smith CD and The Honourable Mr Justice Karl Harrison CD, both retired judges of appeal who, despite their continued heavy schedules in public life, have continued to serve the judiciary in many ways and have done yeoman service in collating and writing much of the material which has been included in this publication.

I hope that judges and the legal profession in general will find this Bench Book useful and beneficial in helping to achieve the timely delivery of a high standard of justice for all.

The Honourable Mrs Justice Zaila R McCalla OJ
Chief Justice of Jamaica
March 2017

Preface

The main purpose of this Bench Book is to provide an aid to trial judges in directing juries in Circuit Court trials. It therefore contains some brief summaries of the more commonplace areas of law encountered in normal Circuit Court experience, areas that summations should address and examples for consideration. There are also practical suggestions for directions in certain areas of jury and trial management.

It is appreciated that trial judges using this material will have differing degrees of experience and would have developed their own practices, procedures and formulae for summing up which they would prefer to use instead of the material contained in this Bench Book. Consequently, this Bench Book aims to give assistance but is not intended to be at all rigid. It certainly is not intended to be a replacement for thorough research of the law required for any case.

The format of the presentation of the material is that each section begins with a *Legal Summary*, which is intended to be a brief introduction and reminder as to the relevant common law, legislation (both primary and subsidiary) as well as a pointer to any guideline and cases that will aid the reader. Where necessary, citations from recognised legal texts such as *Archbold Criminal Pleading, Evidence and Practice* are provided. We emphasise that in all cases of complexity the law must be researched thoroughly through these works or other sources.

The second part of each section is headed *Directions*. The *Directions* are intended to serve as a checklist of the points that may need to be covered when summing up in the subject area concerned. Readers should remember that specific content will always depend upon the facts and issues in any particular case.

The third part of each section contains *Examples* and *Specimen Directions,* which are usually based on hypothetical facts. These are intended to be useful starting points for framing legal and evidential directions but they must be tailored to each particular case. Failure to thoughtfully address the particular circumstances of each case may result in directions being unclear, the jury being confused and possibly misdirection.

This first effort at a Jamaican Bench Book has drawn its format and the majority of its material from The Crown Court Compendium 2016 published by the England and Wales Judicial College. Jamaican cases and legislation, and material from other jurisdictions, have been included as appropriate. The Bench Book Committee, however, takes full and sole responsibility for the final output. The Committee would be grateful for suggestions as to improvement, especially in respect of decisions

from this, or any other jurisdiction, which would be of assistance to judicial officers as they take on their tasks of managing jury and Gun Court trials.

A limited number of hard copies of the material have been published for this initial effort. Updates of any sections of the Bench Book will be in the form of electronic copies. Judges may print or use the electronic copies as they desire.

The Bench Book Committee
March 2017

Acknowledgements

The Bench Book Committee

The Bench Book Committee duly appointed by the Honourable Chief Justice comprises The Honourable Mr Justice Patrick Brooks, CD, Judge of Appeal, and Puisne Judges, The Honourable Mrs Justice Vivene Harris and The Honourable Mrs Justice Vinette Graham Allen.

The Committee wishes to acknowledge the assistance and support received from the various individuals who have contributed to the creation of this Bench Book.

The Authors

The Honourable Mr Justice F Algernon Smith CD (ret'd) – A retired Judge of the Court of Appeal of Jamaica, who served as Associate Tutor at the Norman Manley Law School from 1981 to 2016, and has been involved in the legal training of Judges, advocates and Justices of the Peace for many years. Justice Smith is regularly called upon to assist the judiciary by sharing his expertise gained from his vast experience. He never demurs. He is still involved in providing public service in other areas and the Bench Book Committee is greatly indebted to him in answering the call to assist in this important project.

The Honourable Mr Justice Karl Harrison CD (ret'd) – A retired Judge of the Court of Appeal of Jamaica, who has authored a number of legal publications and has been involved in the training of Judges, legal practitioners and Justices of the Peace for the Parish of St Andrew for many years. Justice Harrison has been an Associate Tutor at the Norman Manley Law School since 1986. His contributions to the legal profession by his publications and his erudite judgments have enhanced the jurisprudence of this country immensely. His breadth of experience has been tapped in other areas of public service and the Committee is very grateful to Justice Harrison for taking the time to again assist in the development of the law in this country.

Contributions and Editing

Substantial contributions to the work of the authors were made by The Honourable Mr Justice Patrick Brooks. We also acknowledge the valued contribution of The Honourable Mr Justice David Fraser in the area of evidence.

Recognised for their expertise, the Bench Book committee co-opted:

The Honourable Mrs Justice Stephane Jackson-Haisley (Ag) – The learned Judge drew on her extensive experience as a prosecutor in the Office of the Director of Public Prosecutions and as a Resident Magistrate in providing thoughtful input into the finished product.

Judge of the Parish Court His Honour Mr Dale Staple – Prior to his appointment to the Resident Magistrate's Court (now Parish Court) Bench in 2014, His Honour Mr Staple maintained a busy practice as an Attorney in private practice. He has distinguished himself as a Parish Court Judge and is currently the Vice President of the Association of Parish Court Judges and a Member of the Parish Court Rules Committee.

Their input in the review and editing phases has been insightful and valued.

Thanks must also be expressed to those Judges who took the time to respond to an electronic survey. Their suggestions and comments were helpful as we undertook this task. The Registrar of the Supreme Court, Mrs Nicole Walters-Wellington, also assisted at very short notice in securing the input of Judicial Clerks Messrs Janek Forbes and Robert Clarke and Judicial Assistants Miss Yanique Brown and Mr Andre McKenzie in carrying out the important task of checking the accuracy of legal citations. We are grateful for their efforts.

We have been very fortunate to have benefitted from the experience of His Honour Brian Barker QC. Mr Barker's years of experience as the Recorder of London and the Common Sergeant of London has enriched the Jamaican Bench Book and we recognise that his commitment to assisting the Jamaican justice system has been consistent for many years, as he was also a key partner at the inception of Jamaica's Criminal Case Management programme. His contributions, particularly in relation to new areas of law, have been of great assistance. The benefit gained from his experience in applying progressive areas of practice such as written directions, routes to verdict, and discussions with advocates, has greatly enhanced the Bench Book's content and aided in the implementation of the guidance herein.

The Judicial College

We wish to thank in particular the Judicial College based in London. This Jamaican Bench Book is modelled upon the Judicial College 'Compendium' published in 2016. Whilst the Bench Book is specific as to Jamaican law and legal practice in the Courts of Jamaica, the common legal heritage that Jamaica and England & Wales share has meant that we have been able to gain considerable assistance from the well-crafted guidance produced by the Judicial College and authored by Sir David Maddison, Professor David Ormerod QC, His Honour Simon Tonking and His Honour Judge John Wait. Much of the content in the Jamaican Bench Book has been adapted from the 2016 Compendium and indeed the original 2010 England & Wales Bench Book. The support of the Judicial College throughout the process undertaken in Jamaica has been recognised and is valued.

The Judicial Education Institute of Trinidad and Tobago

The authors have also made use of material from a source closer to home. Assistance was gained from the Criminal Bench Book 2015 which is published by Judicial Education Institute of the Republic of Trinidad and Tobago. We wish to thank the Institute for leading the way in the Caribbean in creating a "home-grown" bench book. That effort has helped to inspire this publication. We are also grateful for the Institute's permission to use, in this publication, some of the material in its Bench Book. The Honourable Chief Justice, Mr Justice Ivor Archie, ORTT, who is the President of the Institute, provided a rapid positive response to our request for permission. It was a demonstration of regional co-operation for which we are most grateful.

The British High Commission

We wish to thank the British High Commission for providing the funding and sharing the expertise of the Criminal Justice Team based at the British High Commission, Kingston, Jamaica, namely:

Mr Francis Burak (Barrister – England & Wales), The Crown Prosecution Service

Mr Ayo Awoyungbo (Solicitor – England & Wales, Barrister and Solicitor - Nigeria), The Crown Prosecution Service

Ms Emily Coates (Barrister – England & Wales)

Miss Rachelle Gayle (Barrister – England & Wales [non-practising] and Attorney – Jamaica [non-practising]).

This team provided essential editing support and project co-ordination.

In particular we acknowledge the input of Mr Francis Burak, Criminal Justice Advisor at the British High Commission. With the day to day tasks of the individual Judges of the Committee being as taxing as they are, the time available to be devoted to this project would not have allowed it to have reached completion in the time that it has. It is mainly due to Mr Burak's hard work, persistence and dedication to the task, that this Bench Book has come to fruition. No encomiums would be too high for his input. If truth be told this has been his project.

Gratitude must also be extended to our publishers Ian Randle Publishers under its imprint The Caribbean Law Publishing Company. They have assisted the legal profession of this country in many ways over the years and it is hoped that this effort will be of at least similar beneficial effect.

The Honourable The Chief Justice Mrs Zaila McCalla OJ

Finally, the Committee must acknowledge and commend the vision of the Honourable Chief Justice Mrs Zaila McCalla OJ who conceptualised this project, put the various components together and guided it to completion. This project is only one of the many programmes that the Honourable Chief Justice has engineered for the enhancement of judicial education in this country. Her dedication to the training of judicial officers is second to none and her efforts in this regard have far outstripped those of any of her predecessors.

The Bench Book Committee
March 2017

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Sources

Archbold 2016: Criminal Pleading, Evidence and Practice 64th revised edition edited by James Richardson. London: Sweet & Maxwell, 2016.

Archbold - Criminal Pleading, Evidence and Practice 2009 edited by PJ Richardson. London: Sweet & Maxwell, 2009.

Archbold 2010:Criminal Pleading, Evidence and Practice edited by James Richardson. London: Sweet & Maxwell, 2009.

Archbold - Criminal Pleading, Evidence and Practice 2001 edited by James Richardson. London: Sweet & Maxwell, 2000.

Archbold: Criminal Pleading, Evidence and Practice: 2000 48th edn edited by James Richardson. London: Sweet & Maxwell, 1999.

Archbold: Criminal Pleading, Evidence and Practice: 1997 45th edn. London: Sweet & Maxwell, 1997.

Archbold - Criminal Pleading, Evidence and Practice 42nd edn edited by Stephen Mitchell and PJ Richardson. London: Sweet & Maxwell, 1985.

Archbold - Criminal Pleading, Evidence and Practice 38th edn edited by T. R. Fitzwalter Butler and Stephen Mitchell. London: Sweet & Maxwell, 1973.

Atkins Court Forms. London: LexisNexis.

Blackstone's Criminal Practice 2017 edited by David Ormerod and David Perry. Oxford: Oxford University Press, 2016.

Blackstone's Criminal Practice 2016 edited by David Ormerod and David Perry. Oxford: Oxford University Press, 2015.

Blackstone's Criminal Practice 2012 edited by Anthony Hooper, DC Ormerod, Peter Murphy, Brian Leveson, and J Phillips . Oxford: Oxford University Press, 2012.

Blackstone's Criminal Practice 2001 edited by Peter Murphy. London: Blackstone Press, Ltd, 2001.

Blackstone's Criminal Practice edited by Peter Murphy. London: Blackstone Press, Ltd, 1999.

Cross and Jones's Introduction to Criminal Law, 9th edn by Rupert Cross and Philip Jones. London: Butterworths, 1980.

Crown Court Bench Book: Directing the Jury. London: Judicial Studies Board, March 2010.

Crown Court Bench Book and Specimen Directions 3rd edn 2010 (Northern Ireland).

***Evidence 2001/2002* (Inns of Court Bar Manuals)** Inns of Court School of Law. London: Blackstone Press Ltd, 2001.

Halsbury Laws of England. London: LexisNexis.

Judicial Studies Board 1997 Specimen Directions.

Judicial Studies Board Bench Book 1997.

Judicial Studies Board Crown Court Bench Book July 2001 update.

Macdonald's Immigration Law and Practice by Ian Macdonald and Ronan Total. London: Butterworths, 2014.

Practical Approach to Evidence by Peter Murphy. London: Financial Training Publications Ltd, 1980.

Prosecuting Gang Cases - What Prosecutors Need to Know by Alan Jackson. *Prosecutor, Journal of the National District Attorneys Association*, April 1, 2008.

Smith & Hogan Criminal Law Cases and Materials, 4th edn by JC Smith and Brian Hogan. London, Dublin, Edinburgh: Butterworths, 1990.

Specimen Directions in Jury Trials. Hong Kong: Hong Kong Judicial Institute September 2013.

***The Crown Court Compendium* – May 2016** by David Maddison, David Ormerod, Simon Tonking, and John Wait. London: Judicial College, 2016.

The Republic of Trinidad and Tobago Criminal Bench Book 2015. Port of Spain:

Judicial Education Institute of Trinidad and Tobago, 2015.

Abbreviations

AC	Law Reports, Appeal Cases
All ER	All England Law Reports
C & P	Carrington and Payne's Reports
CAR	Criminal Appeal Reports
Cox CC	Cox's Criminal Cases
Cr App R	Criminal Appeal Reports
Cr LR	Criminal Law Review
Crim PD	Consolidated Criminal Practice Directions
D	Defendant
ER	English Reports
EWCA	England and Wales Court of Appeal (Criminal Division)
F & F	Foster and Finlason's Nisi Prius Reports
JLR	Jamaica Law Reports
JMCA*	File Number for Supreme Court Criminal Appeal
KB	Law Reports, King's Bench
NZLR	New Zealand Law Reports
NICA	Northern Ireland Court of Appeal
P	The/a principal offender
PC	Police Constable
QB	Law Reports, Queen's Bench
RMCA	Resident Magistrate Criminal Appeal
SCCA*	Supreme Court Criminal Appeal
TLR	Times Law Reports
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
V	The victim/complainant
WIR	West Indian Reports
WLR	The Weekly Law Reports

1. INTRODUCTION

1-1 Timing of Directions of Law
1-2 Written Directions and Routes to Verdict
1-3 Summing-up Checklist

1-1 Timing of Directions of Law

Sources: **Crown Court Compendium 2016**

Directions of law have traditionally been provided to the jury for the first time in the summing up. With advancements in substantive law, trial management and criminal practice, it is recognised that this might not be the best way to help the jury, as this means that the jury would be directed that their task was to evaluate the evidence at a stage when the evidence had concluded; and that they would be directed to exercise caution in relation to various parts of the evidence such as identification evidence long after the evidence had been given.

We would therefore encourage judges to give careful thought to the timing of their legal directions. For example: directions about the use of special measures may be best suited to the stage just before the evidence of the witness(es) for whom such measures are to be used, or directions on hearsay and agreed evidence might be given just before or just after the evidence concerned is adduced. We are not suggesting that it will always be appropriate to give some of the legal directions before the summing-up, but simply that thought be given to the time at which directions can most helpfully be provided. It will be wise to forewarn advocates in the absence of the jury if it is intended to give some directions before the summing up and to ask for any submissions the advocates may have.

1-2 Written Direction and Routes to Verdict

Sources: **Crown Court Compendium 2016**

WRITTEN MATERIALS

The provision of written materials to jurors has two main benefits -

(i) A juror's understanding and recollection of the legal directions during deliberations may be increased if they are given written directions alongside oral directions,

(ii) The provision of written materials is likely to reduce the scope for any meritorious appeal in the event of any conviction.

Forms of Written Directions

There is no required or agreed form of written directions for juries. Judges in many jurisdictions have been known to use a variety of different approaches to written directions including:

(i) Brief bullet point summaries of the law.

(ii) Longer narrative summaries of the law.

(iii) Full transcript of judge's legal directions.

(iv) Routes to verdicts in the form of questions and answers.

(v) Diagrammatic routes to verdicts.

(vi) Chart showing permissible combinations of verdicts.

Judges should always be sensitive as to the suitability of providing written directions to the jury adjudicating the case.

Route to Verdict

When a jury is faced with more than one issue in a case, judicial experience suggests that jurors can be assisted by having a written sequential list of questions, or what is often referred to as a 'route to verdict'. Such a document can help focus jury deliberations and provide them with a logical route to verdict. In more complicated cases some judges have a practice of providing a chart showing the jury the permissible combinations of verdicts.

Discussions with Advocates

All written directions for the jury may be discussed, and preferably agreed with the advocates, well before they are provided to the jury. Written directions provided to the jury during the judge's oral directions should be discussed with advocates no later than the point at which the giving of evidence ends and before the advocates' speeches begin.

Keeping a Record

A copy of any written directions, Routes to Verdict or other materials which the judge has provided to the jury and with which they retire must be initialled by the judge and put in the court file to ensure that in the event of an appeal it is that version which comes to be considered.

1-3 Summing-up Checklist

Sources: **Judicial Studies Board Crown Court Bench Book July 2001 update**

This is no more than a memory aid.

It does not include every possible topic which may require your directions: be alert to the issues which have not been included in this list. There is no particular magic in the order: you assess the order which is most appropriate for the specific case. It may sometimes be appropriate to give a legal direction just before referring to the evidence itself.

General

- Function of judge and jury
- Burden and standard of proof
- Separate treatment of counts
- Separate treatment of accused
- Ingredients of each offence including, as appropriate, intention/recklessness/dishonesty, etc.
- Joint responsibility
- Defences, as appropriate: alibi, self-defence, accident, etc

Various aspects of evidence

- Circumstantial evidence
- Admissibility of evidence where more than one accused – evidence of co-accused
- Plea of co-accused
- Good/bad character
- Hostile witness
- Complainant in sexual cases – child witnesses – video evidence
- Accomplice
- Supporting evidence
- Delay
- Identification
- Lies
- Police interviews

- Inferences from silence at interview
- Inferences from silence at court

Summarise the evidence

- Tell the story
- Beware of the notebook summing-up

Before retirement

- Unanimity of verdicts
- Availability of exhibits

Subsequently

- Dispersal overnight
- Majority direction

2. JURY MANAGEMENT

2-1 Empanelling the Jury
2-2 Challenge of a Juror
2-3 Discharging a Juror or Jury
2-4 Conducting a View of the Locus In Quo

2-1 Empanelling the Jury

Sources: **Jury Act (and Amendments); *Archbold* 2001**

LEGAL SUMMARY

1. The Registrar of the Supreme Court has the responsibility to "strike and make up" the panels of jurors for the Circuit Courts. At least twenty-eight days before the sitting of each Circuit Court the Registrar shall issue to the Commissioner of Police a writ of *venire facias* containing the names of the jurors forming the panel(s) for such Court.

THE ARRAY

2. On a trial on indictment in the Circuit Court the jury for the trial shall be balloted for in open court subject to all the rights of challenge.[1] The judge has no discretion to interfere with the selection of the jury, save and except to exclude individually unfit jurors. The list of jurors chosen by ballot is called the array.

3. On trials for treason or murder:

   a. Committed in the circumstances specified in section 2(1)(a) to (f) of the **Offences Against the Person Act**; or

   b. Upon the conviction for which section 3(1A) of the **Offences Against the Person Act** would apply,

   twelve jurors shall form the array.

4. On the trial on indictment before the Circuit Court other than for an offence specified in section 31(1), seven jurors shall form the array.[2]

1. Section 49 Jury Act.
2. Section 31(1) ibid as amended by the Jury (Amendment) Act 2015.

2-2 Challenge of a Juror

Sources: ***Archbold*** **2001, 4-234 page 405 et seq.;** ***Blackstone*** **2001, D11.8 page 1353 et seq; Jury Act – sections 31 and 33**

LEGAL SUMMARY

1. Before the potential number of jurors are called to the jury box the Registrar should inform the accused of his right to challenge.
2. There are two kinds of challenge:
   a. Peremptory challenges, made to the polls (the individual jurors) without reasons assigned; and
   b. Challenges for cause which may be made to the array or to the polls for some definite reason assigned and proved.

Peremptory Challenges

3. These are made to the polls (i.e. to the individual juror as he comes to the jury box to be sworn). Each party is allowed no more than four peremptory challenges in the case of murder or treason or for any other offence that attracts a minimum penalty of a term of imprisonment of not less than fifteen years and no more than two in the case of any other offences.[3] The prosecution has an equal number of challenges for each person who is arraigned.[4]
4. Where a juror is being selected, prior to any evidence being led at the trial, to replace another juror who can no longer serve at that trial, the prosecution and each defendant shall be allowed to use any unused peremptory challenges remaining from that party's allocation.[5]
5. In respect of offences tried jointly, the peremptory challenges allowed for the purposes of s.33(2) shall be four.[6]

Challenges for Cause

6. These may be made by either, party either to the array (i.e. all the jurors called to the box) or to the polls and every such challenge for cause, if objected to by the opposite party, shall be tried and determined by the Court without a jury, and the person challenged shall

3. Section 33(2) Jury Act (as amended by the Jury (Amendment) Act 2015).
4. Section 33(3A) of the Jury Act (as amended by s.14 of the Jury (Amendment) Act 2015).
5. Ibid.
6. Section 33(2A) Jury Act (as amended by the Jury (Amendment) Act 2016).

be examined on oath, and shall be required to answer on oath all lawful questions relating to the trial of the challenge.[7] Challenges for cause must be for some specific reason which must be alleged and proved.

7. Challenge to the array for cause may be made by either party. It should be made before the jury is sworn.

8. Counsel seeking to challenge the array must submit his written grounds for the challenge so that the summoning officer can answer the challenge. If the grounds are contested the judge must determine after hearing evidence whether the challenge is borne out. The burden is on the challenger to satisfy the court on the balance of probabilities. Witnesses may be called to support or defeat the challenge. At the outset the judge should remind counsel that a challenge to the array will only be entertained if the summoning officer has acted consciously and deliberately in breach of his duty to summon the panel on a random basis or if the position of the summoning officer is not inconsistent with indifference and bias may be suspected. If the challenge is proved the court will quash the array and adjourn the trial until a new panel can be summoned. If the challenge is overruled, the jury should be called into court in the normal way.

Procedure on Challenge to the Polls for Cause[8]

1. Challenges are made when the jurors are called to the box but before the challenged juror is sworn.
2. The accused should be informed by the clerk of his right of challenge.
3. On a challenge being indicated, the juror should be asked to leave the jury box whilst the remainder of the selected jurors are sworn.
4. Subsequent challenges should be dealt with in the same way.
5. If counsel can state the grounds of challenge without prejudicing his client in the eyes of the jury, or embarrassing the juror concerned, the judge may be able to deal with the matter in open court briefly and informally (e.g. in a case where the ground is that a juror is related to a potential witness).
6. Where it is not possible to deal with the matter informally, the judge should ask the sworn jurors to retire to their room in the charge of the jury police officer and the remainder of the panel should be asked to leave the court for the time being.
7. The challenged juror should be kept outside the court in the care of an usher but close by in case it is necessary to question him.

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7. Section 33(4) Jury Act.
8. Adapted from the Crown Court Bench Book 2010.

8. The judge must next decide whether to hear the challenge in open court or to exclude the public and the press.

9. If the grounds of challenge, make it desirable in the interests of justice and of the challenged juror to close the court the judge should announce that the court will sit "as in chambers" and the public and the press should be asked to leave the court.

10. Challenges should not be heard in the judge's chambers.

11. If the ground of challenge appears *prima facie* valid and the facts are contested the Judge must decide the facts.

12. The burden of proof is on the party challenging and is the civil burden, that is, on a balance of probabilities.

13. The judge can hear evidence (which should be given on the *voir dire* oath) and himself question the juror and may permit counsel to ask questions directed to the particular ground of challenge alleged; speculative questions seeking to establish the basis for a challenge on different grounds are not permitted.

14. After hearing the evidence and any submissions, the judge should announce his findings, which should be recorded on the court record.

15. If the challenge is allowed, the juror should be discharged and a fresh juror called to take his place when the remainder of the jury have returned.

16. If the challenge is disallowed, the judge should caution the juror not to disclose to other jurors any of the matters that have been considered in the hearing of the challenge and also not to allow the fact that he has been challenged to influence him in any way.

EXAMPLE

In *R v Solomon*[9] the court held that a challenge in the form: 'Challenged for cause. I have reason to believe that this juror may have leaning or affection towards the deceased person, that being so he will not be able to adjudicate impartially on the issue' was apart from being too general, somewhat nebulous and would not enable the Crown to counterplead by way of objection. There must be no fishing. A challenge under s.33 of the **Jury Act** contemplates that a *prima facie* case must first be made out in support of the challenge for cause before the juror can be questioned on the *voir dire*. Cf *R v Kray and others:*[10] Judge permitted examination of jurors before challenge.

9. 12 JLR 608.
10. 53 Cr App R 412.

2-3 Discharging a Juror or Jury

Sources: **Judicature (Supreme Court) Act; Jury Act; Crown Court Compendium 2016**

LEGAL SUMMARY

1. At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness[11] or on application the judge may change the venue pursuant to section 34 of the **Judicature (Supreme Court) Act**.

2. The legislature presumes the power at common law to discharge a juror. Section 31(3)(a) of the **Jury Act** states:

   > Where in the course of a criminal trial any member of the jury dies or is discharged by the Court through illness or other sufficient cause, the jury shall nevertheless, so long as the number of its members is not reduced by more than one, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

3. It is for the judge in the exercise of his discretion to decide what amounts to sufficient cause. Examples of situations in which it may be necessary to discharge a juror include:

   a. illness,[12]

   b. misconduct,[13]

   c. related to the deceased,[14]

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11. Adapted from Crown Court Compendium 2016.
12. *R v Hornsey* [1990] Cr L R 731 (discharge after retirement).
13. See *R v Mirza* [2004] 1 AC 1118 – Lord Slynn of Hadley stated inter alia: "49. It is apparent that from time to time jurors may be influenced by what is said or done to them—maybe they will even be bribed—outside the court room or in the jury room. It is also apparent that from time to time jurors may show in the course of the trial, or their deliberations, that they have been influenced by strongly held views which result in prejudice or bias which override their obligation to listen and decide impartially. The result in either case might be seen as an unjust decision by the jury."
14. *Gibson v R* 5 WIR 450.

d. personal knowledge of the defendant or relative of the defendant,[15]

e. a juror having an unavoidable personal commitment.[16]

4. Guidance provided by the UK Consolidated Criminal Practice Directions[17] is instructive:

> The Judge must decide for him or herself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty. In shorter cases, it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors:

Moreover,

> The good administration of justice depends on the co-operation of jurors, who perform an essential public service. All such applications should be dealt with sensitively and sympathetically and the trial Judge should always seek to meet the interests of justice without unduly inconveniencing any juror.

5. If there is some indication that an improper approach has been made, it is the duty of the judge to investigate the matter including questioning the individual jurors as to whether they have been compromised. The judge will then make an informed decision as to whether any or all of them should be discharged.[18]

6. In the event of a juror being discharged, the remaining jurors will deserve an explanation as to why that person is absent. In cases in which the juror is suspected of engaging in misconduct, care will be needed. In cases where the juror has been discharged for other reasons, few difficulties will arise.

7. The remaining jurors may also need an explanation as to what if any regard they are to have to the comments and views expressed by the discharged juror. In *Carter,*[19] Lord Judge CJ explained:

> [19] It would therefore be wholly unrealistic for a direction to be given to the remaining members of the jury to ignore the views expressed on any subject by the departed juror. What matters is that the discussion between the remaining jurors will continue to ebb and flow and, on reflection, the views expressed by the departing juror would have been examined and either accepted wholly or in part, or rejected wholly or in part, or treated as irrelevant by the remaining jurors in the course of reaching the decisions to which their conscience impels them. The eventual verdict, however, is no more than that of the jurors who have been party to it as a result of the process of discussion in the

15. See *R v Gough* [1993] AC 646; (1993) 188 97 Cr App R (juror a neighbour of the accused's brother).
16. *Hambery* [1977] QB 924; *R v Richardson* [1979] 1WLR 1316.
17. 2013 Edition - IV42.3.
18. *R v Blackwell* [1995] 2 Cr App R 625.
19. [2010] EWCA Crim 201.

> privacy of the jury room. The views expressed by the departed juror will only be relevant to the extent that the remaining jurors will have adopted or assimilated those views as their own.

***NOTE:* Paras 6 and 7 are adaptations of paras 5 and 6 Cap. 2-4 of Crown Court Compendium 2016 with minor modifications to reflect the law that in this jurisdiction the number of jurors trying a case may only be reduced by one (s.31(3) Jury Act).**

DISCHARGING THE ENTIRE JURY:

8. Section 45(2) of the **Jury Act** provides:

> In cases of necessity such as when a juror is taken ill during any trial and the number of its members is reduced by more than one, or a prisoner is by illness or other sufficient cause incapable of remaining at the bar, or for other cause deemed sufficient by the Judge the Judge may discharge the jury

9. 'Necessity' may be described as a high degree of need for such discharge made evident in the judge's mind.

10. It is for the judge alone to decide if a necessity exists for discharging the jury and his decision is not subject to review or appeal.[20]

11. The judge may discharge the jury if misconduct of one or more of the jurors is discovered before verdict.[21]

12. Where prejudicial information has been elicited during trial which no judicial warning can cure the jury should be discharged.[22]

13. The judge may also discharge a jury after they have retired for at least an hour if the judge is of the view that there is no reasonable probability that the jury will arrive at a verdict.[23]

14. If information about a jury irregularity comes to light during an adjournment after verdict but before sentence, then the trial judge should be considered *functus officio* in relation to the jury matter, not least because the jury will have been discharged.

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20. *R v Lewis* [1909] 2 Cr App R 180; *R v Gorman* [1987] 2 All ER 435.
21. *R v Box and Box* [1964] 1 QB 430; *R v Blackwell* [1995] 2 Cr App R 625.
22. *R v Pratt and Morgan* 21 JLR 334; *R v Norris Taylor* 25 JLR 321; *McClymouth (Peter) v R* (1995) 51 WIR 178 – in the course of the trial the eyewitness blurted out that the appellant was a repeat murderer in addition to casting aspersions on his counsel.
23. Section 45(1) Jury Act.

PROCEDURE

Discharge of a Juror for Personal Reasons

15. A request will normally be brought to the attention of the judge either by a note or message from the juror via an usher.
16. The first priority is to ensure that all relevant information has been provided. This can be done by the usher asking any necessary further questions of the juror and writing down the answers.
17. The advocates should be informed. In most cases they may be shown the note or told in detail of the juror's difficulty. If the juror's problem is very personal it is appropriate to indicate to the advocates the general nature of the problem without going into detail.
18. Alternatives to discharge should be considered particularly in longer trials e.g. an adjournment to permit the juror to attend a hospital appointment or an adjournment for one or two days for a juror to recover from temporary illness.
19. A judge may be assisted by submissions from the advocates but whether a juror is discharged or not is a matter for the discretion of the judge.
20. If a juror is discharged part way through the trial he should be discharged from current jury service altogether or until the case he has been trying is complete; and he should be given a clear warning not to speak to the remaining jurors about the case.
21. If the juror is at court rather than absent through illness or other cause, the juror should be asked to come into court without the other jurors, told that the request has been considered, and either indicate the arrangements to be made to enable him to continue sitting or thank the juror for his services to date, formally discharge him and give instructions as to future service (see above).

Discharge of Whole Jury for Irregularity Within the Trial Process

22. If the discharge is as a result of something that has happened within the trial e.g. a witness or advocate referring to matters that are not admissible in evidence and are seriously prejudicial, the matter will be subject to submissions from the advocates.
23. The decision whether or not to discharge will take into account the nature and seriousness of the irregularity and also that juries are expected to abide by their oath/affirmation to try the case according to the evidence.
24. If the decision is not to discharge, consideration must be given to what, if anything, the jury are to be told. In many cases a rehearsal of the inadmissible material draws unnecessary attention to a matter which may have appeared insignificant to the jury.

25. If the jury have to be discharged, consideration must be given to what they should be told. If the matter is to be retried before another jury it is generally prudent to tell them no more than that something has arisen which makes it impossible for the case to proceed. They should be thanked for their work to date and if a retrial is to commence immediately consideration must be given to releasing the jurors from further service until the trial is complete.

Discharge of a Juror or Jury for Irregularity Reported in the Course of the Trial

EXAMPLE 1: Juror released for Personal Reasons

I have received your message about [specify]. I accept that it is impossible for you to continue to serve as a juror in this trial and so I am discharging you from serving any further on this jury.

The trial will continue with the other xx jurors.

Until this case is over, you must not speak about it to anyone at all, including the remaining jurors, your family, friends or anyone else. This is very important to make sure the trial is fair.

Thank you very much for the work you have done on this case. I am sorry that you cannot continue.

EXAMPLE 2: Jury Discharged

Something has happened that means that this trial cannot continue and I must discharge you.

This means that your work in this case is at an end. It is very rare for a jury to have to be discharged before it can consider its verdict(s).

Because the case may now have to be tried by another jury, I cannot explain the reasons for the fact that the trial has ended in this way.

I realise that it must be very frustrating for you not to be able to finish the job you started and I do thank you very much for the work that you have done on this case. I am sorry that you cannot continue.

[If appropriate: Also, you will not have to serve on another jury until [e.g. until this case is over].]

***NOTE:* In every case it is important to thank the jury properly for the work that they have done on the case.**

2-4 Conducting a View of the Locus In Quo

Sources: **Crown Court Compendium 2016; *Archbold* 1997**

LEGAL SUMMARY

1. The judge has a discretion to permit the jury to view the locus in quo at any time during the trial. The object of such a visit is to enable the jury to understand and follow the evidence. It is not in substitution for evidence.[24]

2. A precondition to a decision to visit is that there is evidence that the locality is unchanged, since the commission of the alleged offence.[25]

3. No view of a locus in quo or inspection of any object referred to in evidence may take place after the conclusion of summing up.[26]

4. The judge should take precaution not to allow improper communication being made to the jury at the view. There should be no communication between the juror and witnesses at the locus except to give demonstrations. Any question a juror wishes to ask, should be asked through the judge. Counsel may also be allowed to ask questions through the judge.

5. The judge must be present at any view even when no witnesses are present, to control the proceedings and ensure that the correct procedure is followed.[27] A view is part of a criminal trial and the accused has a right to be present unless he misconducts himself or absconds during trial.[28]

6. For one juror to attend the view and then report back to the others is a breach of the principle that the jury should remain together at all times when evidence is being received.[29]

PROCEDURE

7. Planning:

   a. If the judge decides that a view is to be held, careful arrangements must be made and all those attending the view must know precisely what procedure is to be adopted: the judge must produce clear ground rules.

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24. *R v Warwar* 11 JLR 370, (1969) 15 WIR 298; *R v Herman Williams* 12 JLR 541.
25. *R v Warwar*, *Ronald Masters and Anor v Regina* SCCA 196 & 197/02 [20.12.04] – Any variation or alteration to the geographical or structural nature of the locality would be more likely to confuse than clarify the issues of fact" (per Harrison JA in *R v Kirk Manning* SCCA 43/99 [20.3.00]).
26. *R v Lawrence* [1968] 52 Cr App R 163.
27. *R v Hunter* 81 Cr App R 40, [1985] 1 WLR 613.
28. The Charter of Fundamental Rights and Freedoms s.16(6).
29. *R v Gurney* [1976] Crim LR 567.

b. When on a view the court is still sitting and proper procedures must be followed throughout.

c. If any particular place or other specific feature of the scene is to be identified and viewed, the procedure for doing so must be agreed in advance. It may be helpful to discuss and agree with the advocates a list describing what the jury should look at. This can then be given to the jury and explained to them before leaving court. In an appropriate case this can be supplemented with an annotated plan setting out, for example, a route and/or features that they should look at. Such preparation should reduce the need for anyone to have to communicate with the jury during the view.

d. The jury should be told to take any relevant plans and photographs with them.

e. When it is suggested that a defendant, particularly one who is in custody, is to attend the view great care must be taken. It may be that one or more dock officers will be needed to escort the defendant/s but care needs to be taken with regard to the use of handcuffs. Account must be taken of any risk of escape.

8. Travel:

a. Travel to and from the location must be very carefully regulated. It should start and finish at the court for everyone involved. It is important to ensure that there is no risk of contamination at any stage of the travelling process.

b. Usually travel is by a single coach. It is important that different parties, in particular the jury, the defendant and any witness/es are kept apart and go to and remain in appropriate seats.

c. Talking en route is permitted but on no account may anyone at all talk about the case.

d. If a defendant is to travel to the location, dock officer/officers will escort him as appropriate.

9. At the view:

a. Any communications between the judge and the advocates, any witness/es and/or the jury must be recorded by the court reporter.

b. Apart from communicating with his advocate, any D must remain silent.

c. If any evidence is taken this must be done in the same way as in court: it must be recorded and audible to the judge, advocates, defendant/s if present and all members of the jury.

d. Jurors may ask questions but only by writing a note, not orally. The note should be handed to the judge who should discuss the question with the advocates, if appropriate without the jury (as it would be in court). In some cases, it may be possible to deal with the question at the view; in others it may not be possible to

deal with it until the court has reassembled in the court room in which event this should be explained to the jury.

EXAMPLE

NOTES:

***[THESE* instructions should be given in court before the view takes place.**

***THIS* example does not contain all possible instructions that may have to be given: other instructions will be case-specific, depending on the location and the purpose of the view.]**

Members of the jury, you have asked if you can go to the scene of the incident. I have discussed this with the advocates and have decided that this should be done. Arrangements are being made so that we can all go to the scene together.

There are specific rules that have to be followed for this visit and I'm going to explain them to you now.

At 10 o'clock tomorrow morning, we will all meet in this courtroom [add if appropriate: and I will give you directions about what you should look at when you get to the scene and tell you what documents you should take with you]. The ushers will then take you to [specify location e.g. the car park]. From there a bus will take us to the scene. We will all get onto the bus in a particular order. The defendant will get on first and sit at the back [in the company of the dock officer]. Then the lawyers, [if applicable: the witness, W, with an usher], followed by me and the court clerk. Finally, you and your ushers (who will stay with you throughout the journey and at the scene) will get on. You will sit at the front of the bus but you do not need to sit in any specific order.

While you are on the bus to and from the scene you must not talk about the case, even to each other. You may speak about things other than the case, but only to each other and your ushers.

You must not speak to anyone else.

We are effectively taking the court to the scene so you must follow all the rules that you do in court. That includes not using any mobile phones or electronic devices either in the bus or at the scene.

When we get to the scene you must stay together as a jury in one group and in a place where you can all hear everything that is said, except if I need to discuss a particular point privately with the advocates. You must not talk at the scene. You must simply observe [and listen if any evidence is given]. If you want to ask a question, write it down and hand it to the usher.

When the visit is over we will return to court on the bus. We will get on the bus in the same order, so you will get on last and sit in exactly the same places as before. When we get back to court you will be taken to the jury area first before we all come back into the courtroom.

It is very important that everyone follows these instructions. I will remind you of them again when we meet in court tomorrow morning.

3. TRIAL MANAGEMENT

3-1 Opening Remarks to the Jury
3-2 Defendant Unfit to Plead and/or Stand Trial
3-3 Trial in the Absence of the Defendant
3-4 Trial of One Defendant in the Absence of Another/others
3-5 Defendant in Person
3-6 Special Measures
3-7 Intermediaries
3-8 Interpreters

3-1 Opening Remarks to the Jury

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

1. There is no requirement for a judge to give directions to jurors at the start of a trial. The practice has developed in this jurisdiction for the judge to address the potential jurors on topics such as whether they have any personal connection with anyone involved in the case, bias, fair trial and their role and duty as judges of facts, extraneous matters and so on.

2. It is recommended that judges give serious consideration to the engagement of the practice of opening remarks. "The Instructions given to the jury at the outset will reduce the risk of jurors engaging in behaviour which may jeopardise the fairness of the trial and lead to them being discharged."[1]

3. In this regard the English Guidance provided in Criminal Practice Direction 26G.3 as stated in the 2016 Crown Court Compendium may be adapted.

   The Guidance provides-

   At the start of the trial

   26G.3 Trial judges should instruct the jury on general matters which will include the time estimate for the trial and normal sitting hours. The jury will always need clear guidance on the following:

1. See para. 2 of Cap. 3.1 of the Crown Court Compendium (2016).

i. The need to try the case only on the evidence and remain faithful to their oath or affirmation;

ii. The prohibition on internet searches for matters related to the trial, issues arising or the parties;

iii. The importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;

iv. The importance of taking no account of any media reports about the case;

v. The collective responsibility of the jury. As the Lord Chief Justice made clear in *R v Thompson and Others*[2]

> [T]here is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed…. The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.

vi. The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge at the time, and not to wait until the case is concluded. The point should be made that, unless that **is** done while the case is continuing, it may not be possible to deal with the problem at all.

Subsequent reminder of the jury instructions

26G.4 Judges should consider reminding jurors of these instructions as appropriate at the end of each day and in particular when they separate after retirement.

DIRECTIONS

4. The jury should be informed of the estimated length of the trial; of the normal court sitting hours; of the short breaks, if any, which it is intended to take if the evidence allows for this; and of any variation to those hours on any particular day(s) of which the court is aware at the outset. The jury should be kept informed of changes to the trial schedule.

5. The jury may be informed of the stages of the trial – prosecution opening, evidence, closing speeches, summing-up, deliberations and verdict(s).

6. [Optional]. The jury may be given a brief introductory summary of the issues in the case (whether orally and/or in a short document), emphasising that it is intended as no more than that. Any doubts about whether such a summary should be given, or about the terms in which it should be given, should be discussed in advance with the advocates in the absence of the jury.

2. [2010] EWCA Crim 1623, [2011]1 WLR 200, [2010] 2 Cr App R 27.

7. The judge's tasks during the trial are to see that it is conducted fairly, to rule on any legal arguments that arise, and to sum up the case at the end. Because the judge alone is responsible for legal decisions, he will hear and rule on any legal arguments in the absence of the jury. This is standard practice in criminal trials.

The Jury's Responsibilities

8. The jury's tasks are to weigh up the evidence, decide what has been proved and what has not and return a verdict / verdicts based of their view of the facts and what the judge will tell them about the law.

9. Any juror should indicate immediately if he is not able to hear any of the evidence.

10. If a juror realises at any stage that he recognises someone connected with the case, notwithstanding that he did not do so when the names were read over before the jury were sworn, he should write a note immediately and pass it to the usher who will give it to the judge.

11. The jury must try the case only on the evidence and arguments they hear in court. From this it follows that throughout the trial each juror:

    (1) must disregard any media reports on the case;

    (2) must not discuss the case at all with anyone who is not on the jury, for example with friends or relatives, whether by face to face conversation, telephone, text messages, chat-lines or social networking sites such as Facebook or Twitter;

    (3) must not carry out any private research of their own with a view to finding information which is or might be relevant to the case, for example by referring to books, the internet or search engines such as Google, or by going to look at places referred to in the evidence;

    (4) must not share any information which is or might be relevant to the case and which has not been provided by the court; and

    (5) must not give anyone the impression that he or she does not intend to try the case on the basis of the evidence presented.

12. These instructions are given for good reasons:

    (1) They aim to prevent the jury being influenced by opinions expressed by people who have not heard to the evidence.

    (2) The prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s); otherwise the trial cannot be fair.

    (3) Information obtained from outside sources may not be accurate and may mislead the jury.

13. It is vital in the interests of justice and in the jury's own interests that they should follow these instructions strictly. If they do not it may well be necessary to halt the trial and start again with a new jury, causing a great deal of delay, anxiety and expense. In fairness to the jury they should be aware from the beginning that if they do not follow the instructions they may well be guilty of a criminal offence and at risk of a fine or sentence of imprisonment.

14. Although the jury must not discuss the case with anyone outside their own number they are allowed to talk amongst themselves about the case, as it progresses. However, they should only do so when they are all together in the privacy of their jury room: they should not discuss the case in "twos and threes". The jury should wait until they have heard all of the evidence before forming any final views.

15. Each member of the jury is responsible for seeing that all the jurors comply with all these instructions.

16. The jury must be told that if they have any difficulties or problems while serving as jurors, including any problem they may have amongst themselves, they should write a note to the judge immediately and give this to the usher. If any such matter is not reported until after the trial is over it may be too late to do anything about it.[3]

17. These directions apply throughout the trial, even if the judge does not repeat them.

18. When the trial is over jurors may discuss with others their experience of being on a jury and speak about what took place in open court. However, they must never discuss or reveal what took place in the privacy of their jury room, whether by talking or writing about it, for example in a letter, text message or other electronic message such as on Twitter or Facebook.

OTHER INFORMATION:

19. [Optional]. Members of the jury will sit in the same places in the jury box throughout the trial.

20. [Optional]. If any juror needs to ask a question or give any information to the judge during the trial they should write a short note and give it to the usher [the contents of such notes should be brought to the attention of the Advocates].

21. [Optional]. Any juror may request a break at any time.

22. [If appropriate]. Describe any arrangements made for smokers during any breaks.

23. [If appropriate]. Notepaper and writing materials have been made available for use by the jury. The jury may take such notes as they find helpful. However, it would be better not

3. *R v Mirza* [2004]1AC 1118.

to take so many notes that they are unable to observe the manner/demeanour of the witnesses as they give their evidence. The jury are not obliged to take any notes at all if they do not wish to. In any event the judge will review the evidence when summing up at the end of the trial.

24. [If appropriate]. The jury will be provided with a file/files of documents/photographs. The jury may mark these if they find it helpful.

25. If any witness is giving evidence by special measures, the measures should be described to the jury, who should be told that the use of such measures is becoming increasingly common-place in criminal trials, that it is simply to put the witness at ease as far as possible, and that their use in this case should not affect the jury's view of the evidence of the witness concerned and is no reflection on the defendant.

26. If any witness or a defendant requires an interpreter, the jury should be told why; from what language the evidence will be interpreted into English; and the extent to which the interpreter will be assisting the witness/defendant.

27. If it is clear that security arrangements are in place in court, or if the judge has authorised security arrangements for the jury, the jury should be told that such arrangements are no reflection on the defendant, and must have no bearing on their consideration of the case.

NOTE: **The opening remarks must reflect, as appropriate, the information set out above but are personal to the style of the judge who makes them. Accordingly no example is given.**

3-2 Defendant Unfit to Plead and/or Stand Trial

Sources: ***Archbold*** **2001, 1-90 page 48 et seq;** ***Blackstone*** **2001 A3.38 page 62; Criminal Justice (Administration) (Amendment) Act 2006; Judicial Studies Board Crown Court Bench Book July 2001 update**

LEGAL SUMMARY

1. When on arraignment D stands mute or refuses to answer the question arises as to whether he is mute of malice or by visitation of God. Section 11 of the **Criminal Justice (Administration) Act** provides as follows:

> If any person, being arraigned upon or charged with any indictment,…shall stand mute of malice or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter

> a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

2. The issue of whether D is mute of malice or by visitation of God is essentially a jury matter and not one which the judge can determine for himself.[4]
3. If the jury determines that D is mute of malice, a plea of 'Not Guilty' shall be entered in accordance with section 11 of the **Criminal Justice (Administration) Act**; if the jury finds that D is mute by visitation of God, it will have to determine his fitness to plead.
4. Where at any stage of criminal proceedings any question arises as to the fitness[5] of a defendant, the Court may of its own motion, or on the application of the defendant or the prosecutor, direct that the issue of the fitness of the defendant be tried.[6]
5. If the issue is raised by the defence, the burden of proof is on them to establish on a balance of probabilities that the accused is unfit;[7] if raised by the prosecution, they bear the burden of proof beyond reasonable doubt.[8]
6. A defendant who is deaf and dumb may plead on arraignment through an interpreter who shall be sworn as follows:

> I swear by Almighty God that I will well and faithfully interpret and make true explanation of all such matters and things as shall be required of me according to the best of my skill and understanding.

The court may also request of the interpreter as follows:

> Do you solemnly swear (or affirm) that you will truly, accurately and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God.

Trial Before Judge and Jury:

7. The **Criminal Justice (Administration) Act** provides as follows:

> 25A.- (1) Subsections (2) and (3) shall apply where a direction is made under section 25(2) in the case of a defendant who is being tried, or is to be tried, before a court composed of a Judge and jury.
>
> (2) If the direction is made-

4. *Hope and Davis v R* (1998) 56 WIR 62.
5. "Fitness" means fitness to stand trial (including fitness to plead) and the words "fit" and "unfit" shall be construed accordingly – s.25(1) The Criminal Justice (Administration) Act.
6. Section 25(2) The Criminal Justice (Administration) Act.
7. *Robertson* [1968] 3 All ER 557.
8. *R v Podola* [1960] 1 QB 325, [1959] 3 All ER 418.

a. before the defendant is given in charge to the jury for trial on indictment, a jury composed of the number of jurors required in respect of the indictment shall be sworn to try that issue and, if the defendant consents, the issues to be tried on the indictment;

b. after the defendant has been given in charge to the jury for trial on indictment, the jury shall be sworn to try the issue of fitness in addition to the issues in respect of' which the jury is already sworn.

(3) The issue of fitness shall be put to a jury using the form of words set out in Form A of the Fourth Schedule, and the oath to be sworn to by the jury shall be in the form of words set out in Form B of the Fourth Schedule.

The Fourth Schedule reads as follows:
FOURTH SCHEDULE (Sections 25A, 25D and 25E)
Form A (Section 25A)
Form of words for putting the issue of fitness to a jury
"Members of the Jury, the defendant A.B. is charged as follows:
The defendant A.B. is indicted for the offence of ___________
for that he on the____ day of _____and it is alleged that he is not fit to stand trial upon this indictment. It is your charge therefore to say, having heard the evidence, whether or not he is fit to stand trial."

Form B (Section 25A)
Oath of jurors charged to try the issue of fitness
"I swear by almighty God that I will faithfully try whether the defendant at the bar is fit to stand trial, and give a true verdict according to the evidence."

8. In *Pritchard* [9] Alderson, B the trial judge told the jury:

> There are three points to be enquired into:— First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence— to know that he might challenge any of you [any jurors] to whom he may object— and to comprehend the details of the evidence,... if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters".

9. *Rex v Pritchard* (1836) 173 ER 135 (Nisi Prius).

Trial Before a Judge:

9. Section 25A(4) of the Act provides as follows:

    (4) Where the issue of fitness arises in respect of a defendant -

    a. who is being tried, or is to be tried, before a court other than a court composed of a judge and jury; or
    b. in any other criminal proceedings at any stage other than those referred to in subsection (2),

    the court shall try the issue and render a verdict.

Procedure Where Defendant is Found Unfit:

10. Section 25C provides as follows:

    (1) Where the verdict on trial of the issue of fitness is that the defendant is unfit-

    a. any plea that has been made shall be set aside and any jury empanelled in respect of the case shall be discharged; and
    b. the Court may make such order under subsection (2) as it thinks most suitable in all the circumstances of the case.

    (2) The Court may-

    8. order that the defendant be remanded in custody at the Court's pleasure;
    9. order, in accordance with the provisions of the Fifth Schedule, that the defendant be admitted, at the Court's pleasure, to a psychiatric facility named in the order;
    10. make, in accordance with the provisions of the Sixth Schedule, a supervision and treatment order in respect of the defendant;
    11. make, in accordance with the provisions of the Seventh Schedule, a guardianship order in respect of the defendant.

    (3) A verdict of unfit to stand trial shall not prevent the defendant from being tried subsequently if he becomes fit.

11. The issue of fitness to plead is different from the defence of insanity which is relevant to the time of the incident in respect of the indictment. Fitness to plead deals with the accused's mental capacity at the time of trial.

EXAMPLE[10]

The only question for you to decide is whether this defendant is under such a disability of mind that he is not fit to be tried on this indictment.

As it is the prosecution who assert that he is under such a disability, it is for the prosecution to prove that he is not fit to be tried and they must prove it so that you are sure of it.

(Alternatively:) As it is the defence who assert that he is under such a disability, it is for the defence to prove that he is not fit to be tried. They need only prove this on the balance of probabilities. This means that the defence must show that it is more likely than not that he is unfit to stand trial.

The test which you must apply is this: is the defendant capable of understanding these proceedings so that he can:

1. Put forward any proper defence he might have; and
2. Challenge a juror to whom he might have cause to object; and
3. Give instructions to his lawyers. This means that he must be capable of telling his lawyers what his case is and whether he agrees or disagrees with what the witnesses have to say;

   and
4. Follow the evidence?

If the defendant can do all of these things you must find that he is fit to be tried. If [you are sure] [you find on the balance of probabilities] that he cannot, you must find that he is not fit to be tried.

[The mere fact that the defendant is highly abnormal/not capable of acting in his own best interests is not conclusive that he is unfit to be tried, although it is a factor which you may take into account].

3-3 Trial in the Absence of the Defendant

Source: **Charter of Fundamental Rights and Freedoms (JA) *Archbold* 38th Edition, Section 3 para. 328; Crown Court Compendium 2016**

LEGAL SUMMARY

1. "There must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he must hear the case made against him and have the opportunity…of answering it. The presence of the accused means not merely that he must be physically in attendance, but

10. Judicial Studies Board Crown Court Bench Book July 2001 update.

also that he must be capable of understanding the nature of the proceedings" (per Lord Reading CJ): *R v Lee Kun.*[11]

2. See the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**, 2011 which provides inter alia, as follows:

   16(6) Every person charged with a criminal offence shall -

   (g) except with his own consent, not be tried in his absence unless

   (i) he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence; or

   (ii) he absconds during the trial.

3. The authorities show that the presence of a defendant on trial for a misdemeanour is not indispensably necessary: *R v Carlile*,[12] See also: *R v Lloyd Chuck,*[13] and *R v Edgar Manning et al.*[14] With respect to felonies, however, the rule is that the accused must in general, be present at his trial. But the rule is not absolute; the trial judge has a discretion. See *R v Howson.*[15] Roskill LJ in *R v Jones (No. 2)*[16] made this abundantly clear. He said at page 734:

> …The cases show, as this court ventures to think without a shadow of doubt, that whatever the case might be in a trial for felony, in a trial for misdemeanour the position was different and that it was a matter for the discretion of the presiding judge whether or not the trial should proceed in the absence of the prisoner.
>
> 'Therefore this court is clearly of the view that there was in this case a discretion vested in the trial judge. Counsel for the applicant sought to rely on a passage in the seventh report of the Criminal Law Revision Committee dealing with felonies and misdemeanours where the distinguished members of that committee said: (Cmnd 2659, p 17, para 61).
>
> 'In felony the accused must in general be in court throughout the trial, but this is not necessary in misdemeanour. Although each accused is nearly always present even in misdemeanour, it is occasionally convenient that the trial should continue in the absence of one or more of them, especially if it is a long trial and there are several accused. We recommend that the misdemeanour rule should apply to all trials on indictment. Obviously the power to continue a trial in the absence of the accused would be used sparingly and only when this would not prejudice the defence.'

11. (1916) 11 Cr App R 293 at p. 300. Taken from *Archbold* 38th Edition, Section 3 para. 328.
12. (1834) 6 C. & P. 636.
13. RMCA No 23/91, [31. 7. 91], *R v Lloyd Chuck* (1991) 28 JLR 422 (CA).
14. (1993) 30 JLR 360.
15. (1982) 74 Cr App R 172 CA.
16. [1972] 2 All ER 731.

4. In *R v Lee Kun*[17] Lord Reading CJ made the point in definitive terms -

> No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial: *R. v. Berry (1897) 104 L.T. Jo. 110* per Wills J. Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused.

5. Rose LJ, in handing down the judgment of the court in *R v Hayward, R v Jones, R v Purvis*[18] (affirmed in *R v Jones (Anthony)* [2002] UKHL 5 at [13], [2003] 1 AC 1) stated:

> [22] In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these.
>
> (1) A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
>
> (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to

17. [1914–15] All ER Rep 603 at page 605.
18. [2001] All ER (D) 256 (Jan), [2001] EWCA Crim 168.

> present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.
>
> (6) If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

6. The guidelines referred to above were subsequently incorporated in the English Criminal Practice Directions 2015 (CPD III).
7. Good practice dictates that defendants should be reminded at the plea and case management hearing of their obligation to maintain contact with their lawyers and to be aware of the date of their trial.[19]
8. In summing up the case to the jury, the judge must warn the jury against speculating against the reasons for the absence of the defendant and that absence is not an admission of guilt and adds nothing to the prosecution case.

DIRECTIONS: At the Outset of the Trial or the First Time of Absence

9. Point out to the jury that the defendant is absent.
10. If it is appropriate to tell the jury the reason (e.g. illness), do so and direct them that they must not hold the defendant's absence against him.
11. If it is not appropriate (e.g. misbehaviour or voluntary absence), tell the jury that they must not (a) speculate about the reason for the defendant's absence or (b) treat it as providing any support for the prosecution's case.

DIRECTIONS: When Summing Up

12. Repeat the earlier directions.

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19. *Lopez* [2013] EWCA Crim 1744; [2014] Crim LR 384, CA.

13. If the defendant's absence occurred after he gave evidence, or made an unsworn statement from the dock, no more is to be said.
14. If the defendant's absence occurred before the time when he could have given evidence or made his unsworn statement (and so no warning about inferences from silence at trial has been given) the jury must be told that they must not draw any conclusion against the defendant because he has not given evidence. They may be told that as a matter of fact he has given no evidence which is capable of explaining or contradicting the evidence given by witnesses called by the prosecution.

EXAMPLE

If a reason can be given for D's absence: D is unable to come to his trial because [specify].

If no reason can be given (e.g. because D has absconded):D is not here.

In any event:

But he has previously pleaded 'Not Guilty' [add if appropriate: and he has told his lawyers what his case is and they will be representing him during the trial.]

The fact that D is not here does not affect your task, which is to decide whether or not he is guilty of the charge(s) against him. You must not speculate about the reason he is not here. His absence is not evidence against him and must not affect your judgment.

But because D is not here you will not have any evidence from him to contradict or explain the prosecution's evidence. [If appropriate: He did answer questions when he was interviewed by the police and his answers will be part of the evidence for you to consider. But, you should bear in mind that what he said to the police was not given under oath and he will not be cross-examined.]

3-4 Trial of One Defendant in the Absence of Another/Others

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

1. In some cases a co-defendant is named on the indictment but will not be taking part in the trial because he has already pleaded Guilty or is to be tried separately.
2. Reference to the existence of the defendant who is not on trial without reference to his plea or conviction may be necessary if the jury is properly to understand the present proceedings. In such a case the jury need to be warned not to speculate on reasons for his absence but to try the case on the evidence.

3. In *Regina v Usman Ahmed*[20] the co-accused, did not attend on the first day of trial. The prosecution, relying on *R v Hayward and Ors,* [21] applied to proceed in her absence. The defence submitted, firstly, that the trial should not proceed in the absence of the co-accused, and secondly, that if that argument failed, then the trials should be severed. The defence submitted it was inevitable that there would be speculation by the jury as to the reasons for her absence, and that this might lead the jury to conclude she had a reason to run which would prejudice the applicant. The Recorder rejected those submissions. He was satisfied that the test for trying the co-accused in her absence was satisfied. So far as prejudice was concerned, he was satisfied that an appropriate direction could be given to the jury and that the co-accused's interview could be edited to cure any prejudice arising from it. The court held that a judge must have regard to all the circumstances of the case, including the public interest, the interest of any complainants and witnesses, the risk of the jury reaching an improper conclusion about the absence of a defendant, and, in a case involving more than one defendant where not all are absent, the undesirability of separate trials and the prospects of a fair trial for the defendants who are present. So far as the co-accused's absence itself is concerned, at the outset and again in his summing-up the judge gave a proper direction warning the jury against speculating about the reasons for absence, and directing them that absence is not an admission of guilt and adds nothing to the prosecution case.

4. Reference to the other defendant having been convicted or pleaded guilty may be made for example, (1) by agreement of the parties; and (2) if adduced by the Crown or a second co-defendant on trial in the present proceedings.

5. Where evidence is adduced of the conviction or plea of a defendant who is not present the jury need to be directed on its evidential significance. If it is not evidence against the defendant on trial the jury need to be directed to that effect.[22] The evidence is being adduced for information only. If the evidence of the absent defendant's guilt is admissible as evidence against the present defendant the jury will need to be directed carefully as to the limited use it has.

6. "If the evidence is admitted the trial judge should be careful to direct the jury as to the purpose for which it has been admitted, and—we would add—to ensure that counsel do not seek to use it for any other purpose. Of course, it may happen that the judge will either limit or extend that purpose at a later stage of the trial, after hearing submissions from counsel."

20. [2015] EWCA Crim 2238.
21. [2001] All ER (D) 256 (Jan), [2001] EWCA Crim 168.
22. See *The State v Adams and Poole* [1976] 23 WIR 252 (plea of guilty by co-accused).

7. See also Chapter 14-11: Statements in furtherance of a common enterprise.

DIRECTIONS

8. Where a co-defendant is named on the indictment but is not taking part in the trial, if it is possible to do so without prejudice to the defendant being tried, it will be helpful to make the situation the subject of an agreed fact and put before the jury in this way.

9. Where it is not appropriate for the jury to be given any information about the co-defendant they must be directed that they are not trying that defendant, they must not speculate about his position and that it has no bearing on the position of the defendant whom they are trying.

10. Where a co-defendant's plea of guilty has been referred to, the jury must be directed that whilst this information explains the co-defendant's absence it is not evidence in the case of the defendant whose case they are trying and that they must try the defendant solely on the basis of the evidence which they have heard.

11. Where evidence of a co-defendant's plea of guilty has been admitted, the jury must be directed about the potential relevance of that conviction to the defendant's case. They must also be warned that it must not be used for any other purpose (of which example/s may be given as appropriate to the case).

12. Sometimes there is evidence that persons who are not before the court, other than a co-defendant, have been arrested/charged. This should be the subject of discussion with the advocates before speeches and appropriate directions given to the jury.

EXAMPLE 1: Where the situation of an absent co-accused or co-defendant is known to the jury but is not evidence in the case against the defendant on trial

You have heard that X has been convicted of/pleaded 'guilty' to/been accused of the offence(s) for which D is now being tried. You must decide whether D is guilty or not guilty on the evidence given in this trial and X's position must not influence your decision in any way.

EXAMPLE 2: Where evidence of a guilty plea/verdict in respect of an absent co-defendant has been admitted in evidence

You have heard that X has pleaded 'guilty' to/been convicted of [specify], the offence for which D is now being tried. The fact that X has pleaded 'guilty' is evidence that the offence was committed. But it is not evidence that D took part in the offence and you must decide whether or not D is guilty only on the other evidence given in this trial.

3-5 Defendant in Person

Sources: **Charter of Fundamental Rights and Freedom; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Section 16(6)(c) of the **Constitution of Jamaica** provides:

   > "Every person charged with a criminal offence shall –
   > …
   > (c) Be entitled to defend himself in person …"

2. Where a defendant is unrepresented from the outset, the judge should direct the jury, at the start of the trial, that a defendant has a right to choose to represent himself. The jury should be told to bear in mind the difficulty that presents for the defendant:[23] *De Oliveira.*[24]

3. The judge should ask the defendant whether he wishes to call any witnesses in his defence: *Carter.*[25] The judge may need to assist an unrepresented defendant in the conduct of his defence.

4. In some cases a short explanation of the reason the defendant has chosen to represent himself may be appropriate. This may be particularly desirable if the defendant's representation ceases after the trial has started. For example, in *Hammond*[26] the trial judge directed the jury as follows:

   > Members of the jury, just to let you know what the situation is, the defendant [a co-defendant of Hammond] himself has decided to dispense with the services of his counsel. He was given time to consider and I have refused his application to have alternative counsel and, therefore, from now on he is going to represent himself.
   >
   > It has been explained to him that he will be subject to the same rules of evidence and procedure as counsel would have been had they continued to represent him and which apply to all the other defendants and the prosecution in this case.
   >
   > It has also been explained to him that my role in this case is to ensure that the trial is fair, and that there may be some occasions when he needs some guidance so that he complies with those rules, so as to ensure a fair trial not only for himself but also the other defendants and the prosecution.

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23. Adapted from the Crown Court Compendium 2016.
24. [1997] Crim LR 600.
25. (1960) 44 Cr App R 225.
26. [2013] EWCA Crim 2636.

> He has been provided with all the materials counsel have had on his behalf and will continue to be provided with them throughout the trial.
>
> We are going to adjourn now until tomorrow morning to allow him best to consider how to present his case.

5. On appeal Laws LJ stated:

> 23. It is, it seems to us, quite clear from the learning on this subject (see *R. v De Oliveira [1997] Crim. L.R. 600*) that the directions to be given to the jury where a defendant chooses to be, or becomes, unrepresented are very much to be tailored to the particular case. No doubt there were different ways of dealing with the matter.…Although the judge did not spell out in terms the difficulties faced by a defendant acting in person, it is entirely plain that she was at pains to ensure that he was not prejudiced. She invited him to provide her with relevant documents in advance of his cross-examining a co-defendant so that she might warn him of any issues of admissibility. The jury were told that there would be occasions when he would need guidance to comply with proper procedures. They and the judge were, we emphasise, dealing with an intelligent and resourceful defendant….

6. UK Crim. PD 26[27] provides guidance:

26 P.4 If the defendant is not represented, the judge shall, at the conclusion of the evidence for the prosecution, in the absence of the jury, indicate what he will say to him in the presence of the jury and ask if he understands and whether he would like a brief adjournment to consider his position.

26 P.5[28] When appropriate and in the presence of the jury the judge should say to the defendant:

'You have heard the evidence against you. Now is the time for you to make your defence. You may do one of three things: you may give evidence on oath, and be cross examined like any other witness, or you may make an unsworn statement from where you are, in which case you cannot be cross-examined, or you may say nothing, in which event you cannot be cross-examined also.

You may also call any witness or witnesses whom you have arranged to attend court or lead any agreed evidence. Afterwards you may also, if you wish, address the jury. But you cannot at that stage give evidence.

What do you wish to do?

27. Consolidated Criminal Practice Direction issued 2015.
28. Adapted to have regard to availability of unsworn statement in Jamaica.

7. See also Chapter 17-1: Defendant's silence at trial.

DIRECTIONS

8. Directions may have to be given in respect either of a defendant who has decided to represent himself from the outset of the trial or of a defendant who has become unrepresented in the course of a trial as a result of his advocate withdrawing or being dismissed.

If the Defendant is Unrepresented from the Outset of the Trial

9. Before the jury are sworn, ensure through the defendant and the prosecution that the defendant has all of the papers and a pad of paper and pens with which to take notes.

10. Confirm that, if the defendant intends to call witnesses, he has given notice of their names to the prosecution and has arrangements in place to ensure their attendance.

11. Explain to the defendant the extent of his right to challenge a juror.

12. After the jury have been empanelled explain to them and to the defendant the procedure of court including:

    (1) The order of proceedings prior to the calling of evidence, including the explanation to the jury of their responsibilities and the prosecution opening.

    (2) The calling of witnesses by the prosecution.

    (3) The right of the defendant to cross-examine. It is prudent to stress to the unrepresented defendant at this stage that his right is limited to asking questions of the witness that are relevant to the issues in the trial.

    (4) At the close of the prosecution case he will be entitled to give evidence and call witnesses.

    (5) At the close of the evidence he will have an opportunity to address the jury. There are cases where it will be prudent from the outset to indicate the sort of time that might be allowed for a closing address.

    (6) That the court will seek to assist him with procedural matters but will not be able to assist in the presentation of his defence.

13. It is good practice to give the above directions in writing so that:

    (1) they are understood; and

    (2) there can be no doubt about what he was told.

14. It is also good practice to keep a file of all material provided to the defendant by date, so that there can be no doubt about what he has been given.

If a Defendant Becomes Unrepresented in the Course of the Trial

15. Ensure through the defendant and the prosecution that the defendant has all of the papers and a pad of paper and pens with which to take notes.
16. Explain to the jury that the defendant has dispensed with the services of his lawyers or that the defendant is no longer being represented by lawyers.
17. Emphasise that the fact that he is no longer represented is not evidence in the case.

In All Cases

18. Explain to defendant (in the presence of the jury) the procedure for the [remaining parts of the] trial.
19. The prosecution have no general right to a closing speech unless D has called at least one witness[29] or the court permits.

EXAMPLE 1: The Defendant Unrepresented from the Start of the Trial

The defendant, Mr X, has chosen to represent himself in this trial. In our legal system, everyone has a right to represent themselves instead of having a lawyer. But because we do not expect someone who is not a lawyer to be familiar with the procedure in court, I am now going to explain this to him. [Then go through the matters described above with D.]

EXAMPLE 2: Defendant Becomes Unrepresented During the Trial

You will see that Mr A, who has been representing Mr X, is no longer here. This is because Mr X has decided to represent himself. He is entitled to do this. The reason Mr X is now representing himself has no bearing on your verdict and you must continue to consider the case only on the evidence given in court. From now on I will explain matters of procedure to Mr X but he will now present the rest of his case himself.

***NOTE:* See also the direction and commentary in the case of *Hammond* at *paragraph 4* above.**

29. Section10 Evidence Act.

3-6 Special Measures

Sources: **Crown Court Compendium 2016; Evidence (Special Measures) Act**

LEGAL SUMMARY

1. The Act provides for two types of special measures: giving of evidence by video-recording[30] and giving evidence by video-link.
2. The special measures are available, on application (or of the court's own motion[31]) to specific categories of 'vulnerable' and 'non-vulnerable' witnesses:[32]
   (a) Children (under the age of 18 at the time of determination of the application).
   (b) Complainant in criminal proceedings to a sexual offence.
   (c) Where the witnesses evidence is unlikely to be available to the court, or the quality of the evidence is likely to be diminished as regards its completeness, coherency or accuracy (by reason of fear or distress or a physical disability, physical disorder or mental disorder).
   (d) Witnesses who are available, but for whom it is not reasonably practicable to secure attendance.
   (e) The accused (child accused or accused with disability – only video link is available).
   (f) Witnesses in Civil cases or Coroners proceedings.
3. Eligibility is determined by satisfying the statutory criteria for the specific category of witness and by a separate determination as to whether the Court is satisfied that the special measure is appropriate 'in the interests of the administration of justice'. An aide memoir specifying the staged process for applications is to be found at annex 1 of this Bench Book.
4. Other special measures are provided by other statutes and the common law. Directions may permit evidence to be given:
   (i) Behind screens[33]
   (ii) In camera[34]
   (iii) With the aid of an intermediary

30. Specific regulations are in place with regard to the process for video recording evidence and the handling of recordings: See the Evidence (Special Measures)(Video Recorded Evidence) (Criminal Proceedings) Regulations 2015.
31. See s.3(1) of the Evidence (Special Measures) Act.
32. Reference should be made to sections 2, 3 and 4 for precise wording related to categories of eligibility.
33. *R v X and Ors* 91 Cr App R 36.
34. Section 23 of the Criminal Justice (Administration) Act.

(iv) With the aid of a device to communicate questions or answers

(v) Anonymously[35]

(vi) Removal of gowns while the witness gives evidence.

5. Where on a trial on indictment with a jury, evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

6. In *Brown and Grant*[36] the English Court of Appeal held that the warning should be given immediately before the witness gives evidence, when it is more likely to impress itself on the jury; it is not important whether the warning is repeated in the summing up.

7. "The question is whether effectively the judge has got across to the jury the essential matter of the use of screens and the conclusions that they should draw and not draw from it. That is much more likely to impress itself on the jury if it is given at the time that the witnesses give evidence than if it is repeated at a later date in the summing-up."[37] Indeed, for the judge to revert to it might in some circumstances give the matter more emphasis, derogatory to the defendants, than it deserves.

DIRECTIONS[38]

- The risk to be avoided is prejudice to the defendant. The only adverse inference likely to occur to the jury is the possibility that it has been necessary to protect the witness from the defendant or his associates.
- Judges should inform the jury that the use of screens/live link/video recorded evidence in chief is now becoming increasingly commonplace.[39]
- The purpose of screens and live link is to permit the witness the comfort of giving evidence away from the public gaze.
- The jury should not think that this reflects in any way on the defendant or his case.

35. Section 28 of Child Care and Protection Act; section 17 of the Criminal Justice (Suppression of Criminal Organisations) Act.
36. [2004] EWCA Crim 1620.
37. Per Lord Justice Buxton *Brown & Grant* [2004] EWCA Crim. 1620 para. 21.
38. Adapted from the 2010 Crown Court Bench Book.
39. The use of special measures is not confined to any particular category of case. They can be used in any case in which the statutory criteria are met.

EXAMPLE

Where evidence has been given behind screens, through video link and/or with a pre-recorded interview W gave evidence [insert as appropriate … from behind a screen/by video link/in a recorded interview]. At the start of the case I explained that evidence can be given in various ways and I now remind you that you must treat all evidence in exactly the same way, regardless of how it is given. The fact that W gave evidence in this way/these ways has no reflection on D, and you must not let it affect your judgment of him or of W's evidence.

3-7 Intermediaries

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

1. One measure that may be available to a witness is the use of an intermediary. These measures are important to reduce the trauma experienced by the child. The English Criminal Practice Directions[40] (the CPD) provide a useful guide where it explains:

   > Intermediaries are communication specialists (not supporters or expert witnesses) whose role is to facilitate communication between the witness and the court, including the advocates. Intermediaries are independent of the parties and owe their duty to the court.

2. The current situation is that there is no specific legislation or regulations dealing with intermediaries. The provisions of the **Evidence (Special Measures) Act** may have created situations where intermediaries are required. In such cases the trial judge will have to give appropriate directions. The following paragraphs and examples are included as general guidance. Further guidance may be found in the 2016 Crown Court Compendium.

3. The examination of a witness through an intermediary must take place in the presence of the trial judge and counsel where both can see and hear the witness giving evidence.

4. The judge should explain to the jury at the outset that the role of the intermediary is a neutral one to assist the court by allowing the witness to communicate effectively and explain that this has nothing to do with the defendant and should not prejudice them against them.

40. CPD I 3F.1.

5. Where on a trial on indictment with a jury evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.[41]

6. The jury will need an explanation that the intermediary:

   (1) is not an expert;

   (2) is independent;

   (3) is present to assist the court with communication; and

   (4) will only intervene when communication is a problem.

7. The judge should also explain, in neutral terms, any particular health problems of the witness.

EXAMPLE 1: Explanation to the Jury where a Witness has an Intermediary

During this trial, W will be helped by [name] who is an intermediary.

Intermediaries are used when a witness needs help to understand what is being said and to make sure that the witness is understood by everyone in court. An intermediary does not discuss the evidence with a witness or give evidence for him.

Before today, the intermediary met and got to know W and now the intermediary will help W to follow the proceedings. There has been an earlier hearing at which with the assistance of the intermediary, it was decided for how long, about what and in what way W would be asked questions. The intermediary will intervene if s/he feels that W is having difficulty understanding something or needs a break.

The fact that W is being helped by an intermediary must not affect how you assess W's evidence and it is no reflection on D or W.

EXAMPLE 2: Explanation to the Jury where a Defendant has an Intermediary

During this trial, D will be helped by [name], who is an intermediary.

Intermediaries are used when a defendant needs help to understand what is being said and to make sure, if a defendant gives evidence, that he is understood by everyone in court. The intermediary does not discuss the evidence with the defendant or give evidence for him.

Before today, the intermediary met and got to know D and now the intermediary will help D to follow

41. Adopted from the Youth Justice and Criminal Evidence Act 1999 s.32 67, England, UK.

> the proceedings. There has been an earlier hearing at which with the assistance of the intermediary, it was decided for how long, about what and in what way D would be asked questions. The intermediary will intervene if s/he feels that D is having difficulty understanding something or needs a break.
>
> The fact that D is being helped by an intermediary must not affect how you assess any of the evidence in this case and it is no reflection on D [if appropriate: or any other D].

3-8 Interpreters

Sources: **Charter of Fundamental Rights and Freedoms (Sec. 16(6)(E)); *Blackstone's* 2016 Section D16.32; *Halsbury Laws of England* (Criminal Procedure Vol. 27); Atkins Court Forms**

LEGAL SUMMARY

1. Section 16(6)(e) of the Constitution of Jamaica provides that every person charged with a criminal offence shall: (e) have the assistance of an interpreter free of cost if he cannot understand or speak the language used in court. As was made clear in *Begum*,[42]

   > unless a person fully comprehends the charge which that person faces, the full implications of it and the ways in which a defence may be raised to it, and further is able to give full instructions to solicitor and counsel so that the court can be sure that that person has pleaded with a free and understanding mind, a proper plea has not been tendered to the court. The effect of what has happened in such a situation as that is that no proper trial has taken place. The trial is a nullity.[43]

2. A decision whether an interpreter should be allowed to assist a witness to give evidence is a matter for the court to decide.[44] The court is not bound to accept the assertion of a witness that an interpreter is necessary. It can investigate the need itself, and having been told that a witness has some command of English, the court may take the opportunity to assess the limits of the comprehension and fluency of the witness before permitting the use of an interpreter (*Sharma* [2006] 2 Cr App R (S) 416).

Where Interpreters are used in the Course of Police Interviews

3. The jury may require some explanation as to why an interpreter was used in interview, particularly if an interpreter is not then used at trial.

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42. (1985) 93 Cr App Rep 96, CA.
43. Per Watkins LJ p.100.
44. *Sharma* [2006] EWCA Crim 16.

The Language of the Court is English

4. Unless a defendant fully comprehends the charge against him, its full implications and the ways in which a defence may be raised to it, and, in addition, is able to give full instructions to his attorney so that a court can be sure that he has pleaded with a full and understanding mind, a proper plea will not have been tendered to the court, and any 'trial' will be a nullity.[45]

5. Where a person with insufficient command of the language is on trial and is not represented by counsel, the evidence must be translated to him; he cannot waive compliance with this rule.[46]

6. Where he is represented by counsel, the evidence should still be translated to him unless he or his counsel expresses a wish to dispense with the translation and the trial judge thinks fit to allow this omission; the judge should not allow such omission unless he is of opinion that, in view of what has passed before the trial, the defendant substantially understands the nature of the evidence that is going to be given against him; any substantial variation from the account originally given in a statement or deposition, or any additional evidence, should be translated to the defendant, even though he may be indifferent about the matter or may not wish it.[47]

DIRECTIONS

Where an Interpreter has been Appointed to Assist a Witness

7. Check at the outset of the trial that the interpreter is present and/or is booked to arrive in good time and that arrangements have been made for him to meet the witness.

8. Ask the advocate calling the witness to confirm, in advance of the evidence, the extent to which the witness will need/use the interpreter.

9. The interpreter is sworn in the presence of the jury and confirms the language into which he is to interpret.

10. Confirm in the presence of the jury whether the interpreter is to translate all questions and answers (without entering into discussions with the witness) or be available to assist as required.

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45. *R v Begum* (1985) 93 Cr App Rep 96, CA.
46. *R v Lee Kun* [1916] 1 KB 337, [1914-15] All ER Rep 603, 11 Cr App Rep 293.
47. *R v Lee Kun* [1916] 1 KB 337, 11 Cr App Rep 293 approved in *Kunnath v The State* [1993] 4 All ER 30, 98 Cr App Rep 455, PC.

Where an Interpreter has been Appointed to Assist a Defendant

11. Where an interpreter has been appointed to assist D it is important to remember that jurors watch what is going on in the dock and are likely to notice if an interpreter is or is not interpreting the whole of the evidence.
12. The interpreter should be sworn at the beginning of the hearing in advance of D being identified i.e. before the jury come into court.
13. On being sworn the interpreter will give his name and the language into and from which he is to translate evidence.
14. Confirm with the interpreter that he has spoken with D in conference and is able to interpret for him.
15. Confirm with the defence advocate that the interpreter has been able to interpret in conference.
16. Ask the defence advocate whether the interpreter is required for every word/most of the evidence or occasional assistance with words D may not understand.
17. Confirm with the defence advocate that it is appropriate that you inform the jury of the role of the interpreter in the case to avoid prejudice; if for example they see that not all of the evidence is being translated.
18. When the jury have been sworn and put in charge explain to them as part of the Introductory words [see Chapter 3-1] the presence and role of the interpreter sitting alongside D.

EXAMPLE 1: Interpreter for a Witness

Either: This witness does not speak English/speaks very little English and so the evidence will be translated by the interpreter into his first language, which is [specify].

Or: This witness speaks reasonable English but his first language is [specify] and he may need help from the interpreter with some words or phrases.

EXAMPLE 2: Interpreter for a Defendant

Either: The person sitting next to D is an interpreter. This is because D's first language is [specify] and he does not speak/ speaks very little English and will need the evidence to be translated.

Or: The person sitting next to D is an interpreter. This is because although D speaks reasonable English he may need help with some words or phrases.

Oath of Interpreter[48]

"I swear by Almighty God that I will well and truly interpret unto the several witnesses here produced on behalf of our Sovereign Lady the Queen, touching the death of C. D., the oath that shall be administered unto them, and also the questions and demands which shall be made to all witnesses by the Court (or the jury) concerning the matters of this inquiry, and I will well and truly interpret the answers which the witnesses shall thereunto give, according to the best of my skill and ability."

48. Atkin's Court Forms.

4. FUNCTIONS OF JUDGE AND JURY

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 4-438; *Blackstone's* 2016, D18-26**

LEGAL SUMMARY

1. The jury need to be directed that they are responsible for decisions of fact; the judge for decisions of law. Such a direction is not a mere formality. Without it, juries might get the impression that any comments made by the judge were matters to which they were bound to pay heed. It is the duty of the judge to ensure that the jury understand that responsibility for the verdict is theirs and not his. In *Wang*,[1] the House of Lords confirmed that there are no circumstances where a judge is entitled to direct a jury to return a verdict of guilty.
2. The jury does not have to resolve every issue of fact that has been raised but only those which are necessary to reach their verdict/s.
3. The jury must not speculate; they must decide the case on the evidence alone.
4. In some instances it will be necessary to direct the jury that if they find certain facts to be proved (to the relevant standard) then as a matter of law a particular issue is established. For example, in gross negligence manslaughter, it will be for the jury to establish whether certain facts were proved which, as a matter of law meant that a particular duty of care was owed by the defendant.

DIRECTIONS

5. The jury should be directed as follows:

(1) The judge and the jury play different parts in a criminal trial.

(2) The judge alone is responsible for legal matters. When summing up the judge will tell the jury about the law which is relevant to the case, and the jury must follow and apply what the judge says about the law.

(3) The jury alone are responsible for weighing up the evidence, deciding what has or has not been proved, and returning a verdict/verdicts based on their view of the facts and what the judge has told them about the law.

(4) Where there are different accounts in the evidence about a particular matter the jury must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in the jury's view their evidence is honest and accurate. It is

1. [2004] UKHL 9.

entirely for the jury to decide what evidence they accept as reliable and what they reject as unreliable.

(5) When D has given and/or called evidence: the jury must apply the same fair and impartial standards when weighing up the evidence of the witnesses for the prosecution and the defence.

(6) The jury do not have to resolve every issue that has arisen, but only those that are necessary for them to reach their verdict(s).

(7) The jury are permitted to draw sensible conclusions from the evidence they accept as reliable, but they must not engage in speculation or guesswork about matters which have not been covered by the evidence.

(8) It is important that the jury's verdict(s) should be based only on their own independent view of the evidence and the facts of the case. Therefore:

> (a) Although the jury should consider the points made about the evidence and the facts by the advocates in their speeches, it is for the jury alone to decide which of those points are good and which are not.
>
> (b) Should the judge give the impression when summing up the case that he has formed a view about any of the evidence or any of the facts of the case, the jury are not in any way bound by this, and must form their own view.
>
> (c) When summing up the case, the judge will summarise the evidence but will not attempt to remind the jury of all of it. The jury should not think that evidence which the judge does mention in the summing up must be important, or that evidence which the judge does not mention must be unimportant. It is for the jury alone to decide about the importance of the different parts of the evidence.

(9) If appropriate: the jury must not allow themselves to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/ preconceptions/ prejudices they may have had.

6. In many cases the jury will be provided with a written summary of all / some of the judge's legal directions and/or a route to verdict.

EXAMPLE

At the start of this case I explained that you and I have different parts to play in this trial. I am responsible for legal matters, and will tell you about the law which applies to this case. You must accept and apply what I tell you about the law.

You are responsible for weighing up the evidence and deciding the facts of the case. It is entirely up to you to decide what evidence is reliable and what evidence is not.

You do not have to decide every disputed point that has been raised in the trial only those that are necessary for you to reach your verdict/s.

Some points are not disputed. The evidence that was [read to you/ given to you in the form of Admissions or Agreed Facts] is not in dispute.

But on other points you have heard different accounts from different witnesses. [Briefly give one or two examples.]

Where there is conflicting evidence, you must decide how reliable, honest and accurate each witness is. When doing this you must apply the same fair standards to all witnesses, whether they were called for the prosecution or for the defence.

You may draw sensible conclusions from the evidence you have heard, but you must not guess or speculate about anything that was not covered by the evidence.

It is for you to decide whether any point or points made by the advocates in their speeches are persuasive or not and also for you to decide how important the various pieces of evidence are. For this reason if, when I review the evidence, I do not mention something please do not think you should ignore it. And if I do mention something please do not think it must be an important point. Also, if you think that I am expressing any view about any piece of evidence, or about the case, you are free to agree or to disagree because it is your view, and yours alone, which counts.

Finally, cases like this sometimes give rise to [emotions/sympathy]. You must not let such feelings influence you when you are considering your verdict.

[If appropriate

Either: I will also give you a written summary of the law that applies to this case. This is not separate or different from what I tell you about the law. It is simply to help you remember what I have said when you are considering your verdict(s).

Or: I will also give you my directions of law in writing, so that you do not have to rely only on your memory of them when you are considering your verdict(s).]

[**If appropriate:** I will also give you a written list of questions to follow when you are considering your verdicts. If you answer these questions in order, you will reach verdicts which correctly take into account both the law and your conclusions about the evidence.]

5. BURDEN AND STANDARD OF PROOF

Sources: ***Archbold*** **2016, 4-444;** ***Blackstone's*** **2016, D18.27 and F3.48; Crown Court Compendium 2016 (Paragraphs 1, 2, 5, 6, 7, 9, 10 Adapted)**

LEGAL SUMMARY

1. Otherwise than in cases of insanity and exceptions created expressly or impliedly by statute, the prosecution bears the burden of proving that the defendant is guilty: *Woolmington v DPP;*[1] *Hunt*.[2] The standard of proof is beyond reasonable doubt: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty. It is unwise to elaborate on the standard of proof: *Yap Chuan Ching.*[3]

2. The summing up must contain an adequate direction as to the burden and standard of proof whether or not it has been mentioned by Counsel: *Blackburn*.[4] No particular form of words is essential. The direction is usually given early in the summing up: *Yap Chuan Ching*.

3. If Counsel refers to the term "beyond reasonable doubt",[5] in addressing the jury they should be told that this means the same thing as being sure.[6]

4. Where a statute places a legal burden on the defendant to prove particular facts, the burden is called a "reverse burden" because it is an exception to the general rule that the defendant does not bear a legal burden on any of the facts in issue.[7] The facts are proved by the defendant on a balance of probabilities: the tribunal of fact (the jury) is satisfied that it is more likely than not that the relevant facts occurred: *Carr Briant*.[8] It is for the defendant to prove a negative averment or matters peculiarly within his knowledge

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1. [1935] AC 462; See also *Misick and others v R* [2015] UKPC 31, PC App No 0042 of 2015 (an appeal from the Turks and Caicos Islands) judgment delivered 25 June 2015.
2. [1987] AC 352.
3. *Ching* (1976) 63 Cr App R 7 at para.11.
4. (1955) 39 Cr App R 84.
5. A definition of the term "reasonable doubt" should not be attempted as a matter of course. *R v Wayne Spence* SCCA 202/88 [18.6.90] 27 JLR 223.
6. There is no burden on the defence to prove their case so that the jury feels sure: *R v Gordon Wright* (1985) 22 JLR 235.
7. See for example s.5(2) of the Offences Against the Person Act which states inter alia: "(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder" This provision is not inconsistent with the Charter of Fundamental Rights and Freedoms. The proviso to s.16(5) of the Charter states: "Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts."
8. [1943] KB 607.

on a balance of probabilities: *R v Louis Williams.*[9] See also *R v Lloyd Elliot*[10] applying *R v Edwards*[11] and *R v Hunt.*[12]

5. If the defendant raises defences, for example, alibi, duress or self-defence, the burden of disproving them to the criminal standard is on the Crown: *Williams.*[13]

6. Particular care is needed where the defendant raises different defences, some of which impose burdens on the Crown and some on the defence (e.g. insanity and automatism).

7. Any question from the jury about the burden and standard of proof must be shown to the lawyers and discussed with them in the absence of the jury.

8. A judge presiding in the Gun Court is not required to expressly state where the burden of proof lies and what is the standard of proof required to discharge that burden. "To hold otherwise would make it incumbent upon a judge in a summary trial to address himself as if he were summing-up to a jury": (per Wolfe JA [Ag.]) *R v Phillip Gillies.*[14]

DIRECTIONS

9. When (as is usual) the burden of proof is on the prosecution, the jury should be directed as follows:

    (1) It is for the prosecution to prove that the defendant is guilty.

    (2) To do this, the prosecution must make the jury sure that the defendant is guilty. Nothing less will do.

    (3) It follows that the defendant does not have to prove that he is not guilty. If appropriate: this is so even though the defendant has given/called evidence.

10. In the unusual case when the defendant has the burden of proving an issue, the jury should be directed as follows. (1) It is for the defendant to prove [specify]. (2) To do this, the defendant must show that [specify] is more probable than not to have been the case; but he does not have to go as far as making the jury sure that it was the case.

9. (1988) 25 JLR 291.
10. RMCA No 27/87 (25.6.87), 24 JLR 291.
11. [1974] 2 All ER 1085.
12. [1986] 3 WLR 1115.
13. (1984) 78 Cr App R 276.
14. (1992) 29 JLR 167.

EXAMPLE 1: Where the burden is on the prosecution

The prosecution must prove that the defendant is guilty. The defendant does not have to prove anything to you. He does not have to prove that he is innocent. The prosecution will only succeed in proving that the defendant is guilty if you have been made sure of his guilt. If, after considering all of the evidence, you are sure that the defendant is guilty, your verdict must be 'Guilty'. If you are not sure that he is guilty, or sure that he is innocent, your verdict must be 'Not Guilty'.

If reference has been made to "beyond reasonable doubt" by any of the lawyers, the following may be added:

> You have heard reference to the phrase 'beyond reasonable doubt'. This means the same as being sure.

EXAMPLE 2: Where the burden is on the defendant

When you are considering [specify] this is for the defendant to prove. He has to show that it is more likely than not that [specify]. He does not have to make you sure of it.

6. THE INDICTMENT

6-1 The Form of the Indictment – Separate Consideration of Counts
6-2 Specimen Counts
6-3 Alternative Offences/Alternative Verdicts

6-1 The Form of the Indictment – Separate Consideration of Counts

Sources: **Indictments Act; *Archbold* 2000; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Charges for any offences, whether felonies or misdemeanors may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or similar character – Rule 3 of the **Indictments Act** (Jamaica). Charges are founded on the same facts if they have a common factual origin.[1]

2. All persons concerned in committing an offence whether as principals or by aiding, abetting or procuring can be charged together in one count with that offence although they may be charged in separate counts or indictments.[2]

3. There is no statutory requirement in this jurisdiction for the signing of indictments. The indictment, if defective may be amended before trial or at any stage of trial by order of Court – section 6 **Indictments Act**. If amended after trial had begun, the defendant should be re-pleaded to all amended counts.

4. No one count of the indictment should charge two or more offences: Rule 4 (1) Schedule to **Indictments Act**.

5. The judge must give the jury directions in relation to the ingredients of each offence charged on indictment.

6. If the indictment contains more than one count, the jury should be directed to give separate consideration to each one *R v Lovesey, R v Peterson.*[3] The jury must reach a verdict on each count separately.

1. *R v Barrell and Wilson* (1979) 69 Cr App R 250.
2. *DPP v Merriman* [1973] AC 584 at 606 (Lord Diplock).
3. [1970] 1 QB 352.

7. If there is more than one count and the evidence on one count is relevant to one or more other counts (i.e. is cross-admissible) see Chapter 13. If there is more than one count and no question of cross-admissibility arises, consideration should be given to whether the jury needs to be directed that they must consider the evidence on each count separately.[4] Where the trial involves more than one D the jury should be directed to consider the case against and for each separately: *Smith.*[5] The jury's verdicts may be the same or different in respect of different D's on different counts.

8. However, if the evidence against each D or in relation to each count is the same or very similar the judge should so advise the jury and indicate that as a matter of common sense their verdicts are likely to be the same in relation to each D or count.

DIRECTIONS

1. If there is more than one defendant and (as is usual) the evidence relating to each defendant differs in any material respect, the jury must be directed to consider the case of each separately, and to return separate verdicts on each, which may or may not be the same on each.

2. Where a defendant faces more than one count, the jury must be directed to consider each count separately, and to return separate verdicts on each, which may or may not be the same on each.

3. In a case in which the judge concludes, having discussed the matter with the advocates in the absence of the jury before closing speeches, that given the relevant law and/or the evidence the jury could not properly return different verdicts on two or more different defendants and/or counts, he should direct the jury accordingly, explaining why the cases against these defendants and/or counts stand or fall together.

4. Where the evidence on one count is likely to affect the evidence and/or verdict of the jury on another see Chapter 13: Cross Admissibility.

EXAMPLE: (where there are no alternative counts)

Each defendant faces a number of counts and you must return a separate verdict on each count in respect of each defendant who is charged on that count. To do this, you must consider the evidence on each count and against each defendant separately. Your verdicts do not have to be the same on all counts or in respect of each defendant.

4. There is no strict legal requirement to do so: *R v H* [2011] EWCA Crim 2344.
5. [1935] 25 Cr App R 119.

6-2 Specimen Counts

Sources: ***Archbold*** **1997, paras 1–136, 1–131, 1–132**

LEGAL SUMMARY

1. Where a count charges an offence (not being a continuing offence) as having been committed "on divers days" it is clearly bad for duplicity: see *R v Thompson*.[6]
2. The **Indictments Act** (Jamaica) and the Rules do not provide for specimen counts or multiple incident counts. Where there are a number of incidents occurring on particular occasions e.g. a birthday, a holiday or where a child speaks of end of a school term, the counts can be drafted to make clear what offences are alleged.
3. Where however the child speaks of a number of incidents with no distinguishing features the practice is to draft a small number of counts, each, apart from the first, alleging "on an occasion other than that alleged in the previous counts."

6-3 Alternative Offences/Alternative Verdicts

Sources: ***Archbold*** **1997; Judicature (Appellate Jurisdiction) Act; Crown Court Compendium 2016**

LEGAL SUMMARY: ALTERNATIVE OFFENCES

1. Larceny and Receiving are true alternative offences. They are mutually exclusive. The jury can convict on one or the other offence, but not on both.
2. In *Dolan*[7] and *R v Smythe*[8] the English Court of Appeal said that such offences should be regarded as true alternatives and mutually exclusive.

DIRECTIONS

3. Counts 1 and 2 charge alternative offences. You cannot find the accused guilty on both. First consider count 1 which is the more serious charge.
4. If you find the accused guilty on that count, do not consider count 2 at all.
5. If you are not sure that the defendant is guilty on count 1, then consider count 2. If you are also not sure that he is guilty on count 2 then your verdicts would be 'not guilty' on both counts.

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6. [1914] 9 Cr App R 252 and *R v Robertson* 25 Cr App R 208.
7. 62 Cr App R 36.
8. 72 Cr App R 8.

6. However, if you are sure that he is guilty on count 2 that should be your verdict. You will not be asked to return a verdict on count 1.

Take the Verdict on Alternative Offences

7. The jury should be asked if they find the accused guilty on either count. If their answer is in the positive, then they should be asked to identify the count. The verdict on that count should be taken and no verdict taken on the alternative count.[9] In this way the power of the Court of Appeal to substitute a verdict of the alternative is preserved. See s.24(2) of the **Judicature (Appellate Jurisdiction) Act**.

LEGAL SUMMARY: ALTERNATIVE VERDICTS

8. This should not be confused with alternative counts *strictu sensu*. For example, on a count charging murder the alternative verdict is manslaughter.

9. On a count for wounding with intent the alternative verdict available is unlawful wounding.

10. Where an alternative verdict is available the jury should be directed to consider the more serious offence first.

11. If they find the defendant guilty, they should not consider the less serious offence. If they find him not guilty of the more serious charge, they should consider the less serious on which they may return a verdict of guilty or not guilty. At common law the principle is that the jury must return a verdict of not guilty on the more serious offence before they may consider the lesser offence. (Section 24 (2) of the **Judicature (Appellate Jurisdiction) Act** does not contemplate alternative verdicts).

12. It is interesting to note that in *R v Saunders*[10] the common law was relied on to justify a conviction for manslaughter where the jury were unable to agree on a charge of murder. The impediment to considering the lesser offence was removed by the judge discharging the jury from the obligation of returning a verdict on the major offence. It has been suggested that, as a matter of practice, a judge should not follow the course adopted in *Saunders* – see Archbold 4-460.

DIRECTIONS

Where the alternative offence is not charged in the Indictment, the direction to the jury should deal with the following matters:

a) The count on which the alternative verdict is available should be identified.

9. *R v Seymour* 38 Cr App R 68.
10. [1988] AC 148 HL.

b) The constituent elements of the two offences concerned should be explained.

c) The jury should be told why the offence charged (referred to here as 'A') is more serious than the alternative (referred to here as 'B').

d) The direction should explain that the prosecution says that D is guilty of 'A', but if the jury is not sure of that, they should consider 'B'.

e) The jury should be directed to consider 'A' first. If they find D "Guilty" of that, they should not consider 'B', on which they will not be asked to return a verdict. If they find D "Not Guilty" of 'A' they should consider 'B' on which they may return a verdict of "Guilty" or "Not guilty". Thus they could find D "Guilty" of 'A' or 'B' but not of both; or they could find D "Not Guilty" of both.

7. CRIMINAL LIABILITY

7-1 Child Defendants
7-2 Joint Participation in an Offence
7-3 Joint Principals
7-4 Accessory/Secondary Liability
7-5 The Abolition of Parasitic Accessory/Joint Enterprise
7-6 Withdrawal from Joint Criminal Liability
7-7 Conspiracy
7-8 Criminal Attempts
7-9 Causation

7-1 Child Defendants

Sources: **Child Care and Protection Act, *Archbold* 2010, 1-90, 1-91, 1-92; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Children under the age of 12 are conclusively presumed to be incapable of forming criminal intention (i.e. *doli incapax*).[1]

2. The common law presumption that a boy under the age of 14 is incapable of committing rape or any other offence involving vaginal or anal intercourse is abolished.[2] In other respects the common law presumption that a child between the ages of 12 and 14 is *doli incapax* remains. This presumption can only be rebutted by clear positive evidence that the child knew that his act was seriously wrong (as opposed to mere naughtiness or childish mischief) at the time when he did it.[3]

3. The age of a child (whether over or under 14 years) is likely to be a relevant factor where:

   (1) the offence in question requires a specific intent or subjective recklessness (e.g. foresight of consequences);

   (2) a possible defence has a subjective element;

1. Section 64 Child Care and Protection Act.
2. Section 24 Child Care and Protection Act.
3. *C (A minor) v DPP* [1996] AC 1 HL.

(3) a possible defence requires an assessment of reasonableness (e.g. loss of control, duress, self-defence);

(4) it is shown that a child is not of normal development for his age (e.g. in a defence of diminished responsibility).[4]

4. Discussion with counsel will be required to identify relevance in the particular case.[5]

DIRECTIONS

1. The need for and form of any directions to the jury relating to D's age should be discussed with the advocates in the absence of the jury before closing speeches.[6]

2. Should a direction be thought appropriate, its exact terms will have to be tailored to the circumstances of the individual case. It will have to include an identification of the issue to which D's age is relevant and a direction that the jury should consider that issue in the light of what they know of D's age, development and maturity at the time of the alleged offence.[7]

3. The following directions should be given:

> You are trying a child of (13). The law is that a child of that age cannot be guilty of a criminal offence unless at the time of the alleged offence he knew that what he was doing was seriously wrong. Even if you are sure that he did the acts alleged and that he did them with the intention of (state mens rea of the offence e. g. the intention of killing or causing serious bodily harm) you must not convict him unless you are also sure that he knew that what he was doing was seriously wrong.
>
> You must not conclude that he knew that the act was seriously wrong simply because you think it was an obviously (and even horrifyingly) wrong thing to do. You have heard other evidence (specify) about his ability to distinguish right from wrong. If in the light of that evidence, and the evidence of what he did, you are sure that he knew that what he was doing was seriously wrong, then you will convict him.
>
> (Adapted from Judicial Studies Board Crown Court Bench Book)

4. Crown Court Compendium 2016 Chapter 7-1
5. Ibid.
6. ibid.
7. Ibid.

7-2 Joint Participation in an Offence

Sources: ***Archbold*** **2016, 18-9 and 18-15; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Legal liability for a criminal offence may arise in the following circumstances in which D is involved with another or others:
   - (i) by his own conduct and with the necessary fault, D committed the offence with another (P) [joint principal: see Chapter 7-3 below];
   - (ii) by his own conduct and with intent, D assisted another (P) to commit the offence [assisting: see Chapter 7-4 below];
   - (iii) by his conduct and with intent, D encouraged another (P) to commit the offence [encouraging: see Chapter 7-4 below];
   - (iv) D "commanded or commissioned" (i.e. ordered or suggested) the offence committed by another (P) and P committed it with the necessary fault [procuring: see Chapter 7-4 below].
2. Any person who aids, abets, counsels or procures the commission of any indictable offence, is liable to be tried and punished as a principal offender.[8] Secondary participation is a specific intent offence for the purposes of intoxication: see Chapter 9.
3. It has always been sufficient to prove that D was either the principal or accessory.[9] It is not necessary to specify what role D is alleged to have played.[10] The Crown should draw the particulars of the offence 'in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer'.[11]
4. If all that can be proved is that the principal offence was committed either by D or by P, both must be acquitted.[12] Only if it can be proved that the one who did not commit the crime as principal must have aided, abetted, counselled or procured the other to commit it can both be convicted.[13]

NOTE: **In the context of injury or threats to children or dependants, see however the statutory solution offered in Domestic Violence Act.**

8. Sections 34, 35 and 41 Criminal Justice (Administration) Act; *R v Jogee* [2016] UKSC 8.
9. *R v Fitzgerald* [1992] Cr L R 660.
10. *R v Gianetto* [1997] 1 Cr App R 1.
11. *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350 at p 1357D Lord Hailsham.
12. *R v Abbott* [1955] 2 QB 497; *R v Banfield* [2013] EWCA Crim 1394, [2014] EWCA Crim 1824, [2014] Crim LR 147.
13. *R v Lane and Lane* (1985) 82 Cr App R 5.

7-3 Joint Principals

Sources: ***Archbold* 2016, 18-6; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Where there are several participants in a crime, D will be a principal offender if his conduct fulfils the *actus reus* element of the crime and at the time of performing the *actus reus* he had the relevant *mens rea*.[14] The crucial question in deciding whether D is a joint principal or an accessory is whether D by his own act (as distinct from anything done by P with D's advice or assistance) performed the *actus reus*. There is no need for D and P to act with a common purpose to commit the crime together although in cases of joint principals they usually will: they may for example both independently engage in attacking V, each intentionally causing him GBH by their blows. If each has by his own acts caused GBH then he is liable as a principal.

DIRECTIONS

2. If the prosecution put their case on the sole basis that each of two or more Ds was a principal offender (i.e. that each carried out the *actus reus* of the offence concerned with the necessary *mens rea*) the jury should be directed to consider each D separately, that their verdict(s) on each may or may not be the same, and that they should convict the D whose case they are considering only if they are sure that all the elements of the offence have been proved against him: see example below.
3. However in almost all cases involving two or more Ds it will be necessary to give a direction as to the secondary liability of one or more of them: see Chapter 7-4.
4. In almost all cases the prosecution will allege that one or more Ds are guilty because he/they must have been either a principal offender or an accessory/secondary party. In such cases it is not necessary for the jury to be satisfied whether any one D was a principal or an accessory, provided that they are satisfied that he participated. An example would be where V suffered injuries in an attack in which several Ds took a physical part, but it is not known which D caused which injuries if any: see examples 2 and 4 in Chapter 7-4.

14. *Macklin and Murphy* (1838) 2 Lew CC 225; 168 ER 1136.

EXAMPLE: In a case of robbery where 2 Ds are alleged to have acted as joint principals.

NOTE: **This is a simple "joint principal" example, but in reality there will be few cases in which it will not be open to the jury to find that of two Ds, one acted as a principal and one as a secondary party: directions will need to be crafted accordingly.**

Charge: robbery. It is alleged that D1 and D2, having planned to commit a street robbery, followed V into an alley and then both Ds took hold of him and both demanded his cell 'phone. When he refused, both Ds searched his pockets. During the search D1 found and removed V's cell 'phone. Both Ds then ran away.

Both Ds admit that they were present but both deny using any force on V or searching him. D1 admits that he asked V for his cell phone but claims that he only wanted to borrow it to make an urgent 'phone call and V gave it to him voluntarily. D2 says that he was with D1 but played no part in what happened.

Before you could convict either D of this offence the prosecution must have proved in relation to each separate D, so that you are sure of it, that he took part in the robbery of V by using force on V in order to steal from him and then by stealing V's cell 'phone.

You must consider the case of each D separately and you will return a separate verdict in respect of each D. Your verdicts may, or may not, be the same in each case. You may only convict either D if you are sure that that D used force on V, that he did so in order to steal from him and that he took part in removing the 'phone from V's pocket.

7-4 Accessory/Secondary Liability

Sources: ***Archbold*** **2016, 18-9; Crown Court Compendium 2016**

LEGAL SUMMARY

NOTE: **This is a complex area of the law and what follows is no more than a summary. Whenever an issue of law arises in this area it is essential to refer to the major textbooks.**

1. Following the decision in *R v Jogee,*[15] *Ruddock v The Queen*[16] the UK Supreme Court and Privy Council unanimously re-stated the principles concerning the liability of secondary parties in a single judgment. The court held that the so-called "parasitic accessory"

15. [2016] UKSC 8.
16. [2016] UKPC 7 (PC Jamaica).

approach to liability[17] is no longer to be applied in English law. Numbers in square brackets are paragraph numbers of the judgment.

2. D's liability for criminal offences committed by P is to be based on ordinary principles of secondary liability [76].

3. D is liable as an accessory (and not as a principal) if he assists or encourages or causes another person, P to commit the offence and D does not, by his own conduct, perform the *actus reus*.[18] The offence occurs where and when the principal offence occurs.[19] It is not necessary that D's act of assistance or encouragement was contemporaneous with the commission of the offence by P.[20] D's acts must have been performed before P's crime is completed. There is no requirement that D and P shared a common purpose or intent.[21] It is immaterial that D joined in the offence without any prior agreement.[22] D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.

4. D's liability for assisting an offence will depend on proof that the offence was committed even if the principal offender cannot be identified and that:

   (a) D's conduct[23] assisted the offender, P, in the commission of the offence.[24]

   (b) D intended that his conduct would assist P.[25] There need not be a meeting of minds between D and P.

   (c) D intended that his act would assist P in the commission of: either (i) a type of crime, without knowing it precise details or (ii) one of a limited range of crimes that were within D's contemplation.

   (d) D had not withdrawn at the time of P's offence: see Chapter 7-6.

5. D's liability for encouraging an offence will depend on proof that the offence was committed, even if the offender cannot be identified, and that:

17. The approach laid down by the Privy Council in *Chan Wing Siu v R* [1985] AC 168, as subsequently adopted in English law could not be supported.
18. *Kennedy (No.2)* [2007] UKHL 38, 4 All ER 1083.
19. *JF Alford Transport Ltd* [1997] EWCA Crim 654, [1997] 2 Cr App Rep 326; [1997] Crim LR 745.
20. *Stringer* [2011] EWCA Crim 1396.
21. *A-G 's Reference (No 1 of 1975)* [1975] QB 773.
22. *Ranath Mohan v The Queen* [1967] 2 AC 187.
23. Which can subject to D's *mens rea*, include an omission when D was under a duty to act; *Webster* [2006] EWCA Crim 415.
24. Following *Jogee* paragraph 12, read literally. The prosecution may not even have to establish this.
25. *Bryce* [2004] EWCA Crim 1321; *NCB v Gamble* [1959] 1 QB 11; *Jogee*.

(a) D's conduct amounting to encouragement came to the attention of P (it does not matter that P would have committed the offence anyway)[26] but there is no requirement that D's conduct has caused P's conduct.[27] Non accident presence may suffice if D's presence did encourage and D intended it to.[28]

(b) D intended,[29] by his conduct to encourage P. The prosecution does not need to establish that D desired that the offence be committed.[30] P must have been aware that he had D's encouragement or approval.

(c) D knew,[31] or if the act is preparatory to P's offence, intended the essential elements of P's crime, albeit not of the precise crime or the details of its commission.[32]

(d) Where it is alleged that D counselled P to commit the offence, that offence must have been within the scope of P's authority i.e. was one which P knew he had been encouraged to commit.[33]

(e) D had not withdrawn at the time of the offence: see Chapter 7-6.

6. D's liability for commanding or commissioning will depend on proof that D's conduct caused P to commit the offence and that D acted with intent to 'to produce by endeavour' the commission of the offence.

7. It is not necessary to prove that there existed any agreement between D and P to commit an offence [17].

8. D's *mens rea* is satisfied by proof that:

(a) D intended to assist or encourage P;

(b) D had done so with knowledge of "any existing facts necessary" for P's conduct/ intended conduct to be criminal [9 and 16]; i.e. D must intend/know that P will act with the *mens rea* for the offence;

(c) Intention is what is required. As elsewhere in the criminal law that is not limited to cases where D "desires" or has as his "purpose" that P commits the offence. [91]

26. *A-G v Able* [1984] QB 795 at p 812; see also *Jogee* at para 12.
27. *Calhaem* [1985] QB 808, followed in *R v Luffman* [2008] EWCA Crim 1379.
28. *Clarkson* [1971] 1 WLR 1402 emphasizing that care is needed where D is drunk and might not realize that he was giving encouragement.
29. THIS IS NOT restricted purposive intent: *Bryce* [2004] EWCA Crim 1231.
30. *Jogee* para 90.
31. See recently *R v Chapman, Gaffney & Panton; R v Sabey* [2015] EWCA Crim 539. Knowledge has been construed to include awareness that a fact might exist and deliberately closing one's eyes to the matter or being reckless as to the risk that it might exist: *Carter v Richardson* [1974] RTR 314; *Webster* [2006] EWCA Crim 415.
32. *Jogee* para 14.
33. *Calhaem* [1985] QB 808.

but, most importantly, intention is not to be equated with foresight: "Foresight may be good evidence of intention but it is not synonymous with it." [73].

(d) "Knowledge or ignorance that weapons generally, or a particular weapon, is carried by P will be evidence going to what the intention of D was, and may be irresistible evidence one way or the other, but it is evidence and no more." [26 and 98].

(e) Where P's offence requires proof that P acted with intent (e.g. murder) D must intend to assist/encourage P to act with that intent [10]; it is sufficient that D intended to assist or encourage P to commit grievous bodily harm [95 and 98]. It is not necessary for D to intend to encourage or assist P in killing.

9. Where there is a prior joint criminal venture it might be easier for the jury to infer the intent. It "will often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional." [92]. "If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D must have foreseen that, in the course of committing crime A, P might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances." [94].

10. An intention may also be inferred where there was no prior criminal venture. Where "D joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if P acts with intent to cause serious bodily injury and death results, P and D will each be guilty of murder." [95].

D's Liability for Manslaughter if D Did Not Intend That P Should Commit Murder

11. If P murdered V in the course of a criminal venture with D but D did not intend that P might intentionally kill or cause really serious harm, D can be found guilty of manslaughter if the jury are sure that D intentionally participated in an offence in the course of which V's death was caused and a reasonable person would have realised that, in the course of that offence, some physical harm might be caused to some person.[34]

34. *R v Church* [1966] 1 QB 59.

D's liability for manslaughter if P is convicted of manslaughter.

12. Where D and P participate in a crime and in the course or furtherance of that crime P kills V without intentionally doing so or intending to cause GBH, P will be liable to be convicted of manslaughter if:
    1. P intentionally performed the unlawful act;
    2. that act caused V's death;
    3. a reasonable person sharing P's knowledge of the circumstances would have realized that P's unlawful act might cause a risk of some physical harm, albeit not necessarily serious harm, to V.
13. If there was a manslaughter by P, D will be guilty of it if:
    1. D participated in the unlawful act (as a joint principal or accessory);
    2. D was aware of the circumstances in which the unlawful act would be committed;
    3. a reasonable person sharing D's knowledge of the circumstances would have realized that P's unlawful act might cause a risk of some physical harm to V.
14. D can also be guilty of manslaughter, irrespective of P's liability if D intentionally committed an offence and it caused V's death and a reasonable person would realize that that act might cause a risk of some physical harm to some person albeit not necessarily serious harm.[35]
15. D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.

DIRECTIONS

NOTE

a. In some cases the prosecution may allege that D is guilty because he was either a principal offender or an accessory/secondary party, though they cannot say which (see Examples 2 and 4).

b. The following numbered paragraphs are based on the law as stated in *R v Jogee; Ruddock v The Queen*.[36] As in the Legal Summary above, numbers in square brackets are paragraph numbers of the judgment.

c. A direction based on paragraph 16 below will need to be given in every case in which D is said to be liable as an accessory/secondary party. Directions based on the subsequent

35. Ibid.; *Bristow* [2013] EWCA Crim 1540.
36. *R v Jogee* [2016] UKSC 8; *Ruddock v the Queen* [2016] UKPC 7 (PC Jamaica).

paragraphs should be added only if and as appropriate to the facts and issues in the particular case. The need for and form of any such directions should be discussed with the advocates in the absence of the jury before closing speeches.

The jury must be directed as follows:

16. D is guilty of a crime committed by another person (P) if D intentionally assists/encourages/causes P to commit the crime [8, 9 and 99].
17. If P's crime requires a particular intention on P's part, e.g. murder or a section 18 offence: This means that D must intentionally assist/encourage/cause P to (commit the actus reus) with (the required intent). In *Jogee* paragraphs 90 and 98 it is said that in a case of concerted physical attack resulting in GBH to V, it may be simpler and will generally be perfectly safe to direct the jury that D must intentionally assist/encourage/cause P to cause such harm to V, D himself intending that such harm be caused.
18. Though the prosecution must prove that D intended to assist/encourage/cause P to commit the crime concerned, they do not need to prove that D had any particular wish/desire/motive for the offence to be committed [91]. Such a direction is most likely to be appropriate in conjunction with those referred to in Directions 20 and 28 below.
19. The prosecution must prove that D knew about the facts that made P's conduct criminal [9].
20. Where D does not know which particular crime P will commit, e.g. where D supplies P with a weapon to be used for a criminal purpose: D need not know the particular crime which P is going to commit. D will be guilty if he intentionally assists/encourages/causes P to commit one of a range of offences which D has in mind as possibilities, and P commits an offence within that range [10, 14 and 90]. See also Direction 18 above.
21. It does not matter whether P commits the crime alone or with others.
22. D need not assist/encourage/cause P to commit the crime in any particular way e.g. by using a weapon of a particular kind [98].
23. It is not necessary that D should have met or communicated with P before P commits the crime.
24. D's conduct in assisting, encouraging, causing P to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with P/being present at the scene of P's crime will not be enough; but if D intended by associating with P/being present at the scene to assist/encourage/cause P to commit the crime e.g. by contributing to the force of numbers in a hostile confrontation, or letting P know that D was there to provide back-up if needed, then D would be guilty [11, 78 and 89].

25. The prosecution does not have to prove that what D did actually influenced P's conduct or the outcome [12].
26. The prosecution does not have to prove that there was any agreement between D and P that P should commit the offence concerned [17, 78 and 95].
27. Where the prosecution do allege an agreement between D and P: The agreement that P should commit the crime need not be formal or made in advance. It may be spoken or made by a look or a gesture. The way in which people behave, e.g. by acting as part of a team, may indicate that they had made an agreement to commit a crime. Any such agreement would be a form of encouragement to P to commit the crime [78].
28. Where the prosecution allege that there was an agreement between D and P to commit crime A, in the course of doing which P went on to commit crime B, with which D is also charged, a direction based on the following will be appropriate: If D agrees with P to commit crime A, in the course of doing which P also commits crime B, D will also be guilty of crime B if D shared with P an intention that crime B, or a crime of that type, should be committed if this became necessary. It is for the jury to decide whether D shared that intention with P. If the jury were satisfied that D must have foreseen that, when committing crime A, P might well commit crime B, or a crime of that type, it would be open to the jury to conclude that D did intend that crime B should be committed if the occasion arose. Whether or not the jury thinks it right to draw that conclusion is a matter entirely for them [91–94]. See also Direction 18 above.

EXAMPLE 1: Dwelling house burglary; one accessory/ secondary party providing assistance beforehand, the other doing so at the scene:

D1 and D2 are charged with the burglary of a dwelling house with intent to steal. Neither entered the house. This was done by P who has pleaded guilty. The prosecution say that D1 provided P with tools (jemmy, wire cutter, glass cutter and a torch), which P used when breaking into the house; and that D2 went to the house with P but stood outside as a lookout. D1 denies that he provided the tools used by P. D2 says that he arrived on the scene by coincidence, and knew nothing of the burglary.

The law states that a D may be guilty of a crime even if the crime is actually carried out by another person. If D intends that a crime should be committed and assists / encourages / causes it to be committed, he is guilty of the crime, even if somebody else actually carries it out.

D1 will therefore be guilty of this burglary, even though he did not carry it out himself, if:

1. he provided the tools to P; and
2. he intended to assist P (or anyone else) to carry out a burglary of some kind; and
3. P used the tools when breaking into the house.

The prosecution does not have to prove that D1 knew where, when or by whom the burglary was to be committed, or that he had any wish/desire that any burglary should be committed.

For the same reasons, D2 will be guilty of this burglary, even though he did not carry it out, if he intentionally helped P to carry out the burglary by keeping a lookout while P was in the house.

The prosecution says that D1, D2 and P all played their different parts in committing this burglary; and that D1 and D2 are therefore guilty even though P actually carried it out.

Route to verdict

D1

Question 1

Are we sure that D1 provided the tools to P?

- If yes, go to question 2.
- If no, return a verdict of 'Not guilty' and do not consider questions 2 and 3.

Question 2

Are we sure that when D1 provided P with the tools, D1 intended that they would be used to commit a burglary of some kind?

- If yes, go to question 3.
- If no, return a verdict of 'Not Guilty' and do not consider question 3.

Question 3

Are we sure that P used one or more of the tools provided by D1 to gain entry to [address]?

- If yes, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

D2

Question 4

Are we sure that D2 knew that P had entered the house as a trespasser to steal property?

- If yes, go to question 5.
- If no, return a verdict of 'Not Guilty' and do not consider question 5.

Question 5

Are we sure that D2 was deliberately helping P to commit the burglary by keeping a look-out?

- If yes, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

EXAMPLE 2: Assault occasioning actual bodily harm - attack by three defendants - prosecution allege that each D was either a principal offender or an accessory/secondary party.

The prosecution allege that the three Ds pushed V to the ground and surrounded him. V was then kicked by one or more of the Ds, but the prosecution cannot say by which one(s). V suffered bruising to his body. Each D accepts that D was assaulted and injured, but says that, though present at the scene, he took no part in the assault.

Although the prosecution are not able to prove which of the Ds kicked and injured D there are two ways in which a D could be guilty of this charge. First, he would be guilty if he himself deliberately kicked and injured V. Secondly, he would be guilty if he deliberately helped or encouraged either or both of the other Ds to assault V.

The prosecution say that each D is guilty either because he joined in the attack on V, and must therefore either have intentionally kicked and injured V himself, or because he deliberately helped or encouraged either or both of the others to do so.

Each D however says that although he was present at the scene of the attack on V he played no part in it, and that V was assaulted by the other two. Merely being present at the scene of a crime is not enough to make a D guilty of the crime. But if a D intends by his presence to help or encourage another D to commit the crime by giving moral support to another D or by contributing to the force of numbers, then D is guilty.

Route to verdict

To reach your verdicts you should answer this question separately in respect of each defendant.

Are we sure that the defendant whose case we are considering did one or both of the following two things (even if we cannot be sure which it was):

1. deliberately assaulted V by kicking him; or
2. deliberately helped or encouraged one or both of the other Ds to assault D?

- If the answer is “Yes, we are sure that he did do one of these things”, return a verdict of ‘Guilty’
- If the answer is “No, we are not sure that he did either of these things”, return a verdict of ‘Not Guilty’

EXAMPLE 3: Householder assaulted during a burglary, D being an accessory/secondary party

D is charged in Count 1 with a dwelling house burglary with intent to steal, and in Count 2 with assaulting V, the householder, causing V actual bodily harm. D did not enter the house or assault V himself. This was done by P, who punched and injured V when V discovered and challenged him inside the house. It is agreed that D was outside keeping watch when P assaulted V. P has pleaded guilty to both counts. D has pleaded guilty to count 1 (burglary) and not guilty to count 2 (ABH).

The prosecution do not suggest that D entered the house or assaulted V, but it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else.

D would be guilty of the assault in count 2 if D and P both intended that if P was challenged by someone in the house as P was burgling it, P should if necessary assault that person. If you were satisfied that D must have foreseen that while committing the burglary P might well commit such an assault if the occasion arose, it would be open to you to decide that D intended that the assault would be committed if necessary/if the occasion arose and that D is therefore guilty of the assault. Whether or not you do come to that conclusion is entirely for you to decide, having considered all the evidence.

Route to verdict

You are only considering count 2 (ABH). You should answer the following question

Are we sure that D intended that if P was challenged in the house as P was burgling it, P should if necessary assault the person who challenged him?

- If yes, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

EXAMPLE 4

Following an attack by both Ds, V suffered a fractured skull (agreed to have been caused by a kick to the head and to amount to GBH) and minor bruising to his body. D1 and D2 are charged in count 1 with causing GBH to V with intent, to which they have pleaded Not Guilty; and in count 2 with assaulting V occasioning him ABH to which they have pleaded Guilty. The jury is aware of these pleas.

The prosecution says that the Ds put V to the ground and then both kicked him. The prosecution cannot say who caused the fractured skull but say that each D is guilty of count 1 either as a principal, because he was the D who personally caused it, or as an accessory, because he helped or encouraged the other D to do so. Each D accepts punching V to the body while V was on his feet, but denies intending any serious injury. Each D alleges that when V started to fight back the other D went further than planned or foreseen by putting V to the ground and then kicking him in the head.

There are three ways in which either D may be guilty of Count 1:

First, he would be guilty if he himself kicked V intending to cause him really serious injury and fractured his skull.

Secondly, he would be guilty if he did not personally cause the fractured skull but intended that V should suffer some really serious injury and helped or encouraged the other D to cause such an injury by joining in the kicking of V while he was on the ground.

Thirdly, even if a D did not kick V while he was on the ground he would still be guilty of Count 1 he joined in an attack on V, and the Ds both intended that if V fought back one of the Ds should cause V some really serious injury. If you were satisfied that the D whose case you were considering must have foreseen that during the assault on V the other D might well intentionally cause V some really serious injury if that happened, it would be open to you to decide that D intended that, if the occasion arose, V would be caused really serious injury and that D is therefore guilty of Count 1 even though he did not himself kick V on the ground. Whether or not you do come to that conclusion is entirely for you to decide, having considered all the evidence.

If you are sure that one of these three things applied to the D whose case you are considering, your verdict on Count 1 will be guilty, even if you are not sure which of the three things it was. If on the other hand you decide that the D's account is or may be true your verdict will be 'Not Guilty'.

Route to verdict

Are we sure that the defendant whose case we are considering did at least one of the following three things (even if we cannot be sure which of the three it was)?

1. kicked V on the head, causing the fractured skull, intending to cause V really serious injury; or
2. intended that V should suffer some really serious injury and helped or encouraged the other defendant to do so by joining in the kicking of V on the ground; or
3. though not himself kicking V on the ground, joined with the other defendant in an attack on V with both defendants intending that if the occasion arose one of them should cause V some really serious injury?
    - If the answer is "Yes, we are sure that he did do one of these things" return a verdict of 'Guilty'.
    - If the answer is "No, we are not sure that he did any of these things", return a verdict of 'Not Guilty'.

EXAMPLE 5: Murder/manslaughter

D accepts that he and P took part in a joint attack on V, punching and kicking him. V fought back, whereupon P produced a knife, stabbed V once in the chest, and killed him. P has pleaded guilty to murder (Count 1). D has pleaded not guilty to murder (Count 1) and manslaughter (Count 2) but guilty to assault occasioning actual bodily harm (Count 3). D contends that he did not know that P had a knife.

In law it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else.

D accepts that he took part in an attack on V which caused V some injury. That being so D would be guilty of murder if he knew that P had a knife and intended that if V fought back P should use it during the joint attack on V, intending to kill V or to cause him really serious injury.

D would be guilty of manslaughter if he knew that P had a knife and intended that if V fought back P should use it during the joint attack on V but did not realise that P might intend to kill V or cause him really serious injury.

Route to verdict

Question 1

Are we sure that D knew that P was carrying a knife?

- If yes, go on to answer question 2.
- If no, return verdicts of 'Not Guilty' on Counts 1 and 2 and disregard questions 2 and 3 below.

Question 2

Are we sure that D intended that if V fought back P should use the knife on V during the attack on V?

- If yes, go on to answer question 3.
- If no, return verdicts of 'Not Guilty' on Counts 1 and 2 and disregard question 3 below.

Question 3

Are we sure that D intended that P should use the knife on V intending to kill V or to cause V really serious injury?

- If yes, return a verdict of 'Guilty' on Count 1 and disregard Count 2 (on which you will not be asked to return a verdict).
- If no, return verdicts of 'Not Guilty' on Count 1 and 'Guilty' on Count 2.

7-5 The Abolition of Parasitic Accessory/Joint Enterprise

***NOTE:* Following the UK Supreme Court decision in R v Jogee, the principles governing every form of secondary liability are as described in Chapter 7-4. There is no longer any separate category of parasitic accessory/joint enterprise liability.**

7-6 Withdrawal from Joint Criminal Liability

Sources: ***Archbold* 2016, 18-26; Crown Court Compendium 2016**

LEGAL SUMMARY

1. A secondary party may, exceptionally,[37] rely on the fact that he has withdrawn from the criminal venture prior to P's acts.
2. What constitutes effective withdrawal depends on the circumstances of the case, particularly the extent of D's involvement and proximity to the commission of the offence by P. Compare *Grundy,*[38] (effective withdrawal weeks before burglary) and *Beccara* (nothing less than physical intervention to stop P committing the violent crime they were engaged in).[39]
3. It is certainly not sufficient that D merely changed his mind about the venture: D's conduct must demonstrate unequivocally[40] his voluntary disengagement from the criminal enterprise: *Bryce*.[41] In addition, D must communicate to P (or by communication with the law enforcement agency) his withdrawal and do so in unequivocal terms unless physically impossible in the circumstances: *Robinson*.[42] This requirement for timely, effective, unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal: *Robinson,*[43] *Mitchell and King*.[44] In a case in which the participants have engaged in spontaneous violence, in practice the issue is not whether there had been communication of withdrawal but whether a particular defendant clearly disengaged before the relevant injury or injuries

37. *Mitchell* [1990] Crim LR 496.
38. *R v Grundy* [1974] 1 All ER 292; [1997] Crim LR 543.
39. *R v Becerra and Cooper* (1975) 62 Cr App R 212; *Baker* [1994] Crim LR 444.
40. *O'Flaherty* [2004] EWCA Crim 526 at para 58.
41. [2004] EWCA Crim 1231.
42. *Robinson* [2000] EWCA Crim 8.
43. *Robinson* [2000] EWCA Crim 8, explaining *Mitchell, King* [1999] Crim LR 496. *O'Flaherty* [2004] EWCA Crim 526 at para 61 per Mantell LJ.
44. *Mitchell, King* [1999] Crim LR 496.

forming the allegation were caused.[45] In some instances D throwing down his weapon and walking away may be enough. Whether D is still a party to the crime is a question of fact and degree for the jury to determine. Where D is one of the instigators of the attack, more may be needed to demonstrate withdrawal: *Gallant.*[46]

4. A judge need not direct on withdrawal in every case (e.g. it is unnecessary where D denies that he played any part in the criminal venture: *Gallant.*[47]

5. It is not necessary for D to have taken all reasonable steps to prevent the crime although clearly it should be a sufficient basis for the defence.

DIRECTIONS

6. Any direction on withdrawal from assisting or encouraging is likely to be highly fact-specific. The need for and form of any such direction should therefore be discussed with the advocates in the absence of the jury before closing speeches.

7. Subject to this, it will usually be appropriate to direct the jury as follows:

   (1) The law provides that a person can withdraw from involvement in a crime only if strict conditions are met.

   (2) He must before the crime has been committed:

      i. conduct himself in such a way as to make it completely clear that he has withdrawn; and

      ii. if there is a reasonable opportunity to do so, inform one or more of the others involved in the enterprise / a law enforcement agency (as appropriate) in clear terms that he has withdrawn.

   (3) Against that background, it is for the jury to decide whether, in the circumstances of the case, D did (and said) enough and in sufficient time to make an effective withdrawal from the enterprise. If he did or may have done so, the verdict would be "Not Guilty". If he did not, the verdict would be "Guilty" if all the elements of the offence were proved against him.

   (4) The circumstances to be taken into account would include (as appropriate):

      (a) the nature of the proposed joint crime;

      (b) D's anticipated role in the proposed crime;

      (c) what, if anything, D had already done to further the proposed crime;

45. See *O'Flaherty* [2004] EWCA Crim 526; *Mitchell and Ballantyne* [2008] EWCA Crim 2552; [2009] 1 Cr App R 31; [2009] Crim LR 287; *Campbell* [2009] EWCA Crim 50.
46. [2008] EWCA Crim 1111.
47. Ibid.

(d) the time at which D sought to withdraw;

(e) what D did to indicate his withdrawal;

(f) whether D had any reasonable opportunity to inform anyone else that he was withdrawing/backing out; and, if so

(g) how and when he took that opportunity.

(5) Briefly summarise the parties' cases on these issues.

EXAMPLE: Withdrawal from a joint attack

NOTE: **In this Example the only substantial issue is whether or not D3 had withdrawn from the attack on V.**

D1, D2 and D3 are all charged with causing grievous bodily harm, which means really serious injury, to V, with intent to do so. Witnesses called by the prosecution have said that all three defendants punched and kicked V and then ran away together, leaving V seriously injured on the ground.

You know that D1 and D2 have pleaded guilty. D3 has pleaded not guilty. He admits that he had been part of a plan, with D1 and D2, to cause really serious injury to V, but he says that he withdrew/backed out before the crime was committed. He says that just as the attack was about to begin, he shouted 'Leave it lads' to the others and then stood back while they attacked V. If you are sure that the prosecution witnesses are telling the truth, you would be bound to conclude that D3 was as guilty as D1 and D2. But what if you thought that D3's account was or might be true?

The law provides that a person who joins a plan to commit a crime can withdraw/back out of it, but only if, before the crime has been committed, he does or says something to make it clear that he has backed out.

So if you decide that D3 did do or say something to suggest that he had withdrawn/backed out, or may have done so, you will have to consider when this happened.

If he did not do or say anything until V had already suffered really serious injury that would be too late. The crime would already have been committed, and he would be guilty of it.

But if you decide that he did do or say something, or may have done so, before V had suffered really serious injury, you would have to decide whether what he did or said was enough to make it clear that he had backed out. If you think it was, or may have been, your verdict would be "Not Guilty". Otherwise, it would be "Guilty" (assuming of course that you were sure that he had, with the others, intentionally caused V really serious injury).

On the question of withdrawing or backing out: the prosecution say [specify]; the defence say [specify]

Route to verdict

Because D3 admits that he had planned with D1 and D2 to cause really serious injury to V and that V suffered really serious injury when he was attacked, the questions that arise are as follows:

Question 1

Are we sure that:

(a) D3 took part in the attack on V; and

(b) D3 intended that V should suffer really serious injury?

- If yes, return a verdict of 'Guilty' and disregard questions 2 to 4.
- If no, go on to answer question 2.

Question 2

At any time did D3 do or say, or may he have done or said, anything to suggest that he had withdrawn from the plan to cause really serious injury to V?

- If yes, go on to answer question 3.
- If no, return a verdict of 'Guilty' and do not consider questions 3 and 4.

Question 3

Did D3 do or say this, or may he have done or said this, before V had suffered really serious injury?

- If yes, go on to answer question 4.
- If no, return a verdict of 'Guilty' and do not consider question 4.

Question 4

Did D3 do or say enough, or may he have done or said enough, to make it clear that he had withdrawn from the plan to cause really serious injury to V?

- If yes, return a verdict of 'Not Guilty'.
- If no, return a verdict of 'Guilty'.

7-7 Conspiracy

Sources: ***Archbold* 1997; Crown Court Compendium 2016; Judicial Studies Board Crown Court Bench Book**

LEGAL SUMMARY

1. At common law the offence of conspiracy is committed where two or more persons agreed "to do an unlawful act, or to do a lawful act by unlawful means".[48]
2. The essence of a conspiracy is an agreement between two or more persons to commit an offence or offences; nothing need be done in pursuit of the offence.

48. *Mulcahy* [1868] LR 3 HL 306.

The *mens rea* for conspiracy is the intention to be a party to an agreement to do an unlawful act. It is an essential element.[49]

3. While conspiracy is complete as soon as two parties agree to effect an unlawful purpose, the conspiracy will continue to subsist as long as they agree and will only terminate on its completion by performance or by abandonment or frustration.[50]

4. Conspiracy is a continuing offence and other persons may join in an existing conspiracy and become parties to it. It is not necessary for all the parties to a conspiracy to be in contact with each other.

5. At common law a conspiracy to commit an offence is an indictable misdemeanor. Conspiracy to murder is a misdemeanour: Section 8 **Offences against the Person Act**.

6. The Court of Appeal has repeatedly noted that: "the prosecution should always think carefully, before making use of the law of conspiracy, how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate."[51]

DIRECTIONS

Before you can convict either/ any of the defendants of conspiracy you must be sure:

1. That there was in fact an agreement between two or more persons to commit the (crime in question); and

2. That the defendant whose case you are considering was a party to that agreement in the sense that:

   (a) he agreed with one or more of the other persons referred to in the count that the crime should be committed; and

   (b) at the time of agreeing to this, he intended that they (he/X) should carry it out.

You may think that it is only in a rare case that a jury would receive direct evidence of a criminal conspiracy (e g eye witness/documentary evidence). When people make agreements to commit crimes you would expect them to do so in private. You would not expect them to agree to commit a crime in front of others or to put their agreement into writing. But people may act together to bring about a particular result in such a way as to leave no doubt that they are carrying out an earlier agreement.

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49. *R v Anderson* [1986] 1 AC 27 and *Yip Chiu-Cheung v R* 99 Cr App R 406 PC.
50. *DPP v Doot* [1973] AC 807.
51. *Shillam* [2013] EWCA Crim 160 at para 25.

Accordingly, in deciding whether there was a criminal conspiracy, and if so whether the defendant whose case you are considering was a party to it, look at all the evidence as to what occurred during the relevant period (this is usually but not necessarily the period covered by the count), including the behaviour of each of the defendants/alleged conspirators (see Note 1). If having done that you are sure that there was a conspiracy and that he was a party to it, you must convict. If you are not sure, you must acquit.

When criminal conspiracies are formed it may well happen that one or more of the conspirators is more deeply involved in and has a greater knowledge of the overall plan than the others. Also, a person may agree to join in the conspiracy after it has been formed or he may drop out of it before the crime has been fully carried out. Providing you are sure in the case of any defendant that he did at some stage agree (with a named co-conspirator) that the crime in question should be committed and at that time intended that it should be carried out, it does not matter precisely where his involvement appears on the scale of seriousness or precisely when he became involved, he is guilty as charged.

NOTES

1. In a case in which the conduct of one defendant, A, is relied upon as evidence against, B, the judge must be careful to identify into which category that evidence falls:
   a. Where there is evidence against A of things said and/or done by him which implicates B, but that evidence although admissible against A is in B's case inadmissible hearsay. For example, where A keeps a private diary of events for his own purposes which relates to the conspiracy and which appears to implicate B, but the diary is not kept in the course and furtherance of the conspiracy. See *R v Blake and Tye* (1844) 6 QB 126 and *R v Stewart* [1963] Cr LR 697. In this case the evidence is altogether inadmissible against B, and the jury should be so directed.
   b. Where there is evidence of things said and/or done by A in the course and furtherance of conspiracy, which is relied upon as evidence against B. For example, in a drugs case where there is evidence of a recorded conversation between A and C, and A can be heard to instruct C to deliver the drugs to B; or where A is alleged to have kept contemporaneous accounting records of the conspiracy, which have not been seen by B, but which refer to e. g. drugs supplied to him and money received by him. In this case the evidence will only be admitted if there is other evidence of the existence of the conspiracy charged and of some involvement by B in it: i.e. its admissibility is conditional: see *R v Donat* [1986] 82 Cr App R 173 and *R v Devonport and Pirano* [1996] 1 Cr App R 221. See also *R v Jones, Williams and Barham* [1996]

Crim LR 901. Here if the evidence is admitted it is desirable to give a further direction, and it is submitted that on the current state of the authorities a warning along the following lines would be appropriate:

In this case the prosecution seeks to rely upon things said or done by A, not only against A but also as part of the case against B. These are (identify precisely the evidence in question).

B was not present when these things were said or done, and was therefore unable to confirm or deny the truth (of what A said. Equally, he could not approve or disapprove of what he did).

For that reason, you should treat this evidence with caution when you come to consider its effect on the case against B. Before you hold this evidence or any part of it against B you should consider all of the evidence on which the prosecution relies and all of the evidence called on behalf of the defendant(s). Then ask these questions. Are you sure:

1. that this evidence is true? and
2. that it amounts to evidence of things said or done by A in the course of and for the purpose of carrying out the conspiracy?
3. (only where appropriate) that A in saying/doing what he did was not maliciously and falsely involving B in a conspiracy in which in truth he was not a party.
4. if the evidence passes these tests then you may take it into account when you consider the case of B, and it is for you to decide what weight you should give it. If it fails either/ any test you must ignore it in B's case.

7-8 Criminal Attempts

Sources: ***Archbold*** **2000; Crown Court Compendium 2016; Offences Against the Person Act**

LEGAL SUMMARY

1. Section 50 of the **Interpretation Act** states:

   "A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed."

   Note however that the maximum punishment for attempting to commit murder is imprisonment for life. See the **Offences against the Person Act**.

2. An attempt to commit a felony or misdemeanour is a misdemeanour at common law. But attempts to commit murder are made felonies by the **Offences against the Person Act**.

3. An attempt to commit an offence is any act done with intent to commit that offence, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.[52] The mere intention to commit an offence (apart from treason) is not criminal.
4. The test at common law for determining the precise point when an attempt is committed is known as the 'proximity' test.[53]
5. It is no defence that it was physically impossible to complete the offence.[54]

DIRECTIONS

1. The offence which D is charged with attempting should be defined.
2. The jury should be told that the prosecution must prove that:
   (a) D intended to commit that offence; and
   (b) With that intention, D did act/acts which in the jury's view went beyond mere preparation to commit the offence.
3. If there is an issue as to whether D's acts did go beyond mere preparation, the parties' arguments in that regard should be briefly summarised.
4. If it is appropriate in the circumstances of the case, the jury should be told that the fact that the full offence could not have been committed (e.g. because the pocket which D was trying to pick was empty) provides no defence.

EXAMPLE: Attempted larceny from the person

The prosecution case is that D saw V get a large number of bank notes from a cash machine and put them into his inside jacket pocket. They say that D then followed V along a crowded street and deliberately bumped into him a number of times. Unfortunately for D, he was being watched by PC X, who thought that D was trying to distract V in order to steal the cash. So PC X then arrested D. D says that he had not seen V get any money and was not aware of bumping into him; and if he did it was accidental. Before you can convict D you must be sure that:

1. D bumped into V at least once; and
2. When D bumped into V, he did so deliberately; and
3. When D did so, he was trying to steal the money.

If you are sure about all of these things, your verdict will be 'Guilty'. If you are not sure about one or more of them, your verdict will be 'Not guilty'

There is a distinction between attempting to commit a crime and doing something which is no more than preparation in order to commit it; and if you think that what D did was, or may have been, no more than preparation in order to steal the money you must find him 'Not guilty'. But if you are sure that D was actually trying to steal from V when he was arrested, you will find him "Guilty."

52. *R v Linneker* [1906] 2 KB 99.
53. *Eagleton* [1855] 6 Cox CC 559 at 571.
54. *Shivpuri* [1987] AC 1 HL.

7-9 Causation

Sources: ***Archbold* 2016, 17-66, 19-6, 19-10 and 19-12; *Blackstone's* 2016, A1.25, B1.58; Crown Court Compendium 2016**

LEGAL SUMMARY

General rule

1. Offences which require proof of a result require proof of causation. The question of whether D's act caused the prohibited result is one for the jury; but in answering this question, they must apply legal principles which should be explained to them by the judge.[55]
2. D's act need not be the sole or the main cause of the result. It is wrong to direct a jury that D is not liable if he is, for example, less than one-fifth to blame.[56]
3. D's contribution to the result must have been more than negligible or minimal.[57] He may be held to have caused a result even if his conduct was not the only cause and even if his conduct could not by itself have brought about the result.[58] Where there are multiple causes (including where the victim has contributed to the result), D will remain liable if his act is a continuing and operative cause.
4. Contributory causes from third parties, or victims, will not necessarily absolve the accused of causal liability unless the contribution from the other party is such as to break the chain of causation – see below. In *R v Warburton and Hubbersty*[59] Hooper LJ, delivering the judgment of the court, emphasised that "the test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death."

Novus actus interveniens and remoteness

5. Most problems of causation concern the application of the principle *novus actus interveniens* or "new and intervening act". If there is an intervening event,[60] either as a naturally occurring phenomenon or by some human conduct, it may operate to "break the chain of causation", relieving D of liability for the ultimate result (although he may remain liable for an attempt in many cases). Although D's original act may remain a factual "but

55. *Pagett* [1983] EWCA Crim 1.
56. *Hennigan* [1971] 3 All ER 133.
57. Affirmed by the Supreme Court in *Hughes* [2013] UKSC 56 at para 33 and by the Court of Appeal in *L* [2010] EWCA Crim 1249 at para 9 (concerning Road Traffic Act 1988 s2B); *Henningan* [1971] 3 All ER 133; *Cato* [1976] 1 WLR 110; *Notman* [1994] Crim LR 518.
58. *Warburton* [2006] EWCA Crim 627.
59. [2006] EWCA Crim 627.
60. Which can be an act or omission.

for" cause of the result, the intervening act may operate so as to supplant it as the legal cause.[61]

6. The Court of Appeal has, on more than one occasion, advised against entering into an exposition of the *novus actus interveniens* principle when it is plain that there is more than one cause and the issue is whether D made a more than minimal contribution to the result.[62]

7. An intervening act by D will not break the chain of causation so as to excuse him where the intervening act is part of the same transaction perpetrated by D: e.g. D stabs V and then shoots him.

8. If, despite the intervening events, D's conduct remains a 'substantial and operative cause' of the result, D will remain responsible, and if the intervention is by a person, that actor may also become liable in such circumstances.

9. D will not be liable if a natural event which is extraordinary or not reasonably foreseeable supervenes and renders D's contribution merely part of the background.

10. D will not be liable if a third party's intervening act is one of a free deliberate and informed nature (whether reasonably foreseeable or not)[63] rendering D's contribution merely part of the background. Human intervention in the form of a foreseeable act instinctively done for the purposes of self-preservation or in the execution of a duty to prevent crime or arrest an offender will not break the chain of causation: *Pagett*.[64]

11. D will not be liable if a third party's act which is not a free deliberate informed act, was not reasonably foreseeable rendering D's contribution merely part of the background.

12. D will not be liable if a medical professional intervenes to treat injuries inflicted by D and the treatment is so independent of D's conduct[65] and so potent as to render D's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether D remains liable, not whether the medical professional's conduct ought to render him criminally liable for his part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury)

61. E.g. *Pagett* (1983) 76 Cr App R 279 at p. 288 by Robert Goff LJ: "… the Latin term [novus actus interveniens] has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."
62. E.g. *Pagett* (1983) 76 Cr App R 279.
63. This includes acts instinctively done for self-preservation and acts of an involuntary nature by the third party: *Empress Car* [1998] UKHL 5 in the case of a strict liability environmental offence only if the intervening act was extraordinary would it break causation.
64. (1983) 76 Cr App R 279.
65. Although usually an act, it can be an omission to act: *McKechnie* (1992) Cr App R 51.

with which D is charged. *Malcharek*[66] confirms that "switching off" a life support system will not break the chain of causation: such medical intervention will not meet the test of being (1) unforeseeably bad and (2) the sole significant cause of death.

13. D will not be liable if the victim's subsequent conduct in response to D's act is not within a range of responses that could be regarded as reasonable in the circumstances. Was V's act daft or wholly disproportionate to D's act? If so it will break the chain.

14. D will be liable if the victim has a pre-existing condition rendering him unusually vulnerable to physical injury as a result of an existing medical condition or old age. D must accept liability for any unusually serious consequences which result: *Hayward*,[67] *Blaue*.[68] Caution needs to be exercised with cases of unlawful act manslaughter.

15. Many of the modern authorities on causation relate to cases of causing death by dangerous driving. In such cases the bad driving of the defendant and that of others may be concurrent causes of death. In *Hennigan*,[69] Lord Parker CJ made clear that the jury is not in such cases concerned with apportionment. It was enough if the dangerous driving of the defendant was a real cause of death which was more than minimal. In *Skelton*,[70] Sedley J (as he then was), held that the defendant's dangerous driving must have played a part, "not simply in creating the occasion of the fatal accident but in bringing it about." In *Barnes*,[71] it was held that it was open to the jury to find that the defendant's dangerous driving "played more than a minimal role in bringing about the accident and death." Hallett LJ noted that in some circumstances judges might have to give the jury further assistance in relation to the difference between bringing about the conditions in which death occurred and "causing" the death.

16. In *L*,[72] Toulson LJ, as he then was, held that *Hennigan, Skelton* and *Barnes* established the following principles:

> first, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury.[73]

66. [1981] 1 WLR 690.
67. (1908) 21 Cox CC 692.
68. [1975] 1 WLR 1411.
69. [1971] 3 All ER 133.
70. [1995] Crim LR 635.
71. [2008] EWCA Crim 2726.
72. [2010] EWCA Crim 1249 (concerning death by careless driving).
73. [2010] EWCA Crim 1249 at paragraph 9.

He concluded that:

> it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury.[74]

17. The Court of Appeal in *Girdler*[75] considered how the trial judge might best explain to the jury the concept of foreseeability where the defence case was that a new act had intervened. The defendant in that case had driven into another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction; one did not and a fatal accident occurred. Hooper LJ held that:

> We are of the view that the words "reasonably foreseeable" whilst apt to describe for a lawyer the appropriate test, may need to be reworded to ease the task of a jury. We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were sure that his dangerous driving was more than a slight or trifling link to the death(s) then: 'the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.' The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it should be made clear that the jury are not concerned with what the defendant foresaw.[76]

DIRECTIONS

18. No specific direction will be required unless, unusually, a particular issue of causation arises. If it does, it will usually be one of two kinds.

    a. Where D's conduct was not the only cause of the relevant outcome (e.g. where negligent medical treatment contributed to the outcome, or vehicles were driven by D and another person in such a way as to cause a fatal collision), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that his conduct contributed to the outcome in a way that was significant, that is more than trivial.

    b. Where D's conduct set in train a sequence of events leading towards the outcome concerned, but a new act intervened and became the immediate cause of the

74. [2010] EWCA Crim 1249 at paragraph 16.
75. [2009] EWCA Crim 2666.
76. At paragraph 43.

outcome (e.g. where D's unlawful act caused V to react in a way which caused his injuries or death), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that:

i. A reasonable, ordinary, sensible person, in the circumstances which D knew about at the time of his conduct, could sensibly have foreseen that the new event might follow from his conduct; and
ii. D's conduct contributed to the outcome in a way that was significant, that is more than trivial.

EXAMPLE

You have heard that after D stabbed V, V was taken to hospital where he was treated negligently. If he had been treated properly, he would have had a 75 per cent chance of survival.

You have to decide whether by stabbing V, D caused V's death. This does not need to have been the only cause, but it must have made more than a minimal contribution to V's death. If you decide that it made more than a minimal contribution, and so was a cause of death, you must go on to decide whether the other elements of the offence of murder have been proved. But if you decide that the stabbing made only a minimal contribution to V's death, your verdict must be "Not Guilty".

The prosecution say that the contribution made by the stabbing was clearly more than minimal. If D had not stabbed V, V would not have had to go to hospital, would not have suffered negligent treatment and would not have died. The defence, on the other hand, say that as V would have had a good chance of survival if he had been not been treated negligently, the contribution made by the stabbing should be seen as minimal.

8. STATES OF MIND

8-1 Intention
8-2 Recklessness
8-3 Malice
8-4 Wilfullness
8-5 Knowledge, Belief and Suspicion
8-6 Mistake

8-1 Intention

Sources: ***Archbold*** **2016, 17-34;** ***Blackstone's*** **2016, A2.4; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Numerous offences are defined so as to require proof of 'intention' to cause specified results. The definition of intention has generated considerable case law. The "golden rule",[1] when directing a jury upon intent, is that it is best to avoid any elaboration or paraphrasing of what is meant by intent. It is an ordinary English word that is quite distinct from "motive".

2. Where some extended explanation is needed, the most basic proposition is that a person "intends" to cause a result if he acts in order to bring it about. In such circumstances it is immaterial that D's chances of success are small.

3. In some cases[2] it may be necessary to give a further detailed explanation, sometimes described as 'oblique' as distinct from 'direct' intention.[3] Under this definition, a court or jury *may find* that a result is intended, though it is not D's purpose to cause it, when:

   (1) the result is a virtually certain consequence of that act, and

   (2) D knows that it is a virtually certain consequence.

4. It is advisable not to deviate from that formula by use of words such as "high probability" or "very high probability" instead of "virtual certainty"[4] In *Allen*[5] the Court of Appeal

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1. Per Lord Bridge in *Moloney* [1984] UKHL 4.
2. Usually where D claims his aim was to achieve a different purpose and he hoped that the harm for which he is being prosecuted would not arise.
3. The House of Lords in *Woollin* [1998] UKHL 28 limited its definition to murder, but the test appears to be applied across the criminal law.
4. *R v Royle* [2013] EWCA Crim 1461.
5. [2005] EWCA Crim 1344.

emphasised that it 'is only in an exceptional case that this extended direction by reference to foresight becomes necessary. It is needed where D denies his purpose, not where, for example, D denies any part in the crime: *Phillips*.[6]

5. The probability of the result is an important matter for the jury to consider when determining whether D foresaw the result as virtually certain and whether they infer that he intended it. In a case where reference to foresight of the consequences is required, if the judge is convinced that, on the facts, and having regard to the way the case has been presented, some further explanation is necessary to avoid misunderstanding. The trial judge is best placed to make the decision on the appropriate direction.

6. Where (in such a rare case) it is necessary to direct the jury on the matter, they should be directed that they are not entitled to find the necessary intention unless they are sure that the consequence was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.[7]

7. The mere fact that the result is virtually certain is in fact not proof of intention – the inquiry into intention is one involving an assessment of D's state of mind: *Stringer*.[8] The test of intention is a subjective test.[9]

8. For the purposes of voluntary intoxication, if the offence charged has intention as the predominant *mens rea* it can for practical purposes be treated as one of specific intent: see Chapter 9.

DIRECTIONS: INTENTION

9. A direction about intention will only be needed if the offence charged requires the prosecution to prove that D intended a particular action and/or result and D disputes this.

10. Any doubts about the need for, and form of, any direction about intention should be discussed with the advocates in the absence of the jury before closing speeches.

11. If a direction is necessary, it will usually be sufficient to direct the jury that:

    (1) the prosecution have to prove that D had the required intention at the time of the alleged offence (but see paragraph 16 below); and

    (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence (see Example 1 below).

6. [2004] EWCA Crim 112.
7. *Woollin* [1998] UKHL 28.
8. [2008] EWCA Crim 1222.
9. *R v Loxley Griffiths* (1981) 18 JLR 394.

12. It will <u>not</u> usually be necessary or desirable to attempt a definition of 'intention', this being a word in ordinary English usage. If, unusually, some further explanation is thought necessary, it will usually be sufficient to add only that D intends a certain result if he acts to bring it about and (if the issue arises) that if D does so, his chances of actually bringing it about are not relevant.

13. However, where D contends that he did not act to bring about the result contended by the prosecution, and/or acted to bring about a different result, it <u>may</u> be necessary to add a direction (sometimes referred to as a *Nedrick* or *Woollin* direction) that before the jury could find that D intended the result contended for by the prosecution, they would have to be sure that it was virtually certain that D's actions would have that result unless something unexpected happened, and that D himself realised that that was so. If the jury were sure of that, it would be open to them to find that D intended that result, if they thought it right to do so in the light of all the evidence (see Example 2 below). The jury would be assisted by a written 'Route to Verdict' (see Route to Verdict below).

14. The following directions <u>may</u> also be necessary, depending on the evidence and issues:

    (1) The prosecution do not have to prove that the offence was planned, or that D's intention was formed in advance.

    (2) Although the prosecution must prove that D intended the result concerned, they do not have to prove that D had any particular motive or desire to bring about that result.

    (3) The fact that D may have regretted afterwards what he had done does not negative any intention that he held at the time to do it.

    (4) When deciding whether D had the required intention, the jury are entitled to take into account [as appropriate] D's age/maturity/any relevant learning difficulty or mental or personality disorder referred to in the evidence.

15. The directions suggested in paragraphs 11 to 13 above will need to be adapted if D took alcohol/drugs to give himself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required intention when he started drinking/taking drugs rather than at the time of the alleged offence.

16. For directions about the effect of alcohol/drugs on a defendant's intention see the relevant sections of Chapter 9.

EXAMPLE DIRECTION 1: Causing grievous bodily harm with intent

D is charged with unlawfully and maliciously causing V grievous bodily harm with intent to do so. On this charge, the word 'maliciously' adds nothing so I suggest that you cross out the words "and maliciously" in the Particulars of Offence.

Grievous bodily harm means really serious injury. It is accepted that V's facial fractures amount to really serious injury, but the prosecution have to prove that D intended to cause really serious injury at the time that he struck V in the face. They do not have to prove that D had formed that intention in advance.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things.

So first consider what D did. D's fist only made contact once, but how much force was used? W said that D gave V "a really hard crack" and sent him straight to the floor. Dr. E told you that severe force would have been needed to cause V's injuries. However, D says that he only struck a tame and accidental blow as he was flailing his arms about.

You should also consider what D said. W told you that, before hitting V, D said [specify] and that, after V had hit the floor, D said [specify]. D denies saying any of this.

When you have considered all of this, you must then decide, in the light of your findings, what D's intention was when he caused V's injuries.

EXAMPLE DIRECTION 2: Murder – D claims he acted only to frighten V – *Nedrick* / *Woollin* direction. Manslaughter is not being left as an available alternative verdict

D admits killing V by pouring paraffin through V's letter box and setting it alight. The only question for you to answer is whether or not you are sure that when he did this, D intended either to kill V or to cause V really serious injury. The prosecution say that D clearly intended to do so, but D says that he wanted only to frighten V.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things. [Refer briefly to the evidence and arguments relied on by the prosecution and the defence in this regard.]

If you are sure that D's intention was to kill or seriously injure V, the prosecution will have proved the intention necessary for murder and your verdict will therefore be 'Guilty'.

If however you accept that D may only have wanted to frighten V, you should then consider whether it was virtually certain that, unless something unexpected happened, what D did would cause V's death or really serious injury; and, if so, whether D realised that this was virtually certain. If, in the light of all the evidence, you are sure about these things, it would be open to you to conclude that D did intend to kill or seriously injure V, and your verdict would be 'Guilty'. Otherwise, the prosecution would not have proved the intention necessary for murder, and so your verdict would be 'Not Guilty'.

Route to verdict based on Example 2

Question 1

Are we sure that when D poured paraffin through V's letter box and set it alight, D's intention was to kill V or to cause V really serious injury?

- If **yes,** return a verdict of 'Guilty' and do not consider questions 2 to 4.
- If **no**, go to question 2.

Question 2

Was it virtually certain that D's pouring kerosene through V's letter box and setting it alight would, unless something unexpected happened, cause death or really serious injury to someone inside the house?

- If **yes**, go to question 3.
- If **no**, return a verdict of 'Not Guilty' and do not consider questions 3 and 4.

Question 3

Are we sure that D realised that this was virtually certain?

- If **yes**, go to question 4.
- If **no**, return a verdict of 'Not Guilty' and do not consider question 4.

Question 4

In the light of our answers to questions 2 and 3, and all of the evidence, are we sure that D did intend to kill or cause really serious injury to someone inside the house?

- If **yes**, return a verdict of 'Guilty'.
- If **no**, return a verdict of 'Not Guilty'.

8-2 Recklessness

Sources: ***Archbold* 2016, 17-50; *Blackstone's* 2016, A2.6; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Recklessness features as a *mens rea* element in a wide range of offences. In some, it relates to the circumstances (e.g. whether the property belongs to another) in others, to the consequences (whether damage or injury will result).
2. Lord Diplock in *R v Lawrence*[10] set out the parameters in respect of an act done recklessly.

10. [1982] AC 510.

He said at page 526:

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting "recklessly" if before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

3. There is a difference in the standard used for some statutory offences as opposed to that used for common law offences such as motor manslaughter, where the activity itself carries some amount of danger. Lord Diplock in *R v Lawrence* said at page 525-6:

> In ordinary usage 'recklessly' as descriptive of a physical act such as driving a motor vehicle which can be performed in a variety of different ways, some of them entailing danger and some of them not, refers not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed. One does not speak of a person acting 'recklessly', even though he has given no thought at all to the consequences of his act, unless the act is one that presents a real risk of harmful consequences which anyone acting with reasonable prudence would recognise and give heed to. So the *actus reus* of [driving recklessly] is not simply driving a motor vehicle on a road, but driving it in a manner which in fact creates a real risk of harmful consequences resulting from it.

R v Lawrence was approved in *Brown v R,*[11] a decision from this jurisdiction. Their Lordships accepted the principle stated in *R v Seymour*[12] that "the degree of recklessness required for conviction of the statutory offence was less than that required for conviction of the common law crime of manslaughter".[13] The law applicable in Jamaica was set out by their Lordships in *Brown v R* at paragraph 30:

> A trial judge in Jamaica should give a jury a direction in a motor manslaughter case along the following lines, which should be tailored or adapted to meet the requirements of the particular case:
>
> (a) Manslaughter in this context requires, first, proof of recklessness in the driving of a motor vehicle, plus an extra element of turpitude. That extra element is that the risk of death being caused by the manner of the defendant's driving must in fact be very high.

11. [2005] UKPC 18.
12. [1983] 2 AC 493.
13. *Brown v R* [2005] UKPC 18 at para 19 (PC Jamaica).

(b) The jury should be told specifically that it is open to them to convict the defendant of causing death by reckless driving if they are not satisfied that the risk of death being caused was sufficiently high.

(c) Proof of reckless driving requires the jury to be satisfied

(i) that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property;

(ii) that in driving in that manner the defendant had recognised that there was some risk of causing such injury or damage and had nevertheless gone on to take the risk.

(d) It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard which from their experience and observation would be observed by the ordinary and prudent motorist.

(e) If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury must, in order to reach a finding of recklessness, find that he appreciated the existence of the risk; but they are entitled to infer that he was in that state of mind, though regard must be given to any explanation he gives as to his state of mind which displaces the inference.

4. It is a subjective form of *mens rea*, focused on the defendant's own perceptions of the existence of the risk. Whether it is reasonable for D to run the risk is a question for the jury dependent on all the facts. In directing a jury, there is no need to qualify the word "risk".

5. It is well established that where D closes his mind to the risk he can be found reckless within the subjective definition, as where he claims that his extreme anger blocked out of his mind the risk involved in his action. As Lord Lane CJ put it: 'Knowledge or appreciation of a risk of the [proscribed harm] must have entered the defendant's mind even though he may have suppressed it or driven it out.'[14]

6. For the purposes of voluntary intoxication, it is submitted that where the predominant *mens rea* for an offence is recklessness, that offence can be treated as one of basic intent: see Chapter 9.

14. *Stephenson* [1979] EWCA Crim 1. See also the comments of Lord Bingham in *G* [2003] UKHL 50 para. 39 and Lord Steyn para 58.

DIRECTIONS: RECKLESSNESS

7. A direction to the jury about the meaning of recklessness should be based on the following definition of Lord Bingham in *R v G*[15] which is thought to be of general application albeit provided in the context of an arson case:

   "A person acts recklessly....with respect to -

   (i) a circumstance when he is aware of a risk that it exists or will exist;

   (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk."

8. It may be appropriate to add that:

   (1) the prosecution have to prove that D was reckless at the time of the alleged offence (but see 8-3 paragraph 3 below); and

   (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence.

9. In the definition of some offences for which recklessness will suffice to establish liability, such as criminal damage, recklessness is a lesser alternative to intention. If the prosecution base their case only on intention a direction about recklessness will be unnecessary and confusing. It will rarely be appropriate to direct a jury on recklessness in relation to assault.

10. Any doubt about the way in which the prosecution puts its case should be resolved before the case is opened. If any doubt about the need for and form of a recklessness direction remains at the end of the evidence it should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on recklessness are treated as offences of basic intent: see Chapter 9.

EXAMPLE 1: Malicious Injury to Property

The prosecution must prove that D:

(a) destroyed/damaged [specify] by fire; **and** when he did so

(b) he **either** intended to do so **or** was aware of the risk that [specify] would be destroyed/damaged and took that risk when it was unreasonable to do so in the circumstances that were known to him.

15. [2003] UKHL 50; [2004] 1 AC 1034.

EXAMPLE 2: Arson (deliberately setting fire but being reckless as to whether life would be endangered)

The prosecution must prove that D:

(a) destroyed/damaged [specify] by fire; **and** when he did so

(b) intended to do so; **and**

(c) took the risk of putting the life of another person in danger, by that fire, when it was unreasonable to do so in the circumstances that were known to him.

EXAMPLE 3: Assault Occasioning Actual Bodily Harm

For example, if D throws a glass in the course of a melée in a public house, the prosecution must prove that D:

(a) threw a glass; **and**

(b) when he did so, he intended that the glass should hit someone; **or**

(c) when he did so, he was aware of the risk that the glass would hit someone and took that risk [only if in issue: when it was unreasonable to do so in the circumstances that were known to him]; **and**

(d) the glass hit V, causing V to suffer some personal injury (however slight).

8-3 Malice

Sources: ***Archbold*** **2016, 17-45;** ***Blackstone's*** **2016, A2.12; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Malice features as a form of *mens rea* in a number of offences that are commonly prosecuted (including **Offences against the Person Act** s.22[16]). The classic definition is that provided in *Cunningham*,[17] where the Court of Criminal Appeal observed:

> In any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should

16. In that offence it requires proof only that D foresaw a risk of injury of some type and not that he foresaw a risk of injury of the level actually caused: *Savage and Parmenter* [1992] 1 AC 699.
17. [1957] 2 QB 396.

occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured.

2. In cases requiring 'malice' D must actually foresee the risk that harm might occur and deliberately take it. It is wrong to suggest that it is enough that D "ought to have" foreseen the risk.

3. The test of recklessness requires that D not only foresaw a risk, but unjustifiably went on to take it. It seems from *Cunningham* that that element is not a requirement for the *mens rea* of malice. The House of Lords in *Parmenter and Savage*[18] have approved the *Cunningham* formulation when interpreting the word malice.

4. For the purposes of voluntary intoxication, where the predominant *mens rea* is one of malice, the offence is one of basic intent: see Chapter 9.

DIRECTIONS

5. Except in relation to an offence contrary to s.22 of the **Offences against the Person Act** a direction to the jury about the meaning of 'malice' or 'maliciously' should be based on *R v Cunningham:*[19] see paragraph (d) in Example 1 below.

6. In relation to an offence contrary to s.22 of the **Offences against the Person Act**, the 'Cunningham' direction should be adapted in the light of *R v Savage*;[20] the difference being that in such a case the intention or recklessness need not relate to the particular kind of harm that was in fact done. It is sufficient if it relates to any injury however slight: see paragraph (b) in Example 2 below.

7. If the charge combines 'maliciously' with words requiring a specific intent which encompasses the legal meaning of 'maliciously', the jury should simply be directed that the word 'maliciously' adds nothing and can be disregarded. The example most commonly occurring in practice is unlawfully and maliciously wounding or causing grievous bodily harm with intent to do grievous bodily harm, contrary to s.20 of the **Offences against the Person Act**: see the Example in Chapter 8-1 above.

8. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'malice' are treated as offences of basic intent: see Chapter 9 below.

18. *Savage and Parmenter* [1992] 1 AC 699.
19. [1957] 2 QB 396.
20. [1992] 1 AC 699.

EXAMPLE 1: Causing grievous bodily harm with intent to resist arrest (s.20)

The prosecution must prove the following:

(a) that D deliberately struck PC V;

(b) that D did so unlawfully;

(c) that by striking PC V, D caused him to suffer grievous bodily harm (which means "really serious injury");

(d) that when D struck PC V, he was acting "maliciously". The word "maliciously" has a particular legal meaning, which is that he either

(e) intended to cause PC V some injury, however slight; or

(f) was aware of a risk that he might cause PC V some injury, however slight, but took that risk; and

(g) that when D struck PC V, he intended to prevent PC V from lawfully arresting him.

EXAMPLE 2: Causing grievous bodily harm/wounding (s.22)

The prosecution must prove the following:

(a) that D used some unlawful force on V;

(b) that when he did so D was acting "maliciously". The word "maliciously" has a particular legal meaning which is that he either

(i) intended to cause V some injury, however slight; or

(ii) was aware of a risk that he might cause V some injury, however slight; but took that risk; and

(c) that in the event D caused V to suffer a wound/grievous bodily harm (which means "really serious injury").

8-4 Wilfullness

Sources: ***Archbold* 2016, 17-47; *Blackstone's* 2016, A2.13; Crown Court Compendium 2016**

LEGAL SUMMARY

1. This *mens rea* term appears in many statutory offences including some that are commonly prosecuted. To prove that D's conduct was wilful[21] the Crown must prove either intention or recklessness. In *Sheppard,*[22] Lord Keith held that "wilfully" is a word which ordinarily carries a pejorative sense:

   > It is used here to describe the mental element, which, in addition to the fact of neglect, must be proved.…The primary meaning of 'wilful' is 'deliberate'. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter of general principle, recklessness is to be equipirated [sic] with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty.[23]

2. In *R v D*[24] the Court of Appeal confirmed that, when it is alleged that the D's conduct was 'wilful' on the basis that his conduct was 'deliberate' or 'intentional', few if any problems arise in satisfying the test. When the allegation is that the alleged 'wilfulness' is demonstrated by D being reckless, the question is whether D was reckless in the subjective (*G*[25]) sense rather than the objective (*Caldwell*[26]) sense of the word. The question is whether D had seen the risk of the proscribed circumstances or consequences and nevertheless gone on unreasonably to take that risk; if so his conduct can be described as wilful.
3. In *Turbill,*[27] the Court of Appeal disapproved of the judge using terms like "carelessness" or "negligence" when directing on wilful neglect. As Hallett LJ made clear: "They are not

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21. The same test applies whether the element is one requiring proof of an act or omission: *R v W* [2006] EWCA Crim 2723.
22. [1981] AC 394 at p.408 in the context of the offence under the English Children and Young Persons Act 1933, s.1 as amended by the 2015 Act. Section 9 of the Child Care and Protection Act uses very similar language to s.1 of the English statute in respect of this offence.
23. At p. 418. Quoted with approval in *R v W* [2006] EWCA Crim 2723 at paragraph 38.
24. [2008] EWCA Crim 2360.
25. [2003] UKHL 50. *Att.-Gen.'s Reference (No. 3 of 2003)* [2004] 2 Cr App R 23.
26. *R v Caldwell (James)* [1982] AC 341.
27. [2013] EWCA Crim 1422.

the same….The neglect must be "wilful" and that means something more is required than a duty and what a reasonable person would regard as a reckless breach of that duty."

4. When considering the effect of voluntary intoxication on criminal liability, it must be borne in mind that where the predominant *mens rea* is one of wilfulness the offence is to be treated for practical purposes as one of basic intent: see also Chapter 9.

DIRECTIONS: WILFULLY

5. When directing the jury about the meaning of 'wilful' or 'wilfully', reference should be made to section 8-1 ('Intention') and/or section 8-2 ('Recklessness') above, depending on the offence charged and whether the prosecution put their case on the basis of intention and/or recklessness.

6. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'wilfulness' are treated as offences of basic intent: see Chapter 9 below.

EXAMPLE: Wilfully - Child Cruelty[28]

D is charged with wilfully neglecting his son V, who is four, in a manner likely to cause injury to health. The prosecution say that D did this by failing to get adequate medical help after V had developed a serious rash all over his body. D says that he was away from home for long periods and that, if V was neglected at all, it was by his mother.

The prosecution must first prove that D neglected V in a way likely to damage his health, and the law is that D is to be taken to have done this if he failed to provide adequate medical help for V. The prosecution must also prove that D acted "wilfully".

To do this the prosecution must prove **either:**

(a) that D knew that V needed medical help but deliberately failed to get it; **or**

(b) that D realised that V might need medical help but ignored this and failed to get the help he needed when it was unreasonable in the circumstances known to him.

28. See s.9 of the Child Care and Protection Act.

8-5 Knowledge, Belief and Suspicion

Sources: ***Archbold*** **2016, 17-49 and 49a;** ***Blackstone's*** **2016, A2.14 and 15; Crown Court Compendium 2016**

LEGAL SUMMARY

KNOWLEDGE

1. Knowledge is a *mens rea* term that arises in a vast number of offences. Whereas intention is usually descriptive of a state of mind as to consequences (e.g. D intends to make a gain), knowledge is usually used in relation to circumstances (e.g. possessing an article knowing it is prohibited). Knowledge is a stricter form of *mens rea* than belief or suspicion.

2. In *Montila*,[29] the House accepted that:

> A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A.[30]

3. Subsequently in *Saik*[31] the House of Lords concluded in the context of a requirement of knowledge in conspiracy that: "the word 'know' should be interpreted strictly and not watered down. In this context knowledge means true belief".[32]

4. Proof of negligence is not sufficient to satisfy a requirement of knowledge in an offence: *Flintshire County Council v Reynolds*[33] (a person who has 'constructive notice' may be negligent as to the relevant facts, but is not to be taken to have knowledge of them).

5. *Wilful blindness:* Knowledge is interpreted as including "shutting one's eyes to an obvious means of knowledge" or "deliberately refraining from making inquiries the results of which the person does not care to have".[34] The House of Lords adopted this proposition:

> It is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant

29. [2004] UKHL 50.
30. Ibid. at para. 27.
31. [2007] 1 AC 18 at para. 26.
32. [2006] UKHL 18 at para. 26; [2007] 1 AC 18 See also Hooper LJ in *R v Liaquat Ali and Others* [2005] 2 Cr App R 864 at para. 98; [2005] EWCA Crim 87.
33. [2006] EWHC 195 (Admin) obtaining benefit contrary to Social Security Administration Act 1992, s.112. *Amayo* [2008] EWCA Crim 912.
34. *Roper v Taylor's Garage (Exeter)* [1951] 2 TLR 284 per Devlin J. *Warner v Metropolitan Police Comm* [1969] 2 AC 256, p. 279, per Lord Reid.

> had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed.[35]

6. Similarly, in *Sherif*[36] the court stated that the jury are entitled to conclude, if satisfied that the defendant deliberately closed his eyes to the obvious because he did not wish to be told the truth, that this was capable of being evidence in support of a conclusion that the defendant did indeed either know or believe the matter in question.

7. Devlin J in *Roper v Taylor's Garage (Exeter)*[37] distinguished actual knowledge, wilful blindness (knowledge in the second degree), and constructive knowledge (knowledge in the third degree). Actual knowledge was considered above.

8. As for wilful blindness, Devlin J emphasized:

> …a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [wilful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge].[38]

9. See also recently Davis LJ in *Wheeler* 'wilfully shutting eyes to the obvious may constitute evidence connoting knowledge or belief; and it need not necessarily be assumed in all cases that suspicion is all that can safely be inferred from the relevant facts.'[39]

BELIEF

10. Belief differs from knowledge because knowledge is limited to true beliefs but not those which are mistaken.

11. According to the Court of Appeal in *Hall*:[40]

> Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: 'I cannot say I know for certain that the circumstance exists] but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen'.

12. In *Forsyth*[41] the court said that the judgment in *Hall* is 'potentially confusing'. In *Moys*[42] the court suggested simply that the question whether D knew or believed that the proscribed

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35. *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155 at p.164, per Lord Bridge.
36. [2008] EWCA Crim 2653.
37. [1951] 2 TLR 284.
38. *Roper v Taylor's Garage* [1951] 2 TLR 284 at p. 288.
39. [2014] EWCA Crim 2706, [10].
40. (1985) 81 Cr App R 260 at p. 264.
41. [1997] 2 Cr App R 299. A *Hall* direction is not necessary in every case: *Toor* (1987) 85 Cr App R 116.
42. (1984) 79 Cr App R 72.

circumstance existed is a subjective one and that suspicion, even coupled with the fact that D shut his eyes to the circumstances, is not enough.

13. For the purposes of voluntary intoxication, it is submitted that offences in which the predominant *mens rea* is knowledge or belief can for practical purposes be treated as offences of specific intent: see Chapter 9.

SUSPICION

14. In *Da Silva*,[43] 'suspicion' was held to impose a subjective test: D's suspicion need not be based on 'reasonable grounds'. Suspicion is an ordinary English word. This dictionary definition is consistent with the previous judicial interpretations of the concept of suspicion in the related field of criminal procedure. One of the most famous statements is that of Lord Devlin in *Hussien v Chong Fook Kam*:[44]

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.

15. The court in *Da Silva* also held that:

> the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds.[45]

16. The court stated that using words such as 'inkling' or 'fleeting thought' is liable to mislead. This implies that juries ought to be encouraged to look for some foundation for the defendant's alleged suspicion.

17. For the purposes of voluntary intoxication, offences where the predominant *mens rea* is one of suspicion can for practical purposes be treated as offences of basic intent: see Chapter 9.

DIRECTIONS: KNOWLEDGE, BELIEF AND SUSPICION

18. It should be made clear to the jury that the prosecution must prove that D had the required knowledge/belief/suspicion at the time of the alleged offence.

19. It will usually be unnecessary to give the jury any direction about the meaning of 'knowledge', 'belief' or 'suspicion', these being ordinary words in common usage.

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43. [2006] EWCA Crim 1654. See also *Shah v HSBC* [2010] EWCA Civ 31.
44. [1969] UKPC 26 at p. 3.
45. [2006] EWCA Crim 1654 at para. 16. Applied in *Afolabi* [2009] EWCA Crim 2879.

20. If, however, any elaboration is thought necessary, the jury should be directed to the following effect, as appropriate to the particular case.

    (1) To show that D knew 'X', the prosecution must prove that 'X' was in fact the case, and that D was sure that 'X' was the case.

    (2) To show that D believed 'X', the prosecution must prove that because of the circumstances and/or what he had seen and/or heard, D realised that the only reasonable explanation was that 'X' was the case.

    (3) To show that D suspected 'X', the prosecution must prove that D thought that there was a real possibility that 'X' was the case, even though he could not prove / be sure about it.

21. In a case in which the prosecution contend that D believed or suspected 'X', the prosecution may contend (usually because of the definition of the offence concerned):

    (1) that 'X' was in fact the case; and/or

    (2) that the belief or suspicion was unreasonable.

22. If so, the jury should be directed that the prosecution must prove as much. If not, the jury should be directed, as appropriate, that the prosecution do not have to prove that 'X' was in fact the case and/or that the belief or suspicion was unreasonable.

23. Though the direction to the jury should be kept as simple as possible, it may be necessary in some cases based on knowledge to explain that belief or suspicion are not enough, and in some cases based on belief that suspicion is not enough, by reference to paragraph 20 above.

24. It may also be appropriate to add that if the jury concluded that D closed his eyes to 'X' being the case, and asked no questions to avoid being told that 'X' was the case, they could treat that as evidence that D knew / believed / suspected 'X', if they thought it right to do so.

25. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on 'knowledge' and 'belief' are treated as offences of specific intent, and offences based on 'suspicion' are treated as offences of basic intent: see Chapter 9.

EXAMPLE: Receiving Stolen Property

The prosecution must prove that when D received the stolen [specify], which he admits he did, he knew or believed that it was stolen, and was acting dishonestly.

These two issues go together. If you are sure that D knew or believed that the [specify] was stolen when he received it and that he intended to keep it, you would be bound to conclude that he was acting dishonestly.

The defence have told you that suspicion is not enough and that is true. So it is important to understand the difference between knowledge or belief on the one hand and suspicion on the other. To prove that D knew that [specify] was stolen the prosecution must show that D was sure that it had been stolen. To show that D believed that [specify] was stolen they must show that, because of the circumstances in which D received it, he realised that the only reasonable explanation was that it had been stolen. However, if D merely thought that [specify] might have been stolen that would amount only to suspicion and would not be enough to prove that D knew or believed that [specify] was stolen.

[Here there should be a summary of the circumstances in which D received the stolen goods.]

The prosecution say that it is obvious in these circumstances that D knew or at the very least believed that [specify] was stolen. One of the things that the prosecution rely on is that D said nothing at the time he received it. If you come to the conclusion that D turned a blind eye and asked no questions because he did not need or want to be told the truth, you could treat that as evidence that D did indeed know or believe that [specify] was stolen.

8-6 Mistake

Sources: ***Archbold* 2016, 17-10 and 17-22; *Blackstone's* 2016, A2.35, A3.2 and A3.60; Crown Court Compendium 2016**

LEGAL SUMMARY

Mistake of Criminal Law

1. Ignorance or mistake of law is no defence to a criminal charge;[46] *mens rea* does not involve knowledge on the part of D that his behaviour was against the criminal law.

Mistake of Civil Law

2. Where the *mens rea* of an offence turns on proof of an element of civil law, D's mistake of civil law will excuse him whether or not his mistake was a reasonable one. For example, where D is charged with malicious destruction of property it must be proved that the

46. *R v Esop* (1836) 7 C & P 456.

damaged property "belonged to another". If D has made, or may have made, a mistake in thinking the property is his own, he is not guilty of that offence because he has not intended or been reckless as to damaging property belonging to another.[47]

Mistake of Fact

3. Where D has made a mistake of fact this provides an excuse in all crimes of *mens rea* where it prevents D from possessing the relevant fault element which the law requires for the crime with which he is charged.[48] It is not a question of defence, but of denial of *mens rea*.

4. In crimes where the *mens rea* element is subjective (intention, recklessness, malice, wilfulness, knowledge and belief) the mistake need not be a reasonable one, but reasonableness of D's conduct will be important in evidential terms. The jury may infer from D's conduct and the unreasonable nature of the mistake in the particular circumstances that D had the relevant *mens rea*; but the onus of proof remains throughout on the Crown and, technically, D does not bear even an evidential burden.

5. The same approach applies where D makes a mistake about an element of a defence that calls for him to have a genuine (though not necessarily reasonable) belief in certain facts. For example, in self-defence, D must believe that there is a need for the use of force. D will not be denied the defence of self-defence if he made, or may have made, a sober mistake as to the need for the use of force, even if his mistake was unreasonable.[49] In such a case D would not intend to use unlawful force; see Self-defence Chapter 18-1.

6. In crimes of negligence D's mistake of fact will only excuse if the mistake is a reasonable one. Similarly, where a defence requires D to hold a reasonable belief in a fact,[50] only if the mistake was a reasonable one to make in the circumstances will the defence still be available to D.

7. Mistake of fact, however reasonable, does not afford a defence to crimes of strict liability.

DIRECTIONS: MISTAKE

8. Where D claims to have been ignorant of or mistaken about the criminal law, the jury should be directed that this provides D with no defence.

9. Where D claims to have made a mistake about the civil law which would affect his criminal liability, the jury should be directed as follows:

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47. *Smith* [1974] QB 354.
48. *B v DPP* [2000] UKHL 13; *Morgans v DPP* [2000] UKHL 9; *K* [2001] UKHL 41; *G* [2003] UKHL 50.
49. *Williams* [1987] 3 All ER 411; *Beckford* [1987] UKPC 1 (PC Jamaica).
50. E.g. duress where D must genuinely and reasonably believe there is a threat of death or serious injury: *R v Hasan* [2005] UKHL 22.

(1) If the jury find that D really did make the mistake concerned, or may really have done so, their verdict should be ‘Not Guilty’.

(2) This is so whether the jury regard the mistake as a reasonable or unreasonable one to have made in the circumstances of the case.

(3) Nevertheless, when deciding whether D really did make or may have made the mistake he claims, the jury may, if they find it helpful, consider D’s conduct, and whether or not the mistake was reasonable. They could take the view, if they thought it right, that the less reasonable the mistake D claims to have made, the less likely it is that D really made it.

(4) If the jury were sure that D did not make the mistake at all, it could not provide him with a defence.

10. Where D claims to have made a mistake of fact which would affect his criminal liability whether it was reasonable or not, the jury should be directed as indicated in paragraph 9 above.

11. Where D claims to have made a mistake which would affect his criminal liability only if it was reasonable, the jury should be directed as follows:

(1) If the jury find that D really did make the mistake concerned, or may really have done so, <u>and</u> consider that it was a reasonable one to have made in the circumstances of the case, their verdict should be ‘Not Guilty’.

(2) If the jury find that D really did make the mistake concerned, or may really have done so, <u>but</u> consider that it was not a reasonable one to have made in the circumstances of the case, it would not provide D with a defence.

(3) [If the point arises:] A mistake resulting entirely from D’s voluntary intoxication by alcohol and/or drugs cannot be regarded as reasonable.

(4) If the jury are sure that D did not really make the mistake at all, it could not provide D with a defence.

EXAMPLE: Mistake of Fact – Burglary

It is alleged that D broke and entered [address] without permission, intending to steal something from inside the house at night. D says that he was drunk and that he was not trespassing because he mistakenly thought that the house was his mother's, with whom he was going to stay the night.

The prosecution must first prove that D was a trespasser. To do this they must make you sure either that D did not make the mistake he claims or that, although he may have made the mistake, he would not have done so if had he been sober. In other words the prosecution must prove that D knew the house was not his mother's or that he would have known this if he had been sober.

If you decide that D made or may have made the mistake he claims and that he would or may have made the same mistake if sober, the prosecution will not have proved that he was a trespasser and your verdict will therefore be 'Not Guilty'. If however you are sure that he did not make this mistake, or although he may have made it he would not have done so if sober, the prosecution will have proved that he was a trespasser, and you must then consider a second question.

This question is whether you are sure that D intended to steal something from inside the house. Here it is D's actual intention that counts, whether he was drunk or not. However, you should bear in mind that a person affected by alcohol may still able to form an intention, and it is no defence for him to say that he would not have formed that intention had he been sober.

If you are sure that D did intend to steal something from inside the house, your verdict will be 'Guilty'. If you are not sure, your verdict will be 'Not Guilty'.

See also Example 2 in Chapter 18-1 (relating to mistaken belief in self-defence cases when voluntarily intoxicated).

9. INTOXICATION

Sources: ***Archbold*** **2016, 17-102, 104 and 105;** ***Blackstone's*** **2016, A3.15 and 60; Crown Court Compendium 2016**

LEGAL SUMMARY

1. The effect of a defendant's intoxicated state on his criminal liability turns upon whether it was self-induced, the type of offence charged and the level of intoxication. The same principles apply whether the alleged intoxication is induced through alcohol or through drugs.[1]

VOLUNTARY INTOXICATION

2. Cases of voluntary intoxication include those where the defendant has taken drink or drugs or any other intoxicating substance although he was unaware of its strength.[2]

3. Voluntary intoxication may be relevant to particular defences: for example see Chapter 18-1 Self-defence; Chapter 18-3 Duress. Note in particular that an honest belief in the need to act in self-defence which results from an intoxicated mistake may not be relied upon.

4. If the level of voluntary intoxication is such that D did not know the nature of his act or that he was doing wrong that is <u>not</u> a plea of insanity.[3] If the voluntary intoxication has resulted in a disease of the mind and the defendant claims that the disease caused him to lack awareness of the nature and quality or wrongfulness of the act, the plea is one of insanity:[4] see Chapter 18-5 *M'Naghten* insanity including insane automatism.

5. Specific intent offence:

   (1) An offence is one of specific intent if the predominant *mens rea* is one of intention (e.g. murder).[5] If the offence charged is one of specific intent the Crown must prove that the defendant had the relevant *mens rea* for the offence despite his being intoxicated.[6] His intoxication can provide evidence that he did not form the *mens rea*. The quantity of intoxicant taken is just one of the circumstances to be considered.

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1. *Lipman* [1970] 1 QB 152, Moodie (Leslie) v R [2015] JMCA Crim 16.
2. *Allen* [1988] Crim LR 698.
3. *R v Coley* [2013] EWCA Crim 223.
4. Ibid.
5. *Heard* [2007] EWCA Crim 125 suggesting that the test is whether the mens rea goes to some ulterior matter beyond the *actus reus*.
6. *Majewski* [1976] UKHL 2.

(2) If the defendant did form the *mens rea*, his intoxication provides no excuse: an intention formed in drink or under the influence of drugs remains an intention.[7] If the *mens rea* was formed, it is no excuse for the defendant to say that he would not have formed it but for the intoxication. In *Sheehan and Moore*, Lane LJ stated:

> In cases where drunkenness and its possible effect on the defendant's *mens rea* is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.
>
> Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.

(3) If the defendant has voluntarily intoxicated himself in order to commit/or in anticipation of committing a crime ("Dutch Courage" intoxication) that intoxication does not provide an excuse even though, because of the voluntary intoxication, at the time of committing the offence the defendant did not form the *mens rea.*[8]

(4) In the case of murder, the voluntary consumption of alcohol may allow for a conviction for manslaughter (see *Von Starck v The Queen* [2000] UKPC 5). Lord Clyde said at paragraph 7:

> …As a matter of law it is not disputed that the voluntary consumption of drugs, as well as the voluntary consumption of alcohol, may operate so as to reduce the crime of murder to one of manslaughter on the ground that the intoxication was such that the accused would not have been able to form the specific intent to kill or commit grievous bodily harm…

6. Basic intent offence:

(1) A basic intent offence encompasses, *inter alia*, crimes of recklessness, malice, wilfulness, suspicion, negligence and strict liability.

(2) Intoxication by a dangerous drug: Where the offence charged is a basic intent offence, the defendant's claim of lack of *mens rea* on the basis of his voluntary intoxication will not afford a defence.[9] The jury should be told to ignore the evidence

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7. *Moodie (Leslie)* v *R* [2015] JMCA Crim 16, *Sheehan, Moore* [1975] 1 WLR 739; [1975] 2 All ER 960.
8. *Attorney General for Northern Ireland v Gallagher* [1961] UKHL 2.
9. *Majewski* [1976] UKHL 2.

of the voluntary intoxication and ask whether the defendant would have had the relevant *mens rea* if sober.[10]

(3) Intoxication by non-dangerous drug: When the voluntary intoxication arises as a result of the defendant taking an intoxicating substance that is not commonly known to create states of unpredictability or aggression (e.g. valium), the jury need to be sure that the defendant was, in taking that drug, subjectively reckless as to becoming aggressive or unpredictable in his behaviour.[11] If they are sure of that recklessness having regard to all the circumstances including the drug and its quantity and the defendant's knowledge and experience of it, then the state of the defendant's intoxication at the time of the offence can provide no defence.

INVOLUNTARY INTOXICATION

7. Where the intoxication is involuntary (e.g. spiked drinks, unforeseen adverse reactions to bona fide medical prescription drugs) the defendant is entitled to be acquitted unless the Crown proves that he had the relevant *mens rea* for the offence despite being intoxicated. If it is proved that the necessary *mens rea* was present when the conduct was performed by him, a defendant does not have open to him a "defence" of involuntary intoxication: *Kingston*.[12] A defendant is not involuntarily intoxicated where he has taken a substance commonly known to create states of unpredictability but he was unaware of its strength.[13]

8. The jury should be directed to consider whether they are sure the defendant did not form the *mens rea* for the offence. Intention or recklessness formed in drink or under the influence of drugs, even if imbibed involuntarily, remains intention or recklessness. The question for the jury is whether the defendant did form the *mens rea*, not whether he was capable of doing so.[14]

DIRECTIONS: INTOXICATION

9. A direction about the effect of intoxication by alcohol and/or drugs on D's state of mind will be necessary only if:

(1) D claims not to have formed the required state of mind (*mens rea*) because he was intoxicated by such substances; and

(2) there is evidence that he may have consumed such substances in such a quantity that he may not have formed that state of mind.

10. *Richardson* [1999] 1 Cr App R 392.
11. *Hardie* [1984] EWCA Crim 2.
12. *Kingston* [1994] UKHL 9.
13. *Allen* [1988] Crim LR 698.
14. *Sheehan, Moore* [1975] 1 WLR 739; [1975] 2 All ER 960.

10. The need for, and form, of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to an offence of specific intent where D was voluntarily intoxicated by alcohol and/or drugs, the jury should normally be directed as follows:

    (1) It is possible for a person to be so intoxicated by alcohol/drugs that he is not able to form an intention.

    (2) However, a person intoxicated by alcohol/drugs may nevertheless still be perfectly capable of forming an intention; and if he does so, it is no defence for him to say that he would not have formed a particular intention or acted in a particular way had he not been affected by alcohol/drugs.

    (3) The jury should therefore consider whether, despite being intoxicated, D had formed the required intention at the time of the alleged offence.

    (4) If they were sure that he had, his intoxication would not provide him with any defence.

    (5) If they were not sure, D would be not guilty.

    (6) See also paragraphs 15 and 17 below.

12. In relation to an offence of basic intent where recklessness is sufficient and D was voluntarily intoxicated by alcohol and/or a dangerous drug, the jury should normally be directed as follows:

    (1) They should consider whether they are sure that D would have had the required state of mind had he not been intoxicated i.e. he would have recognised the risk had he been sober.

    (2) If they are sure of this, his intoxication would not provide him with any defence.

    (3) If they are not sure, he will be not guilty.

    (4) See also paragraphs 15 and 17 below.

13. In relation to an offence of basic intent where D was voluntarily intoxicated by a non-dangerous drug, (i.e. one which does not usually lead to unpredictable or aggressive behaviour, such as Valium or insulin, but is said to have done so in D's case), the jury should normally be directed as follows:

    (1) They should consider whether, when he took the drug, D was aware of the risk that it might lead to such behaviour in his case, but went on to take the risk when it was unreasonable to do so in the circumstances known to him.

    (2) If they were sure of this, his intoxication would not provide him with any defence.

(3) If they were not sure, D would be not guilty.

(4) See also paragraphs 15 and 17 below.

14. In relation to any offence (other than one of strict liability) where D claims to have been intoxicated involuntarily (e.g. because his drink had been spiked) the jury should normally be directed as follows:

(1) They must first decide whether or not D's claim is true.

(2) If they were sure it was untrue, they should obviously disregard it.

(3) If they thought that it was or might be true, they should consider whether, despite being involuntarily intoxicated, D had formed the required state of mind at the time of the alleged offence.

(4) If they were sure of this, his intoxication would not provide him with any defence, even though it was involuntary.

(5) If they were not sure, D would be not guilty.

(6) See also paragraphs 15 and 17 below.

15. If D claims not to remember what happened because of the alcohol/drugs he had taken, the jury should be directed as follows:

(7) They must first decide whether or not D's claim is true.

(8) If they were sure that it was untrue, they should obviously disregard it.

(9) If they thought that it was or might be true, they should take it into account when deciding whether the prosecution have proved that D had the required state of mind. They should bear in mind, however, that D might have had the required state of mind at the time of the alleged offence even if he did lose or may have lost his memory at some later stage.

16. The jury should also be directed that when they are considering all these matters they should take into account (as relevant in the particular case) any evidence about the quantity of alcohol and/or the nature and quantity of the drugs that D had taken; when D had done so; the circumstances in which D had done so; D's knowledge and/or experience of alcohol and/or the drug concerned; any expert evidence; and any relevant evidence of D's condition, and/or of what D did and/or said, before and/or at the time of and/or /after the alleged offence.

17. The directions suggested above will need to be adapted if D took alcohol/drugs to give himself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required state of mind when he started drinking/taking the drugs rather than when the offence was committed.

EXAMPLE DIRECTION: Wounding with Intent and Unlawful Wounding

'In relation to Count 1 (s.20[15]) D's defence is that he did not intend to cause V grievous bodily harm, which means really serious injury, and that because D had drunk about ten pints of strong beer in the two hours or so before the incident he was so drunk that he was not capable of forming that intention.

It is possible for a person to be so drunk that he is not able to form a particular intention. However, a person who is drunk may still be able to form an intention; and, if he does so, it is no defence to say that he would not have formed that intention if he had been sober.

If you think that D was or may have been so drunk that he did not form an intention to cause V really serious injury, you must find him not guilty of Count 1 and go on to consider the alternative Count 2 (s.22[16]). But if you are sure that, despite being affected by alcohol, D did intend to cause V really serious injury you will find him guilty of Count 1 and in that event you will not consider, or return a verdict on, Count 2.

When you are considering how drunk D was and whether he intended to cause really serious injury, you should look at all of the evidence on this point.

[Here summarise the relevant evidence.]

If you need to consider Count 2, the amount that D had had to drink is irrelevant. The question on Count 2 is whether you are sure that D either acted "maliciously" in the sense of actual intent or recklessness as to the result as I have already explained to you [see Chapter 8-3 Example 2] or would have done so if he had been sober. If you are sure that one of these things has been proved, your verdict on Count 2 will be 'Guilty'. Otherwise it will be 'Not Guilty'.

15. Offences against the Person Act.
16. Offences against the Person Act.

10. EVIDENCE – GENERAL

10-1 Circumstantial Evidence
10-2 Corroboration and the Special Need for Caution
10-3 Expert Evidence
10-4 Delay
10-5 Evidence of Children and Other Vulnerable Witnesses

10-1 Circumstantial Evidence

Sources: ***Archbold*** **2016, 10-3;** ***Blackstone's*** **2016, F1.18; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely, or almost entirely, on circumstantial evidence and it is in this category that most controversy is generated and specific directions will be required.

2. In a circumstantial evidence case the prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence and motive. The subsequent conduct of the defendant may also furnish evidence of guilt, for example evidence of flight, fabrication or suppression of evidence, telling lies or unexplained possession of recently stolen property.

3. Pollock CB in *R v Exall*[1] compared circumstantial evidence to a rope comprised of several cords. He went on to say:

> One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence—there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

4. At the conclusion of the prosecution case, the question for the judge is whether, looked

1. (1866) 4 F & F 922 at 929, 176 ER 850 at 853.

at critically and in the round, the jury could safely convict.[2] The question for the jury is whether the facts as they find them to be, drive them to the conclusion, so that they are sure, that the defendant is guilty.[3]

5. The correct question is: "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?" (per Pitchford LJ in *R v Masih*[4])

6. Circumstantial evidence must always be "narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. …It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference": *Teper v R*.[5] There is no requirement, however, that the judge should direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion.[6]

7. The House of Lords explained in *McGreevy v DPP*[7] that "circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof.[8] The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence" (per Pitchford LJ in *R v Kelly*[9]).

DIRECTIONS

8. In a case in which there is both direct and circumstantial evidence, the jury should be directed as follows:

    i. Some of the evidence on which the prosecution rely is direct evidence. Briefly summarise the direct evidence.[10]

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2. *P(M)* [2007] EWCA Crim 3216.
3. *McGreevy v DPP* [1973] 1 WLR 276. See also *R v Loretta Brissett* SCCA 69/02 [20.12.04]; *R v Clarice Elliott* (1952) 6 JLR 173; *R v Elijah Murray* (1952) 6 JLR 256; *R v Burns and Holgate* (1967) 11 WIR 110; *R v Cecil Bailey* [1975] 13 JLR 46; *R v Paul Lawrence* SCCA 160/90 [15.6.92]; (1992) 29 JLR 223; *R v Anthony Rose* SCCA 105/97 [31.7.98]; *R v Audley Cameron and Anor* SCCA 123 & 126/97 [20.12.99]; *R v Everton Morrison* 30 JLR 54 at 56A – there must be an array of circumstances which point only to one conclusion and to all reasonable minds that conclusion only. The facts must also be inconsistent with any other rational conclusion.
4. [2015] EWCA Crim 477.
5. [1952] UKPC 15 at p.3 per Lord Normand.
6. *McGreevy v DPP* [1973] 1 WLR 276.
7. Ibid.
8. See also *R v Loretta Brissett* SCCA 69/02 [20. 12. 04]; *R v Anneth Livingston* SCCA 77,81,93/03 [31.7.06]. The Court of Appeal in Jamaica also held that no special directions are required. The trial judge only needs to remind the jury of the standard to which they must be satisfied.
9. [2015] EWCA Crim 817.
10. In *R v Rufus Duncan* SCCA 93/95 [31.7.96] the Court of Appeal (Jamaica) has recommended that there should be a review of the evidence under specific heads.

  ii. The prosecution also rely on what is sometimes described as circumstantial evidence. That means different strands of evidence no one of which proves that the defendant is guilty but which, the prosecution say, when taken together and with other evidence prove the case against the defendant. Briefly summarise the circumstantial evidence, and the conclusions which the prosecution say are to be drawn from it.
  iii. See also paragraph 10 below.

9. In a case in which the only evidence is circumstantial, the jury should be directed as follows:
   i. In some cases there is direct evidence that a defendant is guilty, for example evidence from an eyewitness who saw the defendant committing the crime, or a confession from the defendant that he committed it.
   ii. In other cases however, including this one, there is no direct evidence and the prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that the defendant is guilty but which do, say the prosecution, leave no doubt that the defendant is guilty when they are drawn together.
   iii. Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it.
   iv. See also paragraph 10 below.

10. In a case involving any circumstantial evidence, the jury should also be directed as follows:
   i. Briefly summarise any evidence and/or arguments relied on the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it.
   ii. The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.
   iii. However, the jury must not speculate or guess or make theories about matters which in their view are not proved by any evidence.
   iv. It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty.

EXAMPLE 1

NOTE:* Although an example is provided, judges should bear in mind the words of Pitchford LJ in *R v Kelly: [11]

> It is not unusual for the trial Judge to point out to the jury the difference between proof by direct evidence and proof by circumstances leading to a compelling inference of guilt. However, there is no rule of law that requires the trial Judge to give such an explanation or any requirement to use any particular form of words. It depends upon the nature of the case and the evidence.

Where all the prosecution evidence is circumstantial:

There is no direct evidence that D committed the crime with which he is charged, such as evidence from an eyewitness who saw him committing it, or evidence that he confessed to committing it.

The prosecution therefore rely on what is sometimes referred to as circumstantial evidence: that is pieces of evidence relating to different circumstances, none of which on their own directly proves that D is guilty but which, say the prosecution, when taken together leave no doubt that D is guilty.

[Summarise the pieces of evidence on which the prosecution rely and the conclusions they say should be drawn from them.]

The defence say that you should not accept [some of] these pieces of evidence.

[Identify the pieces of evidence concerned, and summarise the defence arguments about them.]

The defence also say that the evidence on which the prosecution rely does not in fact prove D's guilt at all. They say that there are too many gaps and too many unanswered questions.

[Summarise the defence arguments about this.]

You must decide which, if any, of these pieces of evidence you think are reliable and which, if any, you do not. You must then decide what conclusions you can fairly and reasonably draw from any pieces of evidence that you do accept, taking these pieces of evidence together. You must not however engage in guesswork or speculation about matters which have not been proved by any evidence. Finally you must weigh up all the evidence and decide whether the prosecution have made you sure that D is guilty.

11. *Kelly* [2015] EWCA Crim 817.

EXAMPLE 2[12]

Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.

Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

10-2 Corroboration and the Special Need for Caution

Sources: ***Archbold*** **2016, 4-468;** ***Blackstone's*** **2016, F5.1; Crown Court Compendium 2016; Trinidad and Tobago Criminal Bench Book 2015; Sexual Offences Act 2009; Evidence Act**

LEGAL SUMMARY

1. Corroborative evidence is relevant, admissible,[13] and credible[14] evidence independent of the source requiring corroboration,[15] and which has the effect of implicating the accused.[16] In *R v Elvis Martin*[17] the words used by the trial judge had fallen short of imparting to the jury the necessary ingredients which would make the evidence corroborative that is, independent evidence on a material particular.

2. In *R v Derrick Williams*[18] Forte P expressed the view that the corroboration warning in sexual cases had outlived its usefulness and recommended legislative intervention. Smith JA also stated in *Prince Duncan and Herman Ellis v R*[19] that: "The rule requiring

12. Adapted from the Judicial Studies Board 1997 Bench Book.
13. *Scarrott* [1978] QB 1016 at p. 1021.
14. *DPP v Kilbourne* [1973] AC 729 at p. 746; *DPP v Hester* [1973] AC 296 at p. 315.
15. *Whitehead* [1929] 1 KB 99
16. In *Regina v Ian Vincent* (1991) 28 JLR 69, the court stated that corroborative evidence is not a facsimile of the evidence sought to be corroborated but independent evidence which in some material particular tends to implicate the accused in the commission of crimes and, therefore, slight discrepancies between the two do not preclude the existence of corroboration; in any event, it is sufficient that the trial judge had warned himself about the danger of acting on uncorroborated evidence.
17. SCCA 14/96 (22.10.96).
18. SCCA 12/98 [4.6.01].
19. SCCA 147 & 148/03 [1.2.08].

a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now be only a matter of historical interest". He said this in reference to the decision of the Privy Council in *Rennie Gilbert v R.*[20] He further opined that the guidance given by Lord Taylor in *R v Makanjuola* (see paragraph 7 below) was applicable in Jamaica and that unless otherwise enacted by statute, that guidance should now be followed.

3. In 2009 the **Sexual Offences Act** was enacted. Section 26(1) and Section 26 (2) provides as follows:

> 26. -(1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the trial Judge to give a warning to the jury as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining -
>
> (a) whether to accept the complainant's uncorroborated evidence; and
>
> (b) the weight to be given to such evidence."

4. The **Evidence Act** ("the Act") also provides at s.31Q that subject to subsection (2), it shall not be necessary for the evidence given by a child in civil or criminal proceedings to be corroborated for a determination of liability, a conviction, or any other issue as the case may be in such proceedings.

5. The Act also provides that a trial Judge (whether a judge of the Supreme Court or a Parish Court Judge) may:

   a. in a trial by jury, where the trial judge considers that the circumstances of the case so require, give a warning to the jury to exercise caution in determining whether to accept uncorroborated evidence of the child and the weight to be given to such evidence; or

   b. in a trial by judge alone, where the trial judge considers that the circumstances of the case so require, give himself the warning as provided under paragraph (a)".[21]

6. Whether a warning is given and the terms of any warning given are matters of judicial discretion.[22] In *R v Stone*[23] the Court of Appeal reiterated the need to examine the

20. [2002] UKPC 17; [2002] 61 WIR 174.
21. Section 31Q(2), Evidence (Amendment) Act 2015 (Jamaica).
22. *Laing v The Queen* [2013] UKPC 14 at para.8 citing Lord Taylor CJ in *R v Makanjuola* [1995] 1 WLR 1348 at p. 1351.
23. [2005] EWCA Crim 105.

particular circumstances of the case before reaching a judgment as to the terms in which the requirement for caution should be expressed.[24] A possible starting point, drawing on *R v Turnbull*[25] is to warn the jury of the special need for caution before acting on the disputed evidence and to explain the reason why such caution is required. Where the jury is advised to look for supporting evidence, the judge should identify the evidence which is capable of supporting that of the witness;[26] if there is none, the jury should be directed to that effect.[27]

7. In *R v Makanjuola,*[28] the following guidance was given by Lord Taylor CJ:

> To summarise:
>
> 1. Section 32(1)[29] abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
> 2. It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
> 3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. **This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.**
> 4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

24. The content of the warning is a matter for the judge's discretion in the light of the evidence, the issues and the nature of the particular taint on the evidence of the impugned witness: *Muncaster* [1998] EWCA Crim 296; L [1999] Crim LR 489.
25. [1977] QB 224.
26. *B(MT)* [2000] Crim LR 181.
27. *R v Johnson* (1963) 5 WIR 396 held that where there is no corroboration at all, it is the duty of the trial judge to point this out to the jury, otherwise he may well be inviting them to regard as corroboration something which is not corroboration.
28. [1995] 1 WLR 1348 at p. 1351D.
29. See s.31Q Evidence Act and s.26 of the Sexual Offences Act 2009.

5. **Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.**
6. Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
7. …
8. Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense." [emphasis added]

8. In considering the need to give a discretionary warning of the type described in *Makanjuola* the following types of witnesses/categories of cases should be considered:

(1) Co-defendants: An accused may have a purpose of his own to serve by giving evidence that implicates a co-defendant.[30] In *Jones and Jenkins*,[31] in which each of the defendants in part placed blame on the other, Auld LJ commended counsel's suggestion that in such cases the jury should be directed:

(a) to consider the cases of each defendant separately;

(b) the evidence of each defendant was relevant to the case of the other;

(c) when considering the co-defendants evidence, the jury should bear in mind that the interest may have an interest to serve; and

(d) the evidence of a co-defendant should otherwise be assessed in the same way as the evidence of any other witness.

(2) Witnesses tainted by improper motive.[32]

(3) Witnesses of bad character.[33]

(4) Children: Whether to give a direction will depend on the circumstances of the case, including the intelligence of the child and, in the case of unsworn evidence, the extent to which the child understands the duty of speaking the truth. In *R v MH*,[34] a case involving a three year old complainant, the Court of Appeal rejected the

30. *Cheema* [1994] 1 WLR 147; *Muncaster* [1998] EWCA Crim 296; *Jones and Jenkins* [2003] EWCA Crim 1966.
31. *Jones and Jenkins* [2003] EWCA Crim 1966 at para.47.
32. *Beck* [1982] 1 WLR 461 at p.467E (defence making allegations of impropriety against witnesses for the prosecution); *Chan Wai-Keung* [1995] 1 WLR 251 (prisoner awaiting sentence giving evidence in unrelated case); *Ashgar* [1995] 1 Cr App R 223 (defence allegation that prosecution witnesses were protecting one of their number); *Pringle* (2003) 64 WIR 159 (PC Jamaica) and *Benedetto* [2003] UKPC 27 (cell confession); *Spencer* [1987] UKHL 2 (patients in a secure hospital).
33. *Spencer* [1987] UKHL 2; *Cairns, Zaidi and Chaudhary* [2002] EWCA Crim 2838.
34. [2012] EWCA Crim 2725 at para.50 to 51 per Pitchford LJ.

suggestion that the judge should have directed the jury that children may imagine, fantasise or misunderstand a situation, may easily be coached, may say what they think their mother wants to hear, or may merely repeat by rote that which has been said on a previous occasion; and that the judge should have warned the jury not to be beguiled by the attractiveness of the child and to bear in mind his extreme youth. It would have been wrong for the judge to engage in such generalisations remote from the facts of the case.[35]

(5) Unexplained infant deaths: Such cases may give rise to serious and respectable disagreement between experts as to the conclusions which can be drawn from post mortem findings. Supporting evidence independent of expert opinion may be required.[36]

(6) Inherently unreliable witnesses: For example, if it has become clear that a witness has made a false complaint, otherwise lied or given substantially different accounts in the past.

(7) An accomplice who gives evidence on behalf of the prosecution: Where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the trial judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, has the force of law.[37]

DIRECTIONS

9. In some cases, for example those listed in paragraph 8 above, it may be appropriate for the judge to direct the jury to approach the evidence of a particular witness with caution. The need for, and terms of, any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

10. It is usually a matter for the judge's discretion whether to give any direction, and if so in what terms. However, if one defendant or suspect in relation to an offence gives evidence against another a cautionary direction will almost always be necessary, as to which see the final bullet point below.

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35. In Jamaica, it has always been the practice that the evidence of a child of tender years should be corroborated and a warning given as to the danger of the evidence being uncorroborated - *R v Vince Stewart* (1990) 27 JLR 19; *R v Allan McGann* (1994) 31 JLR 156 and *R v Rohan Chin* SCCA 84/04 [26.7.04].

36. *Cannings* [2004] EWCA Crim 1; *Kai-Whitewind* [2005] EWCA Crim 1092 (evidence supporting the experts' opinion as to cause of death was found in post mortem results) and *Hookway* [2011] EWCA Crim 1989 (dispute between experts not whether there was DNA evidence incriminating the appellants but as to the strength of that evidence).

37. *R v David Gordon* SCCA 161/01 (12. 12. 02). See also *R v Hunter* SCCA 161/90 (30.6.92); *Dockery and Brown v R* (1963) 5 WIR 369; *R v Malek and Reyes* (1966) 10 WIR 97; *R v Patrick Reynolds and Moses Treston* RMCA 19/95 (22.5.96); *R v Beverly Champagnie et al* SCCA 22-24/80 (30.9.83); *R v Elvis Martin* SCCA 14/96 (22.10.96); *R v Mark Phillips* SCCA 68/96 (27.2.98) and *R v Clive Mullings* (1986) 23 JLR 167.

11. Any such direction is best given as part of the review of the evidence rather than as a set-piece legal direction during the first part of the summing up.

12. The strength and terms of any such direction will depend on the circumstances of the individual case. No set formula is available. The following is offered only by way of general guidance, and is not intended to cover every situation that might arise:

    i. The witness concerned ('W') should be identified and the reason(s) for the need for caution should be explained.

    ii. Sometimes it will be sufficient simply to direct the jury to approach the evidence of W with caution. If so, the jury should also be directed that they may nevertheless rely on that evidence if, having taken into account the need for caution, they are sure that W is telling the truth.

    iii. Where there is no independent supportive evidence, it may be appropriate to remind the jury of that fact, and possibly to suggest that the jury may have wished for such evidence. In that event the jury should also be directed that they may nevertheless rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence, they are sure that W is telling the truth.

    iv. In cases where there is potentially independent supportive evidence, that evidence must be identified, adding that it is for the jury to decide whether they accept that evidence and if so whether they regard it as supportive. If they conclude that there is independent supportive evidence they may take this into account when assessing W's evidence, but it does not mean that W is bound to be telling the truth. On the other hand, even if the jury conclude that there is no independent supportive evidence, they may still rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence they are sure that W is telling the truth.

    v. Where co-defendants give evidence against each other, the need for caution needs to be conveyed without unnecessarily diminishing the evidence of either defendant. This can usually be achieved by incorporating directions that the jury should consider the case of each defendant separately; should examine that part of each defendant's evidence which implicates the other with caution, since each may have his / her own purpose to serve; but otherwise should assess each defendant's evidence in the same way as that of any other witness. This approach can be adapted to cover a case in which one co-defendant gives evidence against another, but not vice versa.

EXAMPLE 1: Co-Defendant[38]

When considering the evidence of D1 and D2 you should bear these points in mind:

1. First, as I have already explained to you, you must consider the case against and for each D separately.
2. Secondly, you should decide the case in relation to each D on all of the evidence, which includes the evidence given by each of the Ds.
3. Thirdly, you should assess the evidence given by each of the Ds in the same way as you assess the evidence of any other witness in the case.
4. Finally, when the evidence of one D bears upon the case of the other, you should have in mind that the D whose evidence you are considering may have an interest of his own to serve and may have tailored his evidence accordingly. Whether either D has in fact done this is entirely for you to decide.

EXAMPLE 2: Co-Defendant who has Pleaded Guilty and has, by Written Agreement, Assisted the Prosecutor by Giving Evidence[39]

When considering the evidence of W you should bear in mind that he has already pleaded guilty to the offence with which D is charged and gave evidence which implicated D after formally agreeing to help the prosecution by doing so. He did this hoping to get a lesser sentence.

Because this is the situation you should approach W's evidence with caution, knowing that he has an obvious incentive to give evidence which implicates D. You should ask yourselves whether W has, or may have, tailored his evidence to implicate D falsely or whether you can be sure, despite the potential benefit to W of giving evidence against D, that he has told you the truth. If you are sure that he has told the truth, you may rely on his evidence.

38. This example is based on *Jones and Jenkins* [2003] EWCA Crim 1966.
39. For guidance - taken from the UK Serious Organised Crime and Police Act 2005, s.73. This is a direction that could be considered where a written agreement is made pursuant to the Criminal Justice (Plea Negotiations and Agreement) Act in Jamaica.

EXAMPLE 3: Evidence Given by an Accomplice[40]

Members of the Jury, the prosecution case rests (wholly or in part) on the evidence of (...). The manner in which you approach and evaluate his/their evidence is therefore of pivotal importance in this case. Only if you are sure that he/they is/are (a) truthful, meaning credible, believable, honest and a reliable witness/es, would it be open to you to accept and to act upon his/their evidence.

Based upon the fact that the DPP has granted (...) immunity from prosecution, the prosecution is relying on (.) as an accomplice to the alleged offence of (...). An accomplice simply put, is a party to an offence. An accomplice is a competent witness for the prosecution, which means that, by law, an accomplice may properly give evidence. The law requires, however, that you view the evidence of an accomplice in a certain manner. Since an accomplice is one who is a party to the crime alleged, there may be all sorts of reasons for him to tell lies and to implicate other persons. An accomplice may have a motivation to give false evidence. He may want to curry favour with the prosecution. An accomplice may be motivated to place the accused in a bad light or the worst possible light, and himself, in the best possible light. He may therefore downplay or minimise his own role and maximise or exaggerate the role of someone else, or he may even give completely or partially false evidence about that other person's alleged role. It may well be sometimes that an accomplice witness alone knows why he wants to come to court and give false or partly false evidence. It may be something hidden away in an accomplice's mind that nobody knows of. The practice has developed that before an accomplice gives evidence in a case, he is either granted immunity from prosecution or if he has been charged he is dealt with by the court before he testifies. In this case, (...) has received immunity from prosecution. I must warn you that the fact that an accomplice witness has received immunity from prosecution and so can possibly gain nothing by his evidence at this stage, does not eliminate the danger of such a witness giving false evidence. An accomplice may well have given a false account implicating someone at the very beginning, or from fairly early on in order to save his own skin at the inception, and having once given a false account implicating someone, such a witness is likely to stick to it, particularly if he feels obliged to do so to benefit from the terms of the immunity and to avoid being prosecuted.

[In addition, there have appeared in the evidence of (...) specific weaknesses (...). Depending on the view that you take of these issues they have the potential to undermine his credibility. For all these reasons, I must warn you, Mr Foreman, Members of the Jury, that there is a special need for you to view (,..)'s evidence with a great degree of caution, and a great degree of care.] [Pass the evidence through a fine "strainer".]

Mr Foreman, Members of the Jury, and having given full heed and weight to my warnings to you, if you are sure, the duty being on the prosecution to make you sure, that (...) is an honest witness who is speaking the truth, and is also reliable in terms of the correctness of his identification evidence, then, if you are sure, you would be entitled to rely and act upon his evidence. In such a case it would be open to you to convict the accused for (...).

Mr Foreman, Members of the Jury, if you are sure that an accomplice witness, in this case, (...) is honest

40. Adopted from the Trinidad and Tobago Criminal Bench Book.

and truthful and is correct in his identification, having first approached his evidence with very special care and caution, such evidence, it is open to you to find, may be the best evidence available since it comes from a person who might be best positioned to know what allegedly transpired. You will keep in mind that accomplice witnesses are usually and generally persons of a particular nature. You must guard against the temptation to be morally judgmental and scornful. Generally speaking, persons who solicit the assistance of others with a view to criminal activity or possible criminal activity will not, to put it bluntly, solicit a Priest, a Pundit or an Imam. So do not jump too quickly on to a moral "high-horse" assessment; you must be practical and realistic in your general approach. Now, I am not telling you do not be cautious and careful, I am telling you to be cautious and careful and that the law requires that you look at the evidence of an accomplice very carefully and very cautiously. But if you conclude, having adopted that approach of great care and great scrutiny and great caution, if you conclude that an accomplice witness is speaking the truth and is reliable, it is open to you to find that it may be the best evidence available. If you are not sure that (...) is an honest witness who is speaking the truth and is also reliable in terms of the correctness of his identification evidence, then you must reject his evidence, and in such a case you must find the accused not guilty.

10-3 Expert Evidence

Sources: **Crown Court Compendium 2016; Evidence Act; Practice Direction 1 of 2016 (Jamaica)**

LEGAL SUMMARY

1. Expert evidence requires special preparation and care. Usually, the results of examination, inspection or test are not in dispute, but the conclusions to be drawn from the results certainly are. If those conclusions are based upon opinions expressed by the expert the jury will need to evaluate their quality.

2. Section 31CB of the **Evidence Act** provides for the admissibility of expert reports into evidence.

   (1) "Subject to the provisions of subsection (2), any report signed by an expert shall, in any criminal proceedings, be admitted as evidence of the matters stated therein, without the expert being called upon to attend and to give evidence on oath.

   (2) Where, in any criminal proceedings, a party intends to put into evidence a report as provided in subsection (1), that party shall, not later than thirty days before commencement of the trial, serve upon the other party, (or in the case of an accused, his attorney-at-law) written notice of such intention, together with a

copy of the report, and the other party may, not later than five days before the commencement of the trial, by written notice served on the first-mentioned party, object to the admission of the report, and may require the attendance of the expert to give evidence on oath.

(3) The period of thirty days referred to in subsection (2) shall not be computed to include Saturdays, Sundays or public general holidays or the day on which the notice is served.

(4) The court may, on an application made by either party to the criminal proceedings, or on its own motion, require the expert who has signed a report to attend and give evidence at any stage in the proceedings, where the court considers this to be necessary in the interests of justice.

(5) In this section "expert report" means a written report or a certificate by a person dealing wholly or mainly with matters on which he is (or would, if living be) qualified to give expert evidence; and any document purporting to be an expert report shall be deemed to be such a report unless the contrary is proved.

(6) Any report submitted by an expert at a Coroner's inquest shall be admitted as evidence of the matters stated therein, without the expert being called upon to attend and give evidence on oath, provided that:

(a) no interested party objects to the report being admitted; and

(b) the Coroner is satisfied that it is not necessary that the expert attend and give evidence";

3. In considering the admissibility of expert opinion evidence, a judge should have regard to the factors listed in Practice Direction 1 of 2016 of the Supreme Court of Jamaica which is intended to govern the practice in the Supreme Court and Gun Court as well as for guidance of Parish Court Judges. The Practice Direction is annexed to the Criminal Bench Book and paragraph 16 below includes a summary for tendering expert reports for admission into evidence.

4. Expert evidence is admitted only on matters that lie beyond the common experience and understanding of the jury: *Turner*.[41] The purpose of the expert's opinion evidence is to provide the jury with evidence of findings and the conclusions that may be drawn from those findings. Particular care is needed to avoid expert opinion as to the credibility, reliability or truthfulness of a witness or confession: *Pora v The Queen*.[42] Lord Kerr explained "It is the duty of an expert witness to provide material on which a court can

41. [1981] QB 834.
42. [2015] UKPC 9.

form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case." See also *H.*[43]

5. Unlike lay witnesses, experts may give evidence of opinion. Where the expert has given evidence of opinion, the jury remain the ultimate arbiter of the matters about which the expert has testified. The jury is not bound to accept the expert's opinion if there is a proper basis for rejecting it. But "where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence, juries may not do so": see *Brennan.*[44] The jury must be warned not to substitute their own opinions for those of the experts e.g. by undertaking their own examination of handwriting or a fingerprint. A jury is entitled to rely on an expert opinion which falls short of scientific certainty: *Gian.*[45]

6. If an expert expresses his conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain that these terms are no more than labels which the witness has applied to his opinion of the significance of his findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability: *Atkins.*[46]

7. The fact that a prosecution expert cannot rule out, as a matter of science, a proposition consistent with D being not guilty does not mean that the case should be withdrawn: *R v Vaid.*[47]

8. In deciding what weight, if any, to attach to the expert's evidence the jury may take into account his or her qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

9. Sciences and techniques in their infancy need to be approached with caution but that does not necessarily mean the expert opinion based on such techniques should not be adduced: *R v Ferdinand and others.*[48]

10. If the expert testifies as to primary facts (e.g. that there was no blood on the defendant's boots) the jury cannot reject that and form their own opinion on the matter: *Anderson*.[49]

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43. [2014] EWCA Crim 1555.
44. [2009] EWCA Crim 2553.
45. Ibid.
46. [2010] 1 Cr App R 117.
47. [2015] Crim LR 532.
48. [2014] 2 Cr App R 331(23), CA.
49. [1971] UKPC 25.

11. If the expert is someone involved in the investigation of the offence, the jury will need to be aware of that when considering the weight to give to his or her evidence: *Gokal*.[50]

12. In an extreme case where the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between reputable experts it may be unwise to leave the case to the jury: *Cannings*;[51] cf. *Hookway*.[52] The content of a summing-up in such cases will require considerable care: see *Henderson* for guidance.[53]

13. Where there is a conflict of opinion between reputable expert witnesses, the expert evidence called by the Crown is not automatically neutralised. A dispute between experts about the interpretation of findings did not extinguish those findings which are matters to be evaluated by the jury: *Regina v Kai-Whitewind*.[54]

14. The trial judge has a responsibility both to present the expert evidence in terms which will assist the jury to an understanding and to expose any limitations in its effect. He is perfectly entitled to intervene during the evidence to seek explanations with a view to assisting the jury in his summing up. It makes sense to deal with competing expert evidence by category. Only in this way can the jury sensibly follow and resolve any dispute between experts.[55]

15. The duties of an expert witness in a criminal trial are owed to the court and override any obligation to the person from whom the expert had received instructions or by whom the expert was paid: *R v B (T)*.[56]

Summary of Section 31CB Evidence Act

16. The **Supreme Court Practice Direction 1 of 2016** (Jamaica) sets out the following guidelines with respect to the tendering evidence pursuant to section 31CB of the **Evidence Act** ("the Act"):

    i. Section 31CB may be utilised where:

        (a) A written statement is made or an expert report is prepared and notice served in accordance with the provisions of section 31CB (1) of the Act;[57] and

    ii. It is not necessary to require the witness to attend court to give evidence in chief or to be made available for cross-examination.

50. [1999] 6 Archbold News 2.
51. [2004] [2004] EWCA Crim 1.
52. [2011] EWCA Crim 1989.
53. [2010] 2 Cr App R 185.
54. (2005) Times, 11 May.
55. Adopted from 2010 UK Criminal Bench Book.
56. [2006] 2 Cr App R 22.
57. See paragraph 2 above.

iii. Expert reports tendered into evidence under section 31CB of the Act must be read aloud in Court and become part of the record.

iv. An expert report admitted in accordance with the provisions of section 31CB shall be admitted as evidence of the matters stated therein.

v. Where the Prosecution proposes to tender expert reports into evidence, it may be necessary, for expert reports to be edited to ensure the fair presentation of the evidence; for example, where an expert report contains inadmissible, prejudicial or irrelevant material. Editing of expert reports should in all circumstances be done by Prosecuting Counsel or the Clerk of the Courts in consultation with Defence Counsel, subject to the approval of the Court. If disagreement persists between the Prosecution and the Defence, then the witness shall be required to give oral evidence.

vi. Where parties intend to agree in writing to admit documents into evidence they shall, where practicable, use the format outlined in Forms 1, 2 or 3 in the Schedule.

vii. Depending on the nature of the document it should be read, played or described making it part of the record.

viii. Prosecuting Counsel should also be aware that, where expert reports are to be tendered in the course of a trial before a Judicial Officer sitting alone, there will be a particular need to consider the preparation of fresh reports, rather than using the striking out/bracketing method However, in such circumstances the inability to prepare fresh expert reports should not be a bar to their admission under the Act.

ix. Whenever a redacted report is received from an expert, a copy of the earlier, unedited report(s) of that witness should be given to the Defence in accordance with the Prosecution's disclosure obligations, unless there are legal grounds for withholding disclosure. These instances may include circumstances where the Prosecution has obtained a Non-Disclosure Order from the Court following an application asserting Public Interest Immunity.

x. Where it is intended that section 31CB of the Act will be relied on to adduce evidence during a jury trial, Prosecuting Counsel should in the opening address to the jury, clearly explain the nature and effect of evidence to be adduced in this manner.

xi. A judge sitting in the Circuit Court should where necessary, explain to the jury the effect of evidence adduced in different forms during the trial. For example:

  l. Direct oral evidence

  m. Expert reports read pursuant to section 31CB of the Act

xiv. Where pursuant to section 31CB, evidence has been received in a trial before a Judicial Officer sitting alone, in delivering verdict the Judicial Officer should where necessary, refer to his/her consideration of the effect of the admission of each form of evidence adduced during the trial.

Contents of the Expert Report

17. The expert must be duly qualified and should only provide evidence on matters within his or her expertise: *Atkins*;[58] *Clarke*.[59]

18. *Regina v Bowman*[60] sets out quite comprehensively what the report should contain and provides inter alia as follows:

(i) Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.

(ii) A statement setting out the substance of all the instructions received, both written or oral, questions upon which an opinion was sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which were material to the opinions expressed or upon which those opinions were based.

(iii) Information relating to who had carried out measurements, examinations, tests, etc and the methodology used, and whether or not such measurements, etc were carried out under the expert's supervision.

(iv) Where there was a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given. In that connection, any material facts or matters which detracted from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.

(v) Relevant extracts of literature or any other material which might assist the court.

(vi) A statement to the effect that the expert had complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the expert would inform all parties and, where appropriate, the court in the event that his/her opinion changed on any material issues.

(vii) Where on an exchange of experts' reports, matters arose which required a further or supplemental report the above guidelines should, of course, be complied with.[61]

58. [2010] 1 Cr App R 117.
59. *Robert Lee Clarke* [1995] 2 Cr App R 425.
60. (2006) Times, 24 March.
61. See also the Privy Council decision of *Myers, Brangman and Cox v The Queen* [2015] UKPC 40 (an appeal from

DIRECTIONS

19. There is no invariable rule as to when a direction on expert evidence should be given. It is often best included in the legal directions at the beginning of the summing up; but if, for example, there has been evidence from only one expert, or the expert evidence taken together is brief, it may be preferable to give the direction immediately before the expert evidence is summarised.

20. The direction should be as follows:

    (1) Begin by identifying the expert witness/es and the issue/s on which they have given evidence.

    (2) In every case, the jury should then be directed as follows:

        (a) Expert witnesses regularly give evidence and opinions in criminal trials to assist juries on matters of a specialist kind that are not of common knowledge.

        (b) However, as with any other witness, it is the jury›s task to weigh up the evidence of the expert(s), which includes any evidence of opinion, and to decide which they accept and which they do not. The jury should take into account [as appropriate] the qualifications/practical experience/methodology/ source material/quality of analysis/objectivity of the experts, and the impression they made when giving evidence.

        (c) The jury's verdicts must be based on the evidence as a whole, of which the expert evidence and opinion forms only a part.

    (3) In addition, it may be necessary to incorporate one or more of the following directions:

        (a) The jury is not itself expert on the matters about which the expert(s) have given evidence, and should not therefore carry out any tests, comparisons or experiments of its own, or try to reach conclusions of its own which disregard the expert evidence: see **Notes 1** and **2** below.

        (b) The jury does not have to accept the expert evidence even though it is uncontested: see **Note 3** below.

        (c) In a case where an expert expresses an opinion in relative terms, a direction in accordance with *Atkins* referred to above (paragraph 17).

Bermuda) where the Privy Council referred to the *Ikarian Reefer* case on the duties of an expert. These duties apply equally to criminal cases: *R v Harris* [2005] EWCA Crim. 1980; [2006] 1 Cr App R 551, paragraphs 271–72.

NOTES

1. Such a direction will be necessary if, without it, there is a realistic danger that the jury will go their own way – e.g. in cases involving handwriting or fingerprint comparison.
2. If a non-expert witness gives an opinion on a subject (e.g. handwriting comparison) which is properly the subject of expert opinion, but no such expert evidence has been called, the jury should be directed to disregard the non-expert evidence. This happens infrequently. In any event a distinction is to be drawn between this situation and one in which a non-expert witness who is able to recognise a person's handwriting purports to identify it. This is not expert, but factual, evidence.[62]
3. Such a direction will not always be appropriate. It will not be if, for example, expert evidence is read to the jury because it is agreed by all parties; or if there is un-contradicted expert evidence on which the defence rely. It will be appropriate if, for example, a prosecution expert witness has been challenged in cross-examination, but no defence expert has been called. Before giving any direction about expert evidence discuss it with the advocates in the absence of the jury before closing speeches.
4. In *R v Fitzroy Fisher*[63] the prosecution had relied on the evidence of a Superintendent Carl Major, a handwriting expert. His evidence was to the effect that handwriting on the fictitious job orders and payment vouchers and subsequent encashed cheques issued therefrom was that of the appellant. The court per Cooke JA (Ag) stated *inter alia*:

> We agree with those expressions by Major. Accordingly, it is our view that Major's conclusion was no more than that of "an oracular pronouncement". Therefore, when the Magistrate accepted and relied on the conclusion of Major he was in error. He did not come to an independent judgment. There is no evidence that the Magistrate examined the handwriting on the documents and that he made a comparison. Even if this was so, that would not have provided a remedy. In *R v Harden* [1962] 1 All ER

62. See the Jamaican case of *R v Devon Jones and Anor* (1988) 25 JLR 1 which held that the calling of an expert witness is not the only means of proving handwriting and proof can be provided by a person who has knowledge of the handwriting as well as a comparison by an expert witness. Wright JA referred to the following authorities - "There is some authority against a jury being left without guidance to resolve authorship of disputed handwriting: *R v Smith* (1909) 3 C.A.R. 87; *R v Tilley* (1961) 45 C.A.R. 360; *R v Harden* (1963) 1 QB 8. But *R v Tilley* was considered in *R v O'Sullivan* (1969) 53 C.A.R. 274 at page 283 where Winn, LJ, said: "…it should be accepted these days that *Tilley* (supra) cannot always be in its literal meaning exactly applied; nevertheless, every possible step and regard should be had to what was said by the Court in that case…" In *O'Sullivan*, there was no expert witness and although there was the risk of the jury attempting to make comparison without such assistance it was recognised that once the documents are properly before the jury making comparison by them it really unavoidable. It was held that there was ample evidence to support the conviction and the appeal was dismissed. Of interest is a citation from *R v Harvey* (1867) 11 C.A.R. 546 where Blackburn J, (a judge of unquestioned authority) in dealing with the contention that the police witnesses not being experts were not competent to make the necessary comparison said at page 548: "But the jury can inspect them and compare them with the forged document."
63. RMCA 2/00 [20.7.00].

286 it was determined that it was wrong to invite a jury to draw conclusion based upon its comparison of handwriting in the absence of expert evidence…It would seem imperative that a handwriting expert must demonstrate visually how, based on the scientific criteria he used, why a particular conclusion was reached.

EXAMPLE: Handwriting Expert

There is no doubt that the signature on the cheque has been forged, but D says that he did not write it. On that issue you heard evidence from two handwriting experts, Mr Smith for the prosecution and Mr Jones for the defence. I will summarise their evidence for you later, but in a nutshell Mr Smith says that D definitely wrote the signature and Mr. Jones says that there are strong indications that D did not write it.

There is nothing unusual about expert witnesses giving evidence in a criminal trial: experts are often called to give evidence and opinions on matters of a specialist kind which are not common knowledge, such as the techniques of comparing handwriting and what this can reveal.

As you are unlikely to be experts in this field you must not carry out experiments, tests or comparisons of your own, or try to reach any conclusions of your own which do not take account of the evidence of the experts.

Your task is to weigh up the evidence and opinions which the two expert witnesses gave you and decide which parts you accept and which you do not, just as you do with every other witness. When doing this, take account of what you have heard about the experts' qualifications and experience and the impression they made on you as they gave their evidence.

Finally, bear in mind that the expert evidence forms only part of the evidence and you must reach your verdict(s) by considering all of the evidence in the case.

10-4 Delay

Sources: ***Archbold*** **2016, 4-465;** ***Blackstone's*** **2016, D3.73;** ***Blackstone's*** **2012; Crown Court Compendium 2016; Judicial Studies Board 1997 Specimen Directions**

LEGAL SUMMARY

1. A defendant has the right to a fair trial within a reasonable time. In exceptional cases delay will lead to a stay of proceedings as an abuse of process.[64] That involves a separate question from whether (applying the principles in *Galbraith*[65]) there is a case to answer.

64. *A-G's Reference (No 1 of 1990)* [1992] QB 630 at pp.643–44; *A-G's Ref (No. 2 of 2001)* [2003] UKHL 68; *Burns v HM Advocate (A-G for Scotland intervening)* [2008] UKPC 63. *F(S)* [2011] EWCA Crim 1844.
65. [1981] 1 WLR 1039.

2. A prolonged delay between the commission of the alleged offence and the complaint leading to trial is capable of affecting the quality of the evidence in two ways:
    a. the memory of witnesses fades with time;
    b. lines of inquiry may have been closed, either because records have been lost or destroyed or because witnesses have died or can no longer be traced.
3. In *Bell v DPP of Jamaica*,[66] the Privy Council laid down guidelines for determining whether delay will deprive the defendant of a fair trial. The relevant factors are:
    a. the length of delay;
    b. the reasons given by the prosecution to justify the delay;
    c. the responsibility of the accused for asserting his rights; and
    d. the prejudice to the accused.
4. In *Dyer v Watson*,[67] Lord Bingham, giving the opinion of the Privy Council, said (at page 52) that 'the threshold of proving that a trial has not taken place within a reasonable time is a high one, not easily crossed'.
5. Where there has been a significant delay, juries need to be directed on the relevance of that delay[68] including the impact on the preparation and conduct of the defence and the relationship with the burden of proof. Such a direction is only required where the potential difficulty arising from delay is significant and becomes apparent in the course of the trial or where it is necessary to be even handed between the accused and complainant. Whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case.[69]
6. Particular care will be needed in sexual cases where the issue of delay may be perceived as having an effect on the credibility of a complainant:[70] see Chapter 20-1 and 20-2.

DIRECTIONS

Delay in Making a Complaint

7. Where there has been a substantial delay between the alleged offence(s) and the making of the complaint that led to the current criminal proceedings, the jury should be directed as follows:

66. [1985] AC 937.
67. [2004] 1 AC 379.
68. The principles were reviewed in *H (Henry* [1998] 2 Cr App R 161, at pp.164–168, per Potter LJ. Reviewed in *PS* [2013] EWCA Crim 992. Also *E* [2009] EWCA Crim 1370; *E(T)* [2004] EWCA Crim 1441.
69. *Brian M* [2000] 1 Cr App R 49; *PS* [2013] EWCA Crim 992 at para.25.
70. *R v JD* [2008] EWCA Crim 2557.

a. The jury should consider the length of and the reasons for the delay in making the complaint and ask whether or not the delay makes the evidence in court of V more difficult to believe.

b. In a sexual case: the courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction. Every case is different. See also Chapters 20-1 and 20-2 in relation to sexual cases.

c. The jury should not assume that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful. The jury should consider the circumstances of the particular case.

d. The matters to be considered are (depending on the evidence and issues in the case):
   (a) Any reason(s) given by V for not having complained earlier.
   (b) Any reasons why V may have been put off from speaking out earlier (about which V did not give evidence) such as:
      (i) V felt afraid of D;
      (ii) V was shocked and/or ashamed and/or confused;
      (iii) V blamed himself;
      (iv) V had mixed feelings for D;
      (v) V was worried that no-one would believe him;
      (vi) V was worried about what would happen to him/D/the family if he spoke out.
   (c) Whether or not D is said to have put pressure on V to keep quiet and if so, how
   (d) What triggered the eventual making of the complaint.
   (e) The age and degree of maturity and understanding of V at the time/s it is said that the offence/s was/were committed.
   (f) The difference in age and the relationship (if any) between V and D.
   (g) The physical and/or emotional situation in which V was living at the time.
   (h) Whether V had made earlier complaints that did not lead to criminal proceedings and if so when and, briefly, if relevant why they were not proceeded with.
   (i) Any reasons for the delay suggested by or on behalf of D.

e. It is for the jury alone to weigh up all these matters when deciding whether they are sure that V has given truthful and reliable evidence.

Delay: the Effect on the Trial

8. Where there has been a substantial delay between the alleged offence(s) and the current criminal proceedings, it will probably be necessary to direct the jury as suggested below. However, the length of the delay, the cogency of the evidence and the circumstances of the case may all affect the need for or the content of such a direction, which may well need to be discussed with the advocates in the absence of the jury before closing speeches. Thus, what follows should not be regarded as a blueprint:

   (a) The passage of time is bound to have affected the memories of the witnesses.

   (b) A person describing events long ago will be less able to remember exactly when they happened, the order in which they happened or the details of what happened than they would if the events had occurred more recently.

   (c) A person's memory may play tricks, leading him genuinely to believe that something happened (to him) long ago when it did not. This will only arise in the rare case where it is suggested V suffers from Recovered Memory Syndrome, and expert evidence must always be called on this point.

   (d) The jury must therefore consider carefully whether the passage of time has made the evidence about the important events given by any of the witnesses concerned less reliable than it might otherwise have been because (depending on the evidence in the particular case) they cannot now remember particular details / they claim to remember events in unlikely detail/their memories appear to have improved with time.

   (e) The passage of time may also have put D at a serious disadvantage. For example, (again depending on the evidence in the particular case):

      i. D may not now be able to remember details which could have helped his defence.

      ii. Because, after all this time, V has not been able to state exactly when and / or where D committed the crimes of which D is accused, D has not been able to put forward defences, such as showing that he could not have been present at particular places at particular times, which he may have been able to put forward but for the delay.

      iii. D has not been able to call witnesses who could have helped his defence because they have died / cannot now be traced / cannot now remember what happened.

      iv. D has not been able to produce documents which could have helped his defence because they have been lost / destroyed / cannot be traced.

(f) [If appropriate]: The fact/s that:

  i. D is of good character and/or

  ii. No other similar allegations have been made in the time that has passed since the events alleged is/are to be taken into account in D's favour.

(g) The jury should take all these matters into account when considering whether the prosecution has been able to prove, so that the jury is sure about it, that D is guilty.

EXAMPLE 1

***NOTE:* Any direction dealing with delay is bound to be fact-specific, as is the example below. In a case involving sexual allegations see also Chapters 20-1 and 20-2 below.**

You know that V first complained that D had repeatedly beaten and injured him at the care home about 20 years after V had left the home. You should take this into account in three ways.

First, the defence say that if V had really been beaten, he would have complained much earlier. However, when V was asked about the delay, he said that he was terrified of D while at the home and that, even after he left, it took him a long time to pluck up the courage to go to the police. He did so only when he was appalled to read a newspaper article describing D as a wonderful caring man. Take all this into account when considering whether V's complaints are true. Someone who delays making a complaint is not necessarily lying. Equally, someone who makes a prompt complaint is not necessarily telling the truth.

Secondly, bear in mind that the passage of time is likely to have affected the memory of each of the witnesses about exactly what happened all those years ago. It may even have played tricks on their memories, leading them genuinely to believe that things happened when they did not.

Thirdly, be aware that the passage of time may have put D at a serious disadvantage. He may not able to remember details now that could have helped him, and he has told you that two workers at the care home, who he says would have supported his case, have since died.

[Where D is of good character]: Fourthly, the fact that no similar allegations have been made in the 20 years since the date of the alleged events which you are considering means that D is entitled to ask you to give significant weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

You should take the long delay into account in D's favour each of these ways when you are deciding whether or not the prosecution have proved that D is guilty, so that you are sure of it.

EXAMPLE 2[71]

We are now concerned with events which are said to have taken place a long time ago. You must appreciate that because of this there may be a danger of real prejudice to a defendant. This possibility must be in your mind when you decide whether the prosecution has made you sure of the defendant's guilt.

(Where appropriate:) You are entitled to consider why these matters did not come to light sooner. Is that a reflection on the reliability of the complaint? Or does it arise from the conduct of the defendant? You have been given an explanation for this, which is [...]

You should make allowances for the fact that with the passage of time memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred [many years ago]. Sometimes the passage of time may even play tricks on memories.

You should also make allowances for the fact that from the defendant's point of view, the longer the time since an alleged incident, the more difficult it may be for him to answer it. [For example, has the passage of time deprived him of the opportunity to put forward an alibi and evidence in support of it?] You only have to imagine what it would be like to have to answer questions about events which are said to have taken place [...] years ago to appreciate the problems which may be caused by delay. Even if you believe that the delay in this case is understandable, if you decide that because of this the defendant has been placed at a real disadvantage in putting forward his case, take that into account in his favour when deciding if the prosecution has made you sure of his guilt.

(Where appropriate in the case of a defendant of good character i.e. either here, or when giving the second limb of the good character direction on page 23.2, add:) Having regard to what you know about this defendant and in particular the [...] years since the date of the alleged offence [and (if it be the case) that no similar allegation has been made against him] you may think he is entitled to ask you to give considerable/more than usual weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

10-5 Evidence of Children and Other Vulnerable Witnesses

Sources: **Crown Court Compendium 2016; Evidence Act; Evidence (Special Measures) Act 2012; Sexual Offences Act 2009; Child Care and Protection Act 2004**

LEGAL SUMMARY

1. Special Measures and Intermediaries are dealt with in Chapters 3-6 and 3-7.

71. Adapted from Judicial Studies Board 1997 Specimen Directions.

2. The approach to receiving the evidence of children has altered dramatically over recent years.

3. Section 31N of the **Evidence Act** ("the Act") deals with the competence of a child to testify. It states:

   (1) Subject to subsection (2) and the other provisions of this Act, at every stage in civil or criminal proceedings, a child is competent to give evidence.

   (2) A child is competent to give evidence, if and only if it appears to the court that the child is a person who –

      (a) is possessed of sufficient intelligence to justify the reception of the evidence; and

      (b) understands the duty of speaking the truth.

4. The child's competence shall be determined by the court on a balance of probabilities.[72]

5. In determining the question of competence, the court shall treat the child as having the benefit of any special measure for which the court has made or proposes to make an order[73] and shall proceed to do so in the absence of the jury.[74]

6. Arrangements for child witnesses to give evidence under special measures directions are provided at sections 5-7 of the **Evidence (Special Measures) Act 2012.**

7. The Court of Appeal in *Barker*[75] noted that the witness need not understand every single question or give a readily understood answer to every question. The witness is competent if he understands the questions put to him and can also provide understandable answers.

8. Where the court considers it necessary to question the child in making its determination under subsection (1) of the Act the questioning shall-

   (a) subject to the provision of subsection (5), be conducted by the court in the presence of the parties to the proceedings and (i) any social worker accompanying the child; or (ii) any other person appointed by the court for this purpose; and

   (b) be conducted with the benefit of any special measure which the court deems necessary.[76]

9. If the court considers it necessary in order to make a determination under subsection (1), it may review evidence from a child psychiatrist, child psychologist, probation officer, or

72. Section 31O(b).
73. Section 31O(2).
74. Section 31O(3).
75. [2010] EWCA Crim 4.
76. Section 31O (4) Evidence Act (Jamaica).

any other person who the court considers to be qualified to make an assessment of the child and who is not a party to the proceedings.[77]

10. Once the child is considered competent, his/her evidence shall be given without administering an oath and shall be treated as if the evidence had been given on oath.[78]

11. No conviction, verdict or finding in proceedings considered under s.31N of the Act shall be taken to be unsafe by reason only that the evidence of the child was given without administering an oath.[79]

12. Subject to s.63 of the **Child Care and Protection Act**, a child who wilfully gives false evidence in any civil or criminal proceedings commits an offence shall be dealt with in accordance with the provisions of s.76 of the **Child Care and Protection Act**.[80]

13. Corroboration of the evidence of children is no longer required. The former requirement was abolished by section 31Q(1) of the **Evidence Act.** See also section 26 of the **Sexual Offences Act 2009** where a person is tried for the offence of rape or any other sexual offence under that Act. There may, however, be a need to advise the jury of the need for caution before accepting the evidence of a young child where the nature or quality of the evidence appears to require it. Such warnings are no longer routinely given.

14. Section 31Q(2) of the **Evidence Act** provides as follows:

    (2) Notwithstanding the provisions of subsection (1), the trial Judge (whether a Judge of the Supreme Court or a Parish Court Judge) may -

    (a) in a trial by jury, where the trial Judge considers that the circumstances of the case so require, give a warning to the jury to exercise caution in determining whether to accept uncorroborated evidence of the child and the weight to be given to such evidence; or

    (b) in a trial by Judge alone, where the trial Judge considers that the circumstances of the case so require, give himself the warning as provided under paragraph (a).

15. A warning may also be given pursuant to section 26(2) of the **Sexual Offences Act** which states:

    (2) Notwithstanding the provisions of subsection (1), the trial Judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining -

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77. Section 31O (5) Evidence Act (Jamaica).
78. Section 31P (1) and (2) Evidence Act (Jamaica).
79. Section 31P (4) Evidence Act (Jamaica).
80. Section 31P (3) Evidence Act (Jamaica).

(a) whether to accept the complainant's uncorroborated evidence; and

(b) the weight to be given to such evidence.

16. As far as possible, children should only be interviewed in the presence of a parent or guardian, or in their absence, some person who is not a police officer. See *Williams (Ricardo) v R*[81] where a cautioned statement was taken from a boy, 12 years of age, accused of murder.

17. The approach to cross examination of children and vulnerable witnesses[82] is markedly different from that in relation to adults. Ensuring that advocates adapt the style of cross-examination requires effective case management from the outset. The Court of Appeal has repeatedly emphasised that the judge has a clear obligation to control cross-examination of children and vulnerable witnesses.[83] In *Barker*[84] the Lord Chief Justice considered the circumstances in which very small children might give evidence in criminal trials. The Court acknowledged that whilst the right of the defendant to a fair trial must not be undiminished, the trial process must cater for the needs of child witnesses and that the forensic techniques had to be adapted to enable the child to give the best evidence of which he or she is capable.

Refer to the Judicial Criminal Case Management Bench Book for any guidance on case management for children.

Witness Distress

18. In cases where the witness becomes distressed by questioning from the advocate, it may be necessary for the judge to intervene to safeguard the fairness of the trial process.[85] Where a witness becomes so distressed that it is not possible to complete cross-examination that does not necessarily mean that the trial must be stopped.[86] The question will be whether the examination of the witness had been sufficient to allow the jury properly to assess the issues in dispute. Appropriate explanations to the jury will be necessary.

81. (2006) 69 WIR 348.
82. *Dixon* [2013] EWCA Crim 465.
83. *Barker* [2010] EWCA Crim 4. *W and M* [2010] EWCA Crim 1926; *Wills* [2011] EWCA Crim 1938; *E* [2012] EWCA Crim 563.
84. [2010] EWCA Crim 4
85. See Part 3 para 43 of the Office of the Children's Advocate Child Justice Guidelines, July 2013.
86. *Pipe* [2014] EWCA Crim 2570; *Stretton and McCallion* (1988) 86 Cr App R 7; *PM* [2008] EWCA Crim 2787.

Explanation to the Jury

19. In *Wills,*[87] the Court of Appeal emphasised, as it has done in other cases, that when restrictions are placed on cross-examination, the judge where appropriate and in fairness to the defendant:

> …should explain the limitations to the jury and the reasons for them. It is also important that defendants do not perceive, whatever the true position, that the cross-examination by their advocate was less effective than that of another advocate in eliciting evidence to defend them on allegations such as those raised in the present case.
>
> Secondly, we observe that if there is some lapse by counsel in failing to comply with the limitations on cross-examination, it is important that the Judge gives a relevant direction to the jury when that occurs, both for the benefit of the jury and any other defendant. To leave that direction until the summing up will in many cases mean that it is much less effective than a direction given at the time.
>
> Thirdly, this case highlights that, for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate or by the Judge, after the necessary discussion with the advocates. This was, we think, envisaged by what the Lord Chief Justice said in *R v Barker* at page 42.

20. See also *Edwards*[88] where the judge made clear to the jury the difficulty the defendant faced by the limits on cross examination: "The jury knew that the defendant disputed the evidence of [V]. The judge clearly explained his decision as to cross-examination technique and why he had taken it. In addition, the jury was specifically directed "to make proper fair allowances for the difficulties faced by the defence in asking questions about this.""

***NOTE:* See the Office of the Children's Advocate Child Justice Guidelines (www.welcome.oca.gov.jm/media/CHILD-JUSTICE-GUIDELINES.pdf)**

Directions at Trial

1. Any special measures, including the use of an intermediary, should be explained: see Chapter 3-6 Special Measures and Chapter 3-7 Intermediaries.

87. [2011] EWCA Crim 1938.
88. *Edwards* [2011] EWCA Crim 3028.

2. Depending on the age of the child or the vulnerability of the witness, it may help the jury to explain how his level of understanding, regardless of intelligence, may be limited. This may be done before he/she gives evidence.

3. It may also help the jury and be fair to all parties to explain to the jury, before such a witness is cross examined, that the cross examination will not be conducted in the same way as it would have been if the witness had been an adult/non-vulnerable adult: see Example 4 below.

4. Any particular difficulties which have arisen in the course of the case should be addressed in a manner which is fair to both/all parties.

5. Where offences are said to have occurred within the home, the jury should be alerted to the potential difficulties which a child may have perceived in reporting matters: see Example 2 below. Where grooming is alleged to have occurred, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained: see Chapter 20-3: Grooming of Children.

EXAMPLE 1: Evidence of a Child Witness

V is a very young child aged [specify]. It is for you to decide whether he or she is reliable and has told the truth. The fact that a witness is young does not mean that his/her word is any more or less reliable than that of an adult and you should assess V's evidence in the same fair way as you assess any other evidence in the case.

Because this witness is so young you should bear a number of things in mind:

- A child does not have the same experience of life or the same degree of maturity, logic, perception or understanding as an adult. So, when a child is asked questions s/he may find the questions difficult to understand, may not fully understand what it is s/he is being asked to describe and may not have the words accurately or precisely to describe things.
- A child may be tempted to agree with questions asked by an adult, whom the child may well see as being in authority, particularly in a setting such as this. Also, if a child feels that what s/he is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that s/he may get into trouble.
- A child may not fully understand the significance of some things that have happened (which may be sexual) at the time they happened and this may be reflected in the way s/he remembers or describes them [If applicable in later life].
- A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time, when trying to describe events, even after a fairly short period, and a child's memory of when and in what order events occurred may not be accurate.
- A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how s/he felt at the time or why s/he did not take a particular course of action.

All these things go to a child's level of understanding rather than to his/her credibility and so you should be cautious about judging a child by the same standards as an adult. None of these things mean that this witness is or is not reliable: that is a matter for your judgment.

EXAMPLE 2: Cases Involving a Family Setting/Familiar Environment

V gave evidence about things which s/he said happened at [e.g. his/her home / his/her uncle's home]. You should be cautious about assessing what his/her family life was like by reference to your own experiences. A child relies upon and loves the people with whom s/he lives and will usually accept, without questioning, whatever happens within that home as the norm. As a result, events that others might think out of the ordinary may become routine and so are not particularly memorable. This may affect the way in which the child remembers events when some time later s/he is asked about what happened.

Also, a child may not always appreciate that what is happening to him/her in his/her home is not normal and may only come to realise this as s/he grows older. So when you are assessing V's evidence you should look at it in the context of his/her home life as it has been described to you.

EXAMPLE 3: A Child's Reason for Silence

Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may-

- be confused about what has happened or about whether or not to speak out;
- blame him/herself for what has happened or be afraid that he/she will be blamed for it and punished;
- be afraid of the consequences of speaking about it, either for him/herself and/or for another member of the family (such as [specify]);
- may feel that s/he may not be believed;
- may have been told to say nothing and threatened with the consequences of doing so;
- may be embarrassed because s/he did not appreciate at the time that what was happening was wrong, or because s/he enjoyed some of the aspects of the attention they were getting;
- simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out [e.g. for the sake of a younger child who s/he feels may be at risk];
- may feel conflicted: loving the abuser but hating the abuse.

EXAMPLE 4: Cross-Examination of a Child Witness

Because V was so young [name of defence advocate] was not permitted to question and challenge him/her in the same way, or for the same amount of time, as he would have questioned and challenged an older witness.

This does not mean however that V's evidence is not disputed. You are aware of the defence case however from [specify e.g. D / other witnesses]

EXAMPLE 5: V's evidence has had to be curtailed before cross-examination has been concluded

You will remember that although [name of defence advocate] did ask V some questions, a point came when V was so upset that it would not have been right to ask him/her to continue giving evidence. If cross-examination had continued, V would have been asked about [specify points]. You do not know how V would have responded to those questions and you must not speculate about this.

***NOTE:* this direction may need to be amplified in light of any submissions or arguments raised in the defence closing speech about any resulting disadvantage to D.**

EXAMPLE 6: Evidence capable of supporting the evidence of a child witness

You know that W is only six. It is open to you to convict D on the evidence of the child alone, just as if the complainant was an adult, you could convict D on the word of that adult alone.

***NOTE:* When reviewing the evidence in summing up, the judge should point out any evidence which does, or which does not, support the complainant's evidence in the same way as in the case of an adult complainant. Care must be taken however to avoid any implication that the evidence of a child requires corroboration.**

EXAMPLE 7: Children of Tender Years

Sample Direction

I should also warn you that there is also the danger of acting on the evidence of children of the age of…. There is the risk of unreliability, inaccuracy, over-imaginativeness and the susceptibility of being influenced by third parties.

11. GOOD CHARACTER OF DEFENDANT

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

1. For centuries it has been accepted that evidence of the accused's good character is admissible in criminal trials. In the modern era the courts have accepted that good character evidence may be admissible (i) to bolster the accused's credibility and (ii) as relevant to the likelihood of guilt. This has been repeatedly accepted by the Court of Appeal, most prominently in *Vye*[1] and by the House of Lords in *Aziz*[2] and by the 5 member Court of Appeal in *Hunter et al.*[3]
2. The words of Lord Steyn in *Aziz* should always be borne in mind: Judges "should never be compelled to give meaningless or absurd directions." No direction should be given if it is "an insult to common sense" or misleading.
3. Whenever a direction is given the judge must adopt an appropriate form of words to convey the significance of the evidence of good character.
4. In *Hunter* the Court states the principles derived from *R v Vye* and *R v Aziz* by which it remains bound:[4]
    a. The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements ['credibility limb'].
    b. The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements. ['propensity limb']
    c. Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.
    d. There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge

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1. [1993]1WLR 471.
2. [1996] AC 41.
3. [2015] EWCA Crim 631.
4. See also *Michael Reid v R* SCCA No. 113/07 [03.04.09] in which the Court of Appeal (Jamaica) conducted a very thorough review of the case law on good character.

considers it would be an insult to common sense to give directions in accordance with *Vye*. The judge then has a residual discretion to decline to give a good character direction.

e. A jury must not be misled.

f. A judge is not obliged to give absurd or meaningless directions. [68]

5. It is also important to note what *Vye* and *Aziz* did not decide:

   a. that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;

   b. that a defendant with previous convictions is entitled to a good character direction;

   c. that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged;

   d. that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt.

   e. that the failure to give a good character direction will almost invariably lead to a quashing of the conviction; [69]

6. The Court offered guidance as to the approach to be adopted, identifying 5 categories relating to good character: see paragraph 11 below.

7. If defence advocates did not take a point on the character directions at trial and/ or if they agreed with the judge's proposed directions which were then given, these are good indications that nothing was amiss. [98]

8. The Court noted, per curiam: "as a matter of good practice, if not a rule, defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and if so the precise terms. This discussion should take place before the evidence is adduced. This has advantages for the court and for the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the Crown can conduct any necessary checks and the judge will have the fullest possible information upon which to rule. The judge should then ensure that the directions given accord precisely with their ruling."[101]

9. Where there are co-Ds whose character may warrant a different direction from that of the accused, two situations arise:

   a. If D1 merits a good character direction and D2 has a bad character (whether the jury have heard about it or not) it is incumbent on the judge to direct the jury about D1's good character: *Cain.*[5]

   b. If D1 merits a good character direction and D2 does not qualify for a good character direction (but nor has his bad character been revealed). There is a danger in this situation that a good character direction given in relation to D1 alone will lead the jury to speculate and conclude that D2 is likely to have a bad character. It is nevertheless incumbent on the judge to give the good character direction to D1, although the judge then has discretion as to what to say about D2. In most situations a warning against speculation is appropriate.

Default by Defence Counsel to Raise the Issue of Good Character of Defendant

10. The failure of counsel to discharge his duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice. See *Peter Stewart v Regina* [2011] UKPC 11 Privy Council Appeal No 61 of 2010 [18.5.11] (the defendant's good character only emerged when his antecedent report was read at the subsequent sentencing hearing. In the Board's view, this was a straightforward case and it could safely be said that, even had a full character direction been given, the jury would inevitably still have convicted); *Michael Reid v R* SCCA No. 113/07 [03.04.09] (The defendant stated that his attorney informed him that in relation to character witnesses that he did not think this would make any difference); *Maye v R:* Privy Council Appeal No 104 of 2006 [1.7.08] (PC Jamaica) (failure on the part of defence counsel to call a highly material witness and to adduce evidence of the appellant's good character); *Muirhead v R:* Privy Council Appeal No. 103/06 [28.7.08] (the appellant made an unsworn statement on advice from his counsel, (by which he was, he said, "surprised and disconcerted") and no evidence of his good character was called). See also *Brown v R* (Jamaica) [2005] UKPC 18 [13.4.05] (PC Jamaica) (the fact that the failure to put in evidence of good character at the appropriate time was a regrettable omission on the part of counsel; their Lordships concluded that on balance there was no substantial miscarriage of justice and they regarded it as appropriate to apply the proviso).

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5. [1994] 1 WLR 1449.

DIRECTIONS

11. All directions on this topic must be crafted in accordance with the law as set out in the case of *Hunter*.[6] Hallett LJ VP gave the judgment of the Court. In paragraphs 76 to 88, from which the italicised passages below are citations, she set out the need or potential need for directions as to good character in the following five categories:

    (1) Absolute good character: This category applies where "*a defendant ... has no previous convictions or cautions ... and no other reprehensible conduct alleged, admitted or proven*," whether or not he has adduced evidence of positive good character.

    It is only in this category that there is a requirement upon the trial judge to give a full good character direction i.e. one containing both the "credibility limb" (if D has given evidence or made an out of court statement on which he relies) and the "propensity limb" (see paragraph 2(b) below). "*The Judge must tailor the terms of the direction to the case before him/her, but in the name of consistency, we commend the Judicial College standard direction in the Crown Court Bench Book*[7] *as a basis*."

    See Examples 1 and 2 below. Example 1 replicates this standard direction verbatim. Example 2 and the subsequent examples use it as a basis.

    (2) Effective good character: Where "a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the Judge must make a judgment as to whether or not to treat the defendant as a person of effective good character ... It is for the Judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates... If the Judge decides to treat a defendant as a person of effective good character ... s/he must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure that the jury is not misled". See Example 3 below.

    (3) Previous convictions adduced by the defence: Defendants may adduce previous convictions which are not in the same category as the offence alleged in the hope of obtaining a good character direction on propensity from the judge. A defendant in this position has no entitlement to either limb of the good character direction. The judge has a broad "open textured" discretion whether or not to give any good character direction, and if so in what terms. See Example 4 below, in which only the "propensity limb" is referred to.

6. [2015] EWCA Crim 631.
7. The Crown Court Bench Book: Directing the Jury – March 2010.

(4) <u>Bad character adduced and relied on by the prosecution</u>: "Where a defendant has no previous convictions, but evidence is admitted and relied on by the Crown of other misconduct, the Judge is obliged to give a bad character direction. S/he may consider that as a matter of fairness they should weave into their remarks a modified good character direction ...This too is a broad discretion ... Where the defendant has previous convictions and bad character is relied upon it is difficult to envisage a good character direction that would not offend the absurdity principle."

(5) <u>Bad character adduced by the defence and not relied on by the prosecution:</u> "That leaves the category of defendants who have no previous convictions but who admit reprehensible conduct that is not relied on by the Crown as probative of guilt." As in categories (3) and (4) above, the Judge has a broad "open textured" discretion whether or not to give any good character direction, and if so in what terms.

12. A full good character direction is as follows:

    (1) Good character is not a defence to the charge.

    (2) However, evidence of good character counts in D's favour in two ways:

        (a) his good character supports his credibility and so is something which the jury should take into account when deciding whether they believe his evidence (the 'credibility limb'); and

        (b) his good character may mean that he is less likely to have committed the offence with which he is charged (the 'propensity limb').

13. It is for the jury to decide what weight they give to the evidence of good character, taking into account everything they have heard about the defendant.

14. Where D is of good character but has not given evidence, he is entitled to a full good character direction if he has made an out of court statement (usually to the police) on which he relies, and to a good character direction limited to the "propensity limb" if he has not made such a statement.

15. It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from D's not having given evidence: see Examples 5 and 6 below.

16. Where the prosecution relies on disputed evidence of previous misconduct on the part of a defendant otherwise entitled to a good character direction, the judge should direct the jury that:

    a. if they are sure the evidence is true, they may take it into account as evidence of bad character, adding an appropriate bad character direction (as to which see Chapter 12 below); whereas

b. if they are not sure the evidence is true, they should disregard it, adding an appropriate good character direction. See Example 7 below.

17. A good character direction must never mislead the jury or lead to absurdity.

18. The judge should discuss with the advocates, in the absence of the jury and before closing speeches, the need for and form of any good (and bad) character direction to be given.

19. If a defendant who receives a good character direction has a co-defendant about whom there is no evidence of character the judge should discuss with the advocate for the co-defendant, whether the jury should be directed "not to speculate" about his character (see Example 8 below) or whether, as will commonly be the preferred option, no direction should be given. Practices differ as to whether, if given at all, to give such a direction immediately after the good character direction or at some different point of the summing up. It is suggested that juries will have recognised by this stage of the case that whereas they have evidence about one defendant's good character they know nothing about the character of a co-defendant, and so any direction can properly be given immediately after the good character direction.

EXAMPLE 1 [category (1) above]: Standard direction – relevance to D's credibility and propensity – good character is a positive feature of D's case – weight is for the jury

You have heard that the defendant is a man in his middle years with no previous convictions. Good character is not a defence to the charges but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept what he told you. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him.

It has been submitted on behalf of the defendant that for the first time in his life he has been accused of a crime of dishonestly. He is not the sort of man who would be likely to cast his good character aside in this way. That is a matter to which you should pay particular attention.

However, what weight should be given to the defendant's good character and the extent to which it assists on the facts of this particular case are for you to decide. In making that assessment you may take account of everything you have heard about him.

EXAMPLE 2 [category (1) above]: D has no previous convictions/cautions and there is evidence from character witnesses

You know / it is agreed that the defendant has no convictions or cautions for any criminal offence and you have also heard unchallenged evidence from witnesses who spoke about his personal qualities. [Here summarise the evidence or tell the jury that this will be summarised later]. He is a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First: D gave evidence and you should take his lack of convictions/cautions and his personal qualities into account when you are deciding whether you believe his evidence.

Secondly: the fact that D is now [specify] years old, that he has the qualities about which you have been told and that he has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of [specify].

You should take D's good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

EXAMPLE 3 [category (2) above]: D has spent convictions but the judge has decided that he should be treated as someone of "effective good character"

You know / it is agreed that the defendant has two convictions for [specify]. These offences, which are relatively minor, were committed more than 25 years ago when D was still a teenager.

Because of their nature and age he is to be regarded as if he were a person of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but it should be taken into account in his favour in two ways:

First: D gave evidence and the fact that he is to be treated as someone of good character is something that you should take into account when you are deciding whether you believe his evidence.

Secondly: the fact that D is now [specify] years old and has not committed any offence for over 25 years [if appropriate and has never committed any offence of [specify]] may mean that it is less likely that he would have committed the offence/s with which he is charged.

You should take the fact that D is to be regarded as a person of good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

EXAMPLE 4 [category (3) above]: D has introduced his previous convictions because they are dissimilar to the charges which he faces at trial. The judge decides to give a good character direction limited to the propensity limb

You know / it is agreed that D has convictions for offences of [specify]. D introduced this evidence because he wanted you to know that he has never been convicted of any offence involving [specify].

How should you approach the fact that he has no previous convictions for any offence similar to the charge he now faces? This is obviously not a defence to the charge but it may make it less likely that he has committed an offence of [specify].

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

EXAMPLE 5: D is of good character; he has not given evidence but made an out of court statement on which he relies; direction on credibility and propensity limbs

You know / it is agreed that the defendant has no cautions or convictions for any criminal offence. He is a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First, although the defendant did not give evidence he did give an account to the police when he was interviewed and he relies on that account in this case. You should take his good character into account when you are deciding whether you accept what he said in that interview. Bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination.

Secondly: the fact that D has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of [specify].

You should take D's good character in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

EXAMPLE 6: D is of good character; he did not make any out of court statement and has not given evidence; direction on propensity limb only

You know / it is agreed that the defendant has no convictions or cautions for any criminal offence. He is of good character.

This does not mean that he could not have committed the offence/s with which he is charged but it may mean that it is less likely that he would have committed the offence/s.

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

EXAMPLE 7: D is charged with assaulting V; evidence that D is of positive good character, but the jury have also heard evidence, which D disputes, of his previous bad character / misconduct

You know that the defendant has no previous conviction or caution for any criminal offence and you have heard from witnesses who spoke about his personal qualities [about which I will remind you in due course]. On the other hand you have also heard evidence that the defendant assaulted V on a number of previous occasions, something which D denies.

How should you approach the evidence of these alleged previous assaults?

If you are sure that one or more of these alleged previous assaults occurred, you should consider whether this shows that D had a tendency to be violent towards V.

If you are sure that he did have such a tendency you could treat this as some support for the prosecution's case, but this would only be part of the evidence against him and you must not convict him wholly or mainly on the strength of it. If you are not sure that he did have such a tendency, then his previous conduct could not support the prosecution's case against him.

If, on the other hand, you are not sure that any of these alleged previous assaults occurred you must ignore them completely and must treat the defendant as a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First: D gave evidence and you should take his lack of convictions/cautions and his personal qualities into account when you are deciding whether you believe his evidence.

Secondly: the fact that he has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of [specify].

You should take D's good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

EXAMPLE 8: Co-defendant about whom there is no evidence of character (if any direction is required)

You have heard nothing at all about the character of the co-defendant and you must not speculate about it.

12. BAD CHARACTER OF DEFENDANT

12-1 Evidence of Bad Character – General Introduction
12-2 Directions Applicable to Admissible Bad Character Evidence
12-3 Evidence of Bad Character Adduced by the Defendant
12-4 Bad Character Evidence as Important Background/ Explanatory Evidence
12-5 Bad Character Evidence – Relevant to an Important Matter in Issue
12-6 Important Matter in Issue Between Defendant and Co-defendant
12-7 Evidence to Correct a False Impression Given by the Defendant, Going to Credit and Propensity
12-8 Section 9(f)(ii) – Defendant's Attack on the Character of Prosecutor or the Prosecutor's Witnesses
12-9 Non-Defendant's Bad Character

12-1 Evidence of Bad Character – General Introduction

Sources: **Evidence Act; Judicial Studies Board Crown Court Bench Book 2010; *Archbold* 1997**

LEGAL SUMMARY

1. Bad character evidence is evidence of or a disposition towards misconduct. Apart from evidence of previous convictions other evidence amounting to "reprehensible behavior "is evidence of bad character.

2. Section 9(f) of the **Evidence Act** states:

   A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless

   (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

   (ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

3. In *Selvey v DPP*[1] it was held that if what was said amounted to no more than a denial of the charge it should not be regarded as an imputation on the character of the prosecutor or his witness . Thus in a case of rape the defendant can allege consent without placing himself in peril of cross-examination pursuant to s.9(f)(ii).

4. Section 9(f) regulates the cross-examination of a defendant. He is given a "shield" in respect of other offences and of his bad character. The section is only dealing with the cross – examination of a defendant who chooses to give evidence. The defendant will lose his shield if he puts his good character in issue. Whether or not the defendant's good character is in issue is a question of fact for the judge. See, for example, *R v Ferguson;*[2] *R v Wright.*[3]

5. Where the defendant has given evidence the jury should be told that his bad character, if in evidence, goes solely to his credibility and not as to whether he is likely to have committed the offence. The judge must direct the jury that evidence of previous convictions is relevant to the defendant's credibility and that they may, not must, take such evidence into account: *R v Prince.*[4] Its sole purpose is to show that he should not be believed on his oath *R v Cook.*[5]

6. Where, however, evidence of good character has been elicited or called on behalf of the defendant who has not given evidence, the evidence of good character can only be relevant as to the likelihood of his having committed the offence, and the evidence of bad character can only be relevant to rebut the evidence of good character, i.e. to neutralise it. See *Archbold* at paragraph 4-410.

7. At common law evidence which shows that a defendant has a propensity to misbehave is generally to be excluded on grounds of fairness, unless there is some reason to admit it beyond mere propensity. Mere propensity to behave badly is to be excluded as unfair.

8. It is helpful to state the time-honoured formulation which is applied in jurisdictions governed by the common law:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a

1. [1970] AC 304.
2. [1909] 2 Cr App R 250.
3. [2000] Crim LR 85.
4. [1990] Crim LR 49.
5. [1959] 2 QB 340.

person likely from his criminal conduct or character to have committed the offence for which he is being tried.

On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. Per Lord Herschell in *Makin v Attorney General for New South Wales*.[6]

9. In *Myers, Brangman and Cox* [2015] UKPC 40 the Board held that gang evidence, which will almost always involve implications of bad character other than that charged on the part of those labelled gang members, is admissible if relevant to prove something on which a jury may properly rely to resolve an issue in the case.

12-2 Directions Applicable to Admissible Bad Character Evidence

Sources: ***Archbold*** **2009; Crown Court Compendium 2016; Evidence Act; Criminal Justice Administration Act**

DIRECTIONS

1. In the case of disputed bad character evidence the jury must be reminded of the evidence on both sides (whether it be prosecution and defence or co-accused and defence) and warned to rely only on evidence which has been proved (prosecution) or raised to the required standard (co-defendant).
2. Where D has disputed that he is guilty of an offence of which he has been previously convicted, where the conviction has been proved, it is to be presumed that he committed that offence unless the contrary has been proved on the balance of probabilities. For the manner of proving previous conviction see the **Evidence Act** s.27 and the **Criminal Justice Administration Act** s.32; *C.*[7]
3. Evidence of bad character may have been admitted for one or other reason or have become relevant to more than one issue; in such cases directions must be given in respect of all relevant matters in relation to each circumstance.

4. The issues to which evidence is potentially relevant must be identified in detail and the

6. [1894] AC 57 at 65.
7. [2010] EWCA Crim 2971.

jury directed about the limited purpose(s) for which the evidence may be used (such as the circumstances in section 9(f) of the Evidence Act) and relevance to an issue.[8]

5. It is of equal importance to identify any purpose/s for which the evidence may not be used.
6. The jury must be directed to decide the extent to which, if at all, the evidence establishes that for which the party relying upon it contends (e.g. propensity/ credibility).
7. Depending on the nature and extent of the convictions or other evidence of bad character, consideration should be given to a direction on the effect of the bad character evidence on the credibility of D.

NOTES:

- Examples of directions on the use to which evidence of bad character may and may not be put are set out in further sections of this Chapter relating to specific circumstances.
- In addition to directing the jury in the summing up, it may help them at the time that the evidence is presented to tell them, in short form, of its relevance and the purposes for which they may, and may not, use it.

12-3 Evidence of Bad Character Adduced by the Defendant

Sources: ***Archbold* 2009, 13-28**

LEGAL SUMMARY

1. See the General Introduction at Cap.12-1.
2. Where the bad character evidence is admitted for a particular purpose it may be used by the jury for any purpose for which it is relevant.[9]

> In our judgment it would be inappropriate in a [situation where bad character evidence is adduced by a] defendant for that defendant to have carte blanche to make such points as he wishes about his previous record, without facing the possibility that his record does him no favours where credibility is concerned: *Speed.*[10]

3. When summing up, the judge's task is to explain to the jury for what purpose the evidence may, and may not, be used.[11] The jury need careful direction on the uses to which evidence of previous convictions properly admitted might be put.[12]

8. *Myers, Brangman and Cox v The Queen* [2015] UKPC 40.
9. *Highton* [2005] EWCA Crim 1985.
10. [2013] EWCA Crim 1650.
11. *Edwards & Another, v R* [2005] EWCA Crim 3244 at para 3; *Campbell* [2007] EWCA Crim 1472 at paras 37–38.
12. *Edwards & Another, v R* [2005] EWCA Crim 3244 at para. 104.

4. In some instances, it may be inappropriate for the jury to use the evidence as evidence going to credibility: *Tollady*.[13] The guidance to the jury may need to include: warning against the danger of placing undue reliance on the bad character, that the evidence of bad character must not be used to bolster a weak case, and that the jury must ignore the bad character if they thought the case against D is a weak one. The jury should also be told that they should not assume that D is guilty simply because of his bad character.

5. A defendant may choose to adduce evidence of his bad character irrespective of whether or not a co-accused agrees.

6. Where evidence of bad character is not intentionally adduced by D (for example it is blurted out in error) the jury must be directed to ignore the evidence unless it is admissible under one or more of the other relevant circumstances.

DIRECTIONS

7. Identify the evidence of bad character.

8. If D elects to adduce evidence of his own bad character that would otherwise have been admissible through one of the other relevant circumstances the jury must be given directions on the use(s) to which the evidence may be put.

9. If D elects to adduce evidence of relatively minor bad character, for fear that the jury might speculate that it was something worse, the jury must be directed that they know about his convictions only so that they know about of the whole background and, if appropriate, that the character evidence does not make it more or less likely that D committed the offence.

10. If the evidence of bad character is minor and relates to matters of a completely different character from that with which D is being tried, the judge has a discretion, after consideration with the advocates, to give D the benefit of the "propensity limb" of the good character direction: see Chapter 11.

11. Depending on the nature and extent of the convictions or other evidence of bad character a direction as to the effect of the evidence upon D's credibility may be required.

12. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that D has been convicted or has behaved badly in the past means it is more likely that he did so on this occasion.

13. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all relevant circumstances.

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13. [2010] EWCA Crim 2614.

EXAMPLE

D has told you of his convictions for [specify]. There are certain ways in which you may use –and others in which you must not use – this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant: see other sections in this Chapter.]

12-4 Bad Character Evidence as Important Background/ Explanatory Evidence

Sources: ***Archbold*** **2009, 13-13, 13-30; Crown Court Compendium 2016**

LEGAL SUMMARY

1. The common law permits evidence to be adduced as to the background of an offence where this is relevant to the offence charged and where the account to be placed before the court would be incomplete and incomprehensible without the background evidence, and this is so notwithstanding that such background evidence might include evidence establishing that the accused was guilty of an offence with which he was not charged: see *R v Fulcher* [1995] 2 Cr App R 251
2. 'Background' or 'explanatory' evidence, for this purpose, includes evidence as to motive: ibid.
3. Evidence of previous gang feuds may be relevant in this regard. See Chapter 21.

DIRECTIONS

4. Identify the evidence of bad character.
5. Explain why the evidence is put before them e.g. how the defendant came to be in prison or had contact with the complainant.
6. Explain any further purpose/s for which the conviction/s or reprehensible behaviour may be used.
7. Depending on the nature and extent of the convictions or other evidence of bad character a direction as to the effect of the evidence upon the defendant's credibility may be required.
8. It is also essential to review any directions by reference to Chapter 12-2: Directions.

EXAMPLE: Evidence Admitted Only as Important Background/ Explanatory Evidence

You have heard that the incident of violence that is the subject of the charge took place while D and V were in prison. The fact that they were in prison does no more than provide the setting for this incident and it would have been impossible to understand events without knowing this.

But the fact that D was in prison does not make it more or less likely that he committed this offence and provides no support for the prosecution case, neither does it make it more or less likely that V attacked D.

12-5 Bad Character Evidence – Relevant to an Important Matter in Issue

Sources: ***Archbold*** **2009; Crown Court Compendium 2016**

LEGAL SUMMARY

1. The mere fact that the evidence adduced tends to show bad character does not render it inadmissible if it is relevant to an issue before the jury, for example to rebut a defence which would otherwise be open to the accused.[14]
2. Propensity to behave badly is admissible as similar fact evidence where it is sufficiently compelling to have real value in controverting innocent coincidence. See *R v Boardman*[15] and *DPP v P*.[16]
3. In a case of alleged sexual abuse, the history and nature of a relationship said to have been abusive will often be relevant to proving a particular incident charged, even though it also shows prior misbehaviour by the defendant. See *Myers et al*.

DIRECTIONS

4. Identify the evidence of bad character.
5. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
6. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.

14. *Makin v Attorney General for New South Wales* [1894] AC 57.
15. *DPP v Boardman (on appeal from R v Boardman)* [1975] AC 421.
16. [1991] 2 AC 447.

7. Identify in detail the issue/s to which the evidence is and is not potentially relevant e.g. propensity, credibility, identity.
8. Direct the jury that it is for them to decide to what extent, if any, the evidence helps them to decide the issue/s to which it is potentially relevant.
9. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury a direction as to the effect of the evidence upon D's credibility may be required.
10. If the evidence is exclusively within the limits of matters in issue between prosecution and defendant, the jury should be warned against prejudice against D or over reliance on evidence of bad character and that they must not convict D wholly or mainly on the basis of previous convictions or bad behaviour. If the evidence is in reality "hallmark" evidence and directly relevant to the issue in the case a warning not to convict wholly or mainly in reliance upon it would be inappropriate.
11. On a multi-count indictment, the issue of cross admissibility should be considered: see Chapter 13.
12. It is also essential to review any directions by reference to Chapter 12-2: Directions.

EXAMPLE 1: Support for Evidence of Identification

You have heard that D was picked out on an identification parade. [See Chapter 15-1 Visual identification.]

The prosecution say that the man picked out on that identification parade was the man who [e.g. burgled the house]. The defence say the identification was mistaken

I have already told you about the risks surrounding evidence of identification and that you should look to see whether the evidence of identification is supported by other evidence. The prosecution say that the identification evidence is supported by D's previous convictions, which demonstrate that he [e.g. has committed 3 other burglaries in the same street within the last 2 years] and the prosecution say that this makes it more likely that the identification evidence is correct.

The defence accept that D has these convictions [e.g. for burglary] but they remind you that [e.g. the estate on which the burglary was committed was an area of high crime and that there are many other people who have committed burglaries in that area].

The fact that D has [e.g. committed burglaries in the same street] cannot prove he did so on this occasion but it is evidence you may take into account as support for the prosecution case. How far it supports the prosecution case will depend on your view of (a) how much of a coincidence it is that the person identified as the burglar in this case has [e.g. committed burglaries on the same street in the past] and (b) the defence point about the number of other people who have [e.g. committed burglaries on this street].

D's previous convictions may only be used as some support for the prosecution case. You must not convict him wholly or mainly because of them.

EXAMPLE 2: Propensity to be untruthful - bearing only on D's credibility

D has put his character in issue. In his evidence, he said that … [specify]. It is for you to decide whether that is or may be true. When you are deciding this question you may take into account D's previous convictions for [specify e.g. perverting the course of justice, by giving a false name when driving whilst disqualified, and committing perjury, by making a false accusation that someone else had assaulted his brother when in fact D had done so].

The prosecution say that those convictions are significant because they show that D is prepared to tell lies to avoid responsibility for offences he has committed and has lied to you for the same reason.

The defence accept that D has these convictions but say they are irrelevant because … [specify: e.g. they happened many years ago].

You should bear in mind that just because someone has told lies in the past does not mean that he is telling lies now. You must decide whether these convictions help you when deciding whether his evidence is, or may be, true or whether you are sure that it is untrue, but you must not convict him wholly or mainly because of them.

12-6 Important Matter in Issue Between Defendant and Co-defendant

Sources: **Evidence Act; *Archbold* 2009, 13-71, 13-72; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Under the Evidence Act s.9(f)(iii) a ground for the admission of the defendant's bad character is that "he has given evidence against any other person charged with the same offence". This will usually arise when the defendants are engaged in "cut-throat" defences. In *R v Varley*,[17] the English CA held that ""evidence against" means evidence which supported the prosecution case in a material particular or which undermined the defence of the co- defendant".
2. In *R v Crawford*[18] the Court said that the essential question was whether the evidence damaged in a significant way the co-defendant's defence: if, on any factual matter there was no issue between the Crown and a co-defendant the defendant's evidence did not damage the defence of the co-defendant if it was to the same effect: if the evidence

17. 75 Cr App R 241.
18. [1998] 1 Cr App R 338.

supports the Crown's case in a respect which is not contentious, that is not a material respect; if, however, the defendant's case supports the prosecution in a significant matter in issue between the Crown and the co-defendant and relative to proof of the commission of the offence by the co-defendant, that was evidence potentially damaging to the co-defendant and to be regarded as falling within s.9(f)(iii).

3. There is a line of authority at common law that permitted one defendant to adduce evidence that was relevant to his defence notwithstanding that it might reveal the bad character of a co-defendant. The line of cases culminated in the decision of the House of Lords in *R v Randall*[19] in which it was held that whilst the prosecution were precluded from leading evidence that does no more than show an accused's propensity to commit the offence charged, no reason of policy or fairness required the exclusion of such evidence when tendered by a co-defendant in disproof of his own guilt.

DIRECTIONS

1. Identify the evidence of D1's bad character.
2. In relation to D1:
   (1) if the evidence of his bad character is disputed, the jury may take it into account as part of the case against him only if they are sure that it is true;
   (2) it is for the jury to decide to what extent if at all the evidence which they are sure is true, or which is not disputed, demonstrates the matter in issue (e.g. whether D1 has a propensity to commit offences of the type charged or to be untruthful);
   (3) the jury should be warned against prejudice against D1 arising from the evidence and against over-reliance on it, and directed that they must not convict D1 wholly or mainly on the basis of it; and
   (4) depending on the nature and extent of the evidence, there may have to be a direction as to the effect of the evidence on D1's credibility.
3. In relation to D2:
   (1) if the evidence of D1's bad character is disputed, the jury may take it into account as part of the case for D2 if they think that it is or may be true (though not if they are sure that it is untrue);
   (2) it is for the jury to decide to what extent if at all the evidence of D1's bad character which they think is or may be true, or which is not disputed, demonstrates the matter in issue (e.g. whether or not D2 was involved in the offence charged).

19. [2004] 1 Cr App R 26.

4. The direction is likely to be complex, should be discussed with the advocates before it is given, and should be provided to the jury in writing.

5. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all s.9(f) circumstances.

EXAMPLE 1: Undisputed evidence of D1's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene, but says that the other committed the offence alone. On the application of D2, evidence has been admitted under s.9(f)(iii) of the Evidence Act that D1 has previously been convicted of offences of violence.

D2 introduced the fact that D1 has previous convictions for crimes of violence. He did so because he says that they show that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. How should you approach this question? Your approach to this will be different depending on whether you are considering the case for D2 or the case against D1.

When considering D2's case: if, having regard to all of the evidence about D1's convictions [if appropriate: including what D1 himself has told you], you decide that they show that D1 has, or may have, a tendency to use unlawful violence, you may take that into account as some support for D2's case that the offence was committed by D1 alone and that D2 was not involved.

However, when considering the case against D1, because it is for the prosecution to prove his guilt, it is only if you are sure that D1's convictions show that he has a tendency to use unlawful violence that you may use this as some support for their case.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it or allow his previous convictions to prejudice you against him.

Finally, in D1's case, if you are not sure that D1 has a tendency to use unlawful violence his convictions are of no relevance and you must ignore them.

EXAMPLE 2: Disputed evidence of D1's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene, but says that the other committed the offence alone. On the application of D2, evidence from D2 himself and from a witness called on his behalf that D1 had committed numerous past assaults with which he has never been charged has been admitted under s.9(f)(iii) of the Evidence Act. D1 disputes this evidence.

You have heard evidence from D2 and his witness that D1 has committed many assaults in the past for which he was never arrested. D2 says that this shows that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. D1 disputes that he has committed any assault in the past or that he has such a tendency. You will have to consider these matters separately in relation to each defendant.

When considering D2's case you will have to decide whether some or all of the evidence of past assaults by D1 is, or may be, true. If you decide that some or all of it is, or may be, true, and that it shows that D1 has or may have a tendency to use unlawful violence, you may use such a tendency as some support for D2's case that the offence was committed by D1 alone and D2 was not involved.

When considering the use of the evidence in the case against D1 the position is different. First you must decide whether you are sure that any of the disputed evidence of past assaults is true. If you not sure that any of it is true, you must ignore it completely when considering the case against D1.

If you are sure that some or all of this evidence is true, you will then have to consider whether it shows that D1 has a tendency to use unlawful violence. If you are sure that it does show that D1 has such a tendency, you may use it as some support for the case against him.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it or allow his previous convictions to prejudice you against him.

Finally, if you are not sure that D1 has a tendency to use unlawful violence his convictions are of no relevance and you must ignore them.

***NOTE:* If D1 is otherwise of good character see also Chapter 11 Good Character: Directions para 14 and Example 7.**

12-7 Evidence to Correct a False Impression Given by the Defendant, Going to Credit and Propensity

Sources: **Evidence Act s.9(f)(ii); *Archbold* 2009; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Under Section 9(f)(ii) of the **Evidence Act** the defendant may be cross-examined as to his bad character if, *inter alia*, he or his advocate had asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character.
2. Merely denying the offence will not trigger the application of s.9(f)(ii). This circumstance only applies if the defendant has given a false impression: *Rahim*.[20]
3. If a defendant calls a witness to establish his good character with regards to his sexual morality, the witness can be cross-examined by the prosecution on the defendant's convictions for offences involving dishonesty: *R v Winfield*.[21]

DIRECTIONS

4. Identify the evidence of bad character.
5. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
6. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
7. Identify in detail the issue(s) to which the evidence is and is not potentially relevant. Since the evidence has been admitted to correct a false impression this is likely to include a direction as to the effect upon credibility.
8. It is also essential to review any directions by reference to Chapter 12-2: Directions.

20. [2013] EWCA Crim 2064.
21. 27 Cr App R 139.

EXAMPLE: Evidence to correct a false impression given by the defendant, going to credit and propensity

In his evidence D said that he was not the sort of person who would [specify]. As a result of that, the prosecution were allowed to present evidence that in the past he had been convicted of [specify].

What use can you make of that evidence?

The prosecution say that the evidence of his convictions shows that he was trying to mislead you when he said he would never [specify]. The defence say that it was not misleading because [specify]. If you are sure D was trying to mislead you about this/these things that does not mean he was trying to mislead you about everything, but it is evidence that you can use when deciding whether or not he was a truthful witness. If you are not sure he was trying to mislead you then his previous convictions will not help you to decide whether or not what he said in evidence was true.

The prosecution also say that the evidence of his previous convictions can help you in another way. They say that those convictions for [specify] show that he is a man who is more likely to [specify]. The defence say that the convictions are [e.g. so old, not really of the same kind] and so do not show he would be more likely to [specify].

If you are not sure that they show that D1 has such a tendency, you should ignore them: they would be irrelevant. If you are sure that they show that D has such a tendency, you may use them as some support for the case against him. How much support, if any, they provide is for you to decide, but remember that the convictions only form a part of the evidence in the case and you should not convict D only or mainly because he has been convicted in the past. Neither should you be prejudiced against him because of his past record.

The convictions are [e.g. so old, not really of the same kind] and so do not show he would be more likely to [specify].

If you are not sure that they show that D1 has such a tendency, you should ignore them: they would be irrelevant.

If you are sure that they show that D has such a tendency, you may use them as some support for the case against him. How much support, if any, they provide is for you to decide, but remember that the convictions only form a part of the evidence in the case and you should not convict D only or mainly because he has been convicted in the past. Neither should you be prejudiced against him because of his past record.

12-8 Section 9(f)(ii) – Defendant's Attack on the Character of Prosecutor or the Prosecutor's Witnesses

Sources: **Evidence Act; *Archbold* 2009, 13-80; Crown Court Compendium 2016**

LEGAL SUMMARY

1. By virtue of section 9(f)(ii) of the Evidence Act the defendant may be cross-examined as to his bad character "if the nature or conduct of his defence is such as to involve imputations on the character of the prosecutor or the witnesses of the prosecutor."
2. An imputation on character includes charges of faults or vices – see *R v Bishop*.[22] The leading case on the interpretation of this provision is *Selvey v DPP*.[23]

DIRECTIONS

3. Identify the evidence of bad character.
4. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
5. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
6. Direct the jury that where a defendant makes an attack upon another person's character the jury are entitled to know of the character of the person making the attack so that they can have all the information about that person and the defendant when deciding where the truth lies.
7. It is also essential to review any directions by reference to Chapter 12-2: Directions, which are applicable to all circumstances under s.9(f).

22. [1975] QB 274; 59 Cr App R 246.
23. [1970] AC 304 HL.

EXAMPLE: Evidence relating to attack made by the defendant on a prosecution witness

You have heard that D has previous convictions for [specify]. The reason you heard about them was because D has alleged that W is/has [specify] and you are entitled to know about the character of the man who makes these allegations when you are deciding whether or not they are true.

[Here specify the arguments of the prosecution and the defence.]

You should bear in mind that just because D has previous convictions, this does not necessarily mean that he is telling lies. You must decide whether these convictions help you when you are considering whether or not he is telling the truth; but you must not convict him of this offence because he has been convicted in the past.

12-9 Non-Defendant's Bad Character

Sources: **Evidence Act; *Archbold* 1997, 8-138; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Section 18 of the Evidence Act permits the questioning of a witness as to whether he has been convicted of any offence and if necessary for the convictions to be proved.
2. The judge has a discretion to excuse an answer when the truth of the matter suggested would not in his opinion affect the credibility of the witness as to the subject matter of his testimony.

DIRECTIONS

3. Identify the evidence of bad character.
4. Where the evidence is disputed the jury must decide:
   i. if the evidence is adduced by the prosecution whether they are sure it is true;
   ii. if adduced by the defence, whether it may be true.
5. Identify the issue/s to which the evidence is potentially relevant.
6. The jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue/s.
7. Depending on the nature and extent of the convictions or other evidence of bad character, there may need to be a direction as to the effect on the credibility of the person if he was a witness.

EXAMPLE

You have heard that W has convictions for offences of violence namely [specify]. You heard about W's convictions because D claims that it was W who started this incident and says that W's convictions support this.

The fact that W has these convictions does not mean that he must have used unlawful force on this occasion but it is something that you may take into account when you are deciding whether or not the prosecution have made you sure that it was D, and not W, who started the violence and that D's use of force was unlawful.

13. SIMILAR FACT EVIDENCE

Sources: ***Practical Approach to Evidence*****; Evidence 2001/2002 Inns of Court School of Law; Crown Court Compendium 2016;** ***Archbold*** **2001; Crown Court Benchbook 2001**

LEGAL SUMMARY

1. If the indictment against D comprises more than one count the issue may arise as to whether the evidence relating to one count is admissible in relation to another, and if so to what uses it may legitimately be put by the jury.

2. At common law, evidence of previous misconduct (similar fact evidence) is admissible to prove identity, or to rebut a defence of mistake, accident or innocent association, or to rebut a suggestion of fabrication on the part of the complainant.

3. In *DPP v Boardman,*[1] the House of Lords stressed that the test of admissibility in cases where the evidence sought to be adduced comes from another victim was probative value derived from a striking similarity between the facts testified to by the several witnesses.

4. However in *R v P*[2] the House made it clear that in such cases striking similarity is not an essential element except in cases where the identity of the offender is in issue. Their Lordships held that the true test of admissibility is whether the evidence in question has a probative force sufficiently great to make it just to admit it, notwithstanding that it is prejudicial in tending to show that the accused is guilty of another crime.

EXAMPLES

5. The following examples are designed to be of assistance in three 'classic' similar fact situations. In *DPP v P* 93 Cr App R 267, 279 Lord Mackay LC said: "Once the principle has been recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved." The directions below involve illustrations of specific offences. They do not cover all similar fact situations. They are given by way of general guidance only, and must of course be carefully adapted to suit the needs of each individual case.

1. [1975] AC 421.
2. [1991] 3 All ER 337.

EXAMPLE 1: Where there is no direct evidence that the defendant committed the offence charged or any of the 'similar offences' (as in the cases of *Makin v Attorney General for New South Wales* [1894] AC 57 PC and *R v Smith* 11 Cr App R 229)

There is no direct evidence that the defendant [killed A or that he did so with intent to kill or cause him really serious harm]. There is evidence that he had the opportunity to do so, but that, in itself, is far from sufficient to enable you to be sure that he did.

You have, however, heard evidence suggesting the commission of [a number of] other similar offences, all of which the defendant had the opportunity to commit.

If (where it is not admitted) you are sure that the events to which the witnesses have testified took place, you must look at the whole of this evidence and ask yourselves: is the relationship between the circumstances of these offences/occurrences (e.g. in time, place and (...state other circumstances highlighting in particular unusual characteristics)) so close that you are sure that they must be a series of similar offences committed by the same person?

If that is so, looking at the case against this defendant is it possible that he can have an innocent explanation for the fact that [all of those bodies of children were found buried in gardens of houses in which he had carried on a business of fostering children] [three women whom he had married under false names had all made wills in his favour and drowned in their baths shortly afterwards]; or is the only reasonable explanation that these [children] [women] were killed by the defendant [or with his assistance or encouragement]?

If, but only if, you are sure that there is no credible innocent explanation you may take the whole of this evidence into account in deciding whether you are sure that [the defendant killed, or was a party to the killing with intent of A].

EXAMPLE 2: Where there is no direct evidence that the defendant committed the offence charged but there is independent evidence that he committed other 'similar offences' (as in *R v Straffen* 36 Cr App R 132)

There is no direct evidence that the defendant [killed A or that he did so with intent to kill or cause really serious harm]. However, there is [evidence that] [the defendant has admitted that] he killed B and C. You have also heard evidence as to the circumstances in which those offences were committed.

The prosecution say that the circumstances of the offence which is presently charged and which you must decide so closely resemble those of the other [two] [earlier] [later] offences that the only reasonable conclusion is that all three offences are the work of one person, and that it therefore follows that the defendant is guilty of the offence charged. (Here state the circumstances). You must therefore consider three questions:

Are you sure that the defendant committed offences B and C? If you are not sure of that, the evidence relating to those offences is of no value, and you must ignore it. If, however, you are sure that he did commit these offences, go on to consider:

Are you sure that the circumstances of those offences were as alleged by the prosecution? If you are not sure of that ignore them. Equally if you are not sure that any particular alleged circumstance existed, ignore it. If you are sure that all, or some of those circumstances existed, go on to consider:

Are you sure that the circumstances in which offences B and C were committed so closely resemble the circumstances which you are sure existed in the present case that you can have no doubt that the three offences must have been the work of one person, i.e. the defendant? [It is suggested on behalf of the defendant that it is possible that the resemblance between the circumstances of these offences might be purely coincidental. If you think that there is any realistic possibility that the resemblance between the circumstances of the offences might be no more than a coincidence, and that the offence might have been committed by someone else, the evidence is of no value and you must ignore it.]

EXAMPLE 3: Where there is direct testimony that the defendant committed the offence and the question is whether the witness (W) who says that he did was speaking the truth. X and Y testify to similar offences on other occasions

Ask yourselves: Are sure that W, X and Y did not put their heads together to make false accusations against the defendant? If you are not sure of that, the evidence of X and Y is of no value, and you must ignore it. If you are sure that there was no collaboration of that kind, you are entitled to consider the evidence of X and Y in deciding whether W was speaking the truth [and vice versa if e.g. three offences are charged].

You must then ask: Is it reasonably possible that the three persons, independently making the similar accusations which you have heard, could all be either lying or mistaken? If you think that is incredible then you may well be satisfied that W was speaking the truth. In answering this question you must consider two important aspects of the evidence:

The degree of similarity between the accusations. The greater the degree of similarity, the more likely it is that independent witnesses are speaking the truth, for you may think it would be a remarkable coincidence if they hit upon the same lies or made the same mistakes as to matters of detail. On the other hand, the less the degree of similarity, the less weight should be given to this evidence; and

Whether W, X or Y may have been consciously or unconsciously influenced in their evidence through hearing of complaints made by others. If you think it is possible that they, or any of them, may have been influenced in making the accusation at all, or in the detail of their evidence, you must take that into account in deciding what weight, if any, you give to their evidence.

NOTES

1. The leading case relating to the principles to be applied in similar fact cases is *DPP v P* 93 Cr App R 267. In relation to the issue of collusion, see *R v Ryder* 98 Cr App R 242 and *R v H* 99 Cr App R 178. In relation to identification, see *R v Brown and Others* [1997] Crim LR 502 and *R v John W* [1998] 2 Cr App R 289.
2. Much assistance will also be derived from *R v John W* [1998] 2 Cr App R 289 and *R v Masquera* [1999] Crim LR 857 (and commentary). In the former case, the Court of Appeal considered when a 'sequential' approach and when a 'cumulative' approach to similar fact evidence would be appropriate.

14. HEARSAY

14-1 Hearsay General
14-2 Witness Absent – Section 31D Evidence Act
14-3 Business Documents
14-4 Introduced by Agreement – Sections 31C, 31CB, 31CA of the Evidence Act
14-5 Previous Inconsistent Statement
14-6 Previous Inconsistent Statement of a Hostile Witness
14-7 Statement to Refresh Memory
14-8 Previous Consistent or Self-Serving Statements
14-9 Statement to Rebut Allegation of Recent Fabrication
14-10 *Res Gestae*
14-11 Statements in Furtherance of a Common Enterprise
14-12 Out of Court Statements Made by One Defendant
14-13 Dying Declarations

14-1 Hearsay General

Sources: ***Practical Approach To Evidence*; Inns of Court School of Law Evidence 2001/2002; *Archbold* 2009, 11-1 et seq; Crown Court Compendium 2016; Evidence Act**

LEGAL SUMMARY

1. The rule against hearsay is that evidence is inadmissible if:
    a. it consists of any statement made by a person other than while giving evidence in the instant proceedings, and
    b. it is tendered for the purpose of proving any fact contained in the statement.
2. Thus, there are two elements and both must be present before the rule can operate to exclude evidence. The rule is stated pithily as: any statement other than one made by a witness while giving testimony in the proceedings in question is inadmissible as evidence of the facts stated.
3. The rule is based on an awareness that hearsay, if admitted, would carry with it two formidable difficulties: first the inherent danger of unreliability through repetition which

increases in proportion to the number of repetitions and the complexity of the statement; second the court cannot see and hear the evidence directly tested and the accused is denied his right to confront the witness.[1] Accordingly, the primary purpose of the rule is to ensure that witnesses give evidence as to facts that are within their own knowledge.

4. This exclusionary rule applies equally to the defence.

Examples of Hearsay

5. In *R v Turner*[2] it was held that evidence that a third party, not called as a witness, had admitted that he had committed the robbery with which the accused was charged, was inadmissible. See also *R v Callam*[3] where *Turner* was applied.

6. In *Sparkes v R*[4] (an appeal from Bermuda) a white man was charged with indecent assault on a four-year-old girl. About an hour and a half after the event the girl told her mother when questioned about her assailant that a coloured boy did it. The girl did not give evidence. *Sparkes* sought to lead evidence from the girl's mother of what the child had said. Their Lordships held that the trial judge had rightly rejected the evidence as inadmissible hearsay (the appeal was allowed on other grounds). Note, if the girl had given evidence the mother's evidence might have been admissible as recent complaint.

7. Where, however, as happened in *R v Myers,*[5] the prosecution do not seek to admit a confession made by an accused, because there had been breaches of the Codes of Practice, a co-accused may elicit evidence of the confession, by way of exception to the hearsay rule, provided it is relevant to his defence or undermines the prosecution case against him.

8. Statements in documents are subject to the rule against hearsay. The leading case is *Myers v DPP*.[6] In *Patel v Comptroller of Customs*[7] the Board held that labels on bags were inadmissible hearsay to prove what they asserted, namely the country of origin.

Identifying Hearsay Evidence

9. If the statement is to be admitted to prove that what was said was true, it will be hearsay evidence and inadmissible unless it falls within one of the exceptions to the rules. If however, the statement is to be adduced to prove a fact other than the truth of what was

1. *R v Blastland* [1986] AC 4 at p 54 per Lord Bridge of Harwich.
2. [1975] 61 Cr App R 67 CA.
3. [1994] Crim LR 198.
4. [1964] AC 964 PC.
5. [1997] 4 All ER 314, HL.
6. [1965] AC 1001 HL.
7. [1966] AC 356 PC.

said in the statement, it is original evidence and may be admissible if that fact other than the truth of the statement is relevant.

10. In *Ratten v R*[8] the defendant was charged with the murder of his wife by shooting. His defence was that the gun had gone off accidentally while cleaning it. A telephone operator testified that about five minutes before a time when the wife was known to be dead she received a call from a hysterical woman, made from the defendant's telephone number in which the woman said, "Get me the police " and gave the defendant's address. The defendant denied that this call had been made. Were the details of this call admissible? The Privy Council held that the evidence was not hearsay and was admissible because it was relevant to two issues. It was relevant despite the nature of the words spoken, to show that, contrary to the defendant's evidence, a call had been made by a woman who could only have been the victim. Secondly, the evidence that the voice was hysterical and had asked for the police was relevant because it allowed the jury to infer that the woman, at that time, was in a state of emotional distress and fear this would have tended to rebut the defence that the gun went off accidentally.

11. Lord Wilberforce said at p. 387:

> Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially", i.e. as establishing some fact narrated by the words.

12. In *Mawaz Khan v R*[9] the importance of identifying the purpose for which the evidence is tendered was emphasised. Two men were charged with murder. Each made a statement to the police in the absence of the other. Both statements set up identical alibis and offered identical explanations for the injuries which each had sustained. Many of the details of their statements were contradicted by evidence of witnesses. Neither gave evidence and the jury were initially directed that a statement made by a defendant in the absence of his co-defendant is only evidence against the maker. The judge went on to direct the jury that in one respect the statement of one defendant could be used against the other. They could be used in determining whether or not the co-defendants had fabricated an alibi and had therefore co-operated after the murder. It was argued before the Privy Council that the evidence should not have been left to the jury as evidence against each co-defendant because it was hearsay. The Board rejected this argument. The statements were admissible as original evidence. The purpose of adducing the evidence was not to prove that the contents were true but that they had co-operated in fabricating a joint story.

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8. [1972] AC 378 PC.
9. [1967] 1 AC 454 PC.

From this fact the jury could infer not only that each defendant had lied but also that they had co-operated after the crime.

13. Hearsay is generally not admissible as evidence of the truth of the facts it contains. However, there are many common law and statutory exceptions to the rule against hearsay.

14. The task of the jury is to assess the probative value (weight) and reliability of evidence admitted as hearsay. The Court of Appeal has on several occasions reminded judges of the need for care in crafting directions in order to ensure that hearsay evidence is considered fairly and that the jury are warned about the limitations of such evidence. The strength of the warning depends on the facts of the case and the significance of the hearsay evidence in the context of the case as whole.

15. When summing up the judge should not refer to the statutory provisions under which hearsay came to be admitted; and whereas in many cases it is possible for the jury to know the reason for admitting the evidence (e.g. a witness has died) or the reason why a witness could not be expected to remember the information recorded, in some cases (e.g. fear) generally this cannot be done.

DIRECTIONS: HEARSAY – GENERAL DIRECTIONS

16. Directions should include the following:

    a. Whether the evidence is agreed or disputed and, if disputed, the extent of the dispute.

    b. The source of the evidence should be identified (e.g. a deceased witness or business records) and the jury reminded of any evidence about the maker of the statement so that they may be assisted in judging whether the witness was independent or may have had a purpose of his own or another to serve.

    c. Where the statement is oral, evidence about the reliability of the reporter should be identified.

    d. Any other evidence which may assist the jury to judge the reliability of the evidence should be identified (e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made).

    e. Reference should not be made to the statutory provisions under which hearsay came to be admitted.

    f. In some cases it is possible for the jury to know the reason for admitting the evidence (e.g. the witness has died) or the reason why a witness could not be expected to remember the information recorded, in other cases this cannot be done (e.g. fear).

g. Where it is the defence who are seeking to rely on hearsay evidence the directions must be tailored to reflect the fact that the burden of proof is on the prosecution.

h. It is suggested that as well as giving a direction about hearsay in the summing up, it is helpful to give the jury a summary of the direction, by way of explanation, just before such evidence is adduced.

i. The jury need to be directed that hearsay evidence may suffer from the following limitations when compared with evidence given on oath by a witness at trial:[10]

   (a) There has usually been no opportunity to see the demeanour of the person who made the statement.

   (b) The statement admitted as hearsay was not made on oath.

   (c) There has been no opportunity to see the witness's account tested under cross-examination, for example as to accuracy, truthfulness, ambiguity or misperception, and how the witness would have responded to this process. In some cases the credibility of the absent witness and/or his consistency will have been challenged under s. 31J of the Act. In such cases the jury needs to be reminded of those challenges and of any discrepancies or weaknesses revealed.

14-2 Witness Absent – Section 31D Evidence Act

Sources: **Evidence Act; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Section 31D of the **Evidence Act** (Jamaica) governs admissibility of first hand hearsay statements (i.e. those which the absent witness could have made if testifying) from identified witnesses who do not testify for one of the specified reasons: the witness

   a. is dead,

   b. is unfit to be a witness,

   c. is outside of Jamaica and it is not reasonably practicable to secure attendance,

   d. cannot be found after reasonable steps have been taken:[11] or

10. *Grant v The State* [2006] UKPC 2.
11. In *R v Fuller* SCCA 55/01 [19.12.03] the Court of Appeal stated that it is desirable under s.31D(c) of the Evidence Act that evidence be given to show that efforts have been made by the prosecution to secure the attendance of the witness who is outside of Jamaica. Section 31D(d) of the Act relates to the inability to locate a witness after taking reasonable steps to find him or her. In the instant case it is in respect of a witness who is overseas. The two situations are clearly different. In the latter, the Court has to consider whether efforts have been made to find the witness whose whereabouts are

e. it is in the interests of justice to admit the statement from a witness who, through fear,[12] has either not testified at all or not testified on the matter in his or statement. The witness must have been competent at the time of making the statement.

2. Admissibility in such cases is also dependent on other safeguards including checks on the likely reliability of the evidence and the means by which the jury can assess its reliability.[13] Section 31J provides a checklist for the judge to use when (a) considering the admissibility of the evidence and (b) if it is admitted, identifying factors to the jury for their consideration in their determination of the reliability of the evidence and the weight it deserves (although, when addressing the jury, reference to the section is not desirable).

3. Section 31D does not permit evidence from unidentified witnesses. Nor does it provide for the admissibility of multiple hearsay.

4. In *R v Oneil Smith*[14] it was held that although s.31D is aimed primarily at out of court statements, it no doubt embraces depositions and the transcript of a person's evidence in previous proceedings. By virtue of s.31D(d), if the prosecution is unable to satisfy the requirement of s.34 of the **Justice of the Peace Jurisdiction Act** (that is that the deponent is absent from the island) but can satisfy the Court that the deponent cannot be found after all reasonable steps have been taken to find her, the Court has a discretion to admit the deposition: See *Rudolph Fuller v R.*[15]

5. Care is needed to ensure that prejudice does not arise from any assumption that the defendant is the cause of the absence of the witness. This may be especially true of cases in which the witness cannot be found or is in fear. It will not be appropriate to disclose the reason for the absence of the witness unless the defendant has introduced that in evidence.[16] Section 31D applies in cases of frightened witnesses who do not testify at all and in cases of witnesses who do not, through fear, testify in connection with the subject matter of the statement. In the latter case, particular care is needed to avoid prejudice.

DIRECTIONS: See 'General Directions'

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uncertain or unknown whereas in the former it is a question of whether it is reasonably practicable for the witness to attend. See also *R v Michael Barrett* SCCA 76/97 [31.7.98]; and *Wizzard (Barry) v R* (2007) 70 WIR 222 (PC Jamaica).

12. *Nyron Smith v R* SCCA 24/01 [11.4.03]- section 31D(e).
13. *R v Riat* [2012] EWCA Crim 1509.
14. SCCA 113/03 [20.12.04].
15. SCCA No. 55/2001 [19.12.03].
16. *Jennings and Miles* [1995] Crim LR 810.

EXAMPLE 1: Hearsay – Statement of Absent Witness Read As Part of the Prosecution Case

The statement made by X, who could not/did not give evidence in court [in an appropriate case: because he is [e.g. dead]], was read to you. But the fact that this [particular] statement was read does not mean that the prosecution and the defence agree that it/all of it is true. In particular it is disputed that [specify].

You must decide how much importance, if any, you give to this evidence and when you are doing so you must bear in mind that this evidence has a number of limitations.

First: Although X signed a formal declaration at the beginning of the statement that it was true and that he knew he could be prosecuted if he deliberately put something into the statement which was false, X's statement was not made under oath or affirmation.

Secondly: if X had given evidence in court he could have been cross-examined, and you do not know how he, and his evidence, would have stood up to that. [If applicable]:

Thirdly: when you are deciding whether or not you can rely on what X said in his statement you should also take account of what you know about X, namely [specify…e.g. matters relating to credibility adduced under s.31J]

Finally, when you are deciding how much importance, if any you give to X's evidence, you must look at it in light of the other evidence in the case. You will remember that when N gave evidence, his account differed from X's because [specify]. Also, when D gave evidence, he contradicted X's evidence by saying [specify]. So, you should take account of N's and D's evidence when deciding whether X's account was truthful, accurate and reliable.

You must also keep X's evidence in perspective. It only relates to one issue in the case, namely [specify] and this is not the only issue, or even one of the main issues, in this case.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of his.

[Where other witness statements have been read by agreement and their contents are agreed it will be necessary to add: The position in the case of X's statement is different from that relating to the statements of [specify witnesses]. The contents of those statements, which were read to you by agreement, are agreed and so, as I explained when the first of those statements was read, they are not in dispute.]

EXAMPLE 2: Hearsay – Additional Considerations When the Accuracy of the "Reporter" of Hearsay Evidence is in Issue

When another witness, W, gave evidence he said that X, who is not available to give evidence himself, told him that [specify]. The fact that X said this is disputed, so you must consider whether what W said about this is true and accurate.

When you are considering this you must bear in mind: · *Ws reaction, both in what he said and how he said it, when it was put to him that [specify]; all that you know about W, namely that [specify]; and that when X is alleged to have spoken to W, X was some distance away from him and running away from the scene, apparently in some distress. This could, depending on what you make of the situation, cut both ways. On one hand, the fact that this is alleged to have been said immediately after the incident may make it less likely that X was inventing what he said. On the other hand, if X was in distress, this may have affected how X could take in what had just happened. You should also consider whether the distance between X and W, and the fact that X was running away from the place where W was standing, had any bearing on W's ability to hear clearly and to remember accurately what X said.

EXAMPLE 3: Statement of Absent Witness Read as Part of the Defence Case

D is charged with s.20 wounding; identification evidence is in issue; W gave evidence that a third party, X, admitted committing the offence

When another witness, W, gave evidence he said that X, who has not given evidence himself, told him that [specify]. The prosecution do not accept that X said this or that, if he did say it, it is true. It is for you to decide whether W's evidence is, or may be, true or whether you can be sure that it is not; and if it is, or may be, true whether what X told W was, or may have been, in fact the truth or whether you can be sure that it is not. [Here summarise any arguments raised by the parties.]

It may not surprise you that X has not been at court, so that he could be asked to incriminate himself by admitting this offence. But the fact remains that you have not had the opportunity of seeing and hearing him for yourselves and this is something which may affect the significance which you attach to this evidence. This is because when you see and hear a witness give evidence and be cross-examined you may get a much better idea of whether what they are saying is honest and accurate. When you are deciding what importance, if any, you attach to this evidence you must look at it in light of all of the other evidence in the case.

14-3 Business Documents

Sources: **Evidence Act s.31F(1)(A), (2) and (3); Crown Court Compendium 2016**

LEGAL SUMMARY

1. Section 31F provides for the admissibility of a document created or received in the course of a trade, business, profession or other occupation or as the holder of an office.
2. In many cases there will be no need for a statutory reason for the absence of the witness; it is sufficient that the statement was created/received in the trade or business. "Business records are made admissible…because, in the ordinary way, they are compiled by people who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because *prima facie* they are reliable": *Horncastle*[17]
3. Section 31J provides for the credibility of the maker of the statement to be tested.

DIRECTIONS: HEARSAY - BUSINESS DOCUMENTS

4. The judge should identify for the jury:
   a. whether the evidence is agreed or disputed and, if disputed, the extent of the dispute;
   b. the source of the evidence should be identified and the jury should be reminded of any evidence about the maker of the statement so that they may be assisted in judging whether the witness was independent or may have had a purpose of his own or another to serve;
   c. any other evidence which may assist the jury to judge the reliability of the evidence e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made;
   d. the difficulties, if any, which the other side may have in challenging or rebutting the evidence.

17. *Horncastle* [2009] EWCA Crim 964.

EXAMPLE: Hearsay – Business Document – Person Who Recorded Information Cannot Reasonably Be Expected to Have Any Recollection – Accuracy of Document Questioned

As part of the prosecution's case, you were shown records made by a number of people who worked in [specify business] in/on [specify type of record/exhibit]. Obviously, whilst the people who made entries in/on that record knew the facts which they were recording at the time, it would not be reasonable to expect those people to remember any specific transaction now. Because of this, nobody who made those entries was called to give evidence; and it is the entries themselves which provide the evidence that [specify].

All of the entries were made as part of the routine process of [specify business] and it is not suggested that any entry was deliberately falsified. What is suggested is that a number of entries are inaccurate. In some of those cases, you have seen other documents [specify] which show different details. In light of all of this evidence, you must decide whether or not you can safely rely on the entries in these records as being accurate.

14-4 Introduced by Agreement – Sections 31C, 31CB, and 31CA of the Evidence Act

Sources: **Evidence Act (as amended); Practice Direction No.1 of 2016 'Tendering Evidence Pursuant to sections 31C, 31CA and 31CB of the Evidence Act'**

LEGAL SUMMARY

1. The amended (2015 amendment) Evidence Act contains a variety of 'agreed evidence provisions that allow, by agreement, for the admission of evidence or documents without the maker being present to give oral testimony, and for the admission of agreed facts without the need lead evidence to prove such facts.

   - **31C** – admission of a written statement without the maker being present, such statements are admissible to the same extent and effect as direct oral evidence by that person.
   - **31CB** – admission of expert reports without the expert being called upon to give evidence on oath.
   - **31CA(1)(a)** – admission into evidence of any document, without the maker of the document being present to give evidence in relation thereto.
   - **31CA(1)(b)** – admissions to treat any fact as being proved, without evidence being led to provide such fact.

2. Practice Direction No.1 of 2016 'TENDERING EVIDENCE PURSUANT TO SECTIONS 31C, 31CA AND 31CB OF THE EVIDENCE ACT' provides detailed guidance on the approach to be taken when the agreed evidence provisions are utilised, the practice direction should be read in conjunction with Evidence Act (as amended in 2015). A copy of the Practice Direction can be found annexed to the Criminal Bench Book.

3. The Practice Direction emphasises that a judge sitting in the Circuit Court should, where necessary:

   (a) Explain to the jury the effect of evidence adduced in different forms during the trial;

   (b) Make an inquiry of the accused person to ensure he understands that evidence will be adduced in this manner and that he has agreed to the admissions of his own free will.

EXAMPLES

EXAMPLE 1 – 31C

You are no doubt familiar with the traditional way in which evidence can be put before you. A witness comes into the witness box is sworn or affirmed, is questioned by counsel and gives his/her evidence. Another way is as follows – before the case comes for trial the defence receives a copy of all written witness statements and they decide which witnesses they need to ask questions of and which they don't. Where they have no questions for a witness it is unnecessary to bring the witness to court to say only what is in his/her statement. So, where both sides agree, it is permissible for the witness' statement to be read to you without the witness coming into court. The important thing for you to remember is that the contents of the statement are just as much evidence as if the witness had come into the witness box, taken the oath/affirmation and given the same information in answer to questions. What that means is that you are to treat the evidence in the statement of [name the person] in the same way you would have treated his/her evidence if he/she had come before you and testified. The contents of the statement are not conclusive. Therefore like any other witness you have the same three options to accept or reject all of what is in his/her statement or to accept parts and reject other parts as you see fit. As you make your determination you should bear in mind that you have not actually seen him/her testify to be able to assess his/her demeanour. [If necessary add – You will note that rebuttal evidence has been called or critical comment has been made on the contents of the statement in the closing speech of…to the effect that…You should bear that in mind as you determine what you make of the statement of…]

The direction under section 31 C should be modified and adapted to deal with expert reports as opposed to witness statements and combined with the usual direction on how to treat the evidence of expert witnesses.

EXAMPLE 2 –31CB

The direction under section 31 C should be modified and adapted to deal with expert reports as opposed to witness statements and combined with the usual direction on how to treat the evidence of expert witnesses.

EXAMPLE 3 – 31CA(1)(a)

The required directions will depend on whether or not the document has been admitted by the parties as conclusive evidence (agreed facts) or should be treated akin to a witness statement or an expert report. The required directions will also depend significantly on the nature and content of the document and the purpose for which the parties have sought to have the document admitted

EXAMPLE 4 – Agreed Facts pursuant to 31CA(1)(b)

You are no doubt familiar with the traditional way in which evidence can be put before you. A witness comes into the witness box is sworn or affirmed, is questioned by counsel and gives his/her evidence. Another way is by admissions by agreement in the form of an (oral or written statement of Agreed Facts.

Sometimes the parties agree that certain facts are correct/not in dispute and can be put before you by agreement without the need for any witness to come and testify or for any particular statement to be read. Agreed facts may combine information from a number of sources. Agreed facts are by definition undisputed evidence and they are conclusive on the matters they covers. The accused person is however **NOT AGREEING** that he is guilty of the offence(s). What he is saying is that he has no dispute that a certain state of affairs exists (or existed at the time of the incident). However that state of affairs does not establish his guilt. The accused is taking issue with (outline the issue (s)) and that is/those are the issue (s) that you will be called upon to decide in order to determine whether you find the accused guilty or not guilty of (outline offence(s)).

EXAMPLE 5 – Agreed Facts Inquiry of Accused Person

Prosecuting and Defence Counsel in this case have indicated (orally or in writing) that there are agreed facts. It is intended that these facts will be put into evidence in your trial.

Where parties agree that certain facts are correct they can be put before the court by agreement without the need for any witness to come to testify or for any particular statement to be read. Such agreed facts are conclusive of the matters stated. The court is aware that by agreeing these facts you are **NOT** admitting guilt to the offence(s) with which you are charged before this court today. The trial will proceed on the issues in dispute that have caused you to plead not guilty.

It is important that you understand this, and that you have been properly advised by your counsel; as such I am using this opportunity to ask:

(i) Have you been advised by your counsel that the statement of agreed facts is conclusive of the matters stated, but that your agreement does NOT mean you are admitting that you are guilty of the offence(s) for which you are charged?

(ii) (If statement of agreed facts is in writing) - Have you signed the written statement of agreed facts of your own free will?

(iii) (If statement of agreed facts is oral) – Go through each agreed fact with accused and seek to confirm his/her agreement with them.
(iv) Do you consent to the use of these agreed facts in your trial?

[If the answers are not in the affirmative or you observe doubt or confusion on the part of the accused, allow reasonable time for counsel to advise his/her client and to take further instructions]

14-5 Previous Inconsistent Statement

Sources: **Evidence Act, Crown Court Bench Book 2010**

LEGAL SUMMARY

1. At common law, it was open to a cross-examiner to put to a witness his previous inconsistent statement. The use of previous inconsistent statement in cross-examination is now governed by sections 16 and 17 of the **Evidence Act**.

2. After examining cases on previous inconsistency, White JA, said:

> …whether the inconsistency is explained or not, the matter of its immateriality or materiality is for the jury. And where the witness gives an explanation accounting for the discrepancy between a previous inconsistent statement and his evidence at the trial, the Judge must leave it for the jury's determination as a question of fact, in that, it is for them to decide whether the inconsistency, discrepancy or contradiction is of so material a nature, that it goes to the fundaments of the Crown's case resulting in the jury not being able to accept the witness' evidence on that point, and in the long run, maybe, reject him as a witness of truth. The issue of credibility is a matter for the jury. Insubstantial contradictions do not, in any way, or to any extent, cancel the effect of the witness' testimony at the trial.[18]

DIRECTIONS: HEARSAY – PREVIOUS INCONSISTENT STATEMENT

X has admitted that he [You may be satisfied that X] had previously made a statement which conflicted with his evidence. You may take into account the fact that he made such a statement when you consider whether he is believable as a witness. However, the statement itself is not evidence of the truth of its contents, except for those parts of it which he has told you are true.

18. *R v Garth Henriques & Owen Carr* SCCA 97 & 98/86 [25.3.88].

3. Where the inconsistency is neither serious nor central to the case, it is normally sufficient to no more than draw attention to it.

4. Take care to explain what is and what is not evidence and the relevance of a previous inconsistent statement to the credibility of a witness. If there are several witnesses concerned, give the main direction before you deal with the first of them and then refer briefly to that direction when you deal with each of the others.

14-6 Previous Inconsistent Statement of a Hostile Witness

Sources: ***Archbold*** **1997, 8–94 et seq; Evidence Act; Crown Court Bench Book 2010; Specimen Directions**

LEGAL SUMMARY

1. A party producing a witness may, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony if he does not distinctly admit that he has made such statement. See s.15 of the **Evidence Act**.

2. It seems that at common law a judge has the power to order that a witness called for the prosecution but who refuses to give evidence, be treated as hostile even though there is no 'present testimony' with which the previous statement can be said to be inconsistent under s.15.[19]

3. In *R v Pestano and Others*[20] it was held that the application for a witness to be regarded as hostile must be made at the instant it is obvious that such witness is showing unmistakable signs of hostility. See also *Alfred George Thompson*[21] and *Takis Prefas and Daniel Pryce.*[22] Such a witness may by leave of the judge be cross-examined as to — (1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting his accuracy, veracity, or credibility in the particular circumstances of the case; and as to (3) whether he has made any former statement, oral or written, relative to the subject-matter of the proceeding and inconsistent with his present testimony. The previous statement may be oral or written.[23]

4. There is no rule of law that where a witness is shown to have made a previous statement inconsistent with that made at the trial, the jury should be directed that evidence given

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19. *R v Thompson* [1976] 64 Cr App R 96 and *A Practical Approach to Evidence* p. 346.
20. [1981] Crim. LR 397.
21. [1977] 64 Cr App Rep 96.
22. [1988] 86 Cr App Rep 111.
23. *R v Prefas and Pryce* [1987] Crim LR 327; [1986] 86 Cr App R 111.

at the trial should be regarded as unreliable. The explanation given by the witness for the previous statement might be acceptable to the jury but where no exception is given the trial judge would be acting consistent with his responsibility to ensure a fair trial to direct a jury that the effect of the evidence is negligible*: R v Christopher Parkes.*[24] The evidence should be left with the jury to give it whatever weight they think fit along with a warning that they should be cautious in acting upon it: See *R v Delroy Samuels;*[25] *Solomon Beckford v R.*[26]

> The explanation given by the witness for the previous statements might be acceptable to the jury. But there may be other cases where no explanation is given or the explanation preferred, is so tenuous that no reasonable person could accept it, then a trial Judge would be acting consistent with his responsibility to ensure a fair trial to direct the jury that the effect of the witness' evidence is negligible.[27]

5. Where a witness has been declared hostile and prosecuting counsel has been permitted to cross-examine him, the cross-examination must be restricted to matters affecting his credibility. It should not bring out matters which are of no evidential value but which may prejudice the trial: *Godfrey v R.*[28]

DIRECTIONS: PREVIOUS INCONSISTENT STATEMENT OF A HOSTILE WITNESS

X was called by the prosecution, but gave evidence which did not support the prosecution's case. The prosecution was therefore allowed to treat him as a hostile witness – a witness who had in effect changed sides – and to cross-examine him to show that he had earlier made statements which are inconsistent with the evidence he had now given in court.

These earlier statements are not evidence of the truth of their contents, except for those parts of them which he has told you are true. They were put before you by the prosecution to throw doubt on the reliability of his evidence here in court.

You have to decide whether you can accept any part of the evidence he has given in court and, if so, what part of it. If you decide that there is serious conflict between the evidence he gave you and statements previously made by him, you may think that you should reject his evidence altogether and not rely upon anything he has said in the witness box.

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24. (1991) 28 JLR 47.
25. (1991) 28 JLR 61.
26. SCCA 41/85 [10.10.85] (PC Jamaica).
27. Per Carey JA at p. 22 of *Beckford v R.*
28. (1960) 2 WIR 263.

14-7 Statement to Refresh Memory

Sources: *Archbold* **1997, 8–77 et seq.**

LEGAL SUMMARY

1. A witness giving evidence may refresh his memory by reference to any writing, concerning the facts to which he testifies, made or verified by himself at a time when his memory was clear.[29]
2. A witness is entitled to refresh his memory from an earlier document or recording before testifying.[30] If mention of this is made in the course of the evidence the jury should be directed that this is normal practice.
3. The judge retains a discretion as to whether a witness should be permitted to refresh his memory while giving evidence.[31] It is not necessary for the witness to have faltered before he is permitted to do so.[32]
4. If the witness refreshes his memory during the course of, or in a break in testifying, the earlier document may, in some circumstances become admissible if cross-examination takes place on other parts of the document other than those parts used by the witness to refresh his memory.
5. The jury may inspect a memory-refreshing document if necessary.[33]
6. If the jury will find it difficult to follow the cross-examination of the witness who has refreshed his memory without having the record, this may be provided to them.[34] However it would not be placed before them as evidence of the truth of the contents of the record.[35]
7. A document exhibited under this exception to the hearsay rule (see 4 supra) should not accompany the jury when they retire, other than in exceptional circumstances (e.g. it would help following translated text).[36] If the jury does retire with the document they need to be warned not to attach disproportionate weight to it.[37]
8. At common law, where a memory–refreshing document is put in evidence, it is evidence only of the consistency of the witness. In *R v Virgo*[38] the conviction was quashed where

29 *Attorney-Gen's Reference No 3 of 1979*, 69 Cr App R 141 per Lord Widgery CJ at 414.
30 *Richardson* [1971] 2 QB 484; *R v Beckford* (No. 2) 9 JLR 240; 9 WIR 437.
31 *McAfee* [2006] EWCA Crim 2914.
32 *Mangena* [2009] EWCA Crim 2535.
33 *Bass* [1953] 1 QB 680.
34 *Sekhon* (1986) 85 Cr App R 19.
35 Ibid.
36 See e.g. UK Criminal Justice Act 2003 s. 122.
37 *Hulme and Maguire* [2005] EWCA Crim 1196.
38. [1978] 67 Cr App R 323.

the trial Judge directed the jury, by necessary implication, that the diary of a prosecution witness, used by the witness to refresh his memory, could be regarded as evidence of the truth of the facts contained in it.[39]

14-8 Previous Consistent or Self-Serving Statements

Sources: ***Archbold*** **2009, 8-102, 8-103;** ***Practical Approach to Evidence***

LEGAL SUMMARY

1. The general well-known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with his testimony before the Court in order to lend weight to the evidence: *R v Beattie*;[40] *Brian Rankine & Anor v R.*[41]
2. There are well-known exceptions to that rule:
   a. The first one is where it has been suggested to the witness that the evidence he or she has given on oath is a recent invention, that the witness has just made it up. If that suggestion is made, then it is obviously a rule of common sense as well as law, that a previous consistent statement can be shown in order to demonstrate that the evidence has not recently been fabricated.
   b. The second exception is complaints made in sexual cases, complaints which are made at the first opportunity, are admissible in order to show consistency.
   c. Where the statement forms part of the actual events in issue, sometimes known as the *res gestae* rule: *R v Beattie*.
   d. Where a wholly or partially self-serving statement is made by the defendant, in relation to an offence charged, when questioned about the offence.
   e. Where a witness gives evidence of a previous identification of the defendant. See *R v Osbourne and Virtue*.[42]
3. It is only in cases where a witness has been accused of a recent concoction that his statement can be produced to establish consistency, thus the bald suggestion that a witness is not speaking the truth is insufficient: *R v Gladstone Hall*.[43] The facts of this

39. Murphy, *A Practical Approach to Evidence* p. 330.
40. (1989) 89 Cr App R 302.
41. SCCA 72 and 73/04 [28.7.06].
42. [1973] 1 QB 678.
43. (1994) 31 JLR 386.

case reveal that among the statements taken by the police in connection with the murder with which the appellant was charged, was that of a witness, 'R'. R was not called by the prosecution but was in fact a witness for the defence. In cross-examination, it was put to R by Crown Counsel that he was not speaking the truth. Counsel for the defence sought and was granted permission to tender into evidence the statement of this witness on the basis that it would go to prove that he was being consistent. The complaint on appeal was that the trial judge had failed to direct the jury as to the probative value of the statement but this was without any legal basis since the statement had no probative value and should not have been admitted into evidence.

14-9 Statement to Rebut Allegation of Recent Fabrication

Sources: ***Archbold*** **2009;** ***Blackstone's*** **2017, F7.62; Crown Court Compendium 2016**

LEGAL SUMMARY

1. If in cross-examination it is suggested to a witness that his evidence is a **recent fabrication,** evidence of a previous consistent statement will be admissible in re-examination to negative the suggestion and confirm the witness's credibility (*Y*[44]). The principle has no application where a witness is cross-examined on the basis that his account was fabricated from the outset, unless the effect of the cross-examination is in fact to create the impression that he invented his story at a later stage (*Athwal*[45]). In a trial for a sexual offence in which the previous statement amounts to a complaint, it may be admissible to rebut the allegation of **recent fabrication** notwithstanding that it is inadmissible as a **recent** complaint (see *Tyndale*[46]).

2. At common law the evidential effect of the earlier statements is limited to the rebutting of the suggestion made of recent concoction and cannot be used as evidence of the truth: *Murphy.*[47]

3. "…The touchstone is whether the evidence may fairly assist the jury in ascertaining where

44. [1995] Crim LR 155. See also *R v Oyesiku* 56 Cr App 240. In this case the conviction was quashed because the trial judge had improperly refused to allow the jury to see the previous statement; by inspection of it, the jury would have been in a better position to assess the extent to which it rebutted the attack made on the witness's testimony. See also *Sekhon* (1987) 85 Cr App R 19, at F6.22 *et seq.* For earlier authority, see *Benjamin* (1913) 8 Cr App R 146 and *Flanagan v Fahy* [1918] 2 IR 361. (Blackstone's F 7.63).
45. [2009] 1 WLR 2430.
46. [1999] Crim LR 320 and F6.31.
47. [1985] Crim. LR 270.

the truth lies. It is for the trial Judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence" (per Maurice Kay LJ at paragraph [58] of *Regina v Athwal and Another*[48]).

DIRECTIONS: HEARSAY STATEMENT TO REBUT ALLEGATION OF RECENT FABRICATION

4. It should be explained to the jury that the reason that they heard about W's previous statement was because it was suggested to W that he had invented his evidence and it is relevant to the question whether W has in fact done so and whether his evidence is true or false. It is implicit that the statement will have been made before the point at which the witness is alleged to have invented the evidence.
5. It is for the jury to decide, depending on what they make of the statement whether it rebuts the suggestion that W's evidence is invented.
6. The jury should be directed that the statement, or that part of it which has been used for this purpose, is evidence of the matter/s stated in it (but not evidence of the truth) and they are entitled to use it to decide whether or not W has been consistent and, if they are satisfied that he has been, that is something they may keep in mind when deciding whether or not his evidence is truthful.

EXAMPLE

When W was cross-examined it was suggested to him that he had made up his account of the incident. Because of that suggestion, which W rejected, [advocate for the party by whom W was called] asked W about the statement that he made on [date], in which he gave the same/a similar account to the one he has given today.

The reason you heard about W's statement is to help you decide whether W has made up what he said in the witness box or whether it is true. Both what W said in the statement and what he said in the witness box are evidence of [specify] for you to consider when you are deciding (a) whether W has been consistent in what he has said about the incident; (b) whether his statement shows that the suggestion that he made up what he said when he gave evidence in the witness box is wrong and (c) whether W's evidence is true.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single W's evidence out by having a copy of his.

48. [2009] 1 WLR 2430.

14-10 *Res Gestae*

Sources: *Archbold* **2009; Crown Court Compendium 2016; Evidence 2001/2002**

LEGAL SUMMARY

1. An out of court statement which relates to and is closely associated in time and place with a relevant state of affairs or event as it arises or occurs is generally admissible as an exception to the hearsay rule.

2. The basis for admissibility under this exception – the *res gestae* exception - is that hearsay can be regarded as more likely to be reliable if the statement was made spontaneously. To be admissible such a statement must:

   a. have been made by a person "so emotionally overpowered" by an event that the possibility of concoction or distortion can be disregarded; or

   b. have accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or

   c. relate to a physical sensation or mental state such as intention or emotion.

3. The law governing admissibility is stated in *Andrews.*[49] It is not always necessary to give a specific direction about the risks in mistaken identification if the speaker was dying at the time of making the statement: *Mills v The Queen.*[50]

4. The *res gestae* exception should not generally be relied upon where the maker of the statement is available as a witness – see *Tobi v Nicholas.*[51]

5. In *R v Andrews* the declarant was the victim of the offence. However, the declarant need not be the victim – see obiter dicta in *Ratten v R*[52] and *R v Glover* [1991] Crim LR 48.

6. In *Stoutt v R* (British Virgin Islands)[53] their Lordships stated that the trial judge need to explain to the jury that the absence of the opportunity to test the accuracy of what the deceased said represent a significant disadvantage to the accused, and that it needs to be taken into account when assessing what he had said.

49 [1987] AC 281 p. 300–301.
50 [1995] UKPC 6; *Mills, Mills, Mills and Mills v R* (1995) 46 WIR 240 (PC Jamaica).
51 [1988] 86 Cr App R 323.
52 [1972] AC 378.
53 [2014] UKPC 14 (13 May 2014).

CASE NOTES

I. A statement made by the dying victim saying "Ritchie, Ritchie" were admissible under the *res gestae* rule, albeit hearsay, as they were made soon after she was attacked: *R v Richard Murray* (1988) 25 JLR 409.

II. The appellant and the deceased were involved in a fight, at which point the deceased ran over to the witness' house where he said words indicating that it was the appellant who had stabbed him and he was going to die. It was held on appeal that the trial judge had not relied on the principle of dying declaration but rather relied on the statement being part of the *res gestae* and the statement was rightly admitted: *Regina v Icilda Brown* (1990) 27 JLR 321.

III. The prosecution witness said he heard the voice of the deceased saying 'Lumsie, you kill me". He went in the direction of the voice and he found the deceased lying on the street dead with cuts all over his body. The trial judge treated the statement of the deceased as a dying declaration. It was held on appeal the circumstances in which the statement was made disclosed that it was made as part of the *res gestae* and should have been admitted on that basis. The trial judge had given no direction to the jury on the opportunity for concoction or the question as to whether the deceased might have been activated by malice or on the issue of visual identification and the fact that the maker of the statement was not subjected to cross examination: *R v Aston Williams* SCCA 16/91 [30.11.92].

IV. The deceased who died in hospital shortly after he was shot was heard to say 'Look how Blacka shot me for nothing'. The court held that his statement of the attack describing how he had received his injuries was admissible in evidence as part of the *res gestae* at the trial of the attacker, if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion: *Regina v Winston Hankle* SCCA 163/90 [23.3.92]; (1992) 29 JLR 62.

V. The statement "Speng, Speng mamma, Speng", made by the deceased in answer to his mother, while in the taxi, on their way to the hospital as to who had shot him was properly admitted in evidence as part of the *res gestae*: *R v Winston Allerdyce* (1992) 29 JLR 199.

DIRECTIONS

7. Depending on the reason for the statement having been admitted in evidence the jury should be reminded of the evidence about the statement, in the context of the situation in which it was made.

8. The jury should be directed that:

(1) before they may rely on the statement they must be sure:

(a) that the statement has been reported accurately;

(b) that the statement was spontaneous and genuine and not the result of [insert as appropriate: deliberation, invention, distortion, rehearsal, malice or ill-will];

(c) that, if sure that it was genuine and spontaneous, it was not made as a the result of a mistake as to the circumstances in/about which it was made;

(d) and if they cannot be sure about these things they must ignore the statement completely;

(2) If, having considered these factors, they are sure that they can rely on the statement, they must decide what weight/significance they should attach to it, bearing in mind any limitations revealed by the evidence e.g. that the maker of the statement is unidentified or is dead and so has not given evidence in relation to the subject matter of the statement or been tested by cross-examination.

EXAMPLE: Arson With Intent to Endanger Life

W was one of the police officers at the scene. He gave evidence that when the house was completely engulfed in flames, a woman ran from the back door coughing uncontrollably and obviously distressed. W said that this woman turned and pointed at the door and screamed "Jason's inside. He's the one you want". She then ran away up the street and has not been seen since. Within moments, D appeared at the door, badly affected by the smoke but otherwise uninjured.

W then arrested him. W accepts that he did not make any note of what the woman said until he made his witness statement.

When you are looking at this evidence you must bear these points in mind: ·

- First, before you can rely on W's evidence of what the woman said, you must be sure that his recollection is accurate. If you are not sure that W's recollection of what she said is accurate, you must ignore this evidence.
- If you are sure that W's recollection is accurate, you must next decide whether, when she said "He's the one you want", the woman was saying that D was responsible for the fire. If you are not sure that the woman was saying this, you must ignore this evidence.
- If you are sure that the woman was saying that D was responsible for the fire, you must then decide whether her words were spontaneous – that is to say they just came out – and whether they reflected the situation as she genuinely believed it to be, or whether she had any other reason for saying what she did, such as to make a false accusation against D. If you are not sure that what she said reflected the situation as she genuinely believed it to be you must ignore this evidence.
- If you are sure that what the woman said was spontaneous and genuine, you must next consider whether she was, or may have been, mistaken in believing that D was responsible for the fire. If you decide that she made, or may have made, a mistake, you must ignore what she said.

- If you are sure that she wasn't mistaken, you may take account of this evidence when you are deciding whether the prosecution have proved that D is guilty.

However, when considering what importance you should give to this evidence, you must keep in mind that, because the woman has never been identified, she has not given evidence about this herself. So, you have not been able to see her and do not know how her evidence might, or might not, have stood up to cross-examination. Obviously, if she had given evidence in line with what W told us she said, this would have been challenged in court.

14-11 Statements in Furtherance of a Common Enterprise

Sources: ***Archbold*** **2009; Crown Court Compendium 2016; Evidence Act**

LEGAL SUMMARY

1. The common law exception admitting hearsay statements made in furtherance of a common enterprise is preserved by the **Evidence Act** s.31A. In short, the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that enterprise may be admissible against another party to the enterprise, but only where the evidence shows the complicity of that other in a common offence or series of offences.[54]

2. Once admitted, the evidence may be considered by the jury when deciding upon the existence of the conspiracy, its objects and purpose, and when deciding whether the defendant was a conspirator.

3. The jury will need direction on several matters:

   (1) It is for them to decide whether the acts and declarations were made by a conspirator.[55] The hearsay evidence may be used when considering whether there was a conspiracy and whether the actor/speaker was a conspirator.

   (2) The jury must not convict D solely on the basis of this evidence: they may only convict him if there is other evidence which implicates him and they are sure on all of the evidence that he is guilty.

5. The jury will also need careful direction to guard against the risk that they will treat the statement as primary evidence of D's involvement without regard to the limitations of the hearsay evidence.[56] These include for example that D was not present when the statement was made and so was not in a position to respond, challenge or disagree with

54. *Gray* [1995] 2 Cr App R 100; *Murray* [1997] 2 Cr App R 136; *Williams* [2002] EWCA Crim 2208.
55. *King* [2012] EWCA Crim 805; *Smart and Beard* [2002] EWCA Crim 772 at [30].
56. *Jones* [1997] 2 Crim App R 119; *Williams* [2002] EWCA Crim 2208.

it at the time that it was made; the statement may be ambiguous or incomplete; D will not have had any opportunity to test the evidence in cross-examination where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

DIRECTIONS

6. A statement, whether made orally or in writing, by one party to a common enterprise may, if a reasonable interpretation is that it was made in furtherance of the common enterprise, be put in evidence to prove that a D who was not party to the statement participated in the common enterprise; provided that there is some other evidence of D's involvement. Such evidence commonly arises out of telephone communication (text or speech) between alleged co-conspirators.
7. The purpose for which the evidence was adduced must be explained to the jury.
8. The limitations of the evidence must also be explained: for example
   (1) D was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made;
   (2) the statement may be ambiguous or incomplete;
   (3) D will not have had any opportunity to test the evidence in cross-examination where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.
9. This evidence is only part of the evidence and the jury must consider the evidence as a whole.
10. The jury must not convict D solely on the basis of this evidence: they may only convict him if there is other evidence which implicates him and they are sure on all of the evidence that he is guilty.

EXAMPLE

You have heard evidence from W that [D1] said [specify evidence of what was said by alleged conspirator].

This evidence is disputed and so the first question for you to answer is whether or not this evidence is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true you can use this evidence when you are deciding:

(a) whether the alleged conspiracy actually existed; and

(b) whether any particular defendant was involved in any such conspiracy.

On the question of whether the alleged conspiracy actually existed, you should look at exactly what was said and decide whether it must have been said in order to carry out the alleged conspiracy or whether it could have been said for some other reason. If you are not sure that it was said in order to carry out the alleged conspiracy, you must ignore it.

[In the case of an incomplete sentence or message: Also, the sentence/message is obviously incomplete and you must not guess or make assumptions about what might have been said in the rest of the sentence/message.]

If you are sure that it was said, that may provide some evidence that the conspiracy existed but on its own what was said cannot prove that there was a conspiracy. Your conclusion about whether or not there was a conspiracy depends on what you make of all of the evidence, not just what was said.

If you are sure, on all of the evidence, that there was a conspiracy, you can take account of the evidence of what was said when you are deciding whether or not a particular defendant was involved in it.

In the case of D1, you will have to decide whether or not he is the person who said [specify what was said]. When you are deciding this, you must consider [here give a direction about identification by voice: see Chapter 15-7 below]. If you are sure that D1 was the person W heard, you can take account of what he said, along with the other evidence, when you are deciding whether he is guilty of the conspiracy with which he is charged.

In the cases of D2 and D3, although the person speaking referred to both of them by name, you must be cautious about it and aware that this evidence has a number of limitations. In particular, there is no evidence that either D2 or D3 was present when the person said what he did, so neither was there to respond, whether to agree or to disagree with what was said.

Although D1 gave evidence, he said that he was not the person speaking and so cannot provide any explanation of what was said; and if you think that the person speaking was someone other than D1, it follows that D2 and D3 have not had any opportunity to challenge what was said by having the speaker cross-examined.

[If applicable, having regard to the evidence: You should also consider whether, if you are sure that [specify what was said] was said by someone involved in the conspiracy (whoever that was) it may have been said falsely and maliciously in order to implicate others who were not involved in it.]

Finally you must not convict D2 or D3 just because of this evidence. You can only convict either one of these defendants if there is other evidence that implicates him and you are sure, on all of the evidence, that he is guilty.

14-12 Out of Court Statements Made by One Defendant

Sources: ***Archbold* 1997, 15-368; 2009, 11-3**

LEGAL SUMMARY

1. It is a fundamental rule of evidence that statements made by one defendant either to the police or to others (other than statements made in the course and in pursuance of a joint criminal enterprise to which the co-defendant was a party) are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own: *R v Gunewardene*;[57] *Archbold* 1997 at 15-368.
2. It is the duty of the judge to impress on the jury that the statement of one defendant not made on oath in the course of the trial (and not falling within any other recognized exception) is not evidence against a co-defendant and must be entirely disregarded: *R v Gunewardene*.
3. A jury should not be directed that they may test the credibility of a Crown witness whose evidence affects all defendants by considering it in the light of a statement under caution made by one of them; *R v Daniel and Watson* [1973] Crim LR 627.
4. Where the statements of co-defendants indicate that they have co- operated with each other after the offence, they may be used against each other to show an attempt to fabricate a false story: see *Mawaz Khan v R*.[58]
5. With a view to minimizing the prejudicial effect the judge may edit a defendant's statement so as to remove passages which incriminate the co-defendant: *R v Gunewardene* supra or judge may order separate trials: *R v Buggy*.[59]
6. Note however, *Dennis Lobban v R*[60] where Lord Steyn in delivering the judgment of the Privy Council stated *inter alia*:

> A Judge in a criminal trial had a discretionary power to refuse to admit relevant evidence on which the prosecution proposed to rely if he considered that its prejudicial effect outweighed its probative value, but he had no discretionary power on that basis at the request of a defendant in a joint trial to exclude evidence tending to support the defence of a co-defendant or to edit a co-defendant's statement on which the co-defendant wished to rely.

57. [1951] 2 KB 600; 35 Cr App R 80.
58. [1967] AC 454 PC.
59. 45 Cr App R 298.
60. (1995) Times, 28 April; [1995] 2 All ER 602; [1995] 2 Cr App R 573 (PC Jamaica).

Lord Steyn continued:

> Two principles were clearly established.
>
> First, a trial Judge in a criminal trial always had a discretion to refuse to admit evidence tendered by the prosecution if in his opinion its prejudicial effect outweighed its probative value. He could exclude evidence tendered by the prosecution in a joint trial probative of the case against one co-defendant, on the ground that it was unduly prejudicial against another co-defendant.
>
> The second principle was lucidly summarised by Keane, *The Modern Law of Evidence* (3rd edition [1994] p 36):
>
>> The discretion may only be exercised in relation to evidence tendered by the prosecution. There is no discretion to exclude, at the request of one co-accused, evidence tendered by another.

7. In the Court of Appeal (Jamaica), Carey JA, stated:

> In the case where one co-accused makes a statement implicating his co-accused, we are not aware of any rule requiring a trial Judge to edit such a statement. Indeed, in our Judgement, it would be wholly unfair to the maker of the statement who would be entitled to have the statement in its entirety placed before the jury. A trial Judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one, and unfair to a co-accused. His responsibility, is to both.

14-13 Dying Declarations

Sources: ***Archbold* 2009, 11-18a**

LEGAL SUMMARY

1. Upon an indictment for murder or manslaughter the dying declaration of the deceased as to the cause of his death is admissible if, when the statement was made, he had a hopeless expectation of imminent death.[61]
2. In *Nembhard v R*[62] a policeman was shot outside his house. His wife heard the shots and ran out to him. He told her he was going to die and named his attacker. The Privy Council held that the policeman's statement to his wife was admissible to show that Nembhard was the murderer.

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61. *R v Perry* [1909] 2 KB 697.
62. [1981] 1 WLR 1515 PC, (1981) 18 JLR 385 (PC Jamaica).

3. *Nembhard* also held that there was no rule of law or of practice which required a trial judge admitting evidence of a dying declaration under common law rules to warn a jury specifically that it was dangerous to rely on it in the absence of corroboration.

4. The general principle on which this species of evidence is admissible is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world has gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which imposed by a positive oath administered in a court of justice.[63]

5. A declaration made by the deceased between the request for prayer and the expression of feelings that he was not going to make it was clearly admissible as a declaration made in extremity. The victim's serious injuries would have dominated his thoughts and the possibility of concoction or distortion could be disregarded: *R v Andre Jarrett*.[64]

6. It was unusual to have a *voir dire* on the admissibility of a dying declaration by a victim of homicide. In *R v Andy Stainrod*[65] Carberry JA stated: "In our experience, while it is customary to have a *voir dire* when the Crown seeks to put in an alleged confession that the defence challenges as not being voluntary or to have been extorted by force or fraud, it was unusual to have a *voir dire* on the admissibility of a dying declaration: though if the jury's absence is requested by the defence and acceded to by the Judge in the exercise of his discretion, no complaint can be made": *Anderson* (1929) 21 Cr App R 178 at 183.

7. A dying declaration that is incomplete will be inadmissible. In *Cyril Waugh v R*[66] the deceased, while making the statement, fell into a coma from which he never recovered. No one could tell what he was about to add. Their Lordships held that it was a serious error to have admitted it in part, as was done – without the last unfinished sentence – and an even more serious error not to have pointed out to the jury that it had not been subject to cross-examination.

DIRECTIONS

8. In summing up the judge must point out to the jury that the maker of the statement is not liable to cross-examination thus there is no opportunity to test the deceased's reliability by this means: *Nembhard v R.*

63. Per Eyre CB in *Woodcock* (1789) 1 Leach 500 approved in *R v Perry* at 701.
64. SCCA 130/01 [4.3.03].
65. (1986) 23 JLR 350.
66. [1950] AC 203.

15. IDENTIFICATION

15-1 Visual Identification by a Witness/Witnesses
15-2 Identification from Visual Images: Comparison by the Jury
15-3 Identification from Visual Images by a Witness who Knows the Defendant and is so able to Recognise him
15-4 Identification by Facial Mapping
15-5 Identification by Fingerprints
15-6 Identification by Voice
15-7 Identification by DNA

15-1 Visual Identification by A Witness/Witnesses

Sources: **Crown Court Compendium 2016; Trinidad and Tobago Criminal Bench Book 2015; Judicial Studies Board Bench Book 1997**

LEGAL SUMMARY

1. The risk of honest but mistaken visual identification of suspects is well established and requires investigators to comply with the **Judges' Rules** and the guidelines set out in *Turnbull*.[1]

2. The basic principle is the special need for caution when the issue turns on evidence of visual identification. The summing-up in such cases must not only contain a warning, but expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.[2]

3. The principal safeguards provided are:

   (i) Making a record of a description first given by the witness, before any identification procedure takes place.

1. [1977] QB 224 (CA).
2. Trial judges are not bound to any form of words, but they have a duty to recount the evidence with accuracy, to present the defence fully and fairly, and to have regard to the decisions of the Court of Appeal that in directing the jury on the issue of visual identification the significance of the strength and weakness of that evidence must be pointed out: *R v Oliver Thompson* 23 JLR 223, 226.

(ii) Holding an identification procedure whenever the identification is disputed, unless it is not practicable or it would serve no useful purpose: See the cases of *John v State of Trinidad and Tobago*;[3] *Pipersburgh*.[4]

4. A *Turnbull* direction is required where identification is a substantial issue. This includes "recognition" evidence: See *Beckford and Shaw*.[5]

5. The warning will not be required where the sole issue is the truthfulness of the witness unless, assuming the witness to be honest, there is also room for mistake.

6. *Turnbull* is intended, primarily, to deal with the 'ghastly risk' in cases of fleeting encounters: see Lord Widgery CJ in *R v Oakwell*[6] and also *R v Pattinson and Exley*.[7] The rule is equally applicable to police witnesses: see *R v Reid*.[8]

7. Where the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.[9] The identification evidence can be poor, even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions.[10] Where, however, the quality is such that the jury can safely be left to assess its value, even though there is no other evidence to support it, the trial judge is entitled (if so minded) to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken: see *R v Weeder*[11] and *R v Breslin*.[12] The judge should identify the evidence he regards as capable of supporting the evidence of identification.

3. [2009] UKPC 12.
4. [2008] UKPC 11 (Belize).
5. (1993) 42 WIR 291 (PC Jamaica).
6. (1978) 66 Cr App R 174.
7. [1996] 1 Cr App R 51.
8. 90 Cr App R 121, PC
9. See *R v Fergus (Ivan)* (1994) 98 Cr App R 313, CA; *Wilbert Daley v R* (1993) 30 JLR 429 (PC Jamaica) – the trial judge should withdraw the case from the jury, not because the court believes a witness is lying but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore insufficient to found a conviction; and the fact that an honest witness may be mistaken on identification is a particular source of risk.
10. *R v Gavaska Brown et al* (2001) 62 WIR 234 ("Speck of time" observing applicant); *Rose (Michael) v R* (1994) 46 WIR 213 (PC Jamaica) (Incident lasting minutes – more than a fleeting glance); *Freemantle v R* 45 WIR 312 (PC Jamaica) (Incident lasting seconds); *Ronald Eccles v R* SCCA 95/95 [6.5.96] (awakened from sleep); *R v Jerome Tucker and Anor* SCCA 77 & 78/95 [26.2.96] (side view of applicant for three seconds; seeing through split in bathroom door); *R v Bryan Davis* SCCA 93/96 [12.5.97] (jam packed dancehall); *R v Gladstone Hall* (1994) 31 JLR 386, *Bernard v R* [26.4.94]; 45 WIR 296, *R v Oniel Williams* SCCA 75/98 [6.7.99] (identification made under terrifying, traumatic and distressing circumstances), *R v Carlton Taylor* SCCA 57/99 [20.12.01] (appellant seen sideway whilst running away); *R v Omar Nelson* SCCA 89/99 [20.12.01] (lifting of mask); *Tillett v R* Privy Council Appeal 56/98 [28.6.99] Belize (cycling past witness rapidly); *R v Mark Sangster and Anor* SCCA 70 & 81/98 [23.3.00] (seconds seeing face during shoot out); *R v Clifton Williams and Anor* SCCA 200 & 201/99 [20.12.02] (witness shot and falling face downwards to the ground viewing appellants).
11. 71 Cr App R 228.
12. (1984) 80 Cr App R 226.

8. Where identification involves recognition, the judge should remind the jury that mistakes in recognition, even of close friends and relatives are sometimes made: *Beckford and Shaw*.[13] In a recognition case, the risk is not that the witness will pick out the wrong person on a parade, but that at the time of the offence he mistakenly thinks he recognises the offender; this danger should be brought home to the jury: *Thomas*[14] See also *Pop.*[15] As to the cumulative effect of a number of identifying witnesses, see *R v Barnes*.[16]

Recognition by Name

9. A witness may know the name of the person he asserts is the offender either because he has had personal experience of the offender using or answering to the name, or because he is aware of the offender being known by that name. The issue is whether or not the witness has correctly identified the accused as the offender, not whether he knows his name. In order to judge this, the tribunal of fact will want to know how well the witness knew the accused and what opportunity he had to observe the offender at the material time.

10. The *Turnbull* direction is to be given in these circumstances:

    (i) First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

    (ii) In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of word.

    (iii) Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification

13. (1993) 42 WIR 291 (PC Jamaica);
14. [1994] Crim LR 128 (CA).
15. *Pop (Aurelio) v R* (2003) 62 WIR 18.
16. [1995] 2 Cr App R 491.

to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

(iv) Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. It is insufficient to merely refer to the weaknesses; the judge must clearly explain why it is a weakness: See *Fergus;*[17] *Pattinson*[18] (CA); *Stanton.*[19]

Where the Defence is an Alibi

11. Care should be taken in directing about support to be derived from the jury's rejection of an alibi. There may be many reasons for putting forward a false alibi. Alibi witnesses may be genuinely mistaken as to dates, etc. The mere fact that the defendant has lied about his whereabouts does not of itself prove that he was where the identifying witness said he was.

12. In *Mills et al v R*[20] the Privy Council held that the observations of Lord Widgery in *Turnbull* have no application to an alibi put forward only in an unsworn statement.

Identification Where the Judge Sits Alone

13. When the trial judge sits alone he must expressly warn himself in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification.[21] In this respect, there should be no difference in a trial judge and jury and trial judge who sits alone. By merely uttering the warning but failing to show that the caution has been applied in analysing the evidence, will result in a judgment of guilty being set aside.[22]

Identification Procedures

14. The following are visual identification procedures:

(1) Video identification;

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17. *R v Fergus* [1992] Crim LR 363 (CA).
18. [1996] 1 Cr App R 51.
19. [2004] EWCA Crim 490.
20. (1995) 46 WIR 240 (PC Jamaica).
21. *R v Locksley Carroll* (1990) 27 JLR 259; *R v Lebert Balasal and others* (1990) 27 JLR 507; *Regina v Gerald Cross* (1994) 31 JLR 228; *R v Denzil Dawes* (1990) 27 JLR 539.
22. *R v Alex Simpson, R v McKenzie Powell* SCCA Nos. 151/88 & 71/89, [5.2.92].

(2) Identification parades;

(3) Informal parades;

(4) Group identification;

(5) Confrontation;

(6) Dock identification.

15. Video identification is the preferred procedure, but an identification parade may be offered if video identification is not practicable or if a parade is both practicable and more suitable than video identification.

Identification Parade

16. Unlike a confrontation or a dock identification, a parade can confirm the witness' ability to pick out the person identified.[23] Failure to hold a parade does not necessarily result in a serious miscarriage of justice, provided that the trial judge adequately directs the jury.[24] However, there ought to be an identification parade where it would serve a useful purpose: *R v Popat*.[25] In *R v Fergus*[26] the witness claimed only to have seen the accused once and heard his name from someone else. An identification parade should have been held.

17. Failure to observe rule 554A of the 1939 Identification Rules (with respect to the one-way mirror) go to the weight of the evidence and not to the validity of the parade.[27] Fairness is an important consideration as it gives the opportunity to independently fairly and without assistance identify the assailant.[28] It is imperative that all forms used on the parade should be included in the prosecutor's instructions. The Identification form should be available at the trial in the hands of the police officer who conducted the parade so that if necessary it can be used to refresh his memory.[29] The parade form operates as a record of what transpired on the parade, so, the admission of the form into evidence is unobjectionable.[30]

23. *Watt v R* (1993) 42 WIR 273 (PC Jamaica).
24. *Goldson (Irvion) and McGlashan (Devon) v R* (2000) 56 WIR 444 (Privy Council).
25. [1998] 2 Cr App Rep 208.
26. [1992] Crim LR 363.
27. For failure to follow guidelines and perceived irregularities on the parade see: *Pop (Aurelio) v R* (2003) 62 WIR 18 (failure to hold an identification parade); *R v Phillip Gillies* (1992) 29 JLR 167 (presence of police officer in room with the witness prior to the holding of an identification parade); *R v Cecil Gibson* (1975) 24 WIR 296 (officer having conduct of the investigations choosing eight men for the parade); *R v George Lawrence* SCCA 29/98 [27.10.99] and *R v Wilbert Daley* SCCA 188/87 [13.7.88] (presence of the investigating officer on the parade); *R v Norris Dohman* SCCA 146/87 [5.5.88] (investigating officer transporting witness to the parade); *R v Anthony McIntosh* SCCA 145/89 [18.2.91] (the same police officer who escorted applicant to the parade escorts the witness from the waiting room to the parade).
28. See the following cases: *R v Cornwall (Michael) and Halloway (Francis)* (1996) 54 WIR 333; *R v Bradley Graham and Randy Lewis* 23 JLR 230; *R v Desmond Williams* SCCA 183/87 [21.6.88]; *R v Michael McIntosh & Anor* SCCA 229 & 241/88 [22.10.91].
29. *R v Oliver Thompson* 23 JLR 223, page 226.
30. *R v Dave Sewell* SCCA 50/98 [30.7.99].

It is even more so when there is evidence from the defence as to its preparation in keeping with the regulations: Regulation 7.13(viii) of the regulations governing identification parades provides: "Every circumstance connected with the identification shall be carefully recorded by the officer conducting it whether the accused or any other person is identified or not."[31]

18. The defence in *Kefian Brown v R*[32] was one of alibi although the tenor of the cross-examination was that the appellant had been present at the scene trying to protect the complainant. One of the issues on appeal was whether an identification parade should have been held. The court held that an identification parade would have served no useful purpose. What was important was the credibility of the witness.

19. In *Isaac Alfred v R*[33] the complainant was only able to give the first name of her attacker. The applicant having raised the defence of alibi and the fact that she could only give a first name to the police the issue was whether an identification parade ought to have been held. An identification parade would have been necessary if there was doubt as to whom the name given by the complainant referred. In this case, there was no such doubt. The identification in respect of the time of day, the lighting and the facts that the complainant and the applicant knew each other well and they were in close proximity for a significant period of time were sufficient evidence upon which the jury could have convicted the applicant.[34]

20. Even where no objection had been voiced to the composition of an identification parade in which two tall men had been placed (one of whom was the suspect), the trial judge ought to have given the jury a clear and firm warning on the matter.[35] In *R v Bradley Graham and Anor*[36] there was discrepancy in the height of the men in the line-up of the parade but there was no positive breach of Identification Parade Rules 552 and 553 (iii) to warrant the Court to follow the course adopted in *R v Cecil Gibson.*[37] It was essentially a jury matter. What however was not free from criticism was the learned trial judge's apparent acceptance of the explanations given for the disparity in heights, but in the final resort the issue was fairly left to the jury for their consideration.

21. Although the failure of the police to try to secure an Attorney-at-Law to represent the defendant at his parade involving the use of a one-way mirror was a breach of the 1977

31. Ibid.
32. SCCA No. 25/08 [26.03.09].
33. SCCA No. 39/07 [30.10.09].
34. See on the other hand *R v Clifton Williams and Anor* SCCA 200 & 201/99 [20.12.02] where the circumstances called for the holding of an identification parade.
35. *Bernard v R* (1994) 45 WIR 296.
36. 23 JLR 230.
37. (1975) 13 JLR 207.

Jamaica Constabulary Force (Amendment) Rules, the rules were procedural only and not mandatory. The breach was one of form rather than substance, especially as two justices of the peace had been present and one had been called as a witness at the trial.[38]

Group Identification

22. This form of identification may be offered initially only if the officer in charge of the investigation considers it more suitable than either video identification or an identification parade and if the identification officer considers it is practicable to arrange. This type of identification is sometimes referred to as an informal parade.

23. In *R v Vernon Smellie and Eustace Hanson*[39] the defendant Smellie refused to stand on an identification parade which he had been previously informed would have been held on that day. He armed himself with his slop pail and threatened to empty it on any one who attempted to make him stand on the parade. In the circumstances, whilst he was in his cell along with other persons he was pointed out by the witness in the presence of a Justice of the Peace, and Detective Acting Corporal Gardener. Wolfe JA as he then was stated: "there was absolutely nothing wrong with the procedure used to identify the applicant after he had refused to stand on the parade. The guidelines referred to by counsel anticipate a situation in which the suspect voluntarily submits himself to stand on a parade. In the circumstances of this case, if Sergeant Barrett and Michael Fraser are to be believed, there was no other course open to the officer but to do a group identification. Significantly, the English Police and Criminal Evidence Act 1984 Code D 24 of the codes of practice approved by the Home Secretary recommends the very procedure followed by Sergeant Barrett in this case. See para. 14-4 43rd Edition of *Archbold, Criminal Pleading Evidence and Practice*: See *R v John*[40] where it was held that if an accused refuses to take part in a parade the witness may identify him in the dock.

24. The reason a suspect gives for refusing to stand on a formal identification is of no moment. The police may adopt any satisfactory identification procedure in respect of a refractory suspect. One such procedure is group identification held covertly without the suspect's consent. This procedure is often referred to as an informal parade. Any number of suspects may be identified at the same time. Care should be taken so that the conditions are fair to the suspect in the way they test the witness' ability to make an identification.[41]

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38. *R v Bradley Graham and Anor*. 23 JLR 230.See also *R v Norris Dohman* SCCA 146/87 [5.5.88] (It is desirable for a Justice of the Peace to be present but it is not mandatory.
39. SCCA 62 & 63 of 1992 [6.6.94].
40. (1973) Crim LR 113.
41. *R v Waldron Francis* SCCA 36/02 [3.3.03].

Confrontation

25. This is the last resort, and should only be used if all other options are impracticable. Their Lordships in the Privy Council have held in *Garnett Edwards v R*[42] that confrontation between an identifying witness and a suspect is in general undesirable and should be avoided, lest they undermine the value of the identification evidence. Where, however, a witness to an incident knows well the person suspected of involvement in the incident, the suspect may properly be confronted by the witness so that the latter may confirm that the suspect is the proper person to be held in connection with the incident.[43]

26. Where the witness does not know the suspect well, an identification parade is the proper means of identifying the suspect and confrontation should be confined to rare and exceptional circumstances.[44]

27. Photographs or composite images for identification purposes should not be shown to witnesses for identification purposes if there is a suspect already available to be asked to take part in an identification procedure.

Dock Identification

28. The term 'dock identification' is best understood as referring to the identification of an accused for the first time during the course of the trial itself (i.e. by a witness who has not previously named him or identified him by any other means. Such evidence has long been considered potentially unreliable: *Edwards v The Queen,*[45] and especially so when a witness who has failed to pick out the accused at an identification parade is then invited to try to identify him in court: *Holland v HM Advocate,*[46] *Lawrence v The Queen,*[47] but the dangers inherent in a dock identification may not be present where the witness says, 'the person whom I have already identified to the police as the person who committed the crime is the person who stands in the dock': *France v The Queen.*[48]

29. The fact that there was a dock identification does not make the evidence inadmissible.[49] There might be reasons why there had been no identification parade, which the court

42. (2006) 69 WIR 360.
43. *Williams (Noel) v R* (1997) 51 WIR 202 (PC Jamaica). See also *Isaac Alfred v R* SCCA 39/07 [30. 10.09]; *R v Trevor Dennis* (1970) 12 JLR 24*9: R v Gavaska Brown et al* (2001) 62 WIR 234; *R v Leroy Hassock* [1977] 15 JLR 135. See also *R v Paul Turner* SCCA 143/87 [26.9.88]; *R v Nigel Lewis* SCCA 114/90 (4.11.91); *R v Donovan Patrick* SCCA 58 & 64/96 [21.3.97]; *R v Leroy Cargill and Anor* (1987) 24 JLR 217; *Junior Reid v R* (1983) 20 JLR 149; *R v Haughton and Ricketts* SCCA 122 and 123/80 [27.5.82]; *R v Barrington Maxwell* (1982) 19 JLR 333.
44. *Williams (Noel) v R* (1997) 51 WIR 202.
45. [2006] UKPC 23 (PC Jamaica).
46. [2005] HRLR 25.
47. [2014] UKPC 2 (PC Jamaica).
48. [2012] UKPC 28.
49. *R v Nicholas Power* SCCA 147/06 [24.4.08].

could consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge has to warn the jury to approach such identification with great care. He should point out to the jury the advantages of an identification parade and to warn them of the heightened risk of a false identification when a witness, who had been for example, unable to identify the defendant at an identification parade, make a dock identification. Judicial directions which meet the *Turnbull* guidelines on the dangers inherent in all identification evidence do not address the separate issue of the dangers of dock identification.[50] Such directions are insufficient for that purpose. In *Jason Lawrence v R*[51] the court held that although it would have been desirable, for the sake of completeness, for the judge to have directed the jury on the question of dock identification in respect of the eyewitness's evidence, the evidence of another witness had placed the appellant as the only individual who had made violent physical contact with the deceased at the relevant time. A direction on the credibility of the second witness was therefore more appropriate.

DIRECTIONS

30. Where the prosecution case depends on visual identification evidence (which may include a situation in which the defendant admits presence but denies that he was the person who acted as is alleged by the identification witness) a *Turnbull* direction must be given.

31. The jury must be warned that:

    (1) there is a need for caution to avoid the risk of injustice;

    (2) a witness who is honest and convinced in his own mind may be wrong;

    (3) a witness who is convincing may be wrong;

    (4) more than one witness may be wrong (*see paragraph 8 below*);

    (5) a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.

32. The jury should be directed to put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:

    (1) the time during which the witness had the person he says was D under observation; the time during which the witness could see the person's face;

    (2) the distance between the witness and the person observed;

    (3) the state of the light;

    (4) whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);

50. *Tyndale and Fletcher v R* SCCA 15 & 23/06 [24.10.08].
51. SCCA 158/05 [21.11.08].

(5) whether the witness had ever seen D before and if so how many times and in what circumstances (i.e. whether the witness had any reason to be able to recognise D);

(6) the length of time between the original observation of the person said to be D (usually at the time of the incident) and the identification by the witness of D the police (often at an identification procedure);

(7) whether there is any significant difference between the description the witness gave to the police and the appearance of D.

33. Any weaknesses in the identification evidence must be drawn to the attention of the jury, for example those arising from one or more of the circumstances set out above, such as:

(1) the fact that an incident was unexpected/fast-moving/shocking or involved a (large) number of people so that the identifying witness was not observing a single person;

(2) anything said or done at the identification procedure, including breaches of any relevant rules or regulations.

34. Evidence which is capable and, if applicable, evidence which is not capable of supporting and/or is capable of undermining the identification must be identified.

35. The jury may also use evidence of description, if they are sure that it comes from a witness who is honest and independent, as support for evidence of identification given by an/other witness/es.

36. Particular care is needed if the defendant's case involves an alibi: see Chapter 18-2.

37. Where more than one witness gives evidence of identification the jury should be told that they must consider the quality of each witness' evidence of identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as the jury are alive to this risk, they are entitled to use one witness' evidence of identification, if they are sure that that witness is honest and independent, as some support for evidence of identification given by an/other witness/es.

38. In every case, the direction must be tailored to the evidence and to the arguments raised by the parties in respect of that evidence.

EXAMPLE

This is a trial where the case against the defendant depends wholly or to a large extent on the correctness of one or more identifications of him which the defence alleges to be mistaken. I must therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. An apparently convincing witness can be mistaken. So, can a number of apparently convincing witnesses.

I must also warn you that mistakes in recognition, even of close friends and relatives are sometimes made.

You should therefore examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says was the defendant under observation? At what distance? In what light? Did anything interfere with the observation? Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? How long was it between the original observation and the identification to the police? Is there any marked difference between the description given by the witness to the police when he was first seen by them and the appearance of the defendant?

(Where appropriate:) I must remind you of the following specific weaknesses which appeared in the identification evidence …

15-2 Identification from Visual Images: Comparison by the Jury

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

CCTV Evidence Generally

1. The proliferation of CCTV cameras has led to the increased reliance on images which purportedly record relevant events as a means of identification.

2. In *Attorney General's Reference (No 2 of 2002),*[52] Rose LJ held that there were at least four circumstances in which subject to a sufficient warning, the jury could be invited to conclude that D committed the offence on the basis of a photographic image from the scene of the crime which is admitted in evidence:[53]

   (a) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock;[54]

52. [2002] EWCA Crim 2373.
53. Ibid. at para.19. The prosecution case was that the defendant was recorded in a CCTV film of indifferent quality taking part in a riot.
54. *Dodson & Williams* [1984] 1 WLR 971.

(b) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this;[55] and this may be so even if the photographic image is no longer available for the jury;[56]

(c) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury;[57]

(d) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury.[58]

CCTV Comparison by the Jury

3. In the first category of case, the recording is shown as real evidence and may provide the court with the equivalent of a direct view of the incident in question. In *Dodson & Williams*[59] it was held that although the exercise required of the jury is not expert in nature, the jury should still be warned of the dangers of mistaken identification and of the need to exercise great care in attempting to make an identification from a CCTV recording. A full *Turnbull* warning may not always be appropriate.[60]

4. The recording in question (or photograph taken from it) must be of sufficient clarity.[61] Where D's appearance has changed since the suspect's image was captured on CCTV, the jury should be provided with a photograph of D which was taken contemporaneously with the CCTV image. Other factors which the jury may need to be made aware of in seeking

55. *Fowden* [1982] Crim LR 588, *Kajala v Noble* (1982) 75 Cr App R 149, *Grimer* [1982] Crim LR 674, *Caldwell* (1994) 99 Cr App R 73 and *Blenkinsop* [1995] 1 Cr App R 7.
56. *Taylor v Chief Constable of Cheshire* (1987) 84 Cr App R 191. Ralph Gibson LJ at p.199 held that where the recording is not available or produced, the court "must hesitate and consider very carefully indeed before finding themselves made sure of guilt upon such evidence". In Selwyn [2012] EWCA Crim 2968 it was held that a Turnbull warning will be necessary in such circumstances.
57. *Clare and Peach* [1995] 2 Cr App R 333.
58. *Stockwell* (1993) 97 Cr App R 260; *Robert Lee Clarke* [1995] 2 Cr App R 425; *Hookway* [1999] Crim LR 750.
59. [1984] 1 WLR 971.
60. *Blenkinsop* [1995] 1 Cr App R 7.
61. *West* [2005] EWCA Crim 3034 at para.14. In *Faraz Ali* [2008] EWCA Crim 1522, Hooper LJ at paras. 36 to 41 doubted that the images relied upon were of sufficient quality to invite the jury to use "the evidence of their own eyes" and repeated that if such an exercise is undertaken, the jury must be given an explicit warning about the dangers of mistaken identification. Cf *Najjar* [2014] EWCA Crim 1309 in which the footage provided the jury "with an equivalent of a direct view of the incident and an exceptionally clear view of the perpetrator" (at para.17) and the appeal against conviction was rejected.

to make a comparison include the extent to which the facial features of the suspect are exposed in the recording or photograph and the opportunity and period of time the jury has had to look at D in the dock.[62] In *Walters*,[63] the court emphasised that the jury's attention should be drawn to the kind of factors that might make recognition from CCTV stills unreliable.

5. In *McNamara*[64] it was held that where a D refused to comply with a jury's request during summing-up to stand up and turn around so they could make comparisons with video evidence, the jury should not be invited to draw an adverse inference from such a refusal. The effect of such a direction would be to reverse the burden of proof.

6. There is no invariable rule that the jury must be warned of the risk that they might make a mistaken identification.[65]

DIRECTIONS

7. The jury must be given a warning, adapted from *Turnbull*, as to the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that:

   (1) it is possible for anyone, and any one of them, to make a genuine and honest mistake in identification; and it is also possible for all of them to make such a mistake. The fact that a number of people make the same identification does not of itself prove that the identification is correct;

   (2) none of them knew D before they saw him in the dock, so this is the only knowledge on which any of them can base their recognition of him;

   (3) even if the person shown on an image appears similar to D, it may not be him.

8. The jury must also be warned that although they have had the advantage of having been able to observe D in the course of the trial over a significant period, in clear light, from a reasonably short distance and without obstruction or distraction:

   (1) his appearance may have changed since the time that the suspect's image was captured and they must be careful not to make assumptions about what the defendant might have looked like at that time. [This situation will not arise if an image proved/agreed to be that of the defendant taken at the time that the suspect's image was captured has been put in evidence.];

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62. *Dodson & Williams* [1984] 1 WLR 971 by Watkins LJ. The need to deal clearly with such factors was highlighted by the Court of Appeal in *Walters* [2013] EWCA Crim 1361 at para.31.
63. [2013] EWCA Crim 1361.
64. [1996] Crim LR 750.
65. *R v Shanmugarajah and Liberna* [2015] 2 Cr App R 215(14), CA.

(2) the image/s with which they are comparing the defendant's features is/are only two dimensional: this is not the same as observing an actual person at the scene.

9. The jury must also be alerted to other factors which may make identification more difficult/ less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face.

10. Any obvious difference between the appearance of the defendant and the suspect shown on the image must be drawn to the attention of the jury.

11. Evidence which is capable of supporting, not capable of supporting or capable of undermining the case that the person shown on the image is the defendant must be drawn to the attention of the jury.

EXAMPLE

You do not have any evidence of this incident from an eyewitness. However, there is CCTV footage and you have got photographs that have been made from that. You are asked to compare D against the person in the footage and photographs.

The prosecution say that you can be sure that it is D. The defence say that you cannot be sure of that, and that [summarise any argument put forward e.g. that the quality of the footage / images makes it impossible / unsafe to make any comparison; or that comparison shows that these are two different people].

When you compare D against the person in the footage / photographs, you should look for any features which are common to both, and for any features which are different. By 'features' I mean both physical appearance and also other characteristics such as the way a person walks, stands, uses gestures and so on.

When making your comparison you must be cautious for the following reasons:

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are. Also, the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken, and you yourselves must have this in mind when you are making your comparison.
- Although you have been able to look at D during this trial in good light, at a relatively close distance and without any obstructions or distractions, none of you knew D beforehand, so your ability to identify him is not based on previous knowledge or having seen him in several different situations before.
- D's appearance has / may have changed since the time of the incident, and you must not speculate about what he looked like then. [Any points on this topic by either party should be summarised here.]
- [If the jury have a photograph known to be of D and taken at or close to the time of the alleged offence] You have a photograph of D taken on / about [date]. You can compare this with the footage / photographs but you must still keep in mind the points I have just raised,
- The quality of the footage / photographs may affect your ability to make a comparison. You should take account of these points: [specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)]. If you decide that the quality of the

footage / photographs does not allow you safely to make any comparison with D, you should not try to do so. However, if you are satisfied that the quality is good enough to allow you to make a comparison, you can study the footage / photographs for as long as you wish.

- The footage / photographs that you have are only two-dimensional and so do not provide the same amount of information as someone at the scene would have. Seeing footage / photographs from the time of the incident is not the same as witnessing it for yourselves. Having said that, a person at the scene only sees the incident once, usually without any warning that it is going to happen; but you have had the advantage of being able to study the footage / photographs several times.
- If you decide that the person shown on the footage / photographs is similar to D, even in several ways, this does not automatically mean that the person shown must be D.

You must also bear in mind that this is only part of the evidence in the case. [Identify any evidence which is capable of supporting, not capable of supporting or capable of undermining the evidence from which the jury are invited to conclude that the person on the footage / photographs is D.]

If you are sure, having considered all of the evidence, that the person shown on the footage / photographs is D, you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage / photographs is D, you must find D not guilty.

15-3 Identification from Visual Images by a Witness Who Knows The Defendant and so is Able to Recognise Him

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 14-4, 22, 63 and 65; *Blackstone's* 2016, F18.3 and 20**

LEGAL SUMMARY

1. Evidence may be received from a witness (usually a police officer) who has studied photographs or film footage of a person and who purports to identify him by using the knowledge acquired as a result of his viewing: *Clare and Peach*.[66]
2. In *Savalia*[67] the "special knowledge" category of case was held to extend to the identification of a defendant from CCTV based not only on his facial features but on a combination of factors, including physical build and gait.
3. Care will need to be given to ensure that the weaknesses in such evidence are drawn to the jury's attention bearing in mind that the witness will have no specialist training in facial mapping or similar techniques.

66. [1995] 2 Cr App R 333.
67. [2011] EWCA Crim 1334.

DIRECTIONS

4. It should be noted that such evidence: (1) is direct evidence of identification by the witness of the defendant; and (2) provides assistance to the jury in making their own comparison of D (and proved/agreed photographs of him) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).

5. The jury must be given a warning, adapted from *Turnbull*, of the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that: (1) a witness can make a genuine and honest mistake in identification; (2) this is equally so when a witness knows someone and purports to recognise them, because genuine and honest mistakes can be made in recognition even by those who know someone well, such as a close friend or member of their family. The jury should be warned that although the witness has had the advantage of being able to study the CCTV footage/images the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.

6. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face and also the degree and currency of the witness' knowledge of the defendant.

7. Any obvious difference between the appearance of D and the suspect shown on the image must be identified. If the defendant's appearance may have changed since the time that the suspect's image was captured this must be pointed out and the jury directed not to make assumptions about what the defendant might have looked like at that time. This situation will not arise if an image proved/agreed to be that of the defendant taken at the time that the suspect's image was captured has been put in evidence.

8. Evidence which is capable of supporting, not capable of supporting, or capable of undermining the evidence of identification must be identified for the jury. Evidence capable of supporting the evidence of identification may include the jury's own comparison of D with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must also reflect the features of the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).

EXAMPLE

You do not have any evidence from a witness who was at the scene at the time of this incident. What you do have is evidence from W, a local shopkeeper who knows D and who has watched the CCTV footage taken from his shop. W gave evidence that when he saw the footage he immediately recognised the person shown on it as D; and that he confirmed this by studying the footage several times. The defence case is that although W knows D and should be able to recognise him, W is mistaken in his identification of him as the person shown on the footage. You may consider W's evidence in two ways: First, it is evidence of W's own identification of D from the footage / photographs. Secondly, you may also use W's evidence to help you compare what you have seen of D in court with the footage of the incident. When considering W's evidence you must be cautious for the following reasons. Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are. A person may be mistaken even when he could be expected to recognise someone because of previous knowledge of him. It has been known for a person to be sure that he has seen someone, even someone he knows well, only to realise that he could not in fact have seen him and that he was wrong. Also, when you are making your own comparison, you must bear in mind that the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken. · The quality of the footage may affect W's – and your - ability to make a comparison. You should take account of these points: [specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)].

15-4 Identification by Facial Mapping

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 14-63 and 66; *Blackstone's* 2016, F18.21**

LEGAL SUMMARY

1. Facial mapping (or photographic comparison) is a developing technique and expertise and amounts to a comparison that is carried out between a photograph and a known person. It amounts to little more than the comparison of one image with another.[68] An expert witness in facial mapping who gives evidence, properly based on study and experience, of similarities and dissimilarities between a questioned photograph and a known person, is not disabled either by authority or principle from expressing a conclusion as to the significance of his findings, provided that it is made clear to the jury that expressions used

68. *Stockwell* [1993] Cr App R 260.

are of subjective opinion.[69] The comparison will involve study of the proportions of the face, the juxtaposition of features of the face and its shape.[70]

2. If objection is taken to admissibility of the expert opinion (though not otherwise) it must be determined by the Judge; and it is for the party proffering the evidence to prove its admissibility.[71]

3. The court should have such evidence examined and, if appropriate, criticised by an expert of equal experience and skill, subject the evidence to rigorous testing in the witness box and ensure careful judicial exposition to the jury of the difference between factual examination/comparison or arithmetical measure on the one hand and, on the other, a subjective, but informed, judgment of the significance of the findings: see *R v Atkins* at [27] per Hughes LJ.

4. Concerns have been expressed as to the proper scope and function of such evidence, particularly where (as in *Hookway*)[72] it is not supported by other evidence incriminating the defendant. Significant facial differences revealed by photographic comparison may prove that the defendant cannot be the person in the photograph, but where the features appear to match there is no database cataloguing the number of persons with particular facial features or measurements from which an expert could derive any statistical analysis to explain the significance of such matches. This led the English Court of Appeal to express reservations in *Gray*,[73] but in *Gardner*[74] the Court rejected the suggestion that expert witnesses should be prevented from expressing opinions as to probabilities based on facial mapping evidence; and in *Ciantar*,[75] it rejected arguments that expert evidence of facial mapping should have been discounted or excluded merely because other experts had expressed doubts as to its quality and sufficiency.

5. In *McDaid*[76] the Northern Ireland Court of Appeal, citing *Atkins*, confirmed that a suitably qualified expert: "may give evidence of facial similarities without being able to make a positive identification and, provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled to make use of the assessment framework employed in this case."

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69. *R v Atkins* [2010] 1 Cr App Rep 117, (offender caught on indistinct CCTV footage).
70. *Hookway* [1999] Crim LR 750.
71. See *R v Atkins* at [9] per Hughes LJ.
72. [1999] Crim LR 750.
73. [2003] EWCA Crim 1001.
74. [2004] EWCA Crim 1639.
75. [2005] EWCA Crim 3559.
76. [2014] NICA 1 para.10.

6. In *Robert Lee Clarke*[77] a robbery that took place at a bank was filmed by an automatic still camera, which took a number of photographs of the robber with different lenses. Some of the photographs were sent to the director of a facial identification centre for comparison with police identification photographs of the appellant who was charged with the robbery. The director of the centre was called by the prosecution as an expert witness. He gave evidence that as a result of his analysis he had formed the opinion that the person in the bank photographs and the appellant were the same person. A defence expert said that he did not think that there was sufficient evidence positively to identify any particular person, including the appellant, with the image of the robber. The trial judge ruled that evidence of the comparison process using a new technique called video superimposition could be given to the jury. The jury convicted the appellant who appealed, *inter alia*, on the ground that the expert evidence should not have been admitted, and that it was for the jury to decide from the photographs whether the appellant was the robber. The Court of Appeal dismissing the appeal, held that facial mapping by way of video superimposition was a species of real evidence to which no special rules applied. As with fingerprint evidence, if it was not sufficiently intelligible to the jury without help, an expert could be called to assist them in their interpretation of that evidence. It was further held that the probative value of such evidence depended on the reliability of the scientific technique, which was a matter of fact, and had been fully explored on the *voir dire* and that the trial judge had been fully justified in admitting the evidence.[78]

7. **Per curiam:** There are no closed categories where expert evidence may be placed before the jury. It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances in science.[79]

DIRECTIONS

8. In this situation E gives evidence of the comparison that he has made between a known image/images of D with CCTV footage/images of the scene of the incident.

9. The precise content of this direction will depend on how the evidence has developed in both examination in chief and cross examination but the following matters must be covered:

    (1) the extent of expertise and experience of E;

    (2) the fact that E is giving expert evidence of opinion: see Chapter 10-3 above (Expert evidence). In particular this is only a part of the evidence and, as with any other part of the evidence, the jury is entitled to accept or to reject it;

77. [1995] 2 Cr App R 425.
78. Dictum of Lord Taylor, CJ in *Stockwell* (1993) 97 Cr App R 260, 264 and *Turner* (1975) 60 Cr App R 80, [1975] QB 834 applied.
79. *Robert Lee Clarke* [1995] 2 Cr App R 425.

(3) the strengths and weaknesses of E's evidence in the light of his method and the extent to which he looked for both similarities and differences between the known image/s and the footage/images of the scene;

(4) that, if it be the case, there is no unique identifying feature linking the appearance of D with the appearance of the suspect;

(5) that E's opinion is not based on any database of the incidence of features appearing in the population at large and consequently is not supported by any statistical foundation of match probability. As a result E's opinion, although informed by experience, is entirely subjective;

(6) that such evidence does not amount to evidence of positive identification (although it could positively exclude a suspect).

10. If E expresses his conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain to them that these terms are no more than labels which E has applied to his opinion of the significance of his findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

11. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

12. The jury should be warned that such evidence does not amount to positive identification and that they should be cautious about finding the defendant guilty on the basis of such evidence if it is not supported by other independent evidence. Evidence which is capable of supporting, evidence which is not capable of supporting and evidence which is capable of undermining such evidence must be drawn to the attention of the jury.

13. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to prepare the images upon which their comparisons were made, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

14. A jury will almost always have seen the CCTV footage and/or still images taken from it for themselves and will have been invited to draw their own conclusions as to the correctness of a witness' identification of the defendant from their own viewing of the footage/images and from their own observation of the defendant. In such a case the jury must be given directions which cover the points set out in both this direction and the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury). Subject to this, the

jury should be directed that they are entitled to treat their own observation as support for the evidence of the witness and vice versa. See by way of analogy the Example in Chapter 15-3.

EXAMPLE

E is an expert in facial mapping [summarise relevant qualifications and experience]. [Give a direction about expert evidence]: E explained what he did to compare images of D's face with images of the face of the person involved in the incident. He then went on to point out similarities and differences he found. Finally he gave his opinion on the significance of his findings. To compare the images E [summarise the steps taken to prepare the images which were used to make a comparison]. E found that: [summarise the evidence of similarity and dissimilarity] When you are considering E's opinion, you must keep the following things in mind:

- Although E pointed out similarities between D's face and the face of the person involved in the incident, he said that there is no unique feature which conclusively shows that the faces are the same.
- Experience has shown that two people, who are completely unconnected with one another, can have very similar facial features.
- There are no statistics/is no database against which the chances of two different people having similar facial characteristics can be measured. So, E cannot say how many people have similar features [e.g. a nose which has been broken and deviates to the right]. Because of this, E's opinion, although based on his examination of the images in this case and his experience of [specify number of] cases is only his personal view.
- E stated that his findings provide [e.g. strong support] for the prosecution's claim that D was the person involved in the incident. This is on a scale of "no support, limited support, moderate support, strong support and powerful support". This is not a numerical scale of probability but is a less precise way of explaining the strength which E himself attaches to what he saw.
- In any event, E's evidence is not evidence of positive identification of D. You must also bear in mind that E's evidence is only part of the evidence in the case. [Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.] If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-5 Identification by Fingerprints

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 14-75; *Blackstone's* 2016, F18.35; *Halsbury's Laws of England***

LEGAL SUMMARY

1. Expert evidence as to the likely match of fingerprint impressions left at the scene of crime and the defendant's fingerprint impressions have been admissible in evidence for at least one hundred years.[80] Once admitted, it is for the jury to assess its weight.[81] Although properly presented fingerprint evidence may provide sufficient identification (even if unsupported), the defendant must be linked to the relevant prints by admissible evidence. His failure to deny that fingerprints are his cannot suffice.[82]

2. Evidence relating to the fingerprints of a defendant is not rendered inadmissible by procedural irregularities when they were taken, although the court has discretion to exclude prosecution evidence where significant unfair prejudice would otherwise result (*Callis v Gunn*[83] (failure to caution); *R v Buchan*[84]).

3. In *Buckley*,[85] Rose LJ held that the Judge's discretion to admit fingerprint evidence depends on all the circumstances of the case, including in particular:

   (i) "the experience and expertise of the witness;

   (ii) the number of similar ridge characteristics;

   (iii) whether there are dissimilar characteristics;

   (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and

   (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination."[86]

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80. *Castleton* [1910] 3 Cr App R 74 (appeal Nov 1909), in which the Court of Appeal refused leave to appeal against conviction when the sole evidence of identification was a match, proved by an expert fingerprint examiner, between a print left on a candle at the scene and the defendant's impressions. See *Buckley* [1999] EWCA Crim 1191 for a review of the history of fingerprint standards.
81. *Reed* [2009] EWCA Crim 2698 (concerning DNA evidence) at para.111 discussing expert evidence generally.
82. *Chappell v DPP* (1988) 89 Cr App R 82.
83. [1964] 1 QB 495, 48 Cr App Rep 36.
84. [1964] 1 All ER 502, 48 Cr App Rep 126, CCA.
85. [1999] EWCA Crim 1191.
86. The editors of *Archbold* (2015) at para 14-77 suggest that the same standards that apply to fingerprint evidence apply to all other forms of prints, including palm prints.

4. It will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence of opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in the light of all the evidence.[87]

5. While in *Buckley* Rose LJ held that the judge would be highly unlikely to exercise his discretion where there were fewer than eight similar ridge characteristics, in some jurisdictions such as England and Wales a non-numerical standard has been adopted and a subjective evaluation in the comparison of prints is encouraged.

6. Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that dissimilar characteristics exist, it may exonerate the defendant.

7. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses his conclusion and the experience on which it is based will be critical.

QUALIFICATION OF EXPERT[88]

8. A fingerprint expert should be:
    - an expert of long-standing thoroughly versed in all aspects of fingerprint work and crime scene examinations;
    - capable of giving a comprehensive and independent assessment of all relevant aspects of prosecution evidence;
    - competent to initiate and complete fingerprint investigations in matters where the Crown is not involved;
    - capable of producing technical papers based on their own experience and not that of others;
    - able to produce comprehensive reports and advice for counsel;
    - able to give verbal evidence at all court levels and stand up to rigorous cross-examination;
    - able to advise counsel during cross-examination of the other side's expert.

DIRECTIONS

9. The jury should be directed that the expert is giving evidence of opinion: see Chapter 10-3.

10. The following points should be reviewed:

87. *Buckley* (supra).
88. *Halsbury's Laws of England.*

(1) the experience and expertise of E;

(2) the number of ridge characteristics said to be similar;

(3) whether there are any dissimilar characteristics;

(4) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of a print (i.e. in a smaller area) than in an entire print;

(5) the quality and clarity of the print (e.g. whether there has been any possibility of contamination, any smearing, or any damage to the finger which left the print); (6) if there is a realistic possibility that a dissimilar characteristic (as between the known print of D and the print from the scene) exists, this will exonerate D.

11. If E expresses his conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it should be explained to the jury that these terms are no more than labels which E has applied to his opinion of the significance of his findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

12. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

13. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the fingerprint/s, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

EXAMPLE

E is an expert in the field of identification by fingerprints: [summarise relevant qualifications and experience]. [Give a direction about expert evidence] E explained that each person's fingerprint is unique. He described – using the term "ridge characteristics" – how he compared D's fingerprints with the fingerprint/s found at the scene. He pointed out similarities [and differences] between D's fingerprints and the fingerprint/s found at the scene and gave his opinion on the significance of his findings. To compare the fingerprint/s E [summarise the steps taken to compare the fingerprints]. E's findings were that: [summarise the evidence of the size and quality of the print/s found at the scene and of the similarity (and any differences) found in the/each comparison] e.g. E found a single print which he said was incomplete in that it had not been made by the whole width of a finger and part of the print had been smudged. He said that:

- the characteristics of 13 ridges could be made out;
- of these 12 were common to both D's known fingerprint and the fingerprint found at the scene;
- the 13th may, or may not, have been common to both D's known fingerprint and the print found at the scene: he could not rule out the possibility that it was different. E expressed his opinion in terms of his findings providing [e.g. strong support] for the contention that D was the person involved in the incident, this being on a scale of "no support, limited support, moderate support, strong support and powerful support". It is important to recognise that this is not a numerical scale or a percentage of probability, nor are either such measures possible. It is a relatively imprecise way of expressing his subjective opinion about the strength which he attaches to his findings. E could not say when the print was left or in what circumstances. You must also bear in mind that E's evidence is only part of the evidence in the case. [Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.]

15-6 Identification by Voice

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 14-71; *Blackstone's* 2016, F18.24**

LEGAL SUMMARY

1. "In all cases in which the prosecution rely on voice recognition evidence, whether by listener, or expert, or both, the Judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases" (per Gage LJ in *Flynn and St John*).[89]
2. In *R v Clarence Osbourne*[90] (the Court of Appeal (Jamaica)), the evidence of voice identification was challenged. The learned trial judge had reminded the jury of the basis on which the recognition was made. He pointed to the period both men were acquainted, the nature of their relationship, and the particular speech pattern of the applicant and the opportunities for such knowledge. Carey P (Ag), said:

> …Commonsense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attributable or feature of his speech capable of identifying him as a participant, forms part of the prosecution case.

89. [2008] EWCA Crim 970.
90. [1992] JLR 452.

3. A year later, in *R v Rohan Taylor et al*,[91] Gordon JA said:

> We would add that the directions given must depend on the, particular circumstances of the case….

4. After reviewing the relevant authorities, the learned judge continued:

> In order for the evidence of a witness that he recognised an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act.

Where the Voice is Merely Confirmatory of the Person Seen

5. In *Derrick Beckford v R*[92] the learned trial judge did not form the view that the reliance was more on the voice than on the visual situation. Indeed, the judge was of the view that the voice was merely confirmatory of the person whom the complainant had seen. The attack had taken place in broad daylight. In addition, the complainant and her attacker were at close range for approximately twenty minutes, and the identification parade was less than a month after the incident. These features distinguish the instant case from *Taylor* (referred to above).

Evidence of a Lay Witness

6. In all cases of witness identification or recognition by voice, a modified *Turnbull* direction [see Chapter 15-1] is required emphasising the dangers of assuming that recognition or identification of voice is reliable: *Hersey*,[93] *Chenia*.[94] Identification by voice is even less reliable than eyewitness identification or recognition; even a confident recognition of a familiar voice by a lay listener may nevertheless be wrong: *Flynn and St John*,[95] para.16. The direction need not follow a "precise form of words… so long as the essential elements

91. (1993) 30 JLR 100.
92. SCCA No. 88/2001 [20.03.03].
93. [1997] EWCA Crim 3106.
94. [2002] EWCA Crim 2345.
95. [2008] EWCA Crim 970.

of the warning are given to the jury": *Phipps*.[96] In *R v Roberts*,[97] the Court of Appeal referred to academic research indicating that voice identification was more difficult than visual identification, and concluding that the warning given to jurors should be even more stringent than that given in relation to visual identification.

7. If juries are permitted to listen to recordings to try to identify speakers, they should be reminded to bear in mind the evidence of the voice recognition witnesses and warned of the dangers of relying on their own untrained ears: *Flynn and St John* (above).

8. The potential weaknesses of such identification or recognition include the following factors, some of which are not found in a *Turnbull* warning:

    1. Audibility of speech heard
    2. Environmental factors affecting hearing of speech
    3. Duration for which speech heard
    4. Number of voices heard
    5. Whether it was heard directly or by phone
    6. Whether there was an identified attempt to disguise the voice
    7. Hearer's hearing disability or other impediment (if any)
    8. Variety of speech heard
    9. Degree of familiarity with speaker
    10. Distinctiveness or accent of speaker.

EXPERT OPINION EVIDENCE[98]

9. The principal methods by which voice comparisons are conducted by experts are (a) auditory analysis (where the expert compares recordings by listening repeatedly); (b) acoustic analysis (involving computerised comparisons of the voice samples). Both are admissible forms of evidence in England and Wales: *Flynn* (above) (cf. *O'Doherty*[99] rejecting auditory as too unreliable). In *O'Doherty* Nicholson LJ emphasised the need for a suitable warning to the jury in cases where evidence was given purporting to be identification of the voice of the defendant. He said:

> We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training

96. [2012] UKPC 24 (PC Jamaica).
97. [2000] Crim LR 183.
98. Crim. L.R 2001, August 595-622.
99. [2002] NICA B51.

> or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasise the need to give a specific warning to the jurors themselves.

10. Voice expert evidence can be highly complex evidence of a kind which it is not easy for a jury to evaluate. A jury needs the assistance of the judge: *Yam.*[100] Particular care may be needed where translators are also involved in the exercise: see *Tamiz*.[101]

11. If, juries are permitted to listen to recordings to try to identify speakers, they should be reminded to bear in mind the evidence of the voice recognition witnesses: *Flynn and St John* (above).

DIRECTIONS

12. If an expert witness has given evidence, a direction about such evidence should be given if it has not already been given: see Chapter 10-3 above.

13. What follows is a non-exhaustive list of possible considerations:

    (1) Identification by voice recognition is more difficult than visual identification.

    (2) As with visual identification, a genuine, honest and convincing witness who purports to identify a voice may be mistaken and a number of such witnesses may all be mistaken. This is so even when the witness/witnesses are very familiar with the known voice i.e. the basis for recognition is strong.

    (3) Voice recognition evidence of a witness who is not an expert may be admitted but the ability of a lay listener correctly to identify voices is subject to a number of variables which require such evidence to be treated with great caution and great care having regard to, inter alia, these factors:

        (a) the quality of the recording of the disputed voice;

        (b) the length of time between the listener hearing the known voice and his attempt to recognise the disputed voice;

        (c) the extent of the listener's familiarity with the known voice;

        (d) the nature, duration and amount of speech which it is sought to identify;

100. 2010 EWCA Crim 2072.
101. [2010] EWCA Crim 2638.

(e) the nature and integrity of the process by which the purported identification was made, in particular whether or not a voice comparison exercise in which the disputed voice is put with the voices of several others (similar to an identification procedure) was used.

(4) Voice identification is likely to be more reliable when carried out by:

(i) an expert listener using auditory phonetic analysis and/or

(ii) an expert in voice analysis using acoustic recording and measurement (quantitative acoustic analysis).

(3) Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

(4) Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the recordings, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

EXAMPLE 1: Non-Expert Witness

W gave evidence that at [specify time] on [specify date] she received a 'phone call from D, in the course of which he told her [specify details]. It is not in dispute that W received such a phone call but D denies that it was made by him. He says that W is mistaken in thinking that the voice was his. When considering this evidence you need to be especially cautious because experience has shown that any witness who gives evidence of identification can be mistaken; and this is so even when the witness is honest and convinced that she is right. Such a witness may well seem convincing but this does not mean that the witness cannot be wrong. This is so even when a witness knows a person well and says that she has recognised that person. In this case, where the evidence is that W recognised the voice but did not see the caller, the danger of such recognition being wrong is even greater. So before you could decide that it was D who made this 'phone call you would have to be sure that W's evidence that she recognised his voice is accurate and reliable. You need to look carefully at all the circumstances in which W heard the voice. You must ask yourselves:

- What was the content and the context of the call?
- How long was W listening to the voice of the person she says was D?
- How clear was the telephone? You don't have any recording of the conversation so the only way you can judge this is by the description that W gave when she was questioned about it.
- Did anything distract W during the 'phone call?
- How well does W know D's voice?
- Is there anything distinctive about D's voice or the way he speaks which might make it any easier to identify?

- How long was it between the time of the 'phone call and the time that W told the police that the voice was D's?
- Is there any marked difference between W's description of the voice and speech that she heard during the 'phone call and D's voice and the way in which he speaks? When you consider whether there are any weaknesses in W's evidence you should bear in mind: that whilst W knows D well, she does not have any training or experience in voice recognition; W was speaking and listening to the caller on a 'phone, which does not provide the same quality and definition as a face to face conversation. You should also consider [specify any other matter]. The following evidence is capable of providing support for/undermining W's evidence [specify]. I should point out that the evidence that [specify] is not capable of supporting W's is [specify].

EXAMPLE 2: Expert Witness (with auditory but not acoustic analysis)

There is a recording of a 2-minute conversation between a man alleged to be D and another man which, it is not disputed, implicates D in the offence with which he is charged. The conversation was recorded using a microphone inserted into a hole in a party wall between terraced houses. The wall had been drilled but the voices are muffled: some but not all words can be made out. There is also some "over-talking". The questioned speech has been compared with D's known speech as heard on his 37-minute tape-recorded interview. E is an expert in analysing sound, including sound made by the human voice [summarise qualifications and experience]. [If not already given, an expert evidence direction should be given at this point: see Chapter 10-3 above] When you are deciding whether or not to accept E's evidence you must be cautious for the following reasons:

- The quality of the original recordings of the conversation [e.g. recorded through the wall at the house is compromised because of the muffling effect of the wall, as was apparent when the enhanced versions were played, and as E accepted in his evidence, only certain words are sufficiently clear to be understood as individual words];
- The amount of speech in question [e.g. is small: the total amount of time during which the man said to be D was speaking is 49 seconds and on 3 occasions, for a total duration of 17 seconds, both men were speaking at the same time];
- Although E compared a recording of D's voice with the recording of the conversation, he does not know D himself and is not as familiar as a close relative or friend would be;
- E did not test his comparison by comparing the recordings of D's voice and the speech in question with either recordings of other voices which are similar in pitch, tone, accent and speed or with the voices of any of the other defendants;
- Nor did E carry out any acoustic analysis by using a computer to compare the recorded conversation and the recording of D's voice. Although you have heard the recording of the conversation in question for yourselves, the only reason for that was so that you know (a) what was said and (b) the material on which E has based his opinion. But you are not experts in voice recognition and you must not base any conclusion on your own inexpert and untrained comparison between the recorded conversation and the recording of D's voice. The following evidence is capable of providing support for/undermining W's evidence [specify]. I should point out that the evidence that [specify] is not capable of supporting W's is [specify].

15-7 Identification DNA

Sources: **Crown Court Compendium 2016 (Adapting Paragraphs 5-15; 17-20); DNA Evidence Act, 2015 (Jamaica)**

GLOSSARY: Terms and Definitions

***Allele**:* One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.

***Allele "drop in"**:* An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. Known as a "stochastic effect" of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).

***Allele "drop out"**:* An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a "stochastic effect" of LCN as above.

***DNA**:* Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.

***DNA profile**:* Made up of target regions of DNA codified by the number of STR (see below) repeats at each locus

***Electrophoresis**:* The method by which the DNA fragments produced in STR are separated and detected.

***Electrophoretogram**:* The result of electrophoresis produced in graph form.

***Locus/loci**:* Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.

***Low template DNA/ Low copy numbering**:* By increasing the number of PCR cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample

***Masking**:* When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair "masks" the other.

***Mixed profile**:* Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.

***NDNAD**:* National DNA Database.

***PCR**:* Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.

Term Definition

***SGM Plus* Second Generation Multiplex Test**: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.

***Stochastic threshold**:* Above which the profile is unlikely to suffer from stochastic effects, such as allelic drop out.

***STR**:* Short tandem repeat, where a part of the DNA molecule repeats. Comparison of the pattern or blocks produced is the modern form of DNA profiling, in use since the 1990s.

Stutter: The PCR amplification of tetranucleotide short tandem repeat (STR) loci typically produces a minor product band shorter than the corresponding main allele band; this is referred to as the stutter band or shadow band. They are well known and identified by analysts

***Voids**:* A locus at which no alleles are found in the crime specimen probably through degradation of the material. The defendant may say that the alleles which should have been there might have excluded him.

LEGAL SUMMARY

1. The **DNA Evidence Act 2015** (Jamaica) was enacted in order "to provide for the keeping, maintenance and operation of a consolidated forensic DNA databank, to be known as the National DNA Register, for the purposes of forensic investigation and human identification inter alia; to provide for the regulation of the taking of bodily samples (other than fingerprints taken for purposes of the Finger Prints Act) from persons and crime scenes; the retention or destruction of samples and DNA profiles; and for related matters".[102]
2. The concept of DNA was explained by Phillips LJ in the judgment of the Court of Appeal of England and Wales in *R v Doheny and Adams.*[103] He states *inter alia*, at page 371:

> Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes, 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete

102. Introductory paragraph to the Act.
103. [1997] 1 Cr App R 369.

characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor C.J. in the case of *Deen* (transcript: December 21, 1993), so we shall gratefully adopt his description.

The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto-radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.

Even if a number of bands correspond exactly, any discrepancy between the profiles, unless satisfactorily explained, will show a mis-match and will exclude the suspect from complicity. Thus the first stage in seeking to prove identity by DNA profiling is to achieve a match.

The characteristics of an individual band of DNA will not be unique. The fact that the identical characteristic of a single band are to be found in the crime stain and the sample from the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups "the random occurrence ratio".

PROFILING DNA MATERIAL

1. The guidance of Phillips LJ was approved in the Advice of the Privy Council [Jamaica] in *Pringle (Michael) v R*[104] where Lord Hope of Craighead states at paragraphs 11–13:

   [11] DNA profiling is a valuable tool in the hands of the forensic scientist. The principles upon which it depends can be stated quite simply. DNA is found in nearly every cell of the body. It can be extracted from body fluids such as blood or semen, or from the cells contained in other parts of the body such as hair or fingernails. It can be subjected to

104. (2003) 64 WIR 159 (PC Jamaica).

> examination after it has been cut up into sections. A DNA profile can then be compiled by examining these sections, as they have different characteristics and can vary from one person to another, except in the case of identical twins. This profile can provide a genetic blueprint for each individual. But the characteristics of any one section of DNA are not unique to that person. Numerous other individuals may share the same DNA at these specific sites. So, the power of DNA profiling to discriminate depends on the number of sections that are subjected to analysis. The more sections there are that are analysed, the greater the statistical likelihood that the DNA found in other material can be identified as coming from the same individual.
>
> [12] Sections of DNA extracted from traces of blood, hair or semen found at the scene of a crime can be compared with sections of DNA extracted from a sample of blood taken from suspects or from persons whom the police wish to eliminate from their inquiries. Any discrepancy which is found after subjecting them to comparison will exclude a suspect from the inquiry, unless there is a satisfactory explanation for the failure of the profiles to match each other. If one or more sections from the crime scene match those found in the suspect's sample, the next stage in the inquiry depends on statistics. The statistical likelihood of an individual section being found in another person of the same race can be predicted. This is what is known as 'the random occurrence ratio'. The more the number of sections that are found to match, the greater is the statistical likelihood that they originate from the same source.
>
> [13] Markers are used to identify specific DNA sequences. In the present case only two markers were used. This means that the DNA evidence was less strong than it might well have been if further markers had been used on the relevant material. The more markers that are used, the less likely it is that the same profile will be obtained from samples taken from two individuals. The greater the number of bands that match within this profile, the lower is the random occurrence ratio. But the product of the tests that were done here was sufficient to provide support for the Crown case, which was based mainly on the appellant's confession to Montgomery. If something more was needed to support Simmonds's evidence about the confession, it was to be found in the DNA evidence.

2. The court allowed the appeal in *Pringle* and held that there had been sufficient errors and inaccuracies in the DNA evidence for the jury to have been seriously misled as to its relevance in connecting the appellant with the murder.

MIXED AND PARTIAL PROFILES

3. Each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is

a matter for expert examination and analysis. The presence of mixed profiles allows the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graphic profile, may mask an allele from a minor contributor.

4. There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called "voids". The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group who could have left the specimen at the scene. In statistical terms a matching but partial profile will increase the number of people who could have left their DNA at the scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in *Bates.*[105] The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and admissible in evidence provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the "voids".

INTERPRETING RESULTS

The Role and Obligations of the Expert

5. Interpretation is a matter of expertise. The analyst compares the blocks of alleles at each locus as identified from the crime specimen with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database of 400 profiles. If a match is obtained at each of the 10 loci a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison, the less discriminating the match probability will be.

6. When the expert testifies, he should not overstep the line separating his province from that of the jury. As held in *Doheny,*[106] his role is to explain the nature of the match between the DNA in the crime stain and the defendant's DNA, and give the jury the random occurrence ratio. The expert should not be asked his opinion as to the likelihood that it was the defendant who left the crime stain and should be careful to avoid terminology which could lead the jury to believe that he was expressing an opinion.

7. The court in *Reed*[107] emphasised the importance of the expert to identify areas in the report in relation to which there is a range of opinion. The scope of opinion should be

105. [2006] EWCA Crim 1395.
106. [1996] EWCA Crim 728.
107. [2009] EWCA Crim 2698.

summarised and reasons for the expert's own opinion be given. Any qualifications to the opinion should be made clear.[108]

Match Probability

8. If a person's DNA profile matches that of a crime sample, it is the expert's role to evaluate the significance of the match using statistical means. The "random occurrence ratio" (or "match probability") is the statistical frequency with which the matching profile between the crime scene sample and someone unrelated to the defendant will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than the defendant was the donor of the crime scene sample is effectively eliminated. This significantly reduces the risk that the "prosecutor's fallacy" will creep into the evidence or have any evidence upon the outcome of the trial.[109]

The "Prosecutor's Fallacy"

9. The "prosecutor's fallacy" confused the random occurrence ratio with the probability that the defendant committed the offence. In *Doheny and Adams*,[110] Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.[111]

The Need for a Sufficiently Reliable Scientific Basis

10. In *Dlugosz*,[112] three conjoined appeals which each raised issues as to the evaluation of low template and mixed DNA evidence, it was argued that unless statistical evidence of the relevant DNA match probability could be given, an evaluative opinion should not be admitted either. The court rejected the argument that the jury in such cases lacked a firm basis on which to evaluate the significance of the evidence given. Although in determining the admissibility of any expert evidence the court must be satisfied that there is a sufficiently reliable scientific basis for it,

> …provided the conclusions from the analysis of a mixed profile are supported by

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108. *Doheny* [1996] EWCA Crim 728 para.131.
109. *Gray* [2005] EWCA Crim 3564 at para.21 to 22.
110. [1996] EWCA Crim 728. See also *Gordon* [1995] 1 Cr App R 290.
111. Blackstone's at F18.30: "it may be that only one person in 1000 wears size 14 shoes, but even if D and the offender each wears size 14 shoes that does not mean there is only one chance in 1000 of D being innocent. There may indeed be other suspects, each of whom wears size 14 shoes."
112. [2013] EWCA Crim 2.

> detailed evidence in the form of a report of the experience relied on and the particular features of the mixed profile which make it possible to give an evaluative opinion in the circumstances of the particular case, such an opinion is, in principle, admissible, even though there is presently no statistical basis to provide a random match probability and the sliding scale cannot be used.[113]

The Need for Independent Evidence Linking the Defendant and the Crime

11. Where the crime is one such as simple possession of a weapon a matching DNA profile may be sufficient to establish guilt. The jury is being invited to use the DNA evidence to establish the link between D and the article in question. Subject to being satisfied about the way the DNA was transferred the jury can convict on that evidence.[114] The Court of Appeal explained:

> …the presence of DNA is not relied on as evidence of the presence of the defendant at a particular place at a particular time; rather, the essence of the offence is possession of the article. So there is a much closer connection in this case between the DNA evidence and the commission of the offence. The presence of DNA on the article, on the muzzle of a gun in this case, is capable of being evidence of possession of the article.
>
> The possibility of indirect transfer was a matter for the jury to address on the basis of all of the evidence in the case. If they concluded that it might be the case that it was indirectly transferred in some way, then they would of course have to acquit, but that was not a necessary conclusion and the matter was properly left to them, provided that they were correctly directed as to the burden and the standard of proof.[115]

12. More commonly, some independent evidence beyond a matching DNA profile is required in order to establish a nexus between the defendant and the crime: *Ogden.*[116]

13. In *Reed, Reed and Garmson*,[117] the Court of Appeal approved the trial judge's approach of explaining to the jury at the outset of his consideration of the DNA evidence: "The important thing is this. No one suggests that this evidence on its own conclusively proves the guilt of the defendant on any count or goes anywhere near doing that. If all you had was the DNA evidence you could not begin to find [the defendant] guilty on any of these counts because all the DNA evidence does (at the most) is show that he is one of the men who may have committed these offences and that is perhaps to put it at its highest."

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113. [2013] EWCA Crim 2 at para. 28. See also *Thomas* [2011] EWCA Crim 1295. The expert in the case was entitled to base her opinion on simulation experiments and on her lengthy experience as a forensic scientist. Her evidence could be tested in cross-examination and it was for the jury to assess its limitations and weight.
114. *Sampson* [2014] EWCA Crim 1968.
115. See also *FNC* [2015] EWCA Crim 1732.
116. [2013] EWCA Crim 1294.
117. [2009] EWCA Crim 2698 at paras. 128 to 134.

DNA Testing Guidance on Procedure in Relation to DNA Evidence[118]

14. The following procedures extracted from *Doheny's* case should be adopted where DNA evidence is involved:

    1. The scientist should adduce the evidence of the DNA comparisons between the crime stain and the defendant's sample together with his calculations of the random occurrence ratio.
    2. Whenever DNA evidence is to be adduced the Crown should serve on the defence details as to how the calculations have been carried out which are sufficient to enable the defence to scrutinize the basis of the calculations.
    3. The Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.
    4. Any issue of expert evidence should be identified and, if possible, resolved before trial. This area should be explored by the court in the pre-trial review.
    5. In giving evidence the expert will explain to the jury the nature of the matching DNA characteristics between the DNA in the crime stain and the DNA in the defendant's blood sample.
    6. The expert will, based on empirical statistical data, give the jury the random occurrence ratio the frequency with which the matching DNA characteristics are likely to be found in the population at large.
    7. Provided that the expert has the necessary data, it may then be appropriate for him to indicate how many people with the matching characteristics are likely to be found in Jamaica. Guidance for Jamaica can be found in the case of *Garland Marriott v R*:

> [50] It seems to us that until forensic science is able to restrict reference to the random occurrence ratio to our population, expert witnesses and trial judges should not seek to apply the extended population data to our relatively small population; to do so would be to fall into what their Lordships in *Doheny and Adams* called "the prosecutor's fallacy":
>
> ""The Prosecutor's Fallacy" It is easy, if one eschews rigorous analysis, to draw the following conclusion:
>
> 1) Only one person in a million will have a DNA profile which matches that of the crime stain.
>
> 2) The defendant has a DNA profile which matches the crime stain.

118. *Doheny and Adams* [1997] 1 Cr App R 369. See also *Denis Adams (No. 2)* [1998] 1 Cr App R 377; *Reed, Reed and Garmson* [2009] EWCA Crim 2698 at paras. 128 to 134.

> 3) Ergo there is a million to one probability that the defendant left the crime stain and is guilty of the crime. Such reasoning has been commended to juries in a number of cases by prosecuting counsel, by judges and sometimes by expert witnesses. It is fallacious and it has earned the title of "The Prosecutor's Fallacy"" (Per Phillips LJ at pages 372–373).[119]

15. It is then for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.
16. The expert should not be asked his opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion.
17. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the defendant left the crime stain, since unnecessary theory and complexity deflect the jury from their proper task.
18. In the summing-up careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.
19. The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.
20. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts of the particular case: "Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only [*insert evidence or probability*] from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."

DIRECTIONS

21. DNA evidence, if disputed, is always intricate both in terms of the scientific process and the factual detail. In most cases the existence of DNA is unlikely to be in issue: the main issue is likely to be the interpretation of the scientific findings in terms of match

119. 2012 JMCA Crim 9.

probability, which is usually expressed in terms of the probability of a match between people of the same gender who are unrelated being in the order of one in so many (often expressed in millions or even one billion). The summing up must focus on the real issues in relation to such evidence.

22. A direction about expert evidence will be necessary: see Chapter 10-3.

23. The direction is likely to be complex and should be discussed with the advocates in the absence of the jury before closing speeches.

24. Depending on the issues in the case the following matters may need to be considered when reviewing such evidence for the jury:

    (8) A brief summary of the evidence which has been given to explain what DNA is and how evidence of its presence may be relevant in the trial process. This may include evidence of full and/or partial profiles.

    (9) A summary of the DNA findings.

    (10) Where there is evidence of a partial DNA profile the jury must be made aware of its inherent limitations.

    (11) Where there is evidence of a mixed sample (DNA from more than one person) care must be taken to remind the jury of the detail of the findings and any opinion/s expressed in relation to those findings.

    (12) Avoiding the "prosecutor's fallacy", the random occurrence ratio or, if used, the likelihood ratio, should be explained. The direction should be expressed in terms of probability, for example:

    (13) "…if you accept the scientific evidence called by the Crown there are probably [*insert evidence or probability*] from whom the semen stain could have come. You must look at that scientific evidence and all the other evidence in order to decide whether it was D who left that stain or whether it is possible that it was left by another of the small group of men who share the same DNA characteristics".

    (14) A summary of any explanation given by D in relation to the DNA findings: in most cases D will accept that DNA which matches his DNA profile is his and will give an explanation as to how it came to be where it was found.

    (15) The jury should be reminded that the DNA findings are of themselves only evidence of a probability of contact between D and the place from which the sample was taken and to the extent shown by the profile. In considering their verdict the jury must have regard to all of the evidence in the case.

    (16) The jury should be reminded of evidence which is capable of supporting, not capable of supporting and capable of undermining the DNA evidence.

(17) Where the profile of DNA found at a particular location does not match that of D, this may, depending on the circumstances of the case, be capable of providing powerful evidence which undermines the prosecution case. If this is so, the jury must be directed appropriately.

EXAMPLE 1

Explanation of DNA

***NOTE:* It is important that any explanation is a summary of the evidence given by a forensic scientist and not "evidence" given by the judge. This example is adapted from a UK expert witness statement made in 2013:**

DNA (Deoxyribonucleic acid) is a complex chemical found in almost all cells in the human body which may be deposited onto an item or onto another person. Where DNA is found it is possible to prepare a DNA profile, that is to say a "picture" of the components of the DNA, which may then be compared with another DNA profile, obtained from a reference sample or reference samples taken from one or more people. If the DNA profiles which are compared are different then the DNA could not have originated from the person with whose reference sample the DNA found has been compared. If they are the same then the evidential significance of the match may be evaluated. No person's DNA profile is unique, and so two or more people will have the same DNA profile. Because of this, the existence of a particular DNA profile in a particular situation cannot prove that a particular person was involved in that situation but instead the existence of the profile together with other scientific data may be used to give an indication of the probability, not of that particular person being involved, but of one of a group of people, of which that person is one, being involved. This indication of probability is provided by reference to the "random occurrence ratio". This is the frequency with which DNA characteristics matching the DNA sample found in a particular situation are likely to be found in the population at large. The DNA analysis technique used in this case examined 10 areas, plus another area that indicates the gender of the source of the DNA. Within each area are 2 results: one from the mother and one from the father of the person whose DNA it is. The presence of more than 2 results at one area in the DNA profile indicates the presence of a mixture of DNA from more than one person. Where a mixture of DNA is present it can still be possible to make a statistical assessment of the likelihood of the findings if a person has contributed to the DNA, rather than that they have not and the results are present by chance.

Analysis in a particular case:

In this case we heard of DNA being found on/at [location]. We also heard that this DNA has been compared with a sample of DNA which was taken from D and that the DNA which was found matches D's DNA. It also matches [number] other members of the population. Based on this evidence E said that the probability of the DNA which was found having been left on/at [location] by someone other than D was [data]. That is the random occurrence ratio in this case. If you accept this evidence, it means that there are probably only [*insert evidence or probability*] from whom that DNA could have come. D is one

of them. What you must decide on all the evidence is whether you are sure that it was D who left that DNA or whether it is possible that is was one of that other small group of [state category] who share the same DNA characteristics.

Defendant's explanation: denial that DNA is his and assertion that the exhibits have been contaminated:

D denies that the DNA which was recovered from [location] is his and has suggested in his evidence that a possible reason for this is that the DNA taken from [location] has somehow been exposed to his DNA sample during the course of the scientific examination of these exhibits at the laboratory. You should bear in mind that, as it is for the prosecution to prove the case against D, it is for the prosecution to establish that the DNA taken from [location] has not been contaminated: it is not for D to establish that it has. As to this issue you will remember the evidence which E gave about this possibility when he was cross-examined, namely that [review evidence]. If having considered that evidence you decide that the DNA taken from [location] may have been contaminated, then you will take no account of this evidence at all. If on the other hand you are sure that the DNA taken from [location] has not somehow been mixed with D's DNA then you are entitled to take the evidence about DNA into account when you are considering whether it has been proved, so that you are sure of it, that D is guilty.

Defendant's explanation: admission that the DNA is his and suggestion of how it may have been in the place in which it was found:

D has accepted that the DNA found at/on [location] is his but he has given evidence that [review evidence]. V's evidence on the other hand is that [review evidence]. You will have to consider these two conflicting accounts and decide whether the account which D has given is, or may be true, or whether you can be sure that it is V who has told you the truth. If you find that D's account is, or may be, true then this would provide a possible explanation for the presence of his DNA at/on [location] which is not incriminating. On the other hand if you find V's account is true, it follows that you will reject D's account, and in this event you are entitled to consider the DNA evidence when you are deciding whether the prosecution have established, so that you are sure of it, that D committed the offence.

OTHER FACTORS: A direction in relation to expert evidence must also be given (see Chapter 10-3 above) which should include a similar warning to this:

I should point out to you that the expert's findings and evidence are in themselves only evidence of a probability of contact between D and the location from which the DNA sample was taken. This evidence does not in itself prove that D committed the offence with which he has been charged and, in order to reach your verdict, you must have regard to all of the evidence in the case of which this is but a part. As to the other evidence in the case which is capable of supporting/not capable of supporting/undermining the DNA evidence [review evidence].

EXAMPLE 2

In *Doheny,* Phillips LJ, suggested the following be addressed in the summing up on the aspect of DNA evidence:

The Judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case.

"Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only [*state number and category*] from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics".

In Jamaica, in the context of evidence of a random match probability of say 1: ---- million it might be appropriate to direct the jury in the following manner:

> "What that means is that the probability of finding another person with the same DNA type from the local Jamaican population who is neither the sample donor or anyone related to him is one in … million."

16. DEFENDANT – THINGS SAID

16-1 Confessions
16-2 Lies

16-1 Confessions

Sources: ***Archbold* 2009; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Admissions relevant to the issue of guilt in criminal cases are known as confessions. In *R v Sharp*[1] the House of Lords stated that if an out of court statement by the defendant is partly adverse and partly exculpatory both the adverse parts and the exculpatory parts are to be taken together as one confession.
2. A confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings.
3. Where the admissibility of a confession is to be challenged, the jury should not be made aware of it at that stage and the judge should determine its admissibility on a *voir dire* – see *Adjodha v The State.*[2]

Oral confessions

4. In *R v Leroy Burke,*[3] a memorandum dated 29th July 1982 prepared by the then Director of Public Prosecutions of Jamaica records the practice:

> …that where the prosecution intends to lead evidence of verbal admissions or confessions the defence should always be alerted before the start of the case of such intention and the terms of the admission/confession so as to give the defence an opportunity to determine whether or not to challenge the admissibility of the evidence.

Cell Confessions

5. *R v Michael Pringle*[4] held that there were no fixed rules about directing a jury in cases where one prisoner gave evidence against another prisoner about things done or said when both

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1. [1988] 1 All ER 65.
2. [1982] AC 204 PC (Lord Bridge at p. 223).
3. SCCA 51/89 [19.3.90]; (1992) 29 JLR 463; PC App 33/91 [1.12.92].
4. (2003) 62 WIR 287 (PC Jamaica).

had been in custody together; a trial judge must always be alert to the possibility that the evidence of such a prisoner might be tainted by an improper motive but, in some cases, the correct approach would be to treat the prisoner as an ordinary witness. See also: *Benedetto v R; Labrador v R*[5] [Privy Council] confession made to fellow remand prisoner.

Admissibility of Confessions

6. A confession may be excluded if it was or may have been obtained:

   (a) by oppression of the person who made it; or

   (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof.

***NOTE:* At common law a judge has residuary discretion to exclude admissible evidence if, in his view, its prejudicial effect outweighs its probative value – *R v Sang*.**[6]

7. In the case of *R v Clifford McLawrence*[7] the suggestion was that the accused never made, or signed, the statement. There was no need for a *voir dire* to be held since it was maintained that the document was fabricated and the signature a forgery.

8. Where there is absolute denial that the accused made the statement there is no need for a *voir dire* to be held. The issue is not whether the accused was forced into giving the statement but whether he gave it at all. As soon as it becomes clear at the end of the cross-examination that no issue as to voluntariness arose or raised by the defence, the *voir dire* should be terminated: *R v Hemsley Ricketts*;[8] *R v Steven Palmer*;[9] *R v Glenroy Watson*.[10]

9. In *Williams (Ricardo) v R*[11] the court held that it is an error to assume that the voluntariness of a statement is the sole criterion for its admissibility under the Judges' Rules, and it is essential that consideration is also given to the issue of fairness in its admissibility (*Peart v R* (2006) 68 WIR 372 (PC Jamaica) applied). Accordingly, when a 12-year-old boy makes a statement to the police (albeit that he is believed to be older than that), when there is some doubt as to his literacy, when neither parent is invited to be present during the interview or the taking of the statement, and when no evidence is given by the senior police officer about the interviewing process preceding the agreement to make a

5. [2003] 2 Cr App R 390.
6. [1979] 3 WLR 263 at 269.
7. SCCA 107/92 [26.6.95].
8. SCCA No. 111/83 [9.5.85].
9. SCCA 83/00 [6.4.01].
10. 14 JLR 20; (1975) 24 WIR 367.
11. (2006) 69 WIR 348; [2006] UKPC 12, 25 April 2006 (PC Jamaica).

statement, the statement should be ruled as inadmissible on the ground of unfairness. The presence of a Justice of the Peace when the statement is taken from the boy in these circumstances does not constitute compliance with the Judges' Rules, Administrative Direction, para 4 ("As far as possible…children should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer").

Voir Dire

10. The accused may not give an unsworn statement from the dock in the *voir dire*: *R v Whett Gordon.*[12]

11. The trial judge is not obliged to give reasons for his ruling in the *voir dire* although on occasions good practice requires a reasoned ruling: *Wallace v R.*[13]

Mixed Statements

12. The evidential effect of a 'mixed statement' (i.e. comprising both admissions and exculpatory/self-serving assertions) was explained by Lord Lane CJ in *Duncan*[14] (since approved by the House of Lords in *Sharp*):[15]

> …the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies.

13. While *Duncan* concerned a D who had not given evidence, the principle that the whole statement is admissible as evidence of the truth of the matters stated applies whether D gives evidence or not. As to the weight to be attached to the exculpatory part of a mixed statement, Lord Lane CJ held that:

> … where appropriate, as it usually will be, the Judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight.[16]

14. In *Hamand*[17]the Court of Appeal held that the exculpatory parts of a mixed statement were capable of discharging an evidential burden on D (e.g. to raise the issue of self-defence or loss of control).

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12. SCCA 106 and 108/96 [6 5 98].
13. (1996) 50 WIR 387.
14. (1981) 73 Cr App R 359 at 365.
15. [1988] 1 All ER 65.
16. (1981) 73 Cr App R 359 at 365.
17. (1985) 82 Cr App R 65.

15. In *R v Papworth,*[18] applying *R v Garrod*[19] it was held that the rule is based on fairness to D and simplicity for the jury. The judge should be encouraged to estimate at the end of the evidence whether the Crown placed significant reliance on the incriminating statements; if so, "the more it is likely that the jury should be told that the parts which explain or excuse those incriminating parts are also evidence in the case."

16. Where the Crown rely on a series of inculpatory remarks in interview the judge should not direct the jury to dismiss them as merely reaction.[20] Care needs to be taken not to mis-describe mixed statements. See also *Greenhalgh*[21] where the judge was in error to describe a mixed statement as "not capable of being evidence in the case."

17. *Hamilton and Lewis v R*[22] the PC quoted with approval the following passage from *R v Pearce:*[23]

> A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This is however not to be limited to a statement made on the first encounter with the police.

18. In *Whittaker v R*[24] the PC stated that a pre-trial mixed statement by an accused to the police had the same evidential value outlined in *R v Sharp* whether or not the accused remains silent or gives evidence in his defence at trial.

19. Where an accused person makes an unsworn statement and a mixed statement, the mixed statement is to be admitted in totality. Even if the accused in his unsworn statement at the trial denies making the earlier admissions or explanations and sets up an entirely different defence, he does not thereby deprive himself of the benefit of the exculpatory aspects of the mixed statement: *R v Von Starck.*[25]

20. The entire statement "mi stab him but mi never mean fi kill him" ought to have been left for the jury for them to consider it: *R v Kevin Simmonds.*[26]

21. The statement by the applicant: "officer when I tell you how it go you tell me if you would not do the same thing "ought to have been admitted into evidence because of its relevance as having the reaction of the accused when first taxed with incriminating facts.

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18. [2007] EWCA Crim 3031.
19. [1997] Crim LR 445. See also *R v Shirley* [2013] EWCA Crim 1990.
20. *Gjikokaj* [2014] EWCA Crim 386.
21. [2014] EWCA Crim 2084.
22. [2012] UKPC 37 (PC Jamaica).
23. (1979) 69 Cr App R 365.
24. *R v Sharp* [1988] 1 All ER 65; *Whittaker v R* (1993) 43 WIR 336 (PC Jamaica).
25. (2000) 56 WIR 424, P/C App. 22/99 [28.2.00].
26. SCCA 198/2000 [31.7.02].

It was most misleading of the prosecution to have excluded the statement which could have been favourable to the accused: *R v Cedric Gordon.*[27]

Editing a Defendant's Statement

22. Where a defendant makes a voluntary statement amounting to a confession both to the offence charged and/or of other offences, the portion of the statement relating to the other offences should not be put in evidence by the prosecution unless it is, or becomes, admissible under a particular rule of evidence. See *R v Knight and Thompson*[28] and *R v Evans.*[29]

23. Where a defendant in his confession statement not only admits his guilt but incriminates a co-defendant, counsel for the prosecution is not under any duty to select certain passages and leave out others: *R v Gunewardene*[30] (approved by the PC in *Lobban).*[31]

24. However the judge in his discretion may have the statement edited. See *Lobban;* also *R v George Scott and Manley Davis.*[32] The discretion is to exclude evidence tendered by the prosecution in a joint trial that is probative of the case against one co-defendant on the grounds that it is unduly prejudicial against another co-defendant. There is no discretion to exclude, i.e. edit, at the request of one co-defendant evidence tendered by another: *Lobban*. Also compare the case of *Ibanez v R*[33] – a statement to police incriminates a witness for the prosecution.

Mustaq **Direction**

25. The UK specimen direction published by the Judicial Studies Board in relation to the admissibility of a confession statement where the accused claims that the statement was made as a result of oppression or other improper circumstances reads as follows:

    If, for whatever reason, you are not sure whether the statement was made or was true, then you must disregard it. If, on the other hand, you are sure both that it was made and that it was true, you may rely on it even if it was made or may have been made as a result of oppression or other improper circumstances.

27. 27 JLR 446.
28. [1946] 31 Cr App R 52.
29. [1950] 34 Cr App R 72.
30. [1951] 2 KB 600.
31. *Dennis Lobban v R* Privy Council Appeal 23/93 [6.4.95]; SCCA 148/88 [4.6.90] (PC Jamaica).
32. SCCA 133 & 136 of 72 pp. 6–8. See also R v Nigel Neil SCCA 10/90 [29.7.91]; 28 JLR 395; *R v Kevin Mykoo and Martin Dixon* SCCA 24 & 28/96 [14.4.97]; *Dennis Lobban v R* Privy Council Appeal 23/93 [6.4.95]; SCCA 148/88 [4.6.90] (not evidence against the co- prisoner); *R v Henry Morgan* and Anor SCCA 125 & 127/96 [1.5.98] (engagement of criminal activities unrelated to charges in indictment); *R v Kenneth Myrie* SCCA 217/01[20.12.04]; *R v Kenneth Clarke et al* SCCA 62, 63 & 64/97 (discretionary power of judge to edit statement*); R v Prince McCreath and Ors* SCCA 25, 26, & 27/01 [30.7.04].
33. (1996) 53 WIR 83.

26. This specimen direction was disapproved by the House of Lords in *R v Mustaq,*[34] where it said that if there is a possibility that the jury may conclude (i) that a statement was made by the accused, (ii) that the statement was true, but (iii) that the statement was (or may have been) induced by oppression or in consequence of anything said or done which was likely to render it unreliable, they should be instructed to disregard it.

27. The principle against self-incrimination (on which *Mustaq* ultimately was based) is a long-recognised principle of the common law and, as such, is applicable in Jamaica.

28. Accordingly, in the cases described, a *Mustaq* direction is called for. Further, as *Mustaq* is declaratory of the common law, it could be relied on in appeals in relation to cases that pre-dated that decision: *Wizzard (Barry) v R*[35] – *R v Mustaq* applied.

16-2 Lies

Sources: ***Archbold*** **2016, 4-461; Crown Court Compendium 2016**

LEGAL SUMMARY

1. A defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt.[36] A lie is only capable of supporting other evidence against the defendant if the jury are sure that:[37]

   a. it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake;

   b. it relates to a significant issue;

   c. it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.[38]

2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt.[39] It is important that care is taken to make clear these criteria.

34. [2005] 1 WLR 1513.
35. (2007) 70 WIR 222 (PC Jamaica).
36. *Goodway* 98 Cr App R 11.
37. *Lucas* 73 Cr App R 159. See also *Burge and Pegg* [1996] 1 Cr App R 163.
38. *Goodway* supra; *Taylor* [1998] Crim LR 822 CA.
39. *Strudwick and Merry* (1994) 99 Cr App R 326 at p. 331.

3. If the issue for the jury is whether to believe the prosecution witnesses rather than D, and doing so will necessarily lead them to conclude that D was lying in the account he gave, such a direction is not necessary.[40]

4. Similarly, a lies direction is not needed where D's explanation for his admitted lies can be dealt with fairly in summing-up.[41]

5. A lies direction is normally only required in four situations (which may overlap) as described in *Burge and Pegg*:[42]

   a. Where the defence relies on an alibi;[43]

   b. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by D;

   c. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved;[44]

   d. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

6. Where D told lies in interview and did not mention matters on which he has relied in his defence, a single direction should be given which addresses both points: giving separate directions about lies is always unhelpful.

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40. *Harron* [1996] 2 Cr App R 457.
41. *Saunders* [1996] 1 Cr App R 463 at pp. 518–19.
42. [1996] 1 Cr App R 163.
43. See *Lesley* [1996] 1 Cr App R 39 on the desirability of warning the jury of false alibis sometimes being invented to bolster a genuine defence. See also *Turnbull* ([1974] QB at p 230; *R v Gavaska Brown et al* (2001) 62 WIR 234; *R v Pemberton* (1994) 99 Cr App R 228; *R v Ivan Kelly* SCCA 18/91 [22.7.91]; *R v Penman* [1985] 82 Cr App R 44; *R v Francis* (1990) 91 Cr App R 271. In *Turnbull*, Lord Widgery CJ said: 'Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasion like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.'
44. See *R v Courtney Vassell* SCCA 108/98 [31.7.01]. "…cases establish that the underpinning for the requirement of the Lucas direction is a dependence by the Crown for proof of its case, on the lies told by the defendant. In our judgment, the direction would not be required where the lies are only relied upon by the Crown merely to attack the credibility of the defendant" (per Forte P).

DIRECTIONS: LIES

7. Whether a direction should be given to the jury in respect of any admitted or proved lie/s should be the subject of discussion with the advocates before speeches. In particular, care should be taken to identify with the advocates the lie/s in respect of which the direction is to be given.

8. Before the jury may use an alleged or admitted lie against D they must be sure of all of the following:

   a. that it is either admitted or shown, by other evidence in the case, to be a deliberate untruth: i.e. it did not arise from confusion or mistake;

   b. that it relates to a significant issue; and

   c. that it was not told for a reason advanced by or on behalf of D, or some other reason arising from the evidence, which does not point to D's guilt.

9. The jury must be directed that unless they are sure of all of the above the [alleged] lie is not relevant and must be ignored.

10. If the jury are sure of all of the above they may use the lie as some support for the prosecution case, but it must be made clear that a lie can never by itself prove guilt.

17. DEFENDANT – THINGS NOT SAID OR DONE

17-1 Silence or Conduct when Accused
17-2 Defendant's Unsworn Statement at Trial

17-1 Silence or Conduct when Accused

Sources: ***Archbold* 2009, 15-409**

LEGAL SUMMARY

1. At common law a statement made in the presence of a defendant, accusing him of a crime upon an occasion which may be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own – *Archbold* 2009 at para 15-409. See *R v Christie*.[1]

2. In the Privy Council decision of *Hall v R*[2] (an appeal from Jamaica) the Privy Council said:

> It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. *A fortiori* he is under no obligation to comment when he is informed that someone else has accused him of an offence.
>
> It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation; and this is so whether or not a caution has been administered at the time at which that person is informed of the accusation.

3. Where a defendant is informed by a police officer, who does not caution him, of an allegation made by a third person (e.g. a co-defendant), his silence cannot per se amount to an acknowledgment by him of the truth of the allegation within the principle enunciated in *R v Christie*. The caution merely serves to remind the defendant of a right which he already possesses at common law. The fact that in a particular case he has not been

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1. [1914] AC 345.
2. 12 JLR 240; *R* [1971] 1 All ER 322, [1971] 1 WLR 298, (1970) 16 WIR 276.

reminded of it is no ground for inferring that his silence was not in exercise of that right, but was an acknowledgement of the truth of the accusation.

4. Where persons are speaking on equal terms, the defendant's silence, when confronted with an accusation of a crime, may be left to the jury to decide whether the defendant's silence amounted to an acceptance of the truth of what was said. In *Parkes v R,*[3] the mother of a girl who was found with stab wounds asked the defendant why he stabbed her. The defendant made no reply, but when the mother threatened to hold him until the police arrived, he drew a knife and tried to stab her. The Privy Council approved the judge's direction to the jury that the appellant's silence coupled with his subsequent conduct was a matter from which it could be inferred that the defendant accepted the truth of the accusation. See also *Horne*.[4]

5. Where the defendant had the benefit of the presence of an attorney-at-law, the question is: should the learned judge have directed the jury to consider whether the applicant's silence or refusal to answer amounted to an acceptance or admission of aspects of the prosecution's case. If the jury so found, the next question for them would have been whether guilt could reasonably be inferred from such acceptance or admission. However, in the present case it could not be said that the appellant's refusal to answer the questions singled out by the learned trial judge, amounted to an acceptance or admission of aspects of the prosecution's case. Therefore, the next question of whether guilt could be inferred from such refusal did not arise. The refusal to answer those specific questions was of no evidential value: *Delroy Stewart v R*.[5]

DIRECTIONS: THINGS NOT SAID OR DONE

6. The judge should direct the jury that if they conclude that the defendant had acknowledged the truth as a whole or any part of the facts stated, they may take the statement or so much of it as was acknowledged to be true (but no more) into consideration as evidence in the case generally. Not because the statement, standing alone, afforded any evidence of the matter contained in it, but solely because of the defendant's acknowledgment of its truth; but unless they find as a fact that there was an acknowledgment, they ought to disregard the statement altogether – *R v Norton* [1910] 2 QB 497 at 500-501.

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3. 64 Cr App R 25 PC; (1976) 23 WIR 153 (PC Jamaica); *Hall* was applied in *R v Derrick Latty and Hernard Smith* RMCA 57/87, [14.3.88].
4. [1990] Cr LR 188.
5. SCCA 98/04 [31.7.06]. See also *R v Chandler* [1976] 3 All ER 105; *Rupert Wallace et al v R* SCCA 42, 33 and 40/03 [20.12.04].

17-2 Defendant's Unsworn Statement at Trial

Sources: **Evidence Act; *Practical Approach to Evidence***

LEGAL SUMMARY

1. Section 9(h) of the **Evidence Act** provides that: 'Nothing in this Act shall affect…any right of the person charged to make a statement without being sworn.'

2. A defendant who makes an unsworn statement at trial enjoys immunity from cross-examination, even where he implicates a co-defendant or makes imputations on the character of the prosecutor or a witness for the prosecution.

3. However, where the defendant makes an assertion about his good character in the course of an unsworn statement, the prosecution may lead evidence in rebuttal of what is said: *R v Campbell; R v Lear; R v Nicholls.*[6]

4. In *R v Shimmin,*[7] Cave J held that the effect of an unsworn statement was essentially a matter of 'weight' and was entitled to such considerations as the jury might think it deserved. See also *R v Michael Salmon*[8] where Gordon JA stated: "In our law an accused has a right to make an unsworn statement in his defence." In *Director of Public Prosecutions v Leary Walker* [1974] 12 JLR 1369 (PC Jamaica) Lord Salmon directed at page 1373:

   > The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves.

5. In *Coughlan*[9] the English Court of Appeal made the following observations:

   (a) What was said in an unsworn statement was not to be altogether 'brushed aside' but was of "persuasive rather than evidential" value.

   (b) An unsworn statement could not prove facts not otherwise proved by evidence but 'show the evidence in a different light.'

   (c) The jury should, therefore, be directed to consider the statement in relation to the evidence as a whole. They need not be told that the statement is evidence in the strict sense, but they should be told it had less cogency than sworn evidence.

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6. (1978) 69 Cr App R 221.
7. (1882) 15 Cox CC 122.
8. SCCA 45/91 [24.2.92]; (1992) 29 JLR 32.
9. (1976) 63 Cr App R 33.

6. Counsel for the prosecution should not comment on the defendant's failure to give sworn evidence. However, the judge may, where the circumstances warrant comment on such failure, but such comments must be fair.

7. In *Cedric Gordon*[10] the Court of Appeal held that the judge misdirected the jury by telling them that the appellant's unsworn statement indicated that he had something to hide.

8. For guidelines on appropriate comments by the judge see *DPP v Walker.*[11] Note *R v Steven Palmer.*[12]

9. In *R v Hart* 1978 27 WIR 229 Kerr JA held:

   1. It is unnecessary and often undesirable to categorise an unsworn statement as evidence or non-evidence.
   2. In the ordinary case, a summing up should follow the guidance on the objective evidential value of an unsworn statement advocated in *Director of Public Prosecutions v Leary Walker.*[13]

10. The learned judge also said:

> It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has 'no evidential value whatsoever" – and all this after telling them at the outset that their verdict must be according to the evidence. Indeed, the Judge in *Coughlan's* case (*R v Coughlan* (1976) 64 Cr App Rep 11) was not unaware of this difficulty; thus he said: 'It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.'

10. *R v Cedric Gordon* 27 JLR 446.
11. 12 JLR 1369; [1974] 21 WIR 406 (PC Jamaica).
12. SCCA 83/00 [6.4.01].
13. 12 JLR 1369; [1974] 21 WIR 406 (PC Jamaica).

18. DEFENCES – GENERAL

18-1 Self-Defence/ Prevention of Crime/ Protection of Household
18-2 Alibi
18-3 Duress
18-4 Sane Automatism
18-5 *M'Naghten* Insanity including Insane Automatism
18-6 The Defence of Accident

18-1 Self-Defence/ Prevention of Crime/ Protection of Household

Sources: **Crown Court Bench Book 2010**

LEGAL SUMMARY

1. The accepted statement of law on self-defence is found in *Palmer.*[1] The essential principles to be extracted from *Palmer* are as follows:
   - (i) A person who is attacked or who believes that he is about to be attacked is entitled to defend himself.
   - (ii) In defending himself he is entitled to do what is reasonably necessary.
   - (iii) The defensive action must not be out of proportion to the attack.
   - (iv) In a moment of crisis, a person may not be able to weigh to nicety the exact measure of his necessary defensive action.
   - (v) In a moment of anguish, a person may do what he honestly and instinctively thought was necessary; and
   - (vi) If there has been no attack, then the issue of self-defence does not arise.
2. Once self-defence is raised in a case on a proper evidential basis, the burden is on the prosecution to negative that defence and not on the defence to prove it and that unless the prosecution discharges that burden the defendant must be acquitted.[2]
3. There is now no general duty to retreat in all cases where self-defence is raised.[3] The question whether the accused›s retreat is an element which the jury may consider in

1. [1971] AC 814 (PC Jamaica).
2. *R v Kirk Manning* SCCA 112/99 [18.6.01].
3. *R v Stanley Brooks* SCCA 17/86 [27.4.87] 24 JLR 166; *R v Garnett Shand* SCCA 2/93 [5.7.93].

deciding whether the force was reasonably necessary.[4]

4. Where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self-defence but for the use of excessive force the defence fails altogether and he is guilty of murder not manslaughter.[5]

5. If there is evidence which if accepted could raise a *prima facie* case of self-defence, it should be left to the jury even if the accused has not formally relied upon self-defence.[6]

6. If there is evidence pointing to an armed conflict between the accused and deceased, this renders the need for a direction on self-defence and provocation to the jury.[7]

Honest Belief in the Need to use Force and Reasonableness of Force Used

7. Two crucial limbs must be established, viz:

   (i) that the defendant had an honest belief in facts which, if true, would justify self-defence. The issue of the reasonableness of the belief is relevant only to the question whether the accused's mistaken belief was honestly held.[8]

   (ii) that the defendant had used such force as would have been reasonable in the circumstances which he honestly believed to exist, in defence of himself or another.[9]

8. In *Williams (Gladstone)*[10] Lord Lane CJ described the relevance of the defendant's belief as follows:

> In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.

4. *R v Brian Scott* (1991) 28 JLR 290.
5. *R v Wayne Campbell and Mark Lahoo* SCCA 119/00 [5.7.02]; See also *Anthony Williams v R* (1974) 26 WIR 541.
6. *DPP (Jamaica) v Bailey* [1995] 1 Cr App R 257 (PC Jamaica).
7. *R v Daisy Robinson* SCCA 27 & 28/98 [11.4.03].
8. *Beckford v R* (1987) 36 WIR 300, (1987) 24 JLR 242 (PC Jamaica).
9. *R v Delroy Wynter* SCCA 173/99 [25.10.01]. For excessive force see *R v Barton and Anor* SCCA 97 & 98/ 95 [20.12.96] and *R v Steven Palmer* SCCA 83/00 [6.4.01].
10. [1984] 78 Cr App R 276 at p. 281.

9. This formulation of the test was approved by the Privy Council in *Beckford*[11] Lord Griffiths said:

> In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief, it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.
>
> Their Lordships therefore conclude that...the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.

10. A person who believes he is in imminent danger of attack does not have to await the first blow before responding. He can take pre-emptive action to prevent the attack.[12] But if he is aware that a warning would suffice to prevent the attack, he does not believe that he needs to use force.[13]

11. In judging whether the defendant's response was reasonable the jury should take into account: (a) that a person acting in defence of himself may not be able to judge exactly the measure of response required; and (b) if the defendant only used force which he honestly and instinctively thought was necessary, that would be powerful evidence that his response was reasonable.

12. When it is clear on the defence that the appellant is being attacked, the jury will not be assisted with a direction on honest belief.[14]

Belief Held in Drink

13. If the defendant claims to have believed that it was necessary to defend himself, but the jury is sure that the belief, if he may have held it, was induced by voluntary intoxication, the defendant cannot rely on it.[15]

14. A belief held in drink should, however, be distinguished from an intention held in drink. If self-defence is not available to the defendant because his belief was induced by drink, the prosecution must, where necessary, still prove a specific intent, such as an intent to kill or to cause grievous bodily harm.[16]

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11. [1988] AC 130 (PC Jamaica) at p. 145.
12. *Beckford* [1988] AC 130 at page 144.
13. See paragraph 10 of 2010 Criminal Bench Book Cap. 16.
14. *R v Daisy Robinson* SCCA 27 & 28/98 [11.4.03]. See also *R v Derrick Wolfe* SCCA 94/91 [31.7.92].
15. *O'Grady* [1987] QB 995, 85 Cr App R 315; *Hatton* [2006] 1 Cr App R 16, [2005] EWCA Crim 2951.
16. *O'Connor* [1991] Crim LR 135.

Defence of Another and Force Used in Prevention of Crime and in Making an Arrest

15. Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony.[17]

16. Where the appellant was carrying out his duties as a constable making an arrest, and he was attacked, in those circumstances, there was no duty on him to retreat.[18]

17. Self-defence may be lawfully employed where a firearm is discharged in the course of a struggle in which the deceased's efforts were directed towards the said firearm.[19]

18. A prison warder who is lawfully executing his duty has the right to use such force as necessary to protect his life. This statutory defence is in addition to the common law right of self-defence.[20]

19. Where a constable is resisted in the legal execution of his duty, he may use force if it is necessary for the proper execution of his duty. If in this process, he kills the party resisting him, then the killing is justified not merely by virtue of the law of self-defence, but because of the duty imposed upon him by the law.[21]

Defence of Property

20. The defence is also available in a case where the defendant believes it is necessary to protect property.

21. At common law a householder is entitled to use reasonable force in defence of his property. In *Hussey*,[22] the Court of Criminal Appeal quashed a conviction for unlawful wounding when the trial judge, while leaving self-defence as an issue for the jury, had failed to leave to the jury the issue of defence of property. The relevant distinction between the two defences was that in 1925, self-defence required the defendant to retreat if he could, while defence of property did not, since that would be tantamount to surrendering his property to his adversary. The defendant's landlord sought forcibly to regain possession of a room from the defendant without giving due notice. From inside the room, the defendant discharged a firearm at the door which was being broken down by the landlord and her accomplices. It is to be noted that the court did not hold that use of a firearm in such circumstances was reasonable, only that the defence should have been left to the jury.[23]

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17. *R v Bryan Davis* SCCA 97/96 [12.5.97]. See also *R v Marcello D'Andrea* SCCA 77/98 [26.3.99]; *Duffy* [1967] 1 QB 60.
18. *R v Simmonds* (1965) 9 WIR 95.
19. *R v Stanley McKenzie* SCCA 62/91 [11. 3. 92]; *DPP (Jamaica) v Bailey* [1995] 1 Cr App R 257 (PC Jamaica).
20. *R v Alfred Johnson and Ors* SCCA 109,110,111/90 [3.12.91] 28 JLR 620. See s.15(8) of the Correctional Act.
21. *Glenroy McDermott v R* SCCA No. 38/06 [14.03.08]. Section 14(2)(d) of the Constitution of Jamaica.
22. [1925] 18 Crim App R 160.
23. See also *Georgiades* [1989] Cr App R 206.

22. Defence of property was considered recently by the Court of Appeal in *Faraj*,[24] where it was deployed as a defence to a charge of false imprisonment. The defendant householder believed that a man who entered his house saying he was representing a utility provider was in fact a burglar. He detained him at knife point intending to make enquiries about the man's identity, but then released him before the enquiries were made. Tuckey LJ said:[25]

> So what about defence of property? We can see no reason why a house-holder should not be entitled to detain someone in his house whom he genuinely believes to be a burglar. He would be acting in defence of his property by doing so. Here full effect can be given to the defendant's belief however unreasonable it may be. But this defence, like self-defence, has its limits. The householder must honestly believe that he needs to detain the suspect and must do so in a way which is reasonable. So if the appellant believed that Mr Haq was a burglar he would be entitled to be judged on this basis even if his belief was unreasonable. If all that he had done was to detain Mr Haq for the purposes of establishing his identity it is most unlikely that he would be found to have acted unreasonably. Whether his use of a knife to do so was reasonable is another matter which, like everything else, would be for the jury to decide.

It follows that in judging the defence the jury will be assessing whether the defendant did have or may have had an honest belief that the circumstances rendered it necessary for him to defend his property. Whether the defendant acted reasonably in defence of his property will be decided on principles similar to those which apply to self-defence."

DIRECTIONS[26]

The first question for the judge is whether there is evidence from which the jury could conclude that the defendant acted in self-defence. That evidence need not arise in the defence case if it is a reasonable possibility revealed by the evidence for the prosecution. Directions to the jury should contain reference to the two-stage test:

- Did the defendant honestly believe or may he honestly have believed that he needed to defend himself because he was under attack or in imminent danger of attack? The issue is not whether the defendant was in fact under attack or in imminent danger of attack but whether he genuinely believed that he was. But, if the jury concludes that there was no such attack or danger of attack that is something they are entitled to consider when deciding whether the defendant has told the truth about his belief. If the jury is sure that the defendant held no such belief, self-defence does not arise.

24. [2007] EWCA Crim 1033.
25. At §22.
26. Adapted from Crown Court Bench Book 2010 at p. 296.

- If the defendant did genuinely believe or may genuinely have believed that he needed to defend himself the jury must decide whether the force he used was reasonable. Reasonable force means force proportionate to the nature of the threat the defendant honestly believed was posed by his adversary. If the defendant went well beyond what was needed to defend himself from the force offered by his assailant, that is good evidence that the defendant acted unreasonably. But, in judging whether the defendant acted unreasonably, the jury should have regard to the fact that it is difficult for a person to measure precisely what is needed in response and, if the defendant did only what he honestly and instinctively thought was necessary, that is strong evidence that he responded reasonably.

In *R v Wheeler* [1967] 3 All ER 829 Winn LJ stated:

> The court desires to say for general application, that wherever there has been a killing, or indeed the infliction of violence not proving fatal, in circumstances where the defendant puts forward a justification such as self-defence, such as provocation, such as resistance to a violent felony, it is very important and is essential that the matter should be so put before the jury that there is no danger of their failing to understand that none of those issues of justification is properly to be regarded as a defence: unfortunately there is sometimes a regrettable habit of referring to them as, for example, the defence of self-defence. Where a judge does slip into the error or quasi-error of referring to such explanations as defences, it is particularly important that he should use language which suffices to make it clear to the jury that they are not defences in respect of which any onus rests on the accused, but are matters which the prosecution must disprove as an essential part of the prosecution case before a verdict of guilty is justified.

Where the issue arises whether drink may have played a part in the defendant's comprehension of the circumstances the jury should be told:

- The evidence is that the defendant had voluntarily taken drink. If, when they are considering the circumstances in which the defendant used force, the jury is sure that the defendant held a belief about those circumstances which was mistaken because he was under the influence of drink, the defendant is not entitled to rely on that mistaken belief. If, therefore, they are sure that, had the defendant been sober, he would not have made the mistake he did, they must judge his actions as if he had been sober, both on the question whether he needed to defend himself and, if so, on the question whether he needed to use the force he did. If, however, the circumstances were in fact such that the defendant was entitled to defend himself as he did (i.e. he was under attack or in imminent danger of attack and his response was proportionate), his drunkenness will be immaterial.

When there is evidence of self-defence for the jury to consider the jury must be told:

- There is no burden on the defendant to prove that he was acting in self-defence. The prosecution must prove so that the jury is sure that defendant was not acting in lawful self-defence.

EXAMPLE 1: Self-Defence[27]

As we have heard, the complainant Mr A and the defendant Mr B are neighbours. They share the common driveway between their houses. From to time there have been disputes when one has accused the other of obstructing his side of the drive with a vehicle. This is what occurred on 12 June. The defendant came home to find that Mr A had parked his new camper van in the driveway. It obstructed his side and he could not park his car off the road. The prosecution case is that the defendant lost his temper, marched to Mr A's front door and continuously rang the bell until it was answered by Mr A. As Mr A opened the door, the defendant punched him to the face. The force was sufficient to knock him to the ground. The defendant followed up with two kicks to Mr A's head. As a result, Mr A suffered a black eye, he thought from the punch, and bruising and swelling to the back of his head behind his left ear from the kicks, both of which you have seen in the photographs. The defendant is charged in count 1 with assault occasioning actual bodily harm and in count 2 with common assault by battery. You are not asked by the prosecution to return guilty verdicts on both counts. They are alternatives. They are there for a reason I will explain in a moment.

In order to prove that the defendant committed either of these offences the prosecution must prove that the defendant used unlawful force on Mr A. The defendant admits that he punched Mr A to the face, but he says that his punch was delivered lawfully in self-defence. He says that although Mr A went to the ground he did not follow up with a kick or kicks and Mr A must have banged his head against the door frame as he went down.

The main issue for you to resolve is whether the prosecution has proved, so that you are sure, that the defendant was not acting in lawful self-defence. Let me explain the questions you need to consider.

As I have said, it is for the prosecution to prove that the defendant was not acting in self-defence; it is not for the defendant to prove that he was.

A person who honestly believes that it is necessary to use force to defend himself may use reasonable force to do so. You may think that in this respect the law follows good common sense.

So the first question you need to resolve is whether the defendant did or may have believed that he needed to use force to defend himself. The defendant denies that as soon as Mr A opened the door he punched him. The defendant told you that when he asked Mr A to move his van, Mr A started shouting and then raised his fist, so he punched him. When the defendant was asked why it was necessary to use force rather than leave, the defendant said he had no choice, it was so quick. So you must resolve this issue. Are you sure that Mr A told you the truth about this confrontation? If you are sure he did, there would appear to be no room for the defendant to think he was under threat, but that is for you to decide.

27. Adapted from The Crown Court Bench Book 2010.

If you are sure that the defendant had no honest belief than he needed to use force that is the end of self-defence and your verdict will be guilty of count 1 and you need go no further. If on the other hand, you think the defendant did believe, or may have believed, that he needed to use force to defend himself you pass to the second question.

A person is entitled to use reasonable force to defend himself. Reasonable force means proportionate force. It means not going completely over the top in your response to the threat you honestly think you face. Here, you may conclude that if the defendant honestly believed he needed to use force at all, then a punch was a reasonable response to a threat of a punch. As a matter of law, and again I suggest of common sense, you do not have to wait to be hit before you defend yourself. However, there is at this stage a second and important issue of fact for you to resolve. Mr A said that when he fell to the ground he was kicked. Mrs A, his wife, said that her attention was drawn to the constant ringing of the doorbell. She was in the kitchen. She turned off the gas stove and made her way to the front door. When she got there the door was already wide open, her husband was curled up on the floor and the defendant kicked him to the head. You again have to decide who is telling the truth. If you are not sure that Mr A was kicked while he was on the ground, then you would find the defendant not guilty because a punch and no more was reasonable. If, however, you are sure he was kicked once or more than once, you will need to decide whether that was proportionate and therefore reasonable, or completely over the top. The law is that a person defending himself does not have to judge to a nicety the degree of force it is necessary to use and, if he only did what he honestly and instinctively thought was necessary, that is strong evidence that what he did was reasonable. However, when the defendant was asked about his state of mind in evidence, he agreed that when Mr A was on the ground he was no longer any threat and he knew he wasn't; he accepted that he had no need to kick Mr A; and agreed that if he had kicked Mr A that would have been out of order.

It follows from what I have said that if you think the defendant may honestly have believed that he needed to defend himself and did no more than punch Mr A, your verdict would be not guilty.

If, on the other hand, you are sure the defendant did not honestly believe he needed to defend himself your verdict would be guilty.

Finally, if you think the defendant may have punched Mr A in self-defence but you are sure he went on to kick him while he was on the ground, you must decide whether that was a reasonable response. If you conclude it was or may have been a reasonable response, then your verdict would be not guilty. If you are sure it was not a reasonable response, then your verdict will depend upon whether you are sure a kick or kicks caused the bruising and swelling to the back of Mr A's head. If you are sure it did, your verdict would be guilty of count 1, assault occasioning actual bodily harm. If you were not sure that the kick or kicks caused any bodily injury to Mr A your verdict would be not guilty count 1, but guilty count 2, common assault.

I have prepared a written Route to Verdict which will help you to answer the questions in the right order. If you do that you will arrive at your verdict. Let us read it together.

Route to verdict

Please answer question 1 first and proceed as directed

Question 1

Did the defendant honestly believe that he needed to use force to defend himself?

- If you are sure that the defendant did not honestly believe that he needed to defend himself, verdict guilty count 1 and go no further
- If you think the defendant may honestly have believed that he needed to defend himself, go to question 2

Question 2

Did the defendant use reasonable force to defend himself? See Notes 1-4 below

- If you are sure the force used was unreasonable, go to question 3
- If you think the defendant may have used reasonable force, verdict not guilty count 1 and not guilty count 2.

Question 3

Did a kick or kicks delivered by the defendant cause bruising and swelling to Mr A's head?

- If you are sure that a kick or kicks caused bruising and swelling to Mr A's head, verdict guilty count 1 and go no further.
- If you are not sure that a kick or kicks caused bruising and swelling to Mr A's head, verdict not guilty count 1 but guilty count 2.

NOTES:

1. Reasonable force is force which is proportionate to the threat the defendant honestly believed he faced.
2. The defendant did not have to be exact in measuring the degree of force needed to defend himself. If he did only what he honestly and instinctively thought was necessary, that is strong evidence that what he did was reasonable.
3. If you are sure the defendant went completely over the top in response to the threat he thought he faced, the force he used was not reasonable.
4. If all the defendant did was punch Mr A in self-defence, that was reasonable force; if you are sure the defendant also kicked Mr A on the ground, ask whether that was reasonable in the circumstances as Mr A thought them to be.

EXAMPLE 2: Self-Defence – Drink Taken – Claim of Honest and Instinctive Reaction – Offence Requiring Specific Intent

The complainant, V, told you that he was standing at the bar, chatting to his friend A about football, when he was struck from the side with a beer glass. The glass fractured and caused several deep cuts to the right side of V's neck and face. It is accepted that the defendant wounded V. The defendant's evidence was that he thought V called him a 'batty boy'. He asked V what he meant by it. He said V made a movement which caused him to think he was about to be punched. The defendant demonstrated what he meant. He demonstrated V lifting his right arm from below the bar quickly. The defendant immediately struck out, forgetting that he had the glass in his hand. V was asked about this in evidence. He said he was not even aware of the defendant in the bar. He did not call him any name. He was withdrawing his wallet from his back pocket to pay for drinks and that must have been obvious to the defendant if he was looking. A agreed that V had just ordered drinks. They were talking about Waterhouse Football Club. V made no remark to the defendant that he heard and he said that he was unaware of any sudden movement by V. The shattering glass against V's face came, he said, out of the blue.

As I have told you the prosecution must prove its case. That includes proof that the defendant was acting unlawfully. The defendant's case is that he was acting in self-defence. If he was, the defendant was acting lawfully. It is not for the defendant to prove that he acted lawfully in self-defence, but for the prosecution to prove that he did not. If, therefore, you consider that the defendant was or may have been acting in reasonable self-defence you must find him not guilty of both count 1 (wounding with intent) and count 2 (wounding).

A number of issues have been raised in the evidence. I will, when I have completed my directions, hand you a note that will guide you through the questions you need to resolve in order to arrive at a verdict. First, let me explain what the law means by self-defence:

If you honestly believe that you are under attack or that you are in imminent danger of attack from another person, you are entitled to use reasonable force to defend yourself. This definition contains two main elements. The first stage of your deliberations will concern the defendant's belief and the second stage, if you reach it, the reasonableness of his actions.

Stage 1

The defendant says that he feared an immediate attack and this is what caused him to react as he did. He was asked in cross-examination whether he supported a football team. He said he supported Tivoli. He agreed that V would not have known that. He could not recall, he said, whether he overheard V talking about Waterhouse Football Club. The defendant denied the suggestion made by the prosecution that he lashed out because of his strong dislike of Waterhouse supporters. If, having considered the evidence, you are sure that the defendant's blow was purely aggressive and had nothing to do with any movement by V, you would not be dealing with a case of self-defence at all. If, however, you think the defendant did believe or may have believed, even if he was mistaken, that he was about to be attacked, he was entitled to use force to resist it.

Counsel for the prosecution asked the defendant whether he could have made a mistake about V's movement to retrieve his wallet from his back pocket. He conceded that it was possible, but he did not

think he had. He was asked how much alcohol he had consumed that night. He said he had two cans before he left the house and 6 bottles of Red Stripe in the bar. Asked whether his judgement may have been affected by the amount of alcohol he had taken, he said, no, he knew what he was doing and was just merry.

In judging whether the defendant honestly believed or may have believed that he was about to be attacked you should consider whether he had any reasonable grounds for that belief. If you are sure there were no such grounds, that conclusion may affect your decision whether the defendant held the belief at all. That is a question of fact for you to resolve. If you conclude that the defendant may have held a genuine but mistaken belief that he was about to be attacked, you will need next to consider the effect of alcohol upon him. The law does not permit the defendant to rely on the effect of his own voluntary intoxication. If you conclude so that you are sure that if he had been sober the defendant would not have misunderstood the situation he faced, and would have realised that no force was necessary, then self-defence is excluded.

Therefore, you pass to stage 2 only if:

1. you decide that the defendant may honestly (and rightly) have believed that he was about to be attacked; or
2. you decide that the defendant may honestly (but you are sure, mistakenly) have believed he was about to be attacked, and you conclude that he may have made the same mistake if he had been sober.

Stage 2

Force used in self-defence is lawful only if it was reasonable. Reasonable force is force which is proportionate to the threat the defendant believed he faced. Was it proportionate to strike V with a glass if V did raise his arm intending to punch the defendant? The defendant said that when he swung out he did not appreciate that the glass was in his hand. You will have to judge whether he was telling the truth about that. If you conclude that he may have been telling the truth, it would be a significant finding. It would be significant because you must judge the reasonableness of the defendant's reaction according to his own understanding of the situation. If he reacted suddenly, honestly and instinctively, and without thought for the glass, that would be strong evidence that what he did was proportionate to the attack he feared and was, therefore, reasonable. If, however, you conclude, so that you are sure, that the defendant knew that he was swinging a glass towards V's head, it is the reasonableness of that action which you must judge. If you are sure it was unreasonable, self-defence is again excluded.

Unless you can exclude self-defence, so that you are sure, you must find the defendant not guilty of both count 1 and count 2.

If you do exclude self-defence, you should turn next to the question of intention. You must judge the defendant's intention from the evidence of the surrounding circumstances including the nature of the defendant's actions and, of course, his own evidence. He said he had no intention of causing the serious wounds he admits resulted from his action. When you are judging the defendant's intent the amount of drink he consumed is still relevant but in a different way. Drink is not an excuse for unlawful violence. An intention formed in drink is just as much an intention as an intention formed when sober. Some people become docile in drink; others become aggressive. You need to consider how drink affected the defendant. Did it make him aggressive; did it cloud his judgment; did it cause him to act without thinking?

If the defendant became aggressive in drink and, in the moment he swung the glass, he intended to cause really serious injury, he is guilty of count 1. If you are not sure he intended to cause really serious injury, he is not guilty of count 1, but he is guilty of count 2. The reason is that the defendant accepts that he knew the blow he aimed at V would cause some harm. The law is that that is sufficient to prove guilt of count 2.

Questions of fact are, as I have emphasised, for you to resolve, but you will see the sense of the direction I am about to give you. You could not convict the defendant of count 1, wounding with intent, unless you were sure the defendant intended to cause really serious injury with the glass.

I have prepared a written Route to Verdict which will help you to answer these questions in the right order. If you do that, you will arrive at your verdict. Let us read it together.

Route to verdict

Please answer question 1 first and proceed strictly as directed.

Question 1

Did the defendant deliberately aim a blow at V which in fact caused a wound?

- Admitted. Proceed to question 2.

[STAGE 1] Question 2

When he aimed the blow, did the defendant honestly believe that he needed to use force to defend himself from an imminent attack by V?

- If you are sure the defendant did not honestly believe that he needed to defend himself, self-defence is excluded and proceed to question 8.
- If you consider that the defendant may honestly have believed that he needed to use force to defend himself, proceed to question 3.

Question 3

Was the defendant's belief mistaken?

- If you are sure that the defendant's belief was mistaken, proceed to question 4.
- If you are not sure the defendant's belief was mistaken, proceed to question 5.

Question 4

Would the defendant have made the same mistake if he had been sober?

- If you are sure he would not have made the same mistake if he had been sober, self-defence is excluded and proceed to question 8.
- If you conclude he would or may have made the same mistake if he had been sober, proceed to question 5.

[STAGE 2] Question 5

When the defendant aimed the blow at V, was he aware of the glass in his hand?

- If you are sure the defendant was aware of the glass in his hand, proceed to question 7.
- If you are not sure the defendant was aware of the glass in his hand, proceed to question 6.

Question 6
Was the force the defendant thought he was using (i.e. without the glass) proportionate and, therefore, reasonable in the circumstances?

- If you are sure the force the defendant thought he was using was unreasonable, self-defence is excluded and proceed to question 8.
- If you are not sure the force the defendant thought he was using was unreasonable, the force used was lawful and verdict not guilty count 1 and count 2.

Question 7
Was the force used by the defendant (aiming a blow with the glass in his hand, at V's head) proportionate and, therefore, reasonable in the circumstances?

- If you are sure the force the defendant used was disproportionate and unreasonable, proceed to question 8.
- If you are not sure the force the defendant used was disproportionate and unreasonable, the force used was lawful and verdict not guilty count 1 and count 2

Question 8
When the defendant aimed the blow at V did he intend to cause V really serious injury?

- If you are sure he did intend really serious injury, verdict guilty count 1 and proceed no further.
- See Note 1 below
- If you are not sure he did intend really serious injury, verdict not guilty count 1 and guilty count 2.

***NOTE* 1:**

You would find the defendant guilty of count 1 only if you were sure the defendant was not acting in self-defence and he intended to cause really serious injury with the glass.

You would find the defendant guilty of count 2 if you were sure the defendant was not acting in self-defence, but you were not sure he had the intent to cause really serious injury with the glass.

If you have concluded that the defendant was unaware or may have been unaware of the glass in his hand (Question 5 above), you could not conclude that the defendant intended to cause really serious injury. Your verdict would be not guilty count 1.

18-2 Alibi

Sources: **Trinidad and Tobago Criminal Bench Book 2015; Crown Court Bench Book 2010**

LEGAL SUMMARY

1. Where the defendant merely states that he was not at the place where the offence was committed, this does not raise the defence of alibi. Alibi means more than being not present but rather he was at a specific place elsewhere.[28]
2. No burden is on the accused. The burden lies on the prosecution to negative the alibi to the criminal standard[29] and that includes the need to prove that the accused was not elsewhere but at the scene committing the offence.
3. In a case in which identification evidence is crucial, if the accused seeks to establish an alibi, it is not necessary for the trial judge to direct the jury expressly that the rejection by them of the accused's alibi would not prove that the accused was where the identifying witness said that he had been unless there were circumstances which created a risk that the jury might use the rejection of the alibi in an unwarranted manner as confirmation of guilt.[30]
4. A false alibi warning should be given where the fact or rejection of the alibi is seen as capable of supporting the identification evidence or where the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence.[31]
5. Where a jury may reject an alibi because of inherent weaknesses in the evidence of the alibi witness, the jury should be warned that a false alibi does not by itself prove that the accused was where the identifying witness says he was.[32]

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28. *R v Noel Phipps and Ors* SCCA 21, 22, 23/87 [11.7.88]; *O'Neil Roberts and Another v R* SCCA 37 & 38/00 [15.11.01]; *R v Newton McLeod* SCCA 164/90 [31.7.92]; *R v Geddes and Anor* SCCA 56–58/95 [31.7.96]; Words used by the accused: "a me bed me did deh last night wid mi youth, a frame uno want fi frame mi" when arrested and cautioned, was in the nature of an alibi – *R v Michael Stewart* SCCA 52/97 [29.2.03].
29. *R v Earl Watson* SCCA 92/88 [8.11.88]; *R v Samuel Lindsay and Anor* SCCA 7 & 8/96 [20.12.96]; *R v Everald Elleston* SCCA 151/90 [18.5.92]; *R v Barrett* SCCA 45/89 [16.7.90], *R v Chambers and Bell* SCCA 17 & 18/90 [1.3.91]; *R v Dorr Campbell* RMCA 21/92 [13.7.92], *R v Leroy Barrett* (1990) 27 JLR 308; *R v Johnson* [1961] 3 All ER 969; (1962) 46 Cr App R 55.
30. *London (Junior) v The State* (1999) 57 WIR 424 Court of Appeal of Trinidad and Tobago. See also *R v Gavaska Brown et al* (2001) 62 WIR 234; *R v Turnbull* 1977 QB 224.
31. *R v Peter Campbell* SCCA 17/06 [16.05.08]. See also of Lord Widgery's CJ observation in *R v Turnbull* where he said: "proving the accused told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was".
32. *Roberts (O'Neil) and Another v R;* SCCA 37 &38/00 [15.11.01]; *R v McBean* SCCA 122/95 [16.12.96]; *R v Been* 9 JLR 523, 10 WIR 293; *R v Ray Dixon* SCCA 119/93 [20.12.94].

6. In *Turnbull*[33] the Lord Chief Justice said (at page 230):

> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

7. The learned trial judge in *Mills, Mills, Mills and Mills v R,*[34] did not give the above direction. However, he did direct the jury in the following terms:

> Mr Arthur Mills and the two sons, Garfield and Julius, they say that we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi, they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not, as Mr Mills said, at some lady's house talking, or as the boys said, in their house with their mother.'

> Counsel had submitted that this direction was insufficient and that there was a material failure to direct the jury properly. However, the Court of Appeal had rejected this argument as misconceived and made the following observation:

> 'Where an accused makes an unsworn statement, no such directions [i.e. about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves.

8. Lord Steyn delivering the advice of the Board in *Mills, Mills, Mills and Mills v R* (supra) stated that the last sentence, "The jury is told…it deserves" reflected the guidance given by the Privy Council in *Director of Public Prosecutions v Walker.*[35] See also *Brown (Sheldon) v R*.[36]

33. Ibid.
34. (1995) 46 WIR 240 (PC Jamaica).
35. (1974) 21 WIR 406 (PC Jamaica) at p. 411.
36. [2010] JMCA Crim. 38 delivered July 2, 2010 at para. 15.

DIRECTIONS[37]

9. The first requirement of the direction to the jury is that they understand there is no burden on the defendant to prove that he was elsewhere. The prosecution must prove its case and that includes the need to prove that the defendant committed the offence.

10. The second is to guard against the danger that if the jury disbelieve the defendant's alibi, whether it is a mere denial of presence or a positive assertion that he was elsewhere, they might assume that he is guilty.[38] Thus, the warning should be given whenever there is a risk that the jury will, having rejected the alibi, assume guilt of the offence charged.

11. If the jury are not satisfied with the evidence and are in doubt they must acquit.

12. If the jury are sure that the defendant was present as the prosecution allege the jury must be satisfied of any other elements of the offence that are in issue.

EXAMPLE 1[39]

The accused has raised the issue of alibi. By raising an alibi, the accused is saying that he was not present during the commission of the offence and, therefore, that the prosecution's witnesses who identify him as the assailant are either mistaken or lying.

While the accused has raised an alibi, the burden remains on the prosecution to disprove the alibi of the accused. The accused does not have to prove an alibi; he only has to raise it. In so doing, the accused does not have to prove that the prosecution's witnesses have not been truthful.

Once the accused has raised an alibi, it is incumbent on the prosecution to disprove it to the extent that you as jurors are sure that the accused was at the scene of the offence. Thus, the prosecution must prove so that you are sure that the accused committed the offence and, therefore, that his alibi is untrue.

If you conclude that the alibi of the accused is true or may be true, then he cannot have been the assailant in the offence as charged, and you must acquit him because no one can be in two places at the same time.

If you find yourself in a middle ground where you are not sure whether or not to accept the alibi, where you think that the alibi could be true, you must acquit the accused because it would mean that the prosecution has not satisfied you beyond a reasonable doubt that the accused was at the scene of the offence, committing the offence. If you are in that middle ground, it means that the prosecution did not disprove the alibi and you do the accused no favour by acquitting him. So much so, that if you find that it was possible that the alibi may be true, then you must acquit the accused.

Now what about if you don't believe the accused's alibi at all? Well, even if, having considered the evidence carefully, you are sure that the alibi of the accused is false, you cannot convict him because of that. A false alibi is not equal to guilt.

37. Adapted from Crown Court Bench Book 2010.
38. See statement by Lord Morris of Borth-y-Gest in *Broadhurst* [1964] AC 441 at p. 457.
39. Adapted from the Trinidad Criminal Bench Book 2015.

The accused is not before you charged with telling lies. So that even if you believe his alibi to be false, you must then go back to the prosecution case, examine it carefully as I have explained to you and determine whether the prosecution has convinced you beyond a reasonable doubt of the guilt of the accused. There are sound reasons for this in law. It has happened in the past, that an accused gave false alibis, not because they are guilty but because they think it is easier than telling the truth or because they do not have confidence in their own genuine defence, believing that a made up alibi would be of greater assistance to the case. A person may lie out of fear to support his own evidence. He may make genuine mistakes about date and place and time. So this is why even if you believe his alibi to be false, you cannot convict him on this basis. You must then go to the prosecution case and see if the prosecution has convinced you so that you are sure beyond a reasonable doubt of the guilt of the accused.

This is how you should consider the issue of the alibi raised by the accused.

EXAMPLE 2[40]

The following direction can be used (in addition to the foregoing) when the accused has raised the defence of alibi in a case where the prosecution is relying on identification evidence:

The case for the accused is that he was elsewhere when this offence was committed. As I have told you, if you believe the alibi is true or may be true, then that is the end of the matter, you must find the accused not guilty. If however, you do not believe the alibi, then in going back to the prosecution case, the main question for you to answer is: are you sure that the identifying witness has correctly identified the accused as the man who committed the offence?

The reason for this is as I have told you, the fact that you disbelieve the accused's alibi does not entitle you to find him guilty; neither does it relieve the prosecution of its burden to satisfy you beyond a reasonable doubt of the guilt of the accused. Disproof of an alibi does not support identification evidence.

In this case therefore, even if you disbelieve the alibi, you have to go back to the prosecution case and examine the possibility that its witness may have made a genuine but mistaken identification of the accused. If you think that is so, or maybe so, then you should find the accused not guilty. If, on the other hand, you are sure that the identifying witness is not mistaken, and therefore, you find the evidence of that witness to be both truthful and accurate, then you should find the accused guilty as charged.

40. Adapted from the Trinidad Criminal Bench Book 2015.

18-3 Duress

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 17-119; *Blackstone's* 2016, A3.35**

LEGAL SUMMARY

1. A defendant who commits a crime under duress may, in certain circumstances, be excused liability. This defence can arise where the duress results from threats[41] or from the circumstances in which the defendant finds himself.[42]
2. Duress in either form is not a defence to those charged with murder, attempted murder and a limited number of other very serious offences.[43] It is available however, to a defendant who is charged with conspiracy to murder: *Ness and Awan*.[44] If manslaughter is left as an alternative then it seems appropriate to direct the jury that they cannot convict for that offence unless they are sure that the defendant was not under duress.
3. The defence is not available to a person who becomes voluntarily involved in criminal activity where he knew or might reasonably have been expected to know that he might become subject to compulsion to commit a crime.[45]

DURESS BY THREATS

4. The elements of the defence, set out in full in *R v Hasan*,[46] are:
   a. that the defendant reasonably believed that threats of death or serious injury had been made against himself or a member of his immediate family or someone for whom he might reasonably feel responsible. False imprisonment[47]or threat of serious psychological injury[48] are insufficient. Also, there is no substantive law defence for someone who commits a crime as a result of having been trafficked;[49]
   b. that the defendant reasonably believed the threats would be carried out (almost) immediately and the threat was effective in the sense that there was no reasonable avenue of escape open to the defendant to avoid the perceived threat. It should be

41. *R v Hasan* [2005] UKHL 22.
42. *R v Martin* [1989] 88 Cr App R 343.
43. *R v Howe* [1987] AC 417; *Gotts* [1992] 2 AC 412. See also the Jamaican cases: *R v Wayne Spence* SCCA 202/88 [18.6.90]; *R v Michael Reid & Anor* SCCA 104 & 105/98 [31.7.01]; *R v Trevor Bennett* SCCA 64 [15.7.91].
44. [2011] Crim LR 645.
45. *R v Hasan* [2005] UKHL 22; *R v Ali* [2009] EWCA Crim 716.
46. [2005] UKHL 22, at para 21.
47. *R v Dao* [2012] EWCA Crim 717.
48. *R v Baker* [1997] Crim LR 497, CA.
49. *R v N* [2013] EWCA Crim 379.

made clear to the jury that if the retribution threatened against the defendant or his family or a person for whom he feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.[50] It is not necessary to spell out for the jury all the risks that the defendant claims he faced if he did not take a reasonable opportunity.[51]

c. that the threat (or belief in the threat) of death or serious violence that was the direct cause of the defendant committing the offence. It is not correct to direct the jury that the threat of death or serious injury must be the sole cause: *R v Ortiz*;[52]

d. that a sober person of reasonable firmness of the defendant's age, sex and character would have been driven to act as the defendant did. On characteristics see *R v Bowen*:[53] the reasonable person will not share the defendant's vulnerability to pressure, timidity, or emotional instability. Characteristics attributable to addiction to drink or drugs, are also irrelevant: *R v Flatt*.[54]

5. It is for the defence to raise the issue of duress. Once raised it is for the prosecution to disprove. The defence ought to be left to the jury if there is any evidence of it.[55]

6. If the jury consider that the evidence of each of the above four matters is, or may be, true the defendant is not guilty. If the prosecution satisfy the jury so they are sure that one or more of the above four matters is untrue the defence fails and the defendant is guilty.

DURESS OF CIRCUMSTANCES

7. The same restrictions on the availability apply as to duress by threats. The classic statement of the law is that in *R v Martin*.[56] The threat that arises from the circumstances must be extraneous to the defendant.[57] The threat must be operative at the time of the offence.[58]

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50. *R v Z* [2005] UKHL 35 at [28] per Lord Bingham of Cornhill.
51. *R v Aldridge* [2006] EWCA Crim 1970.
52. (1986) 83 Cr App R 173.
53. [1996] 2 Cr App R 157.
54. [1996] Crim LR 576.
55. Cf *Bianco* [2002] 1 Archbold News 2 which suggests that it is not appropriate to leave it to the jury if no reasonable jury properly directed could fail to find it disproved.
56. [1989] 88 Cr App R 343. See also *R v Shayler* [2001] EWCA Crim 1977 at [49] per Lord Woolf CJ.
57. *R v Rodger* [1998] 1 Cr App Rep 143. See also the Jamaican case of *Rhone Warren* SCCA 78/99 [23. 2.00] where the defendant had raised the defence of duress of circumstances for the offence of causing death by dangerous driving.
58. *R v Pommell* [1995] 2 Cr App Rep 607.

DEFENCE OF DURESS BY THREATS MADE ON AN UN-SWORN STATEMENT

8. In *R v Nicholas Henry*[59] the defendant raised the defence of duress from the dock. He stated that he saw some men with guns and was ordered to make a bomb which was to be thrown on a police station. He said he complied because he was afraid of what they might do to him. When a constable enquired of him what was happening, he lied in explaining that "man was screeching pon them" that is, men were hunting them down. He also said he was afraid that the men would kill him and the police officer if he revealed the truth. After the station was fire bombed he also assisted in hiding some guns which the men brought with them. He did this he said, because he did not wish his family or himself to be molested. The trial judge left his defence of duress to the jury but on his appeal, the court held that the applicant had given absolutely no evidence whatever either in words or of conduct which could raise any reasonable belief in him that his life was at risk. Carey JA, stated inter alia:

> This case illustrates the grave disadvantage to an accused where he seeks comfort from the dock and is thus unable to answer questions from his own counsel as to his beliefs, intentions or the like mental element. Then there was material before the jury on which they would be entitled to find that the applicant had opportunities to save himself but declined to avail himself. When he was in company of the police officer…he lied. He did not confess any fear nor attempt to leave the gang.

DIRECTIONS

9. If an offence is committed under "duress" the defendant is excused criminal liability except in cases of murder, attempted murder and a limited number of other very serious offences.

10. The defence is not available to a person who becomes voluntarily involved in criminal activity where he knew or might reasonably have been expected to know that he might become subject to compulsion to commit the act now charged.

11. It is for the defence to raise the issue of duress; once raised it is for the prosecution to disprove it. The defence must adduce evidence of each of the following four matters:

    (1) That the defendant was threatened; and

    (2) That the defendant was threatened in such a way that he believed that he, or a member of his immediate family, or someone for whom he felt responsible, would be subject to immediate or almost immediate death or serious violence and there was no reasonable avenue of escape open to the defendant to avoid the threat/s; and

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59. SCCA 65/88 [2.3.89].

(3) That the threat/s was/were the direct cause of the defendant committing the offence; and

(4) That a sober person of reasonable firmness of the defendant's age, sex and character would have been driven to act as the defendant did.

12. If the jury consider that the evidence of each of the above four matters is or may be true, the defendant is not guilty. If the prosecution satisfies the jury so they are sure that one or more of the above four matters is untrue the defence fails and the defendant is guilty.

13. In a case of duress of circumstances, the jury should be directed "to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit."[60]

EXAMPLE 1: Duress by threats

***NOTES:* In this Example it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.**

This Example has been drafted with numbered paragraphs to assist in covering the different combinations of issues that may arise.

1. The defendant has raised the defence of duress. He says that he was driven to do what he did by threats, namely [specify].
2. Because it is for the prosecution to prove the defendant's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for the defendant to prove that it does apply.
3. You must first decide whether the threats to which the defendant referred were ever in fact made. If you are sure that they were not made, the defence of duress does not arise and your verdict will be "Guilty". However, if you decide that the threats were or may have been made, they might provide a defence to the charge. Whether they actually do so depend on your answers to the following questions:
   (1) First you must ask whether the defendant acted as he did because he genuinely and reasonably believed that if he did not do so he / a member of his immediate family would be killed or seriously injured either immediately or almost immediately. If you are sure that this was not the case, the defence of duress does not apply and your verdict will be "Guilty". However, if you

60. *R v Martin* [1989] 88 Cr App R 343.

decide that this was or may have been his belief you must go on to consider a further question. [Here go to paragraph (2) if the issue of escape from / avoidance of the threats arises. Otherwise go to paragraph (3).]

(2) You must next ask whether, before acting as he did, the defendant had an opportunity to escape from / avoid the threats without death or serious injury, which a reasonable person in the defendant's situation would have taken but the defendant did not. [Here refer to any escape or avoidance route canvassed during the trial, e.g. calling for help or going to the police.] If you are sure that this was the case, the defence of duress does not apply and your verdict will be "Guilty". However, if you decide there was or may have been no opportunity to escape or avoid the threatened action you must go on to consider a further question.

(3) You must next ask whether a reasonable person, in the defendant's situation and believing what the defendant did, would have done what the defendant did. By a reasonable person I mean a sober person of reasonable firmness of the defendant's age and sex [here refer to any other relevant characteristics that may have been canvassed during the trial - see the Legal Summary above]. If you are sure that a reasonable person would not done what the defendant did, the defence of duress does not apply, and your verdict will be "Guilty". However, if you decide that a reasonable person would or may have done what the defendant did: [either, if the issue referred to in paragraph (4) does not arise,] the defence of duress does apply and your verdict will be "Not Guilty" [or, if the issue referred to in paragraph (4) does arise,] you must go on to consider one final question.

(4) You must finally ask whether the defendant had voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit crime by threats of violence from other people. The prosecution say that he did by [e.g. getting involved with other criminals who might make such threats if he let them down or came to owe them money]. But it is for you to decide. If you are sure that the defendant did voluntarily put himself in such a position, the defence of duress does not apply and your verdict will be "Guilty". However, if you decide that he did not do so or may not have done so, the defence of duress does apply and your verdict will be "Not Guilty".

Route to verdict – Duress by Threats

NOTES:

- In this Route to verdict it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.
- It is also assumed that the issues referred to in questions 3 and 5 both arise. If either or both did not do so, the route to verdict must be drafted in such a way as to reflect this. Question 1 Was D threatened in the way he says he was?
- If you are sure that he was not, return a verdict of "Guilty" and disregard the following questions.
- If you decide that he was or may have been, go to question 2. Question 2 Did D do what he did because he genuinely and reasonably believed that if he did not do it, he / a member of his immediate family would be killed or seriously injured either immediately or almost immediately?

- If you are sure that this was not the case, return a verdict of "Guilty" and disregard the following questions.
- If you decide that this was or may have been the case, go to question 3. Question 3 Before D acted as he did, did D have an opportunity to escape from / avoid the threats without death / injury to himself which a reasonable person in D's situation would have taken?
- If you are sure that this was the case, return a verdict of "Guilty" and disregard the following questions.
- If you decide that this was not or may not have been the case, go to question 4. Question 4 Would a reasonable person, in D's situation and believing what D did, have been caused to do what D did?
- If you are sure that this is not the case, return a verdict of "Guilty" and disregard question 5.
- If you decide that this was or may have been the case, go to question 5. Question 5 Had D voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit crime by threats of violence made by other people?
- If you are sure that this was the case, return a verdict of "Guilty".
- If you decide that this was not or may not have been the case, return a verdict of "Not Guilty".

18-4 Sane Automatism

Sources: **Crown Court Compendium 2016**

LEGAL SUMMARY

1. There are in law two types of automatism, namely, insane and non-insane automatism. A judge was only under a duty to leave the issue of automatism of either type to the jury where the defence had laid a proper foundation for so doing by adducing positive evidence in respect of it, which is a question of law for the judge to decide.

2. A defendant has a complete defence to any charge if he was a "sane automaton" and that automatism was not self-induced. Sane automatism arises where the defendant claims that his act alleged to constitute a crime was involuntary and was not caused by a disease of the mind within the meaning of the *M'Naghten* Rules; see Chapter 18-5. Examples might include reactions to anaesthetics, states of concussion following a blow to the head and hypnotic influences.

3. In a case of sane automatism other than by intoxication "two questions fall to be decided by the Judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say, a case which falls within the *M'Naghten* Rules, or one of non-insane automatism."[61]

61. *R v Burgess* [1991] 2 QB 92, CA.

4. Automatism is only available if the defendant suffered a complete destruction of his ability to exercise voluntary control.[62] In the case of driving offences, it is clear that the ability to drive in a purposeful manner (steering etc.) is inconsistent with involuntariness.

5. The onus is on the defendant to raise evidence of a sufficient case of automatism fit to leave the issue to the jury.[63] That will usually require medical evidence.[64] Once the issue of automatism is left to the jury the burden is on the prosecution to disprove it to the criminal standard.[65]

6. The concept of laying a foundation for the defence of automatism must be considered in the context that the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes, and that if the defence wish to displace that presumption they must give some evidence from which it may reasonably be inferred that the act was involuntary: *Bratty v Attorney-General, of Northern Ireland;*[66] *Jacob (Benedict) v R.*[67]

7. Where the issues of both insanity and non-insane automatism arose in the same case the trial judge should distinguish between them in his summing-up and explain that whereas it is for the defence to prove insanity it is not for them to prove automatism; it is for the prosecutor to negate it once the defence has laid a foundation for it: *Jacob (Benedict) v R.*[68]

8. If the automatism is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) the jury will need to be directed in relation to voluntary intoxication: see Chapter 9.

9. Where, the only cause alleged for the "unconscious" act in question was a defect of reason from disease of the mind, namely, psychomotor epilepsy, and that cause was rejected by the jury, there could be no room for the alternative defence of automatism, either insane or non-insane, and that, accordingly, the trial judge was right in not leaving that defence to the jury: *Bratty v Attorney General of Northern Ireland* (House of Lords) [1963] AC 386.[69]

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62. *R v Coley* [2013] EWCA Crim 223; *Attorney General's Reference No 2 of 1992*, 97 Cr App R 429, 434.
63. *Hill v Baxter* [1958] 1 QB 277 DC; *Broome v Perkins*, 85 Cr App R 321, DC; *R v Burgess* [1991] 2 QB 92 CA.
64. *Bratty v A-G for Northern Ireland* [1963] AC 386; see also *R v C* [2007] EWCA Crim 1862.
65. *Bratty v A-G for Northern Ireland* [1963] AC 386 HL.
66. [1963] AC 386.
67. (1997) 56 WIR 255.
68. Ibid.
69. *Reg. v Cottle* [1958] N.Z.L.R. 999; *Woolmington v Director of Public Prosecutions* [1935] AC 462; 51 T.L.R. 446; 25 Cr App R 72, HL; *Mancini v Director of Public Prosecutions* [1942] AC 1; 58 TLR 25; [1941] 3 All ER 272; 28 Cr App R 65, HL; *Hill v Baxter* [1958] 1 QB 277; [1958] 2 WLR 76; [1958] 1 All ER 193; 42 Cr App R 51, considered.

DIRECTIONS

10. Once evidence is raised by the defence that when D did the act alleged he was unable to exercise any control over his actions, it is for the prosecution to make the jury sure that D had not completely lost his ability to exercise that control.
11. If the jury consider D was, or may have been, completely unable to exercise any control over his actions and this arose, or may have arisen, from some wholly involuntary cause D is not guilty.
12. Automatism which is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) – e.g. by taking alcohol while using some types of prescribed drugs or failing to have regular meals while taking insulin – may still provide a defence, provided that D was not at fault to the degree required by the offence with which he is charged. In some cases the question of fault may be resolved by considering whether D was reckless in causing the state of automatism to exist.

EXAMPLE 1: Automatism

The central issue in this case is whether, when he [specify], D was in control of his actions or whether he was, or may have been, because of [specify cause e.g. concussion], in a state of automatism*; that is to say his state at that time was such that he acted involuntarily and was unable to exercise any control over his actions. A person is only in a state of automatism if he is unable to exercise any control at all over his actions: someone who is partially in control of his actions is not in that state.

It is not for D to prove that he was in such a state but for the prosecution to prove, so that you are sure of it, that he was not. If you are sure that he was not in a state of automatism, then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty. If on the other hand you decide that he was, or may have been, in a state of automatism, then you will find D not guilty. As to this issue [review evidence].

***NOTE:** The word "automatism", despite being a legal term, is used since (a) it is likely, where this is an issue, that this word will have been mentioned at some point during the case and (b) it is useful 'shorthand' to describe a complete loss of the ability to exercise control over a person's actions.*

EXAMPLE 2: Where Automatism is Self-Induced – Offence of Specific Intent

The central issue in this case is whether, when he [specify e.g. wounded V], D was in control of his actions or whether he was, or may have been, in a state of automatism*; that is to say his state at that time was such that he acted involuntarily and was unable to exercise any control over his actions. A person is only in a state of automatism if he is unable to exercise any control at all over his actions: someone who is partially in control of his actions is not in that state.

It is not for D to prove that he was in such a state but for the prosecution to prove, so that you are sure of it, that he was not. If you are sure that he was not in a state of automatism then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty.

If on the other hand you decide that D was, or may have been, in a state of automatism, you must go on to consider what caused him to be in that state. The evidence about the cause of this state is [specify e.g. D was on a course of prescribed drugs, which were supplied with a written warning not to drink any alcohol whilst taking them, but that shortly before the incident he had drunk e.g. 7 bottles of beer.

If you decide that although he was, or may have been, in a state of automatism you are sure that this was caused by D, against written advice which he knew about, mixing prescribed drugs with alcohol then, in law, he is responsible for being in a state of automatism. In these circumstances, whilst he could not have formed any intent to [specify e.g. cause V really serious harm] and so is not guilty of [specify e.g. wounding with intent] he is nevertheless guilty of the "simple" offence of [specify e.g. wounding] because if he had not taken alcohol whilst on a course of prescribed drugs, he would not have got into a state of automatism.

18-5 *M'Naghten* Insanity including Insane Automatism

Sources: **Crown Court Compendium 2016; Crown Court Bench Book 2010**

LEGAL SUMMARY

1. When a defence of insanity is put forward by the defence on a criminal charge, the defendant must prove that at the time of committing the criminal act he was labouring under a 'defect of reason' resulting from "disease of the mind."[70] "Disease of the mind," within the meaning of the *M'Naghten* Rules, is a malfunctioning of the mind caused by disease and did not include a malfunctioning of the mind of a transitory effect caused by the application to the body of some external factor, such as insulin.
2. The onus of raising and proving the insanity of an accused person rests upon the defence who must discharge that burden on a balance of probabilities.[71] The defence must point to

70. *R v Sullivan* [1984] AC 156 (House of Lords).
71. *R v Moses Heath* SCCA 57/89 [15.6.92].

a sufficiency of evidence to raise a *prima facie* case that the accused, at the relevant time, was labouring under a defect of reason from disease of the mind and that, in consequence of the defect of reason due to that disease, he either did not know what he was doing, or if he did know what he was doing, he did not know that he was doing what was wrong. The fact of calling psychiatric evidence on behalf of the defence is not in itself sufficient to raise such *prima facie* case.[72]

3. It does not matter whether the cause of the impairment was organic, as in epilepsy, or functional, or whether the impairment itself was permanent or was transient and intermittent, provided it subsisted at the time of commission of the act.[73]

4. The question is not whether D suffers from some recognised mental illness; a defendant can be treated as insane in law if the defect of reason arises from a medical condition that affects the "mental faculties of reason memory and understanding"[74] such as epilepsy,[75] diabetes,[76] or sleepwalking,[77] or a tumour.[78] It is a question of law not of medicine.

5. The plea of insanity may take the form of insane automatism (i.e. that D has a total loss of control as a result of some disease of the mind). The defence is mutually exclusive from that of sane automatism which requires that the total loss of control arises from some external factor.[79] It is for the judge to distinguish clearly between them as a matter of law. Where the evidence is capable of supporting both insanity and sane automatism (because the defendant suffers a combination of internal and external factors) the sane automatism defence should be left to the jury.[80] The direction will be complicated by the fact that the burden of proof is on the Crown in sane automatism and on the defendant in a case of insanity.[81]

6. In *R v Quick*[82] the facts did not support a defence of insanity; accordingly, the question of whether Q was suffering from automatism should have been left to the jury for them to decide whether Q had been suffering from a temporary malfunctioning of the mind caused by the taking of insulin and, if so, whether in the circumstances he was relieved from the consequences of that self-induced incapacity.

72. *James (Arleigh) v R* (1997) 54 WIR 86.
73. *R v Sullivan* [1984] AC 156.
74. Ibid.
75. Ibid.
76. *R v Hennessy* [1989] 2 All ER 9.
77. *R v Burgess* [1991] 2 QB 92.
78. *R v Kemp* [1957] 1 QB 399.
79. *R v Burgess* [1991] 2 QB 92.
80. *R v Roach* [2001] EWCA Crim 2698.
81. *R v Burns* (1973) 58 Cr App R 364.
82. [1973] QB 910, 57 Cr App R 722.

7. If there is an issue as to D's mental state at the time of trial, that is dealt with by the rules governing fitness to plead[83] – see Chapter 3-2.

8. In a case where the defence is one of self-defence based on insane delusions the jury will need careful guidance.[84]

9. The verdict of insanity must be returned by a jury; it is not for the judge to endorse an agreed plea.[85] If at trial the jury is satisfied that the defendant did the act or made the omission charged but was suffering from mental disorder at the time when the act was done or omission made the jury *shall* return a special verdict of guilty but insane.[86] This special verdict shall not be returned except upon the written or oral evidence of two or more qualified medical practitioners.[87]

10. Where a special verdict is returned the court shall order the defendant to be kept in custody at the court's pleasure, or make a supervision and treatment order or make a guardianship order.[88]

11. If after considering evidence of the issue of automatism a jury are left in real doubt whether or are not sure, so as to be satisfied beyond reasonable doubt, or that the act was involuntary, they should acquit.[89]

12. Where, on a charge of murder, the defence put forward a plea of diminished responsibility within section 5 of the Offences Against the Person Act, it is the duty of the prosecution, if they have evidence tending to prove insanity, to cross-examine on that basis and to call evidence to prove insanity.[90]

DIRECTIONS

13. Explain to the jury that every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his/her crimes unless the contrary is proved.

14. It is for D to prove, on the balance of probabilities, that as a result of disease of the mind he was labouring under such a defect of reason that he did not know (a) the nature and quality of his act or (b) that what he was doing was wrong.

83. Adapted from 2016 Crown Court Compendium.
84. *R v Oye* [2013] EWCA Crim 1725.
85. Adapted from 2016 Crown Court Compendium.
86. Section 25E(1)(b) Criminal Justice Administration Act.
87. Section 25E(2) Criminal Justice Administration Act.
88. Section 25E(3) Criminal Justice Administration Act.
89. *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.
90. *R v Bastian (Stephen)* (1958) 42 Cr App R 75; [1958] 1 WLR 413.

EXAMPLE

D has raised the defence of insanity; insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.

In law, a person is presumed to be sane and reasonable enough to be responsible for his actions. But if a person proves that it is more likely than not that, when he did a particular act, because he was suffering from a disease of the mind either he did not know what he was doing or he did not know that what he was doing was wrong, by the standards of reasonable ordinary people, he is to be found "not guilty by reason of insanity."

You should address this aspect of the case in two stages:

Firstly, you must decide whether D has proved that at the time he [specify action/s] it is more likely than not that he was suffering from a disease of the mind. In this case you have heard evidence from [specify witnesses and their opinions].

If D has not proved that he was suffering from a disease of the mind, then he does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find him guilty.

If however you decide that it is more likely than not that D was suffering from a disease of the mind, then you must go on to decide whether, as a result of that disease, it is more likely than not that:

- either D did not know what he was doing when he [specify];
- and/or D did not know that what he was doing when he [specify] was wrong by the standards of reasonable ordinary people.

If D has not proved either of these things then he does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find him guilty. If D has proved that it is more likely than not that as a result of his disease of mind he did not know what he was doing and/or he did not know that what he was doing was wrong, then you will find him not guilty by reason of insanity.

***NOTE:* In many cases there is no issue that D was suffering from a disease of the mind; the real issue is whether as a result of that he did not know what he was doing and/or that what he was doing was wrong. Directions must be tailored to reflect this**

18-6 The Defence of Accident

Sources: **Cross and Jones's *Introduction to Criminal Law* (9th Edn.)**

LEGAL SUMMARY

1. A person is generally taken to be responsible for his actions unless they are accidental so, if the defence of an accident succeeds it is a complete defence in law.

2. In Cross and Jones's *Introduction to Criminal Law* (9th Edn.) at paragraph 4.12, pages 56, 57, the learned authors state:

> "Accident" is a word which has several shades of meaning but, when we speak of the accused, constitutes the *actus reus* of the crime charged, the allegation always is that the accused did not intend to produce the prohibited consequences.
>
> The typical instance is one in which someone who was conscious of and in control of his bodily movements and aware of all relevant circumstances did not foresee that his conduct would have the prohibited consequences. The accused aims a bullet at a crow, but owing to the presence of a high wind or the fact that he is a poor shot he hits a house pigeon. In either event, he is said to have killed the bird accidentally.
>
> An accident may be caused by conscious reflex action. Thus Hale gives as a case of excusable homicide that in which a man's hand shakes while shooting at the butts, with the result that the arrow kills a bystander.
>
> When an accused alleges that an occurrence was an accident, he may simply mean that he had no causal connection with it; but this is a denial of the *actus reus* and accordingly outside the purview of these paragraphs.'

3. If a defendant raises the defence of accident to a criminal charge, the trial judge is under a duty to direct the jury as to the meaning of the term 'accident', but no such duty arises where the accused is charged with murder and the defence suggests that the death was the result of an accident caused by the deceased: *R v Muir (Henzel)*.[91] The evidence at trial disclosed that the arresting officer saw the applicant at the station and he asked him how the deceased got shot, and the answer was, 'Hartwell shot himself because of problems he was having'. He then cautioned the applicant and the applicant told him: 'Hartwell [i.e. the deceased] cock the gun; hold it by the mouth and gave it to me by the handle, to release the hammer. In doing so, he pulled the trigger and a bullet went off, hitting Hartwell.' The Court of Appeal held that although it is the duty of the trial judge to

91. (1995) 48 WIR 262.

leave for the consideration of the jury every issue fairly arising from the evidence, even where the defence has not relied on it or even if it is inconsistent with any defence which has been raised, on a charge of murder where the defence is that the accused did not cause the death of the deceased who had died by his own hand (either by accident or by suicide) and where the accused did not admit to having done any act which could have caused the discharge of the fatal bullet from the firearm it would amount to an invitation to speculation for the trial judge to direct the jury on the question of manslaughter.

4. In *Director of Public Prosecutions v Bailey (Michael),*[92] on appeal from Jamaica, their Lordships held that where there was a struggle between three men, two of them wanting to get the gun held by the other (a special constable), it is possible that the killing was murder, or that it was provoked and so was manslaughter, or that it was an accident, or that it happened deliberately but in self-defence.

5. See also *Ferguson v R*[93] where on a charge of attempted murder, the prosecution claimed that the appellant had pushed his victim and thrown her sister into the sea. In his defence, the appellant maintained that his victim had slipped and, in falling, had grabbed hold of her sister, causing them both to fall into the sea. The trial Judge gave the jury a general direction as to the onus of proof but did not direct them that, once the defence of accident had been raised, the onus fell on the prosecution to prove that the accident had not taken place as alleged. The appellant was convicted and appealed against his conviction. The Court of Appeal (Bahamas) held, dismissing the appeal, that the allegation by the appellant at his trial that his victim and her sister had fallen into the sea by misadventure without any act of his which contributed to that misadventure did not raise a true issue of "accident"; accordingly, there was no obligation on the trial judge to direct the jury that an onus fell on the prosecution to show that the accident as alleged did not occur and the summing-up as to the onus of proof was adequate and satisfactory.

BURDEN OF PROOF:

6. Where a defendant puts forward an answer or explanation, or, raises an issue of accident to a charge of murder or manslaughter, he does not assume any burden of proving that issue. The onus is on the prosecution to negative the issue or answer of accident; *R v Simmons.*[94]

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92. (1993) 44 WIR 327.
93. (1983) 34 WIR 1.
94. (1976) 24 WIR at p. 155.

DIRECTIONS

7. In *R v Murtagh and Kennedy,*[95] the court outlined what the proper direction to the jury should be (at page 83):

> Having regard to the evidence, it was pre-eminently a case where it was essential for the judge to make clear to the jury three possible positions in which the jury might find themselves, bearing in mind throughout that it was not for the accused to establish their innocence: that is to say (1) if they accepted the explanation of the accused, they must acquit. (2) Short of accepting that explanation, if it left them in doubt, they must acquit. (3) On consideration of the whole of the evidence they must be satisfied of the guilt of the accused of one or other of the crimes alleged against them.

8. In *Baptiste v The State,*[96] there was evidence on which to base the pleas of self-defence, provocation and accident. Kelsick CJ (Ag) stated at page 265:

> We consider it important for the future guidance of judges to summarise the proper directions which should be given to the jury when the special "defences" or issues of self-defence, provocation or accident are raised either directly by the defendant or indirectly from the evidence. In every such case the Judge must, in addition to the general directions as to the onus of proof being on the prosecution, give a special direction that a further burden rests on the prosecution to negative beyond reasonable doubt the existence of these answers. The jury must be reminded that, when the prosecution does not discharge the onus, the verdict in respect of self-defence or accident should be an acquittal, and, in respect of provocation, manslaughter.

EXAMPLE

Sealy (Stephen) v R[97] provides useful guidance as to the summing up to the jury on the issue of accident. The defence in that case was that P was shot in his foot during a struggle with the appellant when a gun which P had accidentally, went off. The Judge dealt with accident in his summing-up as follows:

> Before you the jury can convict the [appellant], the prosecution must prove several things. They must prove that the act which caused the wounding was a conscious act by the [appellant], that is that he was in command of his faculties; that it was deliberate intentional wounding without justification or excuse or that it was not accidental because if the wound was inflicted accidentally then no crime would have been committed and the [appellant] would be entitled to an acquittal.
>
> So, the prosecution must negate accident. They must show by evidence that the wounding was not caused accidentally. The [appellant] does not have to prove anything, he is presumed to be innocent and that presumption remains throughout the trial until after your deliberation you find him guilty of the offence as charged.

There is no onus or responsibility on the [appellant] to prove anything.

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95. (1955) 39 Cr App R 72.
96. (1983) 34 WIR 253.
97. (2000) 60 WIR 27 (Court of Appeal Barbados).

19. DEFENCES – MURDER

19-1 Diminished Responsibility – Abnormality of Mind
19-2 Provocation

19-1 Diminished Responsibility - Abnormality of Mind

Sources: **Trinidad and Tobago Criminal Bench Book 2015; *Blackstone's* 1999**

LEGAL SUMMARY

1. The term "diminished responsibility," absolves an accused person of part of the liability for his criminal act if he suffers from such abnormality of mind as to substantially impair his responsibility in committing or being a party to an alleged violation. The doctrine of diminished responsibility provides a mitigating defence in cases in which the mental disease or defect is not of such magnitude as to exclude criminal responsibility altogether.
2. The defence of diminished responsibility was introduced into the laws of Jamaica by the **Offences against the Person Law 43 of 1958** which is in the same terms as s.2(1) of the English Homicide Act 1957. Section 5(1) of the Act provides that if a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
3. This partial defence is available only to murder and is not available on a charge of attempted murder.[1]
4. The onus of establishing the partial defence is laid on the defendant who raises it. Section 5 (2) provides inter alia:

> …on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

5. The Act goes on immediately in s.5(3) to provide that, if diminished responsibility is shown, the defendant is to be convicted not of murder but of manslaughter.

1. *R v Campbell* [1997] Crim LR 495.

6. In accordance with principle, s.5(2) has always been read as imposing on the defendant a burden of proof only on the balance of probabilities, and not requiring the standard demanded of the Crown when it bears the burden of proof in a criminal case, viz of making the jury sure, that is beyond reasonable doubt.

EVIDENCE

7. In practice, the defence will only be available if the defendant adduces expert evidence of his mental state.[2]

8. The following guidelines have been issued by the Court of Appeal in *R v Valerie Witter* 12 JLR 1261:

> It seems from the previous experience of the court that there appears to be some misunderstanding as to the nature or manner of the proceedings which should take place where the defence is seeking to enter a plea of guilty on the ground of diminished responsibility to a charge of murder. It seems to be uncertain as to whether the evidence tendered before the court should be tendered by the defence or by the prosecution but one thing is clear and that is that medical evidence must be tendered to the court, it was impossible for a person accused of murder to enter a plea of guilty of manslaughter on the ground of diminished responsibility but since the decision in the case of *R. v. Maurice George Cox*,[3] it is perfectly in order for the defence to invite the prosecution to accept such a plea and for the prosecution, with the permission of the court, to accept the invitation and I quote from a passage of the judgment of Lord Justice Winn who presided over the Court of Appeal in that case:
>
> > This is an appeal by leave of the single judge against a sentence which was passed upon the appellant when he had been convicted of manslaughter on the ground of diminished responsibility, having been indicted for murder. That occurred on March 20, 1967, the victim who was killed, having been his own wife and her death having occurred on the evening of January 27. It is, the court thinks, worthy of remark that from the very outset of the trial it was quite clear not only that the accused was prepared to plead guilty to manslaughter on the grounds of diminished responsibility, but that the medical evidence available, in the possession of the prosecution as well as the defence, showed perfectly plainly that that plea was a plea which it would have been proper to accept. However, the matter proceeded to be tried by the jury, as a result of which time and money was spent and the appellant was no doubt kept in some anxiety and uncertainty whilst the trial went on. The court desires to say yet again, not at all for the first time in the B experience of every member of the court, that there are cases where on an indictment for murder, it is perfectly proper, where the medical evidence is plainly to this effect,

2. *Bunch (Martin John)* [2013] EWCA Crim 2498.
3. (1968) 52 Cr App R 130.

> to treat the case as one of substantially diminished responsibility and accept, if it be tendered, a plea of manslaughter, on that ground, and avoid a trial for murder (per Henriques, P).

9. When the defendant raises this defence, the jury must consider not only the medical evidence but also the whole evidence of the facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality:[4] *Walton*.[5]

10. The meaning of the term 'abnormality of mind', which is not a medical term, was considered by the Court of Criminal Appeal in *Byrne*.[6] Lord Parker CJ said:

> Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naghten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise willpower to control his physical acts.
>
> Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.
>
> The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.

11. Abnormality of mind is not in itself sufficient; it must be such as to 'substantially impair' the accused's 'mental responsibility'. Whether it does so:

> …is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some

4. 2015 Trinidad and Tobago Criminal Bench Book.
5. (1977) 29 WIR 29 (PC Barbados) See also *Robinson v The State* [2015] UKPC 34, a murder case, in which the Privy Council concluded that the trial judge had not sufficiently analysed or guided the jury as to the evidence of two doctors, forensic psychiatrists called by the defence to establish diminished responsibility.
6. [1960] 2 QB 396.

> impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called ‹substantial›, a matter upon which juries may quite legitimately differ from doctors (Byrne [1960] 2 QB 396, per Lord Parker CJ at p. 404).

12. The term "impairment must be substantial" is to be interpreted as in *Golds*[7] where the Court of Appeal concluded that the jurisprudence on how to direct jurors was clear: "Judges…should either refuse to provide any further explanation of the term, …or if asked for further help, they should be given a direction of the kind adopted in *R v Simcox,* Times (February 25, 1964) [to the effect that it is possible for the jury to find that an impairment could have a modest impact which is more than minimal or trivial yet which still could not properly be described as substantial]."

13. The Court of Appeal in *Egan*[8] said that explicit guidance should be given to the jury as to the meaning of 'substantial'. This should be done by adopting one of the two meanings approved in *Lloyd*,[9] namely that the jury should approach the word in a broad common-sense way, or 'that the word meant more than some trivial degree of impairment but less than total impairment'. However, in *Mitchell*,[10] the Court of Appeal declined to hold that such guidance was essential.[11]

14. Where alcohol or drugs are factors to be considered by the jury, the best approach is that adopted by the judge and approved by the Court of Appeal in *Fenton*.[12] The jury should be directed to disregard what, in their view, was the effect of alcohol or drugs upon the accused, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes and is not therefore within the section. Then, the jury should consider whether the combined effect of the other matters, which do fall within the section, amounted to such abnormality of mind as substantially impaired the accused's responsibility within the meaning of "substantial" set out in *Lloyd,*[13] *Gittens.*[14] *Dietschmann*:[15] the jury should be directed, e.g.:

> Assuming that the defence have established that the defendant was suffering from mental abnormality... the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the accused had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of

7. [2014] EWCA Crim 748.
8. [1992] 4 All ER 470.
9. [1967] 1 QB 175.
10. [1995] Crim LR 506.
11. Adapted from *Blackstone's Criminal Practice* (1999) B1.16.
12. (1975) 61 Cr App R 261 (CA).
13. Ibid.
14. [1984] QB 698 (CA).
15. [2003] UKHL 10.

mental responsibility arising from that abnormality. But you may take the view that both the accused's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the accused satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him.[16]

15. It is best to omit references to "insanity" in a direction on diminished responsibility.[17]

EXAMPLE[18]

The prosecution must prove to you, beyond reasonable doubt, all the facts which go to make up the accused's guilt. But where the accused raises the defence of diminished responsibility, then it is for the accused to prove it. However, the accused's task is not as heavy as that for the prosecution in proving guilt. It is enough if the accused satisfies you that its case is more probable (more likely than not). If it does that you must find him not guilty of murder and guilty of manslaughter.

Now there are three elements which the accused must prove before this defence can be established. They must all be present. The first is that at the time of the killing the accused suffered from an abnormality of mind. The word "mind" includes perception, understanding, judgement and will. An abnormality of mind means a state of mind so different from that of an ordinary human being that a reasonable person (in other words yourselves) would judge it to be abnormal.

Secondly, the abnormality of mind must arise from either a condition of arrested or retarded development of mind; or any inherent cause; or it must be induced by disease or injury. So far as these first two elements are concerned, although the medical evidence which you have heard is important, you must consider not only that evidence, but the evidence relating to the killing and the circumstances in which it occurred. You must also consider the accused's behaviour both before and after the killing, as well as taking into account his medical history.

Thirdly, the accused must show that the abnormality of mind must have substantially impaired his mental responsibility for what he did, that is his acts (or omissions) which caused the death.

Substantially impaired means just that. You must be satisfied that the accused's abnormality of mind was a real cause of the accused's conduct. He need not prove that his condition was the sole cause of his conduct, but he must show that it was more than a merely trivial cause, in other words more than something that did not make any real/ appreciable difference to his ability to control himself.

16. Adapted from Trinidad and Tobago Criminal Bench Book.
17. *Adams* (unreported) 29 January 1985, (Trinidad and Tobago Criminal Bench Book).
18. Adapted from Trinidad and Tobago Criminal Bench Book 2015.

You should approach all of these three questions in a broad, common sense way. If the defence has failed to prove any one of these elements then, provided that the prosecution has proved the ingredients of murder to which I have referred beyond reasonable doubt, then your verdict must be guilty of murder. If, on the other hand, the defence has satisfied you that it is more likely than not that all three elements of the defence of diminished responsibility were present when the accused killed X, then your verdict must be, not guilty of murder, but guilty of manslaughter on the grounds of diminished responsibility.

19-2 Provocation

Sources: **Crown Court Bench Book 2010; Offences Against the Person Act**

LEGAL SUMMARY

1. The law as to provocation is governed by the **Offences Against the Person Act.** Section 6 of the Act states as follows:

   > 6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

2. In *Phillips v R*[19] Lord Diplock said:

   > The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is, "Was the defendant provoked into losing his self-control"? The second, which is one not of fact but of opinion, "Would a reasonable man have reacted to the same provocation in the same way as the defendant did?"

3. Section 6 therefore involves two questions: (a) is there any evidence of specific provoking conduct of the accused, and (b) is there any evidence that the provocation caused him to lose his self-control? If both questions are answered in the affirmative, the issue of provocation should be left to the jury notwithstanding the fact that in the opinion of the judge no reasonable jury could conclude on the evidence that a reasonable person would have been provoked to lose his self-control.[20] The section is drawn in wider terms than the definition given by Devlin J in *Duffy*.[21]

19. 53 Cr App R 132.
20. *R v Gilbert* 66 Cr App R 237, CA.
21. [1949] 1 All ER 932n.

4. Provocation is a partial defence to murder, but to no other offence at common law. Unlike the defence of diminished responsibility, once there is evidence of provocation to be left to the jury, the burden is on the prosecution to disprove provocation to the criminal standard. If the elements of murder are proved and provocation is not disproved the defendant is entitled to a verdict of manslaughter. Provocation therefore reduces murder to manslaughter; and is available as a potential defence both for a principal and an accessory.[22]

5. Words alone or conduct alone or words in combination with conduct may constitute the provocation. See *R v Jacqueline Smith.*[23] There need be no quality of wrongfulness about the words or conduct if they do in fact cause a loss of self-control.[24]

6. The loss of self-control must be sudden and temporary but there may be some delay between the provocation and loss of control. Revenge after reflection is not, however, killing under provocation. On the other hand, where the provocative conduct took place over a prolonged period of time, the cumulative effect, culminating in a comparatively trivial act of provocation causing loss of self-control, may be sufficient.[25]

7. The words or conduct may emanate from a third person, at least where they cannot sensibly be separated from the words or conduct of the victim.[26]

8. The words or conduct may be aimed at a third person causing the defendant to lose his self-control.[27]

9. The things done or said may be done or said by the deceased or anyone else.[28]

10. The "reasonable man" means "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today": per Lord Diplock in *R v Camplin (Paul*).[29]

11. Once there is evidence from any source, sufficient to be left to the jury on the issue of provocation, the onus remains throughout upon the Crown to prove absence of provocation

22. *R v Marks (Errington Lloyd)* [1998] Crim LR 676, CA.
23. SCCA 27/87 [15.12.87].
24. The persistent crying of a baby may be enough: *Doughty* [1986] 83 Cr App R 319.
25. *Ahluwalia* [1992] 4 All ER 889, [1993] 96 Cr App R 134.
26. *Davies* [1975] QB 691.
27. *Pearson* [1992] Crim LR 193.
28. *R v Davies* (P) ([1975] QB 691); *R v. Doughty* (S.) 83 Cr App R 319, CA.
29. [1978] AC 705 at 771, HL. See *Attorney General for Jersey v Holley* [2005] 2 AC 580, [2005] UKPC 23, where Lord Nichols considered the question whether the reasonable man test as explained in *DPP v Camplin* (supra)survived notwithstanding the decision of the majority of the House of Lords in *Smith (Morgan)* [2001] 1 AC 146.

beyond reasonable doubt.[30] As to the necessity for a careful direction on onus of proof, see *R v Wheeler*.[31]

ELEMENTS OF THE DEFENCE

12. The third element as defined in *Lee Chun Chuen v R*[32] is essentially a matter for the jury. In *Lee Chun-Chuen v R* Lord Morris of Borth-Y-Gest stated:

> Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from *Holmes v. Director of Public Prosecutions*.[33] In *Mancini v. Director of Public Prosecutions*[34] the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate.

13. In referring to the third element Kerr JA in *R v Hart*[35] stated inter alia:

> …It is what Lord Diplock in *Phillips* ([1969] 2 AC 130, [1969] 2 WLR 581, 53 Cr App Rep 132) categorised as 'one not of fact but opinion'. It cannot therefore be used by the trial judge as a basis for deciding whether or not the issue of provocation has been raised. What is required is evidence of a provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self-control'. If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two-fold test as laid down in *Phillips v R* ([1969] 2 AC 130, [1969] 2 WLR 581, 53 Cr App Rep 132).

30. *R v McPherson* 41 Cr App R 213.
31. [1967] 1 WLR 1531.
32. [1963] 1 All ER 73, [1963] AC 220, [1962] 3 WLR 1461.
33. [1946] AC 588, 597.
34. [1942] AC 1.
35. (1978) 27 WIR 229.

DUTY OF THE JUDGE AND COUNSEL

14. The jury should be directed that before they come to consider the issue of provocation the Crown must have proved beyond reasonable doubt that all the other elements of murder were present, including the necessary intent.[36]If there is evidence on which the jury could find provocation, counsel should regard it as their duty to point it out to the judge and to remind him, if he agrees, to leave it to the jury.[37] It does not follow from this that an appeal will not succeed if defence counsel has not advanced the defence to the jury.

WITHDRAWING THE DEFENCE

15. Where, there is only a speculative possibility of the accused having acted as a result of provoking conduct, the issue should not be left to the jury:[38] (there must be some evidence of specific provoking conduct resulting in a loss of control by the accused; the source of such evidence is immaterial as is reliance thereon by the accused).

16. "If a defence is raised in the unsworn statement although it is unsupported by any evidence, that is to say sworn testimony or documentary evidence that defence must be left to the jury but the weakness of the supporting fact base must be highlighted" (per Rowe P).[39] Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given.[40]

17. Where provocation is not left to the jury when it should have been, a conviction for manslaughter will be substituted unless the court is sure that the jury would inevitably have convicted.[41]

TRIAL JUDGE TO INDICATE EVIDENCE SUPPORTING LOSS OF SELF-CONTROL

18. Where a judge is obliged to leave provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that the defendant had lost his self-control; this is particularly important where the defence have not raised the issue.[42]

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36. *Lee Chun Chuen (alias Lee Wing-Cheuk) v R* [1963] AC 220, PC; and *R v Martindale*, 50 Cr App R 273.
37. *R v Cox (Adrian Mark)* [1995] 2 Cr App R 513, CA.
38. *R v Acott (Brian Gordon)* [1997] 2 Cr App R 94 HL.
39. *R v Wayne* Spence SCCA 202/88 [18. 6. 90]. See also *R v Crafton Tomlin* SCCA 101/89 (unreported) [16.11.90]; *R v Carlwood Thompson* SCCA 56/89 [11.12.89].
40. *R v Hart* (1978) 27 WIR 229. See also *R v Daisy Algernon* SCCA 232/88 [19.2.90].
41. *R v Dhillon (Kuljit Singh)* [1997] 2 Cr App R 104, CA.
42. *R v Stewart* [1996] 1 Cr App R 229, CA.

A DESIRE FOR REVENGE

19. Circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect and that would negative a sudden temporary loss of self-control, which is the essence of provocation. But the mere existence of such circumstances does not mean that the judge should not leave the issue to the jury if there is evidence that the accused was in fact provoked; it is for the jury to decide.[43]

SELF-INDUCED PROVOCATION

20. The mere fact that the defendant caused a reaction in others which in turn led him to lose his self-control does not preclude a successful defence of provocation.[44]

CUMULATIVE PROVOCATION

21. Although it is established that a temporary and sudden loss of self-control arising from an act of provocation is essential, it is less clear to what extent previous acts of provocation are admissible. Each case must be considered against the background of its own particular facts.[45] In *R v Brown,*[46] a direction that the jury had to find provocation in something done on the morning of the killing was approved.

FURTHER DIRECTIONS REQUESTED BY JURY

22. In *R v Norris Miller*[47] the jury after retiring communicated to the trial judge that they had failed to understand the directions on provocation and requested further directions. The Court of Appeal held that the request required a full explanation again of what was legal provocation and the three elements which they should look for to find it; the provocative act, the loss of self-control and the immediate retaliation, how they arose, their effect and how they could treat them. Appeal was allowed and verdict of manslaughter entered as the Court of Appeal was of the view that the jurors could not have applied their minds nor could they have given full consideration to the issue of provocation as to whether or not it arose in the case, and, if it did, whether it attracted a verdict of manslaughter.

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43. *R v Baillie (John Dickie)* [1995] 2 Cr App R 31.
44. *R v Johnson* (C) 89 Cr App R 148, CA.
45. *R v Thornton* 96 Cr App R 112, CA.
46. [1972] 2 QB 229, 56 Cr App R 564, CA.
47. *R v Norris Miller* SCCA 34/89 [2.11.90].

DIRECTIONS[48]

23. Discussion with the advocates before speeches is required, particularly where the defence of provocation is put in the alternative or, despite some evidence of provocation, perhaps because it is inconsistent with the case being advanced, is not being put at all.
24. The jury should be told that the burden of disproving provocation lies upon the prosecution to the criminal standard.
25. The direction will require an explanation of the two-stage test using the words of the section but, essentially, placing it within the context of the evidence in the case.
26. The provocative words or conduct should be identified, as should the development of cumulative or 'slow-burn' provocation.
27. Any relevant characteristics of the defendant should be identified and their relevance to the stage 2 objective test explained

EXAMPLE[49]

Provocation is an issue raised in the evidence. It is not for the defendant to prove that he was provoked but for the prosecution to prove so that you are sure that provocation is excluded. For that reason, it is desirable that you consider provocation first.

The word 'provocation' in ordinary usage can mean any annoying remark or behaviour. But in the context of a trial for murder it has a specific legal meaning which I need to explain. Provocation is words spoken or acts done by V which would cause any reasonable person and actually caused the defendant suddenly and temporarily to lose his self-control and kill. There is therefore a two-stage test to be applied".

Loss of control under provocation

The first stage is: Was the defendant, by words spoken or acts done by V, suddenly and temporarily caused to lose his self-control? The defendant told you that locally he has a reputation for being homosexual. He says that in fact he is not. While the defendant was at the bar V, he said, called to him, "You're a 'Wus'." The defendant turned and asked V what he had said. V replied, "I called you a lady-man". The defendant went over to V and protested. V laughed at him. V placed a hand on each side of the defendant's face and kissed him on the lips. As V stood back, the defendant took a knife from his pocket and stabbed V once to the chest. V died before the ambulance arrived. No-one else recalls V using the words "Wus" or "lady-man", but several customers close by confirm that the defendant was protesting at something V had said and that V kissed the defendant on the lips.

48. Adapted from 2010 Crown Court Bench Book.
49. Adapted from the 2010 Crown Court Bench Book.

The defendant ran out of the public house. An hour later he gave himself up to the police. When he was cautioned he immediately gave the account he has now given to you.

You may conclude that V undoubtedly did use provocative words and conduct towards the defendant. The defendant describes his reaction as, "I lost it". What is required is a sudden and temporary loss of self-control. Mere anger, or a desire to teach V a lesson for the insult, is not enough. If you are sure that the defendant did not lose his self-control; if, in other words, you are sure the defendant reacted with thought and deliberation: provocation does not apply and you would move on to consider diminished responsibility. If, however, you conclude that the defendant was or may have been provoked to lose his self-control, you reach the second stage.

Reasonable man with the defendant's characteristics

The second stage is: would a reasonable person placed in the defendant's situation have reacted as the defendant did by stabbing V in the chest?

Who is the reasonable person for this purpose? He is a person of the same age and gender as the defendant. He is therefore a man of 23 years. He is a person having the powers of self-control which you would expect of an ordinary, sober person. You have heard that the defendant had consumed 6 pints of cider. You must assume that the reasonable person would have been sober and not under the influence of alcohol. The reasonable person is someone with the defendant's characteristics. He is therefore a person who has been taunted about his sexuality on previous occasions. That may well affect the gravity of the provocation for this defendant and is something you need to consider when judging the response of a person with ordinary powers of self-control. However, you have also heard that the defendant has been diagnosed as suffering an anxiety disorder, one feature of which may be to render the defendant more than usually sensitive and touchy. It is disputed by the prosecution that this was a symptom of the defendant's disorder. If you thought that a feature of the defendant's disorder was or may have been an unusual tendency towards sensitivity or touchiness it is a feature which, for present purposes, you must ignore. The reason is that the reasonable person must be presumed to have ordinary powers of self-control and not to be unusually sensitive or touchy when subjected to taunting.

If you are sure the reasonable man I have described would not have reacted under provocation as the defendant did, provocation is excluded and you can proceed to consider diminished responsibility. If you conclude that the reasonable may have reacted as the defendant did, your verdict should be not guilty of murder but guilty of manslaughter on the ground of provocation.

Route to verdict

Please consider question 1 and proceed as directed.

Question 1

Did the defendant, by his deliberate and unlawful act, kill V?

- Admitted. Proceed to question 2.

Question 2
Did the defendant, when he stabbed V, intend either to kill or to cause him really serious injury?

- If you are sure the defendant intended to kill or to cause really serious injury, proceed to question 3.
- If you are not sure the defendant intended to kill or to cause really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent.

Question 3
When the defendant stabbed V had he, suddenly and temporarily, lost his self-control as a result of words used by or the conduct of V?

- If you conclude that he may have done, proceed to question 4.

Question 4
Would a reasonable man placed in the defendant's situation have reacted to the provocation and killed as the defendant did?

- If you are sure he would not, proceed to question 5.
- If you conclude that he may have done, verdict not guilty of murder but guilty of manslaughter on the ground of provocation.

20. SEXUAL OFFENCES

20-1 Special Provisions
20-2 Sexual Offences – Historical Allegations
20-3 Sexual Offences – Grooming of Children
20-4 Sexual Offences – Consent and Reasonable Belief in Consent
20-5 Capacity and Voluntary Intoxication
20-6 Recent Complaint and Distress

20-1 Special Provisions

Sources: **Sexual Offences Act; Crown Court Compendium 2016**

LEGAL SUMMARY

1. Section 24 of the **Sexual Offences Act** states:

   "It is hereby declared that subject to s 63 of the **Child Care and Protection Act**, the common law presumption that a boy under the age of fourteen years is incapable of committing rape or any other offence involving vaginal or anal intercourse is abolished."

2. Section 26(1) provides:

   "Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the trial judge to give a warning as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence."

   Subsection (2) makes it discretionary for the judge to give a warning to the jury to exercise caution in determining- (a) whether to accept the complainant's uncorroborated evidence; and (b) the weight to be given to it.

3. Section 27(1) provides:

   "In any proceedings in respect of rape or other sexual offences under the Act no evidence shall be adduced and no question shall be asked in cross-examination relating to the sexual behaviour of the complainant with a person other than the accused unless leave of the judge is obtained on application made by or on behalf of the accused."

   Subsection (2) states the procedure for such application.

4. Section 28 provides for the anonymity of the complainant:

"28. -(1) Subject to subsections (2), (3), (4) and (7), after an allegation has been made that a person has been the victim of rape or any other sexual offence under this Act-

(a) no report of the proceedings in relation to the offence shall reveal the name or address, or include any particulars calculated to lead to the identification of the complainant either as being the person against or in respect of whom the proceedings are taken or as being a witness therein;

(b) (no picture of the complainant shall be published except in so far (if at all) as may be permitted by the direction of the court; and

(c) where a person is charged with rape or any other sexual offence, no matter likely to lead members of the public to identify. a person as the complainant in relation to that accusation shall, during the complainant's lifetime, be published in a written publication available to the public or broadcast or included in a cable programme.

(2) Nothing in subsection (1) prohibits the publication or broadcasting or inclusion in a cable programme of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence.

(3) The trial Judge may-

(a) on an application by the accused, direct that the prohibition against identifying the complainant be inapplicable, if he is satisfied that-

(i) such a direction is required for the purpose of inducing persons likely to be needed as witnesses to come forward to give evidence at the trial; and

(ii) the defence of the accused is likely to be substantially prejudiced if such direction is not given;

(b) direct that the prohibition against identifying the complainant be inapplicable to any matter specified in the direction, if he is satisfied that-

(i) such a prohibition would impose a substantial and unreasonable restriction on the reporting of the trial proceedings; and

(ii) the removal or relaxation of the restriction would be in the public interest.

(4) …"

See Chapter 3-8 (supra) for approved directions.

DIRECTIONS

5. In relation to section 28, the jury will need careful direction to ensure that:

   (1) no unfair prejudice to the defendant is drawn from the use of such measures; and

   (2) the disadvantages faced by the defendant because of the inability to know the identity of the witness are highlighted.

THE DANGERS OF ASSUMPTION

6. The following is adapted from the 2016 Crown Court Compendium Chapter 20-1:

   I. In *D*[1] the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.

   II. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in *Miller*[2]

   > "In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, *R v. MM* [2007] EWCA Crim 1558, *R v. D* [2008] EWCA Crim 2557 and *R v. Breeze* [2009] EWCA Crim 255).

   III. In *Miller*, the Court of Appeal endorsed the following passage from the 2010 Bench Book "Direction the Jury:"

   > The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely

1. *R v JD* [2008] EWCA Crim 2557 see also *Breeze* [2009] EWCA Crim 255.
2. [2010] EWCA Crim 1578.

> variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

IV. The use of such a direction, properly tailored to the case does not offend the common-law principle that judicial notice can be taken only of facts of particular notoriety or common knowledge.[3] Parties are not permitted to adduce generic expert evidence of the range of known reactions to non-consensual sexual offences.

V. This direction may be given at the outset of the case or as part of the summing up. Whenever it is given it is advisable to discuss the proposed direction with counsel.[4] Considerable care is needed to craft the direction to reflect the facts of the case[5] and to retain a balanced approach.[6]

VI. In *GJB*[7] the CA approved the direction of the trial judge in *Miller* on the delay issue.

> We entirely accept that in a suitable case, and this was one, the judge is entitled to and should comment on the reluctance or difficulty of the victim of sexual abuse to speak about it for long afterwards. In this connection, we refer to the judgments of this Court in *D*[8] and in *Miller*. However, it is important that the comment should not assume the guilt of the defendant, and that his case should be made clear. The direction in *Miller* was a model in this respect. The summing up in that case included the following passage:
>
> > You are entitled to consider why these matters did not come to light sooner. The defence say that it is because they are not true. They say that the allegations are entirely fabricated, untrue and they say that had the allegations been true you would have expected a complaint to be made earlier and certainly once either defendant…was out of the way…of the complainant. The defence say that she could have complained to her mother or her grandmother before she left the country or to her mother on the plane, or to the headmaster of the school…or to the social worker who came on one occasion to speak to her (although again bear in mind there is no evidence that the complainant was ever given any contact details or instructions as to how to make such a complaint, or that she could have complained sooner to a family or extended family member once she was safe in Jamaica. On the other hand, the prosecution say that it is not as simple as

3. *Miller*.
4. Ibid.
5. *Smith* [2012] EWCA Crim 404.
6. *CE* [2012] EWCA Crim 1324.
7. *GJB* [2011] EWCA Crim 867; *F(S)* [2011] EWCA Crim 1844.
8. [2008] EWCA Crim 2557.

> that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship.

DIRECTIONS

7. There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.

8. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:

   (7) Of untruthfulness:

      (a) Delay in making a complaint.

      (b) Complaint made for the first time when giving evidence.

      (c) Inconsistent accounts given by the complainant.

      (d) Lack of emotion/distress when giving evidence.

   (8) Of truthfulness:

      (a) A consistent account given by the complainant.

      (b) Emotion/distress when giving evidence.

   (9) Of consent and/or belief in consent:

      (a) Clothing worn by the complainant said to be revealing or provocative.

      (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.

(c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.

(d) Some consensual sexual activity on the occasion of the alleged offence.

(1) Of consent and/or belief in consent and/or lack of involvement:

(a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.

(b) A defendant who is in an established sexual relationship.

9. Such directions must be crafted with care and should always be discussed with the advocates. Thought should be given as to when may be the most appropriate time to give such directions: at the outset of the trial or in the course of summing up?

10. It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary review the directions to be given.

EXAMPLE 1: Delay (in the context of the complainant's allegations)

When you come to consider why this allegation was not made any earlier, you must avoid making an assumption that because it was delayed it must be untrue.

The defence say that the fact that the complaint was not made at the time shows that V is not telling the truth and that she has made up her story. When this was suggested to her in evidence she said [insert e.g. that she was a child aged 12 and afraid to tell anyone because D had told her that if she did so she would not be believed and this was "our little secret"; and that she only overcame her fear when her own daughter was approaching the age that she was when she said D did this to her].

To decide this point, you should look at all the circumstances including the reason that V gave for not having complained at the time that she says this incident occurred. Different people react to particular situations in different ways. Some, if they have experienced something of the kind complained of in this case, may tell someone about it straight away, whilst others may not be able do so, whether out of shame, shock, confusion or fear of getting into trouble, not being believed, or breaking up the family. In this case, if V's complaint is true, she was a child of 12 when it happened and was living in the same family as D, and you should consider whether or not those things would have affected her ability to complain at that time.

The fact that a complaint is not made at the time does not necessarily mean that it must be untrue any more than the fact that a complaint is made immediately means that it must be true. I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true.

EXAMPLE 2: Complaint made for the first time when giving evidence

It is not in issue that until V gave evidence she had not mentioned [specify] to anyone before. The defence say that this shows that she has invented this allegation: they say that she was "making it up as she went along" [if applicable: and that all of her story is untrue]. The prosecution say that [e.g. it is not surprising that when she was having to think about things which happened a long time ago and answer detailed questions about them this triggered her memory so that she was then able to remember this for the first time].

No doubt you will want to consider these arguments but you should bear in mind that the fact that someone does not mention something at the outset and only mentions it at a late stage does not mean that she cannot be telling the truth, any more than the fact that someone who consistently makes the same allegation must be doing so.

The memory of someone who has had an experience of the kind about which V complains may be affected in different ways. Such an experience may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately or, in some cases, at all.

I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true; and when you are considering this you should look at all of the circumstances in which V made her original complaint, the way she gave her account to the police officer in the interview, the way she gave evidence and what she said when it was suggested to her that she had invented this [if applicable: and all of her account.] If you are sure that V's account is true then you may rely on it in reaching your verdict. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

EXAMPLE 3: Inconsistent accounts

When you come to consider whether or not this allegation is true, you must avoid making an assumption that because V has said something different to someone else her evidence to you is untrue.

You have heard that when V gave a statement to/was interviewed by the police s/he said [insert] whereas when s/he gave evidence s/he said [insert].

[Either] There is no issue that these two accounts are inconsistent with one another and you will have to consider why this is so.

[Or] You will have to compare these two accounts and, if you find that they are inconsistent, you will have to consider why this is so.

The mere fact that V has not been consistent in the accounts that s/he has given does not necessarily mean that her/his evidence is not true. Experience has shown that inconsistencies in accounts can arise whether

a person is telling the truth or not. This is because the memory of someone who has had an experience of the kind complained of in this case may be affected by it in different ways and this may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately.

I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true. To answer this question, you must look at all of the evidence including any inconsistencies which you find exist and decide what effect these have on V's truthfulness. If you are sure that V's account is true, then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely upon it.

EXAMPLE 4: Consistent account

You have been asked to find that V's account is true because s/he has been consistent in what s/he said to [e.g. her sister/the police] and in her evidence about this [alleged] incident. The mere fact that a person gives a consistent account about an event does not necessarily mean that account must be true, any more than the fact that a person who gives inconsistent accounts must mean that the event did not happen. In deciding whether or not V's account is true you should look at all of the evidence. If, having done so, you are sure that V's account is true then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

EXAMPLE 5: Lack of emotion/distress when giving evidence

You have been reminded/you will remember that when V gave evidence s/he appeared completely calm and gave his/her account in a matter-of-fact way without showing any emotion. It is entirely for you to decide what you make of V's evidence but it would be wrong to assume that the manner in which he/she appeared to give evidence is is an indication of whether or not it is true. This is because experience has shown that people react to situations and cope with them in different ways. Some people who have experienced an incident of the kind complained of in this case, when they have to speak about it, show obvious signs of emotion and distress, whereas others show no emotion at all. Consequently, the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

EXAMPLE 6: Show of emotion/distress when making a complaint and/or giving evidence

You have been reminded/you will remember that at a number of points in his/her evidence V became distressed and emotional. It is entirely for you to decide whether or not V's evidence is true but you must not simply assume that because V showed distress and emotion it must be true. It is perfectly possible for a witness to become distressed and emotional when describing an incident such as this, whether or not their account is true. The presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

EXAMPLE 7: Clothing worn by the complainant said to be revealing or provocative

[Questioning on this subject should have been restricted, but there will be occasions where such evidence has emerged.] You have been reminded of/you will remember the fact that when V went out on the evening of [date] she was dressed in [specify]. The defence suggested to her that this was because she was "out on the pull" and looking for sex and you will remember her response that [insert]. You should consider this evidence and decide what you make of it but you must not assume that because V was dressed in that way that she must have been either looking for or willing, if the opportunity presented itself, to have sex. People may dress in a variety of ways for a variety of reasons and the mere fact that someone dresses in revealing clothing does not necessarily mean that that person is inviting or willing to have sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

EXAMPLE 8: Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others

V has accepted that she was very drunk on the night of [insert] but it is important that you do not assume that because she got into that state she was either looking for, or willing to have, sex. When it was suggested to her in cross-examination that she was out that night to get drunk and then to have sex she said [insert]. You should consider this evidence and decide what you make of it but you must not assume that because she was drunk she must have wanted sex. People do go out at night and get drunk, sometimes for no apparent reason at all, and it would be wrong to leap to the conclusion that such a person must be out looking for, or willing to have, sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

EXAMPLE 9: Previous sexual activity between the complainant and the defendant

It is common ground that V and D knew one another and that, whilst they have not been in an established sexual relationship, they have had sexual intercourse on a number of previous occasions. It is important to recognise that the mere fact that V has had consensual sexual intercourse with D on other occasions does not mean that she must have consented to have sexual intercourse with him on this occasion or that this would have given D grounds for reasonably believing that she consented to it. A person who has freely chosen to have sexual activity with another person in the past does not, as a result, give general consent to have sexual intercourse with that person on any occasion: each occasion is specific and whilst at one time a person may want to have sex, at another time that person may not want it at all and will not consent to it.

Also, if and when you come to consider whether D may reasonably have believed that V consented, you must not assume that because V had had sexual intercourse with him on a number of previous occasions this, in itself, gave him grounds for believing on this occasion. You must resolve this issue by looking at all of the evidence.

EXAMPLE 10: Some consensual sexual activity on the occasion of the alleged offence

It is common ground that on the night in question V took D back to her home, gave him a cup of coffee and that for a while they engaged in kissing one another, something to which V consented. According to V she then said she had to get up early the next morning and asked D to leave but he refused to go and then forcibly had sexual intercourse with her against her will. D gave evidence that kissing led to further sexual touching and then to sexual intercourse to which V fully consented.

It is for the prosecution to prove that V did not consent to D having sexual intercourse with her and you must decide this issue by looking at all the evidence. When you do so it is important to recognise that the mere fact that V let D into her home and willingly engaged in kissing D does not mean that she must have wanted to go on to have sexual intercourse and must have consented to it. A person who engages in sexual activity is entitled to choose how far that activity goes and is also entitled to say "No" if the other person tries to go further; the fact that V willingly engaged in kissing does not mean that she must have wanted to have sexual intercourse.

If you are sure that V did not consent to having sexual intercourse with D the prosecution must also prove that D did not reasonably believe in V's consent. This too is an issue which you must resolve by looking at all of the evidence but you must not assume that because V had been kissing him willingly before sexual intercourse took place this in itself gave him grounds for believing that she consented to him having sexual intercourse with her.

EXAMPLE 11: Fear: although no use or threat of force, physical struggle and/or injury

It is not suggested that, before or at the time that D had sexual intercourse with V he either threatened her with force or that he used any force upon her and V has accepted that she did not put up any struggle. It is also common ground that V did not suffer any injury.

The defence say that this is because V fully consented to what took place. V on the other hand gave evidence that when D started to undo his trousers and then undid her jeans she was so frightened that she could not move: she said she was "petrified with fear". You will have to resolve this issue by looking at all of the evidence but it is important to recognise that the mere fact that D neither used nor threatened to use any force on V and that she did nothing to prevent D from having sexual intercourse with her and was uninjured does not mean that V consented to what took place or that what V has said about what happened cannot be true.

Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event whilst others may, whether through fear or personality, whilst they did not consent, be unable to do so.

It is important to draw a distinction between consent and submission. A person consents to something if, being capable of making a choice and being free to do so, s/he agrees to it. Consent in some situations may be given enthusiastically, whereas in others it is given with reluctance, but nevertheless it is still consent. But when a person is so overcome by fear that she lacks any capacity either to give consent or to resist, that person does not consent but submits to what takes place.

It is for you to say, having considered all of the evidence, what the situation was in this case, bearing in mind that it is for the prosecution to prove that V did not consent to D having sexual intercourse with her and that D did not reasonably believe that she consented. What they do not have to prove is (a) that D used or threatened to use any force or that V put up a struggle or was injured or (b) that V communicated her lack of consent to D.

EXAMPLE 12: Defendant is in an established sexual relationship with another person

It is not disputed that V was raped: what is in dispute is that it was D who raped her; and the evidence of identification of D as the person responsible is challenged. As part of the evidence you heard from D and also from his wife that they have a mutually fulfilling sex life, and it is D's case that he had no need to have sexual intercourse with a stranger and much to lose by doing so.

You will of course consider this evidence when you are deciding where the truth lies but you must not assume that a man who is married and, if you find that it is or may be the case, who has a fulfilling sex life cannot resort to sexual activity with any other person. In pointing this out I am not suggesting what you should make of the evidence of D or of his wife, but simply alerting you to the danger of making an assumption which, depending on your assessment of their evidence, might flow from it.

EXAMPLE 13: Defendant is a homosexual man

You have heard that D is gay and lives with/goes out with [specify]. You have heard this as part of the background to the case. It is not relevant to the issue of guilt.

It is no more likely that a man who lives with another man has a sexual interest in young boys than it is that a man who lives with a woman will have an interest in young girls. The fact that D is gay is of no significance at all.

20-2 Historical Allegations

Sources: ***Archbold*** **2016, 4-465, 20-9b and 20-27a;** ***Blackstone's*** **2016, B3.3**

LEGAL SUMMARY

1. It is important in historic cases that the judge gives full and detailed reasons for decisions and provides clear guidance for the jury on the difficulties faced by the defence as a result of the lapse of time.
2. As the Court made clear in *PS*,[9] the essential matters that a direction should address were identified as being:

> "(i) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence was essentially a simple denial (the defendant was saying that he had not acted as alleged);
>
> (ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available – indeed, it may be unclear what has been lost;
>
> (iii) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and
>
> (iv) a summary of the main elements of prejudice that were identified during the trial [35] per Fulford LJ.

3. Having reviewed a number of authorities[10] Fulford LJ remarked that:

9. [2013] EWCA Crim 992.
10. *Henry* [1998] 2 Cr App R 61; *Graham* [1999] 2 Cr App R 201; *Brian M* [2000] 1 Cr App R 49.

> no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. We stress, therefore, that the need for a direction, its formulation and the matters to be included will depend on the circumstances of, and the issues arising in, the trial.

4. The court suggested that the problems of delay are:

> often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principal means of protecting the defendant, is diluted and its force is diminished. [37]

As regards the absence of documents and witnesses, see *D.*[11] D was convicted of sexual offences on his nieces and daughter between 39 and 63 years earlier. The Court was clear – the length of delay is nothing more than a statement of fact. What matters is not how long it is since the alleged offence but whether the delay has an effect on the fairness of the trial and the safety of any resultant convictions.

DIRECTIONS

5. In some cases of alleged historical sexual abuse, complaints may have been made before, sometimes a long time before, the complaint which has given rise to the investigation and prosecution with which they jury are concerned. In some cases, such earlier complaints may have been made to a friend or a family member, in others they may have been made to the police or some other person in authority. There may be one or more records of such complaints.
6. In these cases, evidence of such complaints may be adduced as hearsay, to establish consistency or inconsistency, to rebut a suggestion of recent fabrication or, possibly, to refresh memory. If such evidence is adduced in this way, appropriate directions must be given: see Chapter 15-12 above.
7. If the jury are being invited to make the assumption that if the allegation were true, complaint would have been made at the time, the jury should be directed accordingly: see Chapter 20-1 above.
8. Such directions must be crafted with care and discussed with the advocates. It may also be necessary to discuss these directions after speeches, depending on the arguments advanced by the advocates.

11. *D* [2013] EWCA Crim 1592.

EXAMPLE

See the Examples in Chapter 14-12 and Example 1 in Chapter 20-1.

20-3 Grooming of Children

Sources: **Crown Court Compendium 2016; *Archbold* 2016, 20-91; *Blackstone's* 2016, B3-119**

LEGAL SUMMARY

1. Although an offence of meeting a child following sexual grooming is created by section 9 of the **Sexual Offences Act** (Jamaica), other behaviour, often innocent itself but intended to gain favour with and/or the trust of a child with a view to sexual activity, is properly described as "grooming".

DIRECTIONS

2. Where grooming is alleged to have occurred, whether or not this gives rise to a separate count on the indictment, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained.

EXAMPLE 1: Young Child

The prosecution case is that before he sexually assaulted V he "groomed" her. That is to say he won her trust by doing things which in normal circumstances would be innocent, such as playing games with her including play-fighting and tickling, before he went on to touch her sexually. In this situation, a child is unlikely to realise that she is at any risk at all and, when the nature of touching changes from something "innocent" to something which is sexual, the child may not realise that there is anything wrong and may accept it without any feeling of discomfort or dislike and will not make any complaint about it or resist or protest when it happens again. In these circumstances a child is unlikely to be able to say when touching which had been "innocent" changed to touching which was sexual.

In making these observations I am not suggesting what you should find did, or did not, happen in this case: I am simply alerting you to a potential difficulty which a child in such a situation could face. Whether or not you find that this was a situation faced by V is entirely for you to decide.

EXAMPLE 2: Older Child

You have heard evidence in this case that V was 12 years of age and in the care of the Local Authority when she met D.

The prosecution say V was, because of her situation, especially impressionable and vulnerable. She has said in evidence that when she first met D she was impressed by [specify e.g. rides in his car/gifts of alcohol, flattery etc.] and that she liked him and became prepared to do things for him that she would not otherwise have done.

In many relationships, sexual or otherwise, one party will seek to please the other with gifts but in this case the prosecution say that the purpose of D's gifts was to make V dependent upon him and so effectively to remove her capacity to say no.

The defence say there was no sexual relationship and that although V was 12 she obtained alcohol from a variety of sources and was in no way dependant on him.

You must look at the evidence of the relationship between V and D. If you are sure that the gifts etc. were intended to and did make her so dependent on him that she was prepared to submit to [specify] you are entitled to conclude that was not true consent. If you are not sure that was the case and you consider D's account is or may be true, then you could not be sure that she did not consent when [specify].

***NOTE:* For a further comprehensive direction on the difference between consent and compliance or submission, see *R v Ali and Ashraf* [2015] EWCA Crim 1279 para 15.**

20-4 Consent and Reasonable Belief in Consent

Sources: ***Archbold* 2009; Sexual Offences Act; Trinidad and Tobago Criminal Bench Book 2015**

LEGAL SUMMARY

(Paras 2 and 4 adapted from the Criminal Bench Book of Trinidad and Tobago)

1. Section 3(1) of the **Sexual Offences Act** provides:

"A man commits the offence of rape if he has sexual intercourse with a woman—

(a) without the woman's consent; and

(b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not"

2. This Act does not define consent. In the UK, the position is different. Part 1 of the Sexual Offences Act 2003 (UK) states that a person consents to sexual activity 'if he or she agrees by choice and has the freedom and capacity to make that choice'.

3. However s.3(2) of the **Sexual Offences Act** does define circumstances in which consent, though present, is ineffectual . It states:

   "(2) For the purposes of subsection (1), consent shall not be treated as existing where the apparent agreement to sexual intercourse is –

   (a) extorted by physical assault or threats or fear of physical assault to the complainant or to a third person; or

   (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender.

4. In *Marlon Roberts v The State*[12] the appellant challenged the adequacy of the trial judge's directions on the requisite mens rea for the offence of rape. The Court considered *Archbold* (2000) [17-58] as providing a useful guide on the direction that a trial judge should give a jury concerning the issue of consent:

   > [I]n summing-up a case for rape which involves the issue of consent, the judge should, in dealing with the state of mind of the defendant, direct the jury that before they can convict, the Crown must have proved either that he knew the woman did not consent to sexual intercourse, or that he was reckless as to whether she consented. If the jury is sure he knew she did not consent, they will find him guilty of rape knowing there to be no consent. If they are not sure about that, they will go on to consider reckless rape.

5. Consent of a person under the age of sixteen years shall not be a defence to a charge for indecent assault – s.14.

20-5 Capacity and Voluntary Intoxication

Sources: **Trinidad and Tobago Criminal Bench Book 2015**

1. The state of drunkenness of the complainant is relevant in the following ways:

   (i) Alcohol or drugs may have a disinhibiting effect upon the complainant;

   (ii) The complainant may be so drunk that her (his) capacity to consent is removed, or she (he) in fact exercises no choice whether to agree or not

12. CA Crim No 19 of 2007.

2. Only a person who has the capacity to make a choice, and agrees by choice freely made, consents to sexual activity. If the issue of capacity arises it must be dealt with in the judge's directions. In *Bree*[13] the President said:

> In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the Complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the Defendant's state of mind, if intercourse takes place, this would be rape. However, where the Complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a Complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.

Voluntary intoxication of accused

3. The drunkenness of the accused provides him with no defence. Touching or penetration must be the consequence of a deliberate (as opposed to an accidental) act, drunken or not. It is not necessary that the accused should have 'intended' penetration. The issue of consent by the complainant depends upon the complainant's state of mind. If the accused claims that he reasonably believed that the complainant consented, there are three issues for the jury to consider:

   (i) whether the complainant was in fact consenting;

   (ii) whether the accused honestly believed the complainant was consenting, a judgment in respect of which the jury will take the accused as he was, drunk or sober; and

   (iii) whether his belief was reasonable in the circumstances, an objective judgment which requires the jury to adopt the standard of a sober, not a drunken, accused. If the accused was mistaken as to those circumstances, and the jury is sure that the accused's mistake was made because he was drunk, he will not be able to rely on the consequences of his mistake.

4. The trial judge's directions to the jury on the issue of consent should be expressed within the context of the evidence and should deal with the particular factual issues which the jury will have to decide.

13. [2007] EWCA Crim 804.

EXAMPLE: Students drinking heavily – some consensual sexual contact – complainant drowsy or worse under the effects of sleep and alcohol – issues of capacity and consent – relevance of the accused's own state of intoxication

The prosecution must prove three things:

1. The accused penetrated the vagina of the complainant with his penis;
2. The complainant did not consent;
3. The accused did not reasonably believe that the complainant was consenting.

It is necessary to explain how those issues need to be approached in the context of the facts of this case. What is that context? You will be reminded of the evidence in more detail later but here is a summary. The complainant and the accused met in the students' union bar after they had been playing for their respective teams. They both had a great deal to drink. At the end of the evening the accused walked the complainant home to her flat. They had coffee together. There was some kissing and fondling between them. The complainant said that she told the accused she had to go to sleep and lay down on the bed. She recalls nothing else until, in the early hours, she woke to find that she was alone. Her jeans were at the foot of the bed. She had one leg still in her knickers. The complainant has no memory of sexual intercourse taking place, is sure that she would not have consented, but has no awareness whether she consented or not. The accused accepts that the complainant said she had to go to sleep and lay down on the bed. He lay alongside her. After about an hour he started to fondle the complainant. She made some murmuring noises which he took to be an expression of pleasure. He removed her jeans and partly removed her knickers. Receiving no resistance, which he thought meant that the complainant was consenting, he had sexual intercourse with the complainant to ejaculation. He agreed that no word was spoken between them throughout. Asked why he left the flat, he said that he needed to get back to his own place to sleep it off – he had an assignment to prepare the next day.

Penetration

There is no issue that penetration took place. The issues for you to resolve concern consent and the accused's reasonable belief in consent

Consent

The first issue for you to decide is whether the prosecution has proved so that you are sure that the complainant did not give her consent. Consent, you will realise, is a state of mind which can take many forms from willing enthusiasm to reluctant acquiescence. The agreement need not, of course, be given in words provided that the woman was agreeing with her mind.

You may wonder whether the fact that the complainant had been drinking heavily affects either of those questions. There are two ways in which drink can affect the individual depending upon the degree of intoxication. First, it can remove inhibitions. A person may do things when intoxicated which she would not, or be less likely to do, if sober. Second, she may consume so much alcohol that it affects her state of

awareness. You need to reach a conclusion as to what was the complainant's state of drunkenness and sleepiness. Was she just disinhibited, or had the mixture of sleepiness and drunkenness removed her capacity to exercise a choice?

A woman clearly does not have the freedom and capacity to make a choice if she is unconscious through the effects of drink and sleep. There are, of course, various stages of consciousness from wide awake to dim awareness of reality. In a state of dim and drunken awareness you may or may not be in a condition to make choices. You will need to consider the evidence of the complainant's state and decide these two questions: Was she in a condition in which she was capable of making any choice, one way or other? If you are sure she was not then she did not consent. If, on the other hand, you conclude that the complainant chose to agree to sexual intercourse, or may have done, then you must find the accused not guilty.

You reach the stage of considering the accused's state of mind only if you are sure the complainant did not consent.

Belief in consent

The next question is whether the accused honestly believed that the complainant was consenting. If you are sure that the accused knew either that (i) the complainant was in no condition to make a choice one way or the other or (ii) the complainant had made no choice to agree to sexual intercourse, then you will be sure that the accused did not honestly believe that the complainant was consenting. If that is your conclusion, your verdict would be guilty.

If, on the other hand, you conclude that the accused did believe, or may have believed, that the complainant was consenting, you need to consider the final question which is whether his belief was reasonable in the circumstances.

Reasonableness of belief and the effect of drink

The accused had also consumed a great deal of alcohol. However, you need to look at all the circumstances as they would have appeared to the accused had he been sober. Would or should the accused have realised that the complainant was at best drowsy and at worst unconscious? If so, would it have been reasonable or unreasonable for the accused to believe that she was consenting? In considering whether the accused's belief was reasonable you should take account of any steps taken by the accused to ascertain that she was consenting. The accused does not claim that he checked to see whether the complainant was aware of what was happening.

If you are sure that the accused should have realised that the complainant was in no condition to make a choice, or that the complainant was not agreeing by choice, then his belief was unreasonable and your verdict would be guilty. But, if you conclude that the accused's belief was or may have been reasonable in the circumstances, you must find the accused not guilty.

Prepared for you is a written Route to Verdict which will enable you, if you follow it, to consider each of these questions in the correct sequence and, by that means, to reach your verdict:

Route to verdict
Please answer Question 1 first and proceed as directed

Question 1
Did the accused penetrate the vagina of the complainant with his penis? Admitted.

- Proceed to question 2.

Question 2
Did the complainant consent to the act of penetration? (See Note 1 below)

- If you are sure she did not consent, proceed to question 3.
- If you conclude that the complainant did consent or may have consented, verdict not guilty.

Question 3
Did the accused believe that the complainant was consenting? (See Note 2 below)

- If you are sure the accused did not believe that the complainant was consenting, verdict guilty.
- If you conclude that the accused did believe or may have believed that the complainant was consenting,proceed to question 4.

Question 4
Was the accused's belief reasonable in the circumstances? (See Note 3 below)

- If you are sure it was not a reasonably held belief, verdict guilty.
- If you conclude that it was or may have been a reasonably held belief, verdict not guilty.

NOTES

1. The complainant consented only if, while having the freedom and capacity to make the choice, she agreed to sexual intercourse. You will need to consider whether the complainant was in any condition (while under the influence of sleep and alcohol) to make and exercise a choice, and whether she did in fact exercise a choice. If she did agree to sexual intercourse, it was not necessary for her to communicate that agreement to the accused, provided that in her mind she was agreeing.
2. If the accused was aware that the complainant was in no condition to exercise a choice or that she was making no choice, then he did not believe that she was consenting.
3. When judging whether the accused's belief was reasonably held you should consider the circumstances as they would have appeared to the accused had he been sober. Should the accused have realised that the complainant was exercising no choice or was in no condition to make a choice whether to have sexual intercourse with him?

20-6 Recent Complaint and Distress

Sources: ***Archbold*** **(42nd edn) paragraph 4–308, page 403; Judicial Studies Board 1997 Specimen Directions; Hong Kong Criminal Bench Book**

LEGAL SUMMARY

1. Recent complaint in sexual offences is admissible not to establish the truth of the contents of the complaint but to show the consistency of the complainant with regard to the evidence which the complainant gives in the witness-box, and to negate consent.[14] This rule of evidence is not an exception to the hearsay rule, but is in fact an exception to the rule against the admissibility of self-serving statements.
2. "The mere complaint is no evidence of the facts complained of, and its admissibility depends on proof of the facts *by sworn or other legalised testimony*".[15]
3. A definitive statement of and reason for the rule about recent complaint is to be found in *Lillyman.*[16]
4. Where evidence of a complaint is given, four factors must be borne in mind: (a) the complainant must give evidence; (b) the complaint must be made as speedily as could reasonably be expected;[17] (c) the complaint must be made voluntarily and spontaneously and must not be elicited by leading, inducing or intimidatory questions;[18] and the complaint must be made on the first opportunity that reasonably offers itself after the offence.
5. The recipient of the complaint must give evidence not only of the fact of the complaint but the content thereof in order to make the complaint admissible for the consideration of the jury for the limited purposes for which it is admitted.[19] This is necessary, so that the manner in which the complaint was given or elicited may be explored since whether the complaint was spontaneous or voluntary is a very relevant consideration in determining its admissibility.[20]

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14. *R v Linval McLeod and Yvonne Berlin* (1987) 24 JLR 160 at page 164.
15. *Archbold, Criminal Pleading, Evidence & Practice* (42nd edn) paragraph 4–308, page 403.
16. [1895-9] All ER Rep 586.
17. *R v Osborne* [1905] 1 KB 551, *Mayers v R* [1966] LRBG 90; *R v Denzil Halstead* SCCA 3/97 [30.3.98]; A complaint four (4) days after commission of the offence was still recent enough to be admitted in evidence: *R v Robinson and Ors* SCCA 59, 70 & 71/96 [14.7.97]; *R v Peter Campbell* SCCA 17/06 [16.05.08]; Where a complaint is made after there is a lapse of fourteen (14) days after the commission of the offence, the trial judge ought to reject the evidence: *R v Denzil Halstead* SCCA 3/97 [30.3.98].
18. *Mayers v R* [1966] LRBG 90.
19. See *R v Kory Whyte* PC App 12/98 [10.8.98]; (1997) 53 WIR 293 (PC Jamaica).
20. See *Mayers v R* [1966] LRBG 90.

6. The fact that the complaint was made to others before it was made to the witness who gives the evidence of it does not render it inadmissible.[21]

7. If a complainant gives evidence that 'I reported the matter to the police' this is not evidence of a recent complaint but of a necessary step taken by the complainant so that police action may be taken. To tell the jury that this evidence coming from the complainant is not corroboration cannot be sufficient, since indeed it is not evidence at all and the jury should have been told to disregard it.[22]

8. Where evidence is adduced at a trial on a charge of an offence of a sexual nature of a 'recent complaint' by the complainant, it is not necessary that the complainant should describe the full extent of the unlawful sexual conduct alleged, provided that the complaint is capable of supporting (that is, buttressing and enhancing) the complainant's evidence in court.[23]

9. The decision in each case as to whether it is sufficiently consistent for it to be admissible must depend on the facts.

10. In the New Zealand case, *R v Nazif,*[24] the complainant gave evidence of an indecent assault, whereas the witness to whom the complaint was made gave evidence about ordinary assault. The New Zealand Court of Appeal held that the evidence of recent complaint was rightly admitted because, even though the witness only gave evidence of ordinary assault, the complaint was made by the victim proximately to the event and was capable of evidencing consistency. Whether that evidence did in fact support the complainant's evidence from the witness stand was a matter for the jury.

EXAMPLES

Recent Complaint[25]

"You have heard evidence that shortly after this alleged incident X made a complaint to Y [her mother, a passer-by, the police, etc]. This is not evidence as to what actually happened between X and the defendant. Y was not present, and did not see what happened between them.

It is evidence which you are entitled to consider, because it may help you to decide whether or not X has told you the truth. [The prosecution say that her complaint is consistent with her account, and therefore she is more likely to be truthful. On the other hand the defence say...] It is for you to decide whether the

21. *R v Denzil Halstead* SCCA 3/97 [30.3.98].
22. *R v Kory Whyte* PC App 12/98 [10.8.98]; (1997) 53 WIR 293 (PC Jamaica); *Orane Gordon v R* SCCA 189/06 [3.10.08].
23. *Greene (Ricardo) v R* (2005) 68 WIR 169 – Court of Appeal of Barbados.
24. [1987] 2 NZLR 122.
25. Adapted from The Judicial Studies Board 1997 Specimen Directions.

evidence of this complaint helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between X and the defendant, and it therefore cannot of itself prove that the complaint is true.

Add: It cannot be corroboration, independent confirmation of X's evidence."

Distressed Condition of Complainant[26]

See the judgment of Li CJ in Leung *Chi Keung v HKSAR*:[27]

Directions by the judge

The judge should direct the jury on the proper approach to be taken in considering evidence of the complainant 's distressed condition. In summary, the essentials of the proper approach are as follows:

(a) The jury must be satisfied beyond reasonable doubt (i) that the complainant's distressed condition was genuine and (ii) that there was a causal connection between the distressed condition and the sexual offence. In other words, they must be satisfied that (i) the distressed condition was not feigned and (ii) was only referable to the alleged sexual offence and not to any other cause. In deciding on those matters, they must take into account all relevant circumstances.

(b) Where the jury is so satisfied, they could give such weight to the evidence of distress as is appropriate. Weight is entirely a matter for them.

(c) Where the jury is not so satisfied, they should disregard the evidence of distress.

(d) Where fantasy has been properly raised as an issue, the jury must not use evidence of distress to rebut fantasy. If they believe that fantasy is a possibility, they cannot be satisfied of the required causal connection.

A judge sitting alone should approach the matter similarly.

26. Adopted from Hong Kong Criminal Bench Book.
27. (2004) 7 HKCFAR 526 at 542 I–543D, paragraph 41.

21. ANTI-GANG OFFENCES

Sources: **Criminal Justice (Suppression of Criminal Organisations) Act 2014**

LEGAL SUMMARY

1. The **Criminal Justice (Suppression of Criminal Organisations) Act**, (the Act), came into operation on the 17th April 2014 and seeks to prohibit persons from: establishing a criminal organisation; taking part in, or participating in a criminal organisation; providing or obtaining a benefit from a criminal organisation; and harbouring or concealing a participant in a criminal organisation.
2. Section 17 of the Act provides inter alia:

   (1) The jurisdiction of a Circuit Court to hear and determine offences under this Act shall be exercised by a Judge sitting without a jury and there shall be no preliminary or committal proceedings.

   (2) a court hearing a case in the exercise of its jurisdiction …may direct that –

   (i) the identity of any person, including a witness in the case, shall be protected in the manner specified by the court;

   (ii) in relation to any witness called or appearing before the court, the name, identity, and address of the witness and such other particulars concerning the witness, as in the opinion of the Court shall be kept confidential, shall not be published; or'

   (iii) no particulars of the trial other than the name of the accused, the offence charged and the verdict and sentence shall be published without the prior written approval of the Court…."
3. Both protection of the identity of witnesses (including measures taken during court proceedings), and previous history and connections of the person can be considered in appropriate circumstances.
4. The discretionary granting of the above orders can only be 'in the interests of the administration of justice, public safety, public order or public morality'.
5. In exercising that discretion the Court must have regard to the Charter of Fundamental Rights & Freedoms s.16 specifically the 'right to a fair hearing within a reasonable time' and the 'right to examine a witness at trial'. This does not necessarily mean the 'right to confront their accuser'

6. Further careful regard must be given to the extent of disclosure of any previous bad character of a witness so as to enable proper cross examination as to character, but not to the extent of pointing to discovery of identity. (*R v Willard Williamson*,[1] *R v Ward*[2] and *R v H & C.*[3])

GANG RELATED ACTIVITY OFFENCES

7. The following offences in the Act are regarded as gang related:

(i) forming or establishing criminal organisation; (s.3)

(ii) recruitment of child to criminal organisation; (s.4)

(iii) recruitment of adults to a criminal organisation; (s.5)

(iv) being a part of, participating in or facilitating serious offence by a criminal organisation; (s.6)

(v) leadership, management or direction of criminal organisation; (s.7)

(vi) Counselling, giving instruction or guidance to or procuring criminal organisation; (s.7)

(vii) Knowingly providing a benefit to or obtaining a benefit from a criminal organisation; (s.8(3))

(viii) concealing etc. proceeds of criminal activity of a criminal organisation; (s.9)

(ix) knowingly aiding and abetting a criminal organisation; (s.10(5))

(x) harbouring or concealing participant in criminal organisation; (s.10(6))

(xi) inciting or inducing person to commit a serious offence or act of violence to promote or facilitate activities of criminal organisation; (s.10(6))

(xii) inciting or inducing person to commit serious offence or act of violence to hinder or prevent the investigation or prosecution of criminal organisation; (s.10(6))

(xiii) professing to be a part of or a participant in a criminal organisation to obtain benefit; (s.11)

(xiv) preventing, etc. a person from ceasing to be a part of or a participant in criminal organisation; (s.12)

(xv) taking retaliatory action against former participant in criminal organisation, (s.13) and

(xvi) personating a law enforcement officer (s.14).

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1. [2015] JMCA Crim 8.
2. [1993] 2 All ER.
3. [2004] 2 AC 134.

JURISDICTION AND TRIAL PROCEDURE

USE OF GANG EVIDENCE

8. All relevant factors of 'gang evidence' (membership and involvement), as set out in s.6(3), may be 'taken into account' for a range of purposes, including proving intent, motive, and identity, establishing a theory of liability, explaining witnesses' demeanour, and explaining gang culture.[4]

9. In the same way all relevant factors may be taken into account in determining guilt under s.7(3) (leading a criminal organisation) and s.8(4) (providing a benefit to, or obtaining a benefit from, a criminal organisation).

10. For the admissibility and proper ambit of evidence as to the existence and practices of gangs and the defendant's connections with them see *Myers et al v The Queen (Bermuda),*[5] *Lewis and others v R; Laing and another v R,*[6] *and R v Stewart.*[7] The Privy Council pointed out that the ambit of gang evidence will depend, in any particular case, on what legitimate role it may have in helping the jury to resolve one or more issues in the case and that it was not possible to lay down general rules for gang evidence beyond that.

11. Evidence of membership of, or association with, a criminal gang will be admissible in respect of the offences referred at paragraph 7 (supra). In considering admitting such evidence, there were four questions that a judge has to consider:

    (i) whether the evidence was relevant to an important matter in issue between a defendant and the prosecution;

    (ii) whether there was proper evidence of the existence and nature of the gang or gangs;

    (iii) whether the evidence, if accepted, went to show the defendant was a member of or associated with a gang or gangs which exhibited violence or hostility to the police or with links with firearms; and

    (iv) if the evidence was admitted, whether it would have such an adverse effect on the fairness of the proceedings that it ought to be excluded (the four issues).[8]

12. In *Myers, Brangman and Cox v The Queen,*[9] the Board had to determine inter alia whether gang evidence was admissible and if so what is its extent and content and whether it can

4. "Prosecuting Gang Cases – What Prosecutors Need to Know" – Published by Alan Jackson April 2004.
5. [2015] UKPC 40 (6 October 2015).
6. [2014] EWCA Crim 48.
7. (2016) 180 JP 205.
8. See *Lewis and Ors v R* [2014] EWCA Crim 48.
9. [2015] UK PC 40 delivered 6 October 2015.

be given by a police officer who has made special study of the gang concerned as well as of gang culture generally.

13. The following may be gleaned from the opinion of the Board:

    a. Gang evidence of culture, feud and membership is admissible where such evidence truly adds something, beyond mere propensity, which may assist the jury to resolve one or more of the issues in the case.

    b. Gang evidence may be admissible if it significantly advanced the Crown's case by demonstrating motive.

    c. The ambit of gang evidence will depend, in any particular case, on what legitimate role it may have in helping the jury to resolve one or issues in the case.

    d. A police officer may "give evidence as an expert if the subject in which he is giving the evidence as an expert is a subject in which he has expert knowledge, and if it is restricted and directed to the issues in the case – *R v Oakley*[10] per Lord Widgery at page 9.

    e. In giving evidence as an expert a police officer may give gang evidence of gang culture and characteristics, feud and rivalry. And in doing so may draw upon information gathered from a number of sources.

14. The proposed evidence should be served by the prosecution prior to trial to allow the defence to raise any objection to admissibility and to seek to argue exclusion under s.31L of the Evidence Act.

10. (1980) 70 Cr App R 7.

22. TRAFFICKING IN PERSONS

Sources: **Trafficking in Persons (Prevention, Suppression And Punishment) Act; United Nations Convention Against Transnational Organised Crime and the Protocol to Prevent Suppress and Punish Trafficking in Persons; *Macdonald's Immigration Law and Practice***

LEGAL SUMMARY

1. The Government of Jamaica is a signatory to and has ratified the **UN Protocol to Prevent, Suppress and Punish Trafficking in Persons** and has enacted the **Trafficking in Persons (Prevention, Suppression and Punishment) Act, 2007** (the Act).
2. The Act seeks to combat trafficking in persons, particularly women and children, who are being exploited in any way sexually, compelled to provide forced labour or who are being kept in a state of slavery or servitude. In the case of a *child*, exploitation can be made out if recruitment, transportation, transfer, harbouring or receiving has made out, without the need to prove additionally the threat of force or coercion, abduction, deception/fraud, abuse of power or the giving or receiving of a benefit in order to obtain the consent of the person who has control over another. A facilitator of the offence, or a facilitator of improper behaviour with documents, or anyone who receives financial or other benefit; will be equally liable. Where a body corporate commits the offence, every officer concerned will be liable unless it can be shown the offence was committed without their connivance or they had exercised all diligence to prevent commission of the act.
3. Section 4 of the Act creates offences for the trafficking in persons. Offences are tried on indictment before a Circuit Court and persons are liable to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment. Other supportive pieces of legislation are used to assist in the prosecution of trafficking. They are:
   - (i) Sexual Offences Act, 2009
   - (ii) Child Pornography (Prevention) Act, 2009
   - (iii) Child Care and Protection Act, 2004
   - (iv) Offences Against the Persons Act, 2007
   - (v) Cybercrimes Act, 2015; and
   - (vi) Proceeds of Crime Act, 2007

4. Section 4 of the Act provides as follows:

4 -(1) A person commits the offence of trafficking in persons where, for the purpose of exploitation[1] he-

(a) recruits, transports, transfers, harbours or receives another person within Jamaica;[2]

(b) recruits, transports or transfers another person from Jamaica to another country; or

(c) recruits, transports, transfers, or receives another person from another country into Jamaica,

(d) by any of the specified means in subsection (2).

(2) The means referred to in subsection (1) are-

(a) threat or use of force or other form of coercion;

(b) abduction;

(c) deception or fraud;

(d) the abuse of-

(i) power; or

(ii) a position of vulnerability;

(e) the giving or receiving of a benefit in order to obtain the consent of a person who has control over another person.

(3) Notwithstanding the absence of the use of any of the means specified in paragraphs (a) to (e) of subsection (2), a person who recruits, transports, transfers, harbours or receives a child[3] for the purpose of exploitation of that child commits the offence of trafficking in persons.

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1. 'Exploitation' includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of the victim to the intended exploitation is irrelevant: section 2 Trafficking in Persons (Prevention, Suppression and Punishment) Act.
   "Exploitation of the prostitution of a person" means the deriving by one person of monetary or other benefit through the provision of sexual services for money or other benefit by another person: section 2 Trafficking in Persons (Prevention, Suppression and Punishment) Act.
2. A person may be trafficked within his or her own country; there need be no border crossing. On the other hand, smuggling migrants across borders is not trafficking unless the purpose of doing so is exploitation rather than just obtaining a financial or other benefit - *R (on the application of AA (Iraq)) v Secretary of State for the Home Department* [2012] EWCA Civ 23, (2012) Times, 05 March).
3. "Child" means any person under eighteen years of age: section 2 – Trafficking in Persons (Prevention, Suppression and Punishment) Act).

(4) It shall not be a defence for a person who commits the offence of trafficking in persons that the offence was committed with the victim's consent.[4]

(5) A person who facilitates the offence of trafficking in persons commits an offence.

(6) A person who commits the offence of trafficking in persons or who facilitates that offence is liable on conviction on indictment before the Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(7) A person who, for the purpose of committing or facilitating an offence under subsection (1) conceals, removes, withholds or destroys any (a) travel document that belongs to another person; or (b) document that establishes or purports to establish another person's identity or immigration status, is liable on conviction on indictment before the Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(8) Every person who receives a financial or other benefit knowing that it results from the offence of trafficking in persons commits an offence and is liable on conviction on indictment before the Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(9) For the purposes of this section, an offence under subsection (1) is facilitated-

(a) where the facilitator knows that such an offence is intended to be facilitated;

(b) whether or not the facilitator knows the specific nature of the offence that is intended to be facilitated; and

(c) whether or not the offence was actually committed.

OFFENCES BY BODIES CORPORATE:

5. Section 5 of the Act provides:

5-(1) Subject to subsection (2), where a body corporate commits an offence against this Act, every director, manager, secretary or other similar officer concerned with the offence is liable on conviction on indictment before the Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(2) A director, manager, secretary or other similar officer concerned with the management of a body corporate shall not be liable for an offence against this Act unless the Court is satisfied-

(a) that the offence was committed with his connivance; or

4. The consent of a victim to exploitation is always irrelevant where any of the means have been established. An important principle in the trafficking definition is that a child can never consent to his or her own exploitation.

(b) he had not exercised all such diligence to prevent the commission,

(c) having regard to the nature of functions in that capacity and to all the circumstances.

(3) A body corporate which commits an offence against this Act is liable on conviction on indictment before a Circuit Court to a fine

THE ELEMENTS OF TRAFFICKING:[5]

6. The definition of trafficking has three constituent elements:

(a) The Act (what is done) – recruitment, transportation, transfer, harbouring or receipt of persons;

(b) The Means (how it is done) – threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving or receiving payments or benefits to a person to achieve the consent of another person with control of the victim;

(c) The Purpose (why it is done) – for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour or services, including slavery or practices similar to slavery, the exploitation of criminal activities, or the removal of organs.

Elements (a) and (b) constitute the *actus reus* and (c) the *mens rea*.

7. The ingredients from each of the three categories (action, means, purpose) must be present together. For instance, 'harbouring' of persons (action) involving the 'threat or use of force' (means) for 'forced labour' (purpose) is conduct that is to be treated as trafficking in human beings. Similarly, recruitment of persons (action) by deceit (means) for exploitation of prostitution (purpose).

8. The offence under s.4 of the 2007 Act is an offence of intention so, the prosecution has to prove that a defendant had arranged or facilitated the victim's entry into Jamaica intending when doing so to exploit him or her. See *R v SK.*[6]

DISTINCTION BETWEEN TRAFFICKING AND SMUGGLING:

9. "Trafficking of human beings" should not be confused with "smuggling" of human beings into a country. See *Regina v N; Regina v L.*[7] The case law has revealed however, that an individual who may have been smuggled into the country, may become a victim of trafficking.

5. *Macdonald's Immigration Law and Practice*.
6. [2011] All ER (D) 73 (Jul); [2011] EWCA Crim 1691.
7. [2013] QB 379.

EXAMPLE

It is for the prosecution to establish the following three elements (under s.4:) each of which must be present, namely that:

(a) a person has recruited or transported, or transferred or harboured or received a person(s); and

(b) in doing so has used a threat or use of force, or coercion, or abduction, or fraud, or deception, or the use of power or vulnerability, or has given or received payments or benefits to a person to achieve the consent or another with control of the victim; and

(c) did so for the purpose of exploitation [which includes exploiting the prostitution of others]; or for sexual exploitation; or for forced labour or services [including slavery or practices similar to slavery], or for the exploitation of criminal activities, or for the removal of organs.

23. MANSLAUGHTER

Sources: **Offences Against the Person Act; *Blackstone's* 2012/Part B; *Smith & Hogan Criminal Law Cases and Materials* (4th Edition)**

LEGAL SUMMARY

1. Manslaughter can be classified as either voluntary or involuntary. Voluntary manslaughter arises when the crime of murder is reduced to manslaughter by reason of provocation or diminished responsibility. Involuntary manslaughter arises when there is an unlawful killing without intention to kill or to cause serious bodily harm.
2. Voluntary manslaughter is not an offence one can be indicted for, but rather is a verdict which can result from an initial indictment for murder. The actual verdict, however, will be simply 'manslaughter' without the label of 'voluntary'.
3. Involuntary manslaughter, on the other hand, refers to those types of manslaughter which can be charged in their own right and where the accused lacks the *mens rea* for murder, although equally they can result from an indictment for murder where the prosecution fail to prove the *mens rea*.
4. When the act which a person is engaged in performing is unlawful, then if it is also a dangerous act that is likely to injure another person and quite inadvertently he causes the death of the other person by that act then he is guilty of manslaughter. It is not necessary to prove that the accused knew that the act was unlawful and dangerous and the test is would responsible people recognise its danger: *R v Fitzroy Greenland* (1990) 27 JLR 558; *Director of Public Prosecutions v Newberry* [1976] 62 Cr App R (1990) 291 in which the House of Lords approved of directions in *R v Larkin* [1943] 1 All ER 217.
5. The law on manslaughter can be summarised as follows:

   A person is guilty of manslaughter where:

   (a) He kills or is a party to the killing of another with the fault required for murder but he acted:

      (i) Under diminished responsibility (Offences Against the Person Act, s.5(2)

      (ii) Under provocation (Offences Against the Person Act s.6)

      (iii) In pursuance of a suicide pact (Offences Against the Person Act s.7)

   (b) he is not guilty of murder by reason only of the fact that, because of voluntary

intoxication, he lacked the fault required: *Majewski* [1976] 2 All ER 142 (House of Lords).

(c) he kills another:

(i) by an unlawful and dangerous act as defined in *Director of Public Prosecutions v Newbury and Jones* [1976] 2 All ER 365; or

(ii) being reckless (as defined in *R v Caldwell* [1981] 1 All ER 961 (House of Lords) whether personal injury be caused to another.

EXAMPLES

See summing up directions for diminished responsibility at Chapter 19.

24. MOTOR MANSLAUGHTER/ DEATH BY DANGEROUS DRIVING

Sources: ***Archbold*** **2001, 17-57;** ***Blackstone's*** **2012/Part C; Northern Ireland Criminal Bench Book**

LEGAL SUMMARY

1. "Motor Manslaughter" as it is conveniently termed is a common-law crime in Jamaica. It is not defined by any statutory provision. A defendant indicted for motor manslaughter may, under s.30 of the **Road Traffic Act** of Jamaica, (the Act) be found guilty of one of the lesser offences of causing death by reckless driving or dangerous driving.

2. Section 30 of the Act is in the following terms:

   > (1) A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment with or without hard labour for a term not exceeding five years.
   >
   > (2) Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under subsection (1) to find him guilty of that offence, and upon the trial of a person for an offence under subsection (1) it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 27, to find him guilty of that offence, whether or not the requirements of section 38 have been satisfied as respects that offence.

3. Section 27 of the Act deals with reckless or dangerous driving and in particular, section 27-(1), provides inter alia that if any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable to a conviction in respect of that offence.

4. Section 28 deals with the power of the jury to convict for reckless driving or dangerous driving on a trial for manslaughter if they are satisfied that he is guilty of an offence under s.27 (which relates to reckless or dangerous driving), and to find him guilty of that offence, whether or not the requirements of s.38 (which relates to notice of prosecution) have been satisfied as respects that offence.

Test for reckless driving

5. Prior to the decisions of the House of Lords in *R v Caldwell (James*),[1] a case dealing with criminal damage, and *R v Lawrence (Stephen)*[2] which dealt with causing death by reckless driving, the concept of recklessness in the criminal law was largely reflected in the judgment of the Court of Criminal Appeal in *Cunningham*.[3] The House followed their own decision in *R v Caldwell (James)*, holding that the latter case established that the adjective "reckless" when used in a criminal statute had not acquired a special meaning as a legal term of art, but bore its popular meaning of careless, regardless or heedless of the possible consequences of one's acts. The critical feature of these decisions was that a person could be held to be reckless with regard to a consequence even though he himself never foresaw the risk of it occurring, if the tribunal of fact concluded that the risk would have been obvious to the ordinary and prudent bystander.

6. In *Lawrence,* Lord Diplock, (at pages 526 and 527) formulated a standard direction to a jury and stated:

> In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:
>
> First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and
>
> Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.
>
> It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves.
>
> If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.

1. [1982] AC 341.
2. [1982] AC 510.
3. [1957] 2 QB 396.

7. The House of Lords made it clear in *R v Seymour*[4] that manslaughter was a more grave offence than causing death by reckless driving. The court held that the degree of recklessness required for a conviction of the statutory offence was less than that required for conviction of the common-law crime of manslaughter. Lord Fraser of Tullybelton said (at page 500) that the jury was to perform the duty of assessing the degree of wickedness exhibited by the accused in order to decide which offence (if any) he has committed. He added (at page 501):

> If any modification of the "Lawrence direction" is appropriate in a case where manslaughter alone is charged, it would be to add a warning to the jury that before convicting of manslaughter they must be satisfied that the risk of death being caused by the manner of the accused's driving was very high. Such a direction will, of course, always be necessary where the common-law crime and the statutory offence are charged alternatively, but where, as in this case, the common-law crime is charged alone, it may be unnecessary and inappropriate.

8. The decision of the House of Lords in *Adomako*[5] was considered in *Brown (Uriah) v R*[6] (Privy Council Appeal from Jamaica). The former case had clearly identified the ingredients of manslaughter by gross negligence. Their Lordships said:

> Notwithstanding the importance of achieving clarity, simplicity and consistency in manslaughter directions, the decision in R v Adomako cannot be applied as a test in jurisdictions where causing death by reckless driving is a possible alternative offence. In those jurisdictions their lordships do not consider it possible to apply only the test prescribed in R v Adomako, for its application to motor manslaughter was predicated upon the disappearance of the statutory offences of reckless driving and causing death by reckless driving. Where those statutory offences can be charged, as in Jamaica, the content of motor manslaughter must frequently bear some relation to them, in which event a definition has necessarily to be framed with reference to recklessness. There must be proof of an extra ingredient, over and above the elements proof of which will ground a charge of causing death by reckless driving, but in their lordships' opinion juries have to be directed on the meaning of recklessness if they are to give proper consideration to a charge of motor manslaughter. It follows that the authority of R v Seymour and R v Lawrence must still hold good in those jurisdictions, subject to the modification made by the recent decision of the House of Lords in R v G [2003] UKHL 50, [2004] 1 AC 1034, to which their lordships now turn (per Lord Carswell delivering the advice of the Board at para. 25).

4. [1983] 2 AC 493.
5. [1995] 1 AC 171.
6. (2005) 66 WIR 238 (PC Jamaica).

9. The court held in *Brown's* case that in jurisdictions such as Jamaica, where the statutory offence of causing death by reckless driving coexists with the common-law offence of manslaughter, motor manslaughter should be charged only where the risk of death from the accused's driving was very high.

10. The court further held that in an appropriate case it is proper to charge both offences and that the trial judge should direct the jury how to distinguish between them.

Test for Dangerous Driving

11. A person is to be regarded as driving dangerously if –

    (a) the way he drives falls far below what would be expected of a competent and careful driver, and

    (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

    The word 'dangerous' refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.[7]

Reckless Driving and Duress of Circumstances

12. In *R v Conway*,[8] the Court of Appeal, after examining the authorities, concluded that:

> necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances', ... *i.e.* where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person ... (T)o admit a defence of 'duress of circumstances' is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, *i.e.* 'do this or else'. This approach does no more than recognise that duress is an example of necessity.

DIRECTIONS

Suggested Directions in a Motor Manslaughter Case

Their Lordships in *Brown* recommended a direction along the following lines (subject to adaptations to meet the requirements of the particular case):

7. Blackstone's Criminal Practice 2012/Part C.
8. [1989] QB 290, 88 Cr App R 159.

(a) Manslaughter in this context requires, first, proof of recklessness in the driving of a motor vehicle, plus an extra element of turpitude. That extra element is that the risk of death being caused by the manner of the defendant's driving must in fact be very high.

(b) The jury should be told specifically that it is open to them to convict the defendant of causing death by reckless driving if they are not satisfied that the risk of death being caused was sufficiently high.

(c) Proof of reckless driving requires the jury to be satisfied (i) that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and (ii) that in driving in that manner the defendant had recognised that there was some risk of causing such injury or damage and had nevertheless gone on to take the risk.

(d) It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard which from their experience and observation would be observed by the ordinary and prudent motorist.

(e) If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury must, in order to reach a finding of recklessness, find that he appreciated the existence of the risk; but they are entitled to infer that he was in that state of mind, although regard must be given to any explanation he gives as to his state of mind which displaces the inference (para. 30).

Directions for Reckless Driving[9]

"You must be sure:-

1. That the defendant was driving in such a manner as to create an obvious and serious risk of causing physical harm to some other person who might happen to be using the road or of doing substantial damage to property; and
2. That in driving in that manner, he did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

It is for you to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious, and, in deciding that, you may apply the standard of the ordinary, prudent motorist as represented by yourselves."

9. Adopted from The Judicial Studies Board 1997 Specimen Directions.

If the defendant suggests some excuse or explanation for his manner of driving, add the following direction:

> "If you are sure that the defendant's driving did create a serious and obvious risk you should consider, [in relation to his state of mind], his explanation for his manner of driving. If his explanation of what happened may be true and if it may have caused him [involuntarily to drive in that manner] [not to have been in either state of mind necessary for the offence] you should find him not guilty. Only if you are sure that you reject his explanation or its claimed effect can you convict if you are otherwise sure that the offence has been proved."

Directions for Causing Death by Dangerous Driving[10]

> "The prosecution has to prove a number of matters.
>
> The first is that the defendant was driving the car.
>
> The second is that the defendant›s driving caused the death of X. Any contribution to X's death by the way the car was driven, other than a very trivial contribution, is sufficient because the defendant›s driving does not have to have been a substantial or major cause of X's death.
>
> The third is that the way the defendant drove fell far below and not just below what would be expected of a competent and careful driver. It is for you to decide what was the standard to be expected of a competent and careful driver in all of the circumstances.
>
> If you consider that the defendant›s driving did fall below the standard to be expected of a competent and careful driver, but did not fall far below that standard, that is not necessarily the end of the matter. If you consider that he drove either without due care and attention or without reasonable consideration for other people using the road, then you may find the defendant not guilty of dangerous driving but guilty of careless driving or inconsiderate driving.
>
> The fourth is that it would be obvious to a competent and careful driver that it would be dangerous to drive in the way the defendant did. 'Dangerous' means that there was danger either of any injury to any person whether on or off the road or in the defendant›s car, or of serious damage to property. In deciding what would have been expected of or obvious to a competent or careful driver in the circumstances that existed at that time, you must have regard to those circumstances of which a competent and careful driver could be expected to be aware (e.g.) and to those circumstances which it has been proved were in the knowledge of the defendant (e.g.)."

10. Adapted from Northern Ireland Criminal Bench Book.

"The prosecution case is that the state of the vehicle was such that because of (whatever the defect etc.) it would be obvious to a competent and careful driver that driving the vehicle in that state would be dangerous. The defendant has said that he was not/could not have been aware of (the defect(s) etc) because it was not something that could be (seen or realised at first glance/evident to him). Unless you are satisfied beyond reasonable doubt that the (defect etc.) was something which would have been obvious to a competent and careful driver in those circumstances you should find the defendant not guilty."

"Finally, if, having considered all of the evidence, you are satisfied beyond reasonable doubt that the defendant drove dangerously on this occasion then you should find him guilty as charged because it does not matter whether he deliberately drove dangerously, was careless, momentarily inattentive or even doing his incompetent best."

Practice

Their Lordships in *Brown* (supra) were of opinion that prosecuting authorities should give consideration to bringing charges of causing death by reckless driving in cases where the facts warrant that course and that judges should likewise leave that offence to the jury in suitable cases.

25. VERDICT AND DELIBERATIONS

25-1 Adjournments
25-2 Unanimous Verdicts and Deliberations
25-3 Taking Partial Verdicts
25-4 Majority Verdicts
25-5 *Watson* Direction
25-6 Alternative Verdicts
25-7 If the Jury cannot Ultimately Reach a Verdict
25-8 Final Remarks to the Jury

***NOTE:* There are no Legal Summaries in this chapter, the subject matter being covered by the 'Directions and Procedure' sections. Also, in some sections, there are no references to Archbold or to Blackstone's because the topic is not separately covered in those works.**

25-1 Adjournments

DIRECTIONS AND PROCEDURE: ADJOURNMENTS

At times when adjournments are to be taken, such as at refreshment or luncheon breaks or at the end of a day's proceedings, or for any other reason causing the jurors to separate, it is necessary for the jury to be reminded that they must decide the case only on the evidence that they have seen and heard in court and not on anything that they may see or hear outside the courtroom. For this reason no juror must look for or receive any further information about the case, whether by talking to someone or by making their own investigations e.g. on the internet.

EXAMPLE: Adjournments

Based on the time [or whatever the occasion] we will now adjourn until tomorrow morning/after lunch at [time].

In the meantime it is important that you do not speak to anyone outside your own number about the case, not even to family members.

The reason for this is that if you were to talk to anyone else about the case you would not be deciding on the case based on your opinion only, but perhaps on someone else's opinion.

I must also remind you, though I am sure that you need no reminder, that you must decide the case only on the evidence and what you have seen and heard in court, that you must not do any work on the case at all between now and when we come back together in the courtroom. This means that there must be no research, for example on the Internet, no private study or making notes and no communication of any kind. This is because you work together on this case as a team when you are at court and not as individuals when you are away from it.

25-2 Unanimous Verdicts and Deliberations

Sources: ***Archbold*** **2016, 4-491;** ***Blackstone's*** **2016, D19.34; Crown Court Compendium 2016**

DIRECTIONS AND PROCEDURE: UNANIMOUS VERDICTS AND DELIBERATIONS

1. The jury must be directed that:
   (1) they should try to arrive at a unanimous verdict (in respect of each count and each defendant); and
   (2) they may have heard of majority verdicts but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict the judge will deal with the issue at that time. This would only happen if the judge were to decide that it is an appropriate course to take.
2. The jury should be advised that the foreman is the chairman for their deliberations and that the foreman will have to speak on their behalf when they return to the courtroom to deliver their verdict. They are to be informed that the foreman's views do not carry any greater weight than that of any other juror, in other words the foreman does not have any greater say than any other juror.
3. It would also be helpful to reassure the jury that there will inevitably be some debate in the jury room and, at least initially, different views may be expressed. If they all discuss the case by expressing their own views but also taking account of the views of other jurors they are likely to find that they will reach a verdict/verdicts on which they all agree.
4. Apart from exceptional circumstances,[1] the jurors are not allowed to separate once the summation has been concluded. It is better practice not to conclude the summation,

1. Section 47(2) of the Jury Act.

especially in a complex/lengthy case, if a lunch or refreshment break is at hand, or it is close to the end of the court day, but to conclude it after the break or when the jurors return on the following day. If the time for a lunch break arrives while the jury is deliberating, the registrar/clerk is to be directed to arrange for orders to be taken from the jurors as to their needs and collect the money from them so that the purchases can be made.

5. The jury should not be placed under any pressure to arrive at a verdict. It is for that reason that the summation should not be concluded close to the end of the court day; the jurors should not have any anxiety, for example, about getting home etc, affecting their deliberations. For that reason a 3:00 p.m. benchmark has been adopted. Only in the simplest of cases would it be not unreasonable to send the jury to deliberate after that time. But the time is not an inflexible one. In more complex cases, it may well be unreasonable to conclude the summation during the afternoon session. In such cases, it is best to delay concluding the summation until early the following day in order to give the jury adequate time to consider all the issues before it.

EXAMPLE: Unanimous Verdicts and Deliberations

> The evidence is now closed and I must remind you, though I am sure that you need no reminder, that that you must decide the case only on the evidence and the arguments that you have seen and heard in court
>
> It is important that you try to reach a verdict/verdicts on which you are unanimous: that is to say a verdict/s on which all of you agree.

The following is a form of words adapted from the English CrimPD:

> As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, [I will consider it, but that is not for consideration at this time].

The following is an alternative form, elaborating on the English CrimPD wording:

> You may have heard of majority verdicts but please put this completely out of your mind. Should the time come when I could accept a verdict which is less than one on which you all agree [I will consider it, but that is not for consideration at this time].
>
> So please concentrate on reaching a unanimous verdict. You may take as long as you need: you are not under any pressure of time at all.

Further in any event:

> It is entirely up to you how you run your discussions, but the foreman is the chairman for the discussion. It is also the foreman who will have to speak on your behalf when you return to the courtroom to deliver your verdict. The foreman is the chairman of the discussion in order to ensure that everyone gets to have their say and that the discussion is conducted with order and fairness. But the foreman does not have any greater say than any other juror. Nor does the foreman have any additional vote.
>
> When you begin your discussions, a number of different views may be expressed on particular topics but if you each then listen to the views of others, experience shows that in almost all cases juries are able to reach a verdict/s with which they are all able to agree.
>
> When you have reached your verdict/s you will indicate to the officer that you are ready and you will be escorted back into court to deliver that verdict. The registrar will then ask the foreman, to stand, and the foreman will then speak on behalf of you all.
>
> The delivery of a verdict is entirely straightforward: the registrar asks short questions to which the answers are given in no more than one or two words. If the foreman gives an answer that does not reflect the decision of the jury then please raise your hand immediately.

25-3 Taking Partial Verdicts

DIRECTIONS AND PROCEDURE

The taking of partial verdicts is not allowed in this jurisdiction. The jury will be discharged once they have given its verdict or if, in the judge's opinion, it is not likely that it will arrive at a verdict.

25-4 Majority Verdicts

Sources: **Jury Act – Sections 31 and 44 (both as amended); *Archbold* 2016, 4-509; *Blackstone's* 2016 D19.35; CrimPD 26Q**

DIRECTIONS AND PROCEDURE: MAJORITY VERDICTS

1. Other than the brief acknowledgment above, no majority verdict direction should be given to the jury prior to its first retiring.[2]

2. *R v Phipps and Others* SCCA Nos 21, 22 and 23/1987[11.7.88], *R v Greenland* (1990) 27 JLR 558.

2. If after the jury has been deliberating for at least two hours in the case of murder (for which sections 2(1)(a)–(f) and 3(1A) of the **Offences against the Person Act** do not apply) or at least one hour for offences other than murder or treason, a majority verdict may be taken.

3. In practice, it is best to allow the jury all the time it wishes in order to consider its verdict. Only in the most extreme circumstances should the jury be sent for to make an enquiry as to whether it will arrive at a verdict. In addition, greater time than the minimum stipulated by the statute should be allowed for the jury to go from the courtroom to their retiring room and *vice versa*.

4. Where the minimum time, at least, has elapsed, and the jury has returned, whether of its own volition or not, the clerk should announce the period for which the jury has been deliberating. The foreman should be asked whether they have arrived at a verdict and whether it is unanimous. If the foreman indicates that it is not unanimous, the foreman should be asked "in terms of numbers alone, how are you divided". If the division allows for a majority decision to be taken at that time, and the jury indicates that they are unlikely, with further deliberation, to arrive at a unanimous decision, a majority verdict may be taken.

5. In the case of murder, for which sections 2(1)(a)–(f) and 3(1A) of the **Offences against the Person Act** do not apply, the division must be at least 5:2. Where the jury is comprised of 12 persons the majority must be at least 9. In the case of offences other than murder and treason, the majority must be at least 5. The **Jury Act** allows the number of jurors to be reduced by one, it does not, however, address the numbers for a verdict if there is no unanimity.

6. When taking the verdict the trial judge should be sensitive to any comments made by the foreman which may suggest that further assistance is required or may be helpful. There is no stage at which the jury cannot be assisted by guidance from the trial judge.[3]

7. If the division does not allow for a majority verdict to be taken the foreman should be asked if, allowed further time, the jury could arrive at a verdict. Depending on the answer, the judge may consider giving a majority direction.

8. It is for the judge to decide if or when a majority direction is to be given, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the Judge when he is likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done.

3. *Berry v The Queen* [1992] 3 All ER 881, 894, *R v Linton Edwards* SCCA 250/2001 [21.5.03].

9. If the judge has decided to give a majority direction the jury will be sent for and, when they have returned to court the clerk will announce the period during which the jury has been deliberating. The clerk will then ask the jury if they have reached a verdict on which they are all agreed. Assuming that the answer to this question is "No" the jury should be directed that:

   (1) They should still, if at all possible, reach a unanimous verdict.

   (2) If however they are unable to reach a unanimous verdict the time has now come when the court could accept a verdict which is not unanimous but one on which a majority of them agree, stating the relevant majority allowed for that case.

10. The time that has elapsed since the jury retired to consider its verdict must be considered when taking a majority verdict. If the jury has been given substantive additional direction after first retiring then the time for considering a majority verdict is to be calculated from the last time that they retired having received substantive directions (See *R v Failey* (1975) 13 JLR 39).[4]

EXAMPLE: Majority Verdicts

In a moment I shall ask you to go back to the jury room to continue to consider your verdict. It is important that, if you can, you continue to reach a verdict on which all of you agree. But if you find that you really cannot all agree on your verdict, I may now accept a verdict on which fewer than 12 of you agree. However I can only accept such a verdict, whether of Guilty or Not Guilty, if at least 10 of you are agreed: that is to say there must be a majority of either 10 to 2 or 11 to 1.

Please will you now return to the jury room and continue with your deliberations.

25-5 *Watson* Direction

Sources: ***Archbold*** **2016, 4-492;** ***Blackstone's*** **2016, D19.88**

DIRECTIONS AND PROCEDURE

11. Although some recent decisions in the Court of Appeal have discouraged the giving of a *Watson* direction, describing it as an exceptional course,[5] in the most recent case of

4. *Regina v Adams* [1969] 1 WLR 106 gives the impression that It is the time of first retiring that matters but that opinion is based on a statute which is worded differently from the term used in section 44 of the Jury Act. The English legislation is the Criminal Justice Act, 1967, s. 13 (3): "A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation …".
5. *Arthur* [2013] EWCA Crim 1852; *Malcolm* [2014] EWCA Crim 2508.

R v Logo[6] the court, pointing out that *Watson*[7] was still the leading case, stated these principles, per Saunders J, sitting with Hallett VP and McGowan J, at paragraph 20:

> …First, such a direction should only be given after the majority direction has been given and after some time has elapsed or a further direction is sought from the Judge by the jury. That is a gloss on *Watson* which has become generally accepted in other cases. Secondly, there will usually be no need for a direction. Thirdly, the Judge should follow the wording set out in the headnote to *Watson* … Those principles are to be culled from the cases and, we would add, while the decision is one for the Judge's discretion, he or she should normally invite submissions from counsel as to the way in which the discretion is exercised.

He went on, at paragraph 25:

> Given the difficulties that this direction can cause, trial judges may wish to think long and hard before exercising their discretion to do so and, as we have said, they will also be well advised to seek the submissions of counsel to assist them reach a considered decision.

12. Circumstances in which this direction is given will therefore be rare. They will not arise unless and until the jury have been deliberating for a significant time in the context of the particular case and after they have been given a majority direction and have had further time in retirement.
13. If the judge receives a note from the jury asking for help, or stating that they are having difficulty in reaching a verdict, after discussion with the advocates, the judge may give a further direction if he decides that it is appropriate to do so.
14. If the judge does decide to give any further direction the words of the direction formulated by Lord Lane CJ in *Watson* should be followed without deviation (subject, it is submitted, to reference to affirmation in a case in which one or more jurors have affirmed).
15. The judge must avoid putting the jury under any pressure or creating any perception that he is doing so.

THE *WATSON* DIRECTION:

'Each of you has taken an oath [or made an affirmation] to return a true verdict according to the evidence. No one must be false to that oath [or affirmation] but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes with you into the jury box your individual experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the

6. [2015] 2 Cr App R 17.
7. [1988] QB 690, 87 Cr App R 1 CA.

scope of your oath (or affirmation). That is the way in which agreement is reached. If unhappily [ten of] you cannot reach agreement, you must say so.

25-6 Alternative Verdicts

Source: **Trinidad and Tobago Criminal Bench Book 2015**

DIRECTIONS AND PROCEDURE

The issue of whether an alternative verdict is available should preferably be raised with counsel at least prior to closing addresses in order to avoid possible unfairness to the defence.

The jury must be specifically warned not to return an alternative verdict as a compromise.

Alternative verdicts are available for:

1. Murder/manslaughter;
2. Attempted murder/wounding with intent;
3. Wounding with intent/unlawful wounding;
4. Larceny/receiving;
5. Rape/indecent assault.

The alternative verdict need not be on the indictment. It must be made clear to the jury that they can only convict on one or the other. It is necessary to go through the process step by step.

EXAMPLE: Alternative Verdict – Attempted Murder

If you find the defendant guilty on Count 1 of Attempted Murder, i.e. he had the specific intention to kill the virtual complainant, then go no further.

If however, you conclude that he is not guilty of attempted murder, or you are not sure, then go on to consider whether the prosecution has made you sure that when he inflicted injuries on the virtual complainant he did so with specific intention to cause grievous bodily harm.

25-7 If the Jury Cannot Ultimately Reach a Verdict

Sources: **Crown Court Compendium 2016**

PROCEDURE

1. There may come a time when it is clear that, however much time they are given, the jury will not be able to reach even a majority verdict.
2. If that time comes, what is to happen must be discussed with the advocates in the absence of the jury.
3. Thereafter, the jury should be invited to return to the courtroom and asked if they have reached any verdicts on any of the counts, alternative or remaining counts upon which at least the required majority has agreed.
4. If there are counts on which they are unable to agree, the jury should be asked whether, if given further time, there is any reasonable prospect of them reaching a verdict/s. The jury should then be asked to retire to consider this question.
5. In the event that the jury are unable to agree on all/some of the counts they should be discharged from giving verdicts on those counts and thanked for their work.

25-8 Final Remarks to the Jury

Sources: **Crown Court Compendium 2016**

PROCEDURE

1. The judge should always thank the jury for the work that they have done on the case.
2. The judge must not give any indication of his own view of the jury's verdict, particularly if it is adverse.
3. The jury should be reminded although they may now discuss with others their experience of being on a jury and speak about what took place in open court, they must never discuss or reveal what took place in the privacy of their jury room: this being absolutely forbidden. See also Chapter 3-1 paragraph 18.

26. ANNEXES

Annex 1: Special Measures Aide Memoire
Annex 2: Practice Direction 1/2016

ANNEX 1

SPECIAL MEASURES AIDE MEMOIRE

- **Available Special Measures (SM) under the act are video-recorded evidence (‘VR’) or evidence by video-link (‘VL’).**
- **Special Measures are available to <u>both</u> vulnerable and specific categories of non-vulnerable witnesses.**
- **The aide memoir explains the Act by way of a staged process focusing on the court process for obtaining the special measures direction:**

(1) **ELIGIBILITY GATEWAY** – The category of witness for whom SM are available. Including an indication as to which type of special measures are available under the Act.

(2) **GATEWAY CRITERIA** – The statutory factors that the court will consider to determine entrance through the gateway.

(3) **IN THE INTERESTS OF THE ADMINISTRATION OF JUSTICE?** – ALL applications require an assessment of whether the giving of a SM direction is ‘in the interests of the administration of justice’ criteria differs slightly dependent on the category of witness.

ELIGIBILITY GATEWAY	**Type 1 (VR/VL)** **Vulnerable** **Child- U18** ***3(1)(a)(i)** ***2(1),** ***2(2)(a)**	**Type 2 (VR/VL)** **Vulnerable** **Complainant in sexual offence** ***3(1)(a)(i)** ***2(2)(b)**	**Type 3 (VR/VL)** **Vulnerable** **Evidence unlikely to be available** **OR** **Quality likely to be diminished** **-----------------** **by reason of fear/distress or disability/disorder** ***3(1)(a)(i)** ***2(2)(c)**	**Type 4 (VR/VL)** **-** **Witness available but not reasonably practicable to secure attendance** ***3(1)(a)(ii)**	**Type 5 (VL)** **-** **Accused** ***4(1)**	**Type 6 (VR/VL)** **-** **Civil/Coroners witness** ***3(1)(b)**
GATEWAY CRITERIA	**2(2)(a)* • Must be under 18 at time that application is being determined	**2(2)(b)* • Must be complainant criminal proceedings to a sexual offence	**2(3)* • consider nature & circumstances of criminal offence • age • threat of harm • views expressed (e.g.witness/ fam) • any other relevant matter	**3(4)* • expense • logistics • any other relevant factor	*4(1)(a-d) • Accused must be Child or have disability • SM would allow accused to participate more effectively • Arrangements to implement available	**3(1)(b)* • 'appropriate in the interests of the administration of justice'

IN THE INTERESTS OF THE ADMINISTRATION OF JUSTICE?	*3(6)	*3(5)	*3(5)	*3(5)	*4(2) (a-d)	• No specific section addresses. In absence it is suggested the general criteria at *3(5) is used:
	• presumption in favour of interests of administration of justice … unless… • SM would not be likely to improve quality • Witness request no SM AND court satisfied that having no SM would not diminish quality • To determine exceptions against child SM court considers - *3(7): age & maturity, ability of child to understand what is involved in giving evidence by SM, any other relevant matter	• views expressed by witness & submissions on behalf • nature & importance of evidence • likelihood of facilitating availability of evidence • likelihood of improving quality of evidence • whether SM will inhibit testing witness' evidence • any other relevant matter	• views expressed by witness & submissions on behalf • nature & importance of evidence • likelihood of facilitating availability of evidence • likelihood of improving quality of evidence • whether SM will inhibit testing witness' evidence • any other relevant matter	• views expressed by witness & submissions on behalf • nature & importance of evidence • likelihood of facilitating availability of evidence • likelihood of improving quality of evidence • whether SM will inhibit testing witness' evidence • any other relevant matter	• views expressed • likely to facilitate the availability or improve quality • whether SM would inhibit the evidence being effectively tested by a party • Any other relevant matter	• views expressed by witness & submissions on behalf • nature & importance of evidence • likelihood of facilitating availability of evidence • likelihood of improving quality of evidence • whether SM will inhibit testing witness' evidence • any other relevant matter

ANNEX 2

PD No. 1 of 2016

SUPREME COURT OF JUDICATURE OF JAMAICA

PRACTICE DIRECTION (CRIMINAL)

TENDERING EVIDENCE PURSUANT TO SECTIONS 31 C, 31 CA AND 31 CB OF THE EVIDENCE ACT

This practice direction is issued after consultation with Judges of the Supreme Court. It is intended to govern the practice in the Supreme Court and Gun Courts as well as for guidance of Judges of Parish Courts. It replaces PD No.1 of 2015 issued July 28, 2015.

CONTEXT

In this Practice Direction:

"Court" means either the Supreme Court, Gun Court, Regional Gun Court (Western) or a Parish Court;

"Judge" means either a Judge of the Supreme Court or a Judge of a Parish Court and includes a person appointed to act in either of those offices.

CASE MANAGEMENT

(1) In the spirit of the Judicature (Case Management in Criminal Cases) Rules 2011 (in particular the Court's duty under rule 10(b) (i)) (Supreme Court), and whilst observing the protection of the individual's right to due process under section 16 of the Charter of Fundamental Rights & Freedoms, where appropriate, every effort should be made by parties to minimise the necessity of witnesses attending Court to give direct oral evidence.

(2) At the Plea and Case Management Hearing parties may be required to explain to the Judge the justification for requiring the attendance of particular witnesses at trial.

TENDERING WRITTEN STATEMENTS AND EXPERT REPORTS FOR ADMISSION INTO EVIDENCE PURSUANT TO SECTION 31C AND SECTION 31CB OF THE EVIDENCE ACT

Applicability of Section 31C and Section 31CB

(3) Section 31C and Section 31CB may be utilised where:

a. A written statement is made or an expert report is prepared and notice served in accordance with the provisions of section 31C (2) or 31CB (1) of the Act; and

b. It is not necessary to require the witness to attend court to give evidence in chief or to be made available for cross-examination.

Procedure where written statements or expert reports are tendered into evidence pursuant to Section 31C or Section 31CB of the Act

(4) Written statements or expert reports tendered into evidence under section 31C or section 31CB of the Act must be read aloud in Court and become part of the record.

Effect of admission of Evidence pursuant to Section 31C of the Act

(5) A written statement admitted in accordance with the provisions of section 31C of the Act is admissible in evidence to the same extent and effect as if the maker had given direct oral evidence of the matters contained in the written statement.

(6) Under section 31C (6) of the Act, the court may allow the party who consented to the admission of the written statement to lead evidence contradicting the evidence contained in the written statement. Under section 31C (7) of the Act where contradicting evidence is given the party who tendered the written statement may lead additional evidence in response to the contradicting evidence.

Effect of admission of Evidence pursuant to Section 31CB of the Act

(7) An expert report admitted in accordance with the provisions of section 31CB shall be admitted as evidence of the matters stated therein.

DOCUMENTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (a) OF THE EVIDENCE ACT

Applicability of Section 31CA(1)(a)

(8) A document may be admitted in evidence without the maker being called to give evidence whenever each party agrees orally or in writing to its admission. Document is defined in Section 1A of the Act as meaning, "in addition to a document in writing, anything in which information of any description is recorded."

Procedure where documents are received in evidence pursuant to Section 31CA(1)(a)

(9) Any oral agreement by the parties to admit documents into evidence must be clearly stated in open court and must be reflected in the court record.

(10) Where parties intend to agree in writing to admit documents into evidence they shall, where practicable, use the format outlined in Forms 1, 2 or 3 in the Schedule.

(11) Depending on the nature of the document it should be read, played or described making it part of the record.

Effect of admission into evidence of Documents pursuant to Section 31CA(1)(a)

(12) Documents admitted in evidence by agreement pursuant to section 31CA (1) (a) stand as evidence of their contents.

Editing Statements/Expert Reports

(13) Where the Prosecution proposes to tender a written statement or expert report into evidence, it may be necessary, for the statement or expert report to be edited to ensure the fair presentation of the evidence; for example, where a statement or expert report contains inadmissible, prejudicial or irrelevant material. Editing of a statement or expert report should in all circumstances be done by Prosecuting Counsel or the Clerk of the Courts in consultation with Defence Counsel, subject to the approval of the Court. If disagreement persists between the Prosecution and the Defence, the Court may require the witness to give oral evidence.

Editing Statements

(14) There are two acceptable methods of editing a statement:

(a) By marking a copy of the statement in a way which indicates the passages on which the Prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the material so marked. The original signed statement to be tendered to the court must not be marked in any way. The marking on the copy statement should be done by lightly striking out the passages to be edited, so that what appears beneath can still be read, or by bracketing, or by a combination of both. It is not permissible for the Prosecution to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that the Defence and the Court should be served with copies of the signed original statement. Whenever the striking out/bracketing method is used, the following words should appear on the Notice to Adduce the statement or statements being tendered:

> 'The prosecution does not propose to adduce at trial evidence of those passages of the attached copy statement(s) which have been struck out and/or bracketed (unless a notice to adduce so indicating is subsequently served).'

(b) By obtaining a redacted statement, signed by the witness, which omits the offending material.

15. In most cases where a statement is to be edited, the striking out/bracketing method will be the more appropriate, but the taking of a fresh statement may be preferable in the following circumstances:

(a) Where the part of the original statement on which the Prosecution is relying is only a small proportion of the whole. (It will however remain desirable to use the striking out/bracketing method if there is reason to believe that the Defence might itself wish to rely, in mitigation or for any other purpose, on at least some of those parts which the Prosecution does not propose to adduce.)

(b) When the passages contain material that the Prosecution is entitled in law to withhold from disclosing to the Defence.

(16) The procedures outlined in paragraphs 14 and 15 to guide the editing of a statement are applicable to editing the report of an expert, with any necessary changes to those procedures.

(17) Prosecuting Counsel should also be aware that, where a statement or expert report is to be tendered in the course of a trial before a Judge sitting alone, there will be a

particular need to consider the preparation of a fresh statement or report, rather than using the striking out/bracketing method. However, in such circumstances the inability to prepare a fresh statement or expert report should not be a bar to their admission under the Act.

(18) Whenever a redacted statement is taken from a witness or a redacted report is received from an expert, a copy of the earlier unedited statement/report of that witness, should be given to the Defence in accordance with the Prosecution's disclosure obligations, unless there are legal grounds for withholding disclosure. These instances may include circumstances where the Prosecution has obtained a Non-Disclosure Order from the Court following an application asserting Public Interest Immunity.

Editing Documents

(19) The procedures outlined to guide the editing of a written statement or an expert report are applicable to editing documents, with any necessary changes to those procedures. These changes will depend on the nature of the documents and the material that is required to be edited.

AGREED FACTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (b) OF THE EVIDENCE ACT

Applicability of Section 31CA (1) (b)

(20) Agreed facts may be relied on in various circumstances, for example:

(a) Agreement that property has been stolen where the issue is the identity of the perpetrator,

(b) The chain of custody of evidence that is not in dispute,

(c) Formal evidence of photographers, draftsmen and surveyors if not in dispute,

(d) Formal evidence of medical examiners or other experts if not in dispute (for example evidence that a victim was declared deceased and the cause and manner of death),

(e) Proof that a witness was present at a police interview,

(f) Features of the scene of a crime or the sequence of events of an incident that are not in dispute,

(g) The agreed presence of persons at a location.

Procedure where Evidence is adduced as a Statement of Agreed Facts

(21) A statement of agreed facts may be made by the parties at any stage prior to the commencement or conclusion of the criminal trial.

(22) A statement of agreed facts may be made orally or in writing. However, it will be desirable where practicable, for statements of agreed facts to be made in writing and be signed by the accused and counsel for the accused.

(23) The Court shall confirm or ensure that the following safeguards have been followed in relation to all statements of agreed facts:

(a) That the defendant is aware that evidence will be adduced in his/her trial by way of statement of agreed facts and consents to its use;

(b) That the defendant is aware that evidence contained in a statement of agreed facts must be accepted without further proof, but is not an admission of guilt of the offence(s) charged;

(c) That the defendant has been advised by his/her Counsel of the matters outlined in sub-paragraphs (a) and (b);

(d) If the statement of agreed facts is made orally, that the defendant has clearly stated for the Court record his/her agreement with the statement;

(e) If the statement of agreed facts is in writing, that the defendant has signed the statement of his/her own free will.

(24) Where a matter is being tried by a Judge sitting with a jury in the Circuit Court, the process of confirmation outlined at paragraph 23 should be conducted in the absence of the jury.

(25) Statements of agreed facts must be read or stated aloud in court. A copy of a written statement of agreed facts should be admitted as an exhibit in the trial.

(26) Written statements of agreed facts where made by:

(a) A defendant who is an individual, must be signed and dated by the defendant and his Counsel.

(b) A defendant that is a body corporate, must be signed and dated by a Director, Manager, or the Secretary of the body corporate and Counsel for the body corporate.

(27) Where parties intend to rely on a written statement of agreed facts they shall, where practicable, use the format outlined in Forms 4, 5 or 6 in the Schedule.

Effect of Admission of Agreed Facts pursuant to Section 31CA (1) (b)

(28) A statement of agreed facts received in evidence will stand as proven facts between the parties which must be accepted without further proof.

GENERAL MATTERS RELATING TO THE UTILISATION OF SECTIONS 31C, 31CB AND 31CA (1) (a) and (b) OF THE EVIDENCE ACT

Prosecution's Opening

(29) Where it is intended that section 31C, section 31CB or section 31CA (1) (a) or (b) of the Act will be relied on to adduce evidence during a jury trial, Prosecuting Counsel should in the opening address to the jury, clearly explain the nature and effect of evidence to be adduced in this manner.

Directions by a Judge

(30) A Judge sitting in the Circuit Court should where necessary, explain to the jury the effect of evidence adduced in different forms during the trial. For example:

(a) Direct oral evidence;

(b) Statements or expert reports read pursuant to section 31C or section 31CB of the Act; and

(c) Documents or agreed facts adduced by way of admissions by agreement pursuant to section 31CA (1) (a) or (b) of the Act.

(31) Where pursuant to section 31C, section 31CB or section 31CA (1) (a) or (b), evidence has been received in a trial before a Judge sitting alone, in delivering verdict the Judge should where necessary, refer to his/her consideration of the effect of the admission of each form of evidence adduced during the trial.

Zaila McCalla OJ
Chief Justice
September 16, 2016

SCHEDULE

FORM 1

DOCUMENTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (a)

Case No……………….

In the Supreme Court of Judicature of Jamaica
In the Circuit Court for the parish of ……………………..
Holden at …………………… on the ….day of …………………..20…
The Queen
vs
……………………
for
……………………

It is hereby agreed between the Prosecution represented by………..……………………
and the Defendant……………………………….….represented by.......................................
.....that the following document(s) may be admitted into evidence without the maker(s) of the document(s) being called to give evidence:

1. ………………………………………………………………………………………
2. ………………………………………………………………………………………
3. ………………………………………………………………………………………
4. ………………………………………………………………………………………

This agreement is made by the parties with the full knowledge that, if admitted, the contents of the document(s) will form part of the trial of the case in court, and be entered into the court record.

Signed……………………….	Signed…………………	Signed………………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..

FORM 2

DOCUMENTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (a)

Case No……………….

In the …………………… Court ……………………………………………………….

…………………………………………………………………………………………

Holden at …………………… on the ….day of …………………..20…

The Queen

vs

……………………

for

……………………

It is hereby agreed between the Prosecution represented by………..……………………
and the Defendant……………………………..…represented by..
.....that the following document(s) may be admitted into evidence without the maker(s) of the document(s) being called to give evidence:

1. ………………………………………………………………………………………
2. ……………………………………………………………………………………
3. ………………………………………………………………………………………
4. ………………………………………………………………………………………

This agreement is made by the parties with the full knowledge that, if admitted, the contents of the document(s) will form part of the trial of the case in court, and be entered into the court record.

Signed……………………….	Signed…………………………	Signed………………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..

FORM 3

DOCUMENTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (a)

The Parish Court
For …………………..
Holden at ……………………………
Regina)
-v-) Information number …./……
………………………………………)

It is hereby agreed between the Prosecution represented by………..…………………… and the Defendant………………………………..…represented by.................................... ....that the following document(s) may be admitted into evidence without the maker(s) of the document(s) being called to give evidence:

1. ……………………………………………………………………………………
2. …………………………………………………………………………………
3. ……………………………………………………………………………………
4. ……………………………………………………………………………………

This agreement is made by the parties with the full knowledge that, if admitted, the contents of the document(s) will form part of the trial of the case in court, and be entered into the court record.

Signed………………………	Signed………………………	Signed……………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..

FORM 4

AGREED FACTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (b) OF THE EVIDENCE ACT

Case No:…………………………
In the Supreme Court of Judicature of Jamaica
In the Circuit Court for the parish of ……………………..
Holden at …………………… on the ….day of …………………..20…
The Queen
vs
……………………
for
……………………

The following facts are hereby agreed between the Prosecution represented by………..…………………… and the Defendant…………………………………………
represented by...

1. ………………………………………………………………………………………
   ………………………………………………………………………………………
2. ………………………………………………………………………………………
   ………………………………………………………………………………………

This written statement of agreed facts is made by the parties with the full knowledge that the contents of the statement will form part of the trial of the case in court, and be entered into the court record.

Signed………………………	Signed……………………….	Signed………………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..

FORM 5

AGREED FACTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (b) OF THE EVIDENCE ACT

Case No……………………..

In the …………………… Court …………………………………………………….

………………………………………………………………………………………

Holden at ………………… on the ….day of …………………..20…

The Queen

vs

……………………

for

……………………

The following facts are hereby agreed between the Prosecution represented by……….…………………… and the Defendant…………………………………… represented by..

1. ……………………………………………………………………………………
   ……………………………………………………………………………………
2. ……………………………………………………………………………………
   ……………………………………………………………………………………

This written statement of agreed facts is made by the parties with the full knowledge that the contents of the statement will form part of the trial of the case in court, and be entered into the court record.

Signed………………………	Signed………………………..	Signed………………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..

FORM 6

AGREED FACTS ADDUCED BY WAY OF ADMISSIONS BY AGREEMENT PURSUANT TO SECTION 31CA (1) (b) OF THE EVIDENCE ACT

The Parish Court
For …………………..
Holden at …………………………….
Regina)
-v-) Information number …../……
…………………………………………..)

The following facts are hereby agreed between the Prosecution represented by……….……………………. and the Defendant………………………………………… represented by..

1……………………………………………………………………………………………
…………………………..……………………………………………………………………

2.…………………………………………………………………………………………
……………………………………………………………………………………………

This written statement of agreed facts is made by the parties with the full knowledge that the contents of the statement will form part of the trial of the case in court, and be entered into the court record.

Signed……………………….	Signed………………………….	Signed………………………...
Defendant	Defence Counsel	Prosecuting Counsel
Date:………………………	Date:………………………	Date:………………………..