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Foreword

The mission of the Judicial Education Institute of Trinidad and Tobago (JEITT) is:

*to promote excellence in the administration of justice in the Republic of Trinidad and Tobago through continuous training and development of judges, other judicial officers and non-judicial staff attached to the Judiciary.*

Publications are an essential part of the mission of the JEITT, as they promote research and serve as aids to the discharge of the judicial function. This publication of a Criminal Bench Book is one such initiative.

The need for a Criminal Bench Book has long been recognised by the Board of the JEITT as a necessary and relevant publication. It has the blessing of the President of the Board, The Honourable Chief Justice, Mr Ivor Archie ORTT, and the unanimous support of all Board members. Indeed, it is considered a milestone in the unfolding history of the JEITT. Most notably, this Criminal Bench Book is the first e-publication of the JEITT and serves as a watershed moment in its approach to publications in the 21st century.

Consistent with the imperative of access to justice for all, this publication (in its electronic version) will be available to the general profession and public at no cost. All that is required is for an interested person to visit [http://www.ttlawcourts.org/jeibooks](http://www.ttlawcourts.org/jeibooks) and click ‘Get this title’ to download the Criminal Bench Book in PDF format.

Thus, critical information relating to the norms for conducting a fair and just criminal trial are now, for the first time in Trinidad and Tobago, readily available to anyone who is interested in discovering what these may be. The implications are enormous. Not only will every judge have immediate access to the relevant law and procedure, but so too will every lawyer and citizen. This promotes transparency, accountability and consistency in the criminal justice system and removes some of the veils of secrecy so often associated with legal processes. In this way, the constitutional and juridical values of equality and fairness are advanced. It is also worth stating that this publication will assist the media, watchdogs of our democracy, in their scrutiny, analysis of, and commentaries on proceedings in the criminal jurisdiction. Finally, for those interested in research, it will serve as an invaluable resource.

No publication of this kind is possible without the dedication and efforts of many persons. The President and Board of the JEITT are deeply grateful to
the following persons, without whom this Criminal Bench Book would simply not be available. First, to the Chairperson of the Bench Book Committee, Mme Justice A Yorke-Soo Hon JA, and her Co-Chair, Mr Justice M Mohammed JA, together with their Judicial Research Assistants, Mr R Campbell and Ms C Williams for their careful and thorough research and compilation of the relevant materials and writing of the drafts for publication. It has been a long and sometimes challenging journey, but they persevered resolutely, and for that we are deeply grateful. Further thanks go to the judges of the Criminal Bench of Trinidad and Tobago for their participation, enthusiasm and contributions.

Next, to the publications and research staff at the JEITT, Ms K Mahabir, Ms K Braithwaite and Ms T Dassrath, together with the JEITT’s 2015 Interns Mr E Elahie and Ms F Primus, who painstakingly and with a vision for excellence, supplemented the research and writing as well as proofread the text and rendered the layout, to ensure that this publication was clear, coherent and accessible.

The e-version of this publication is the result of the insightful and creative work of the JEITT’s IT Specialist (Ag), Mr J Radhay and the Judiciary’s Internet/Intranet Support Officer Mr S Ajodha. For this we are especially thankful. It is hoped that the e-version of the Criminal Bench Book will be user-friendly and easy to navigate. Finally, we acknowledge the willingness of our producers, Paria Publishing, to work patiently with the JEITT to ensure that this publication meets the standards of professionalism appropriate for one such as this.

Mr Justice P Jamadar JA  
Chairman, Board of Directors, JEITT  
7th September 2015
Preface

Trial by jury is a distinctive feature of the Criminal Justice System in Trinidad and Tobago and a cornerstone of our constitutional democracy. Throughout the years, the judges of the Criminal Bench have steadfastly risen to the challenge of providing jurors with accurate legal directions tailored to the facts of each case. The proper administration of justice calls for judicial ingenuity in crafting summations which are precise, legally sound, and above all else, capable of assisting the jury in the performance of their duty.

Managing the increased volume of cases coming before the criminal assizes adds further burden to the weighty responsibility of the judicial office. Judges must continue to provide clear and concise directions of law in a climate of heightened public scrutiny, reduced trial timelines, voluminous lists, legislation that is constantly developing, and new judicial precedents. These challenges are compounded by the worrying trend of appeals grounded solely upon the inadequacy of trial directions.

The Trinidad and Tobago Criminal Bench Book will serve as a tool of trade for judges and is comprised of guidelines, commentary and specimen directions that are all intended to be a point of reference when preparing to address a jury. It is our hope that this book will clarify complex areas of law which present difficulty to judges and jurors alike. As an evolving text, the Bench Book is a contemporary statement of law and will adapt over time to reflect new developments.

The Crown Court Bench Books of the United Kingdom have traditionally set the standard for crafting legal directions. This Criminal Bench Book derives some of its content from these Bench Books which are already frequently utilised by our judges and are therefore both tested and familiar. We particularly wish to thank Lord Justice Pitchford, Professor David Ormerod QC and the Judicial College of England and Wales for allowing us to incorporate material from the United Kingdom Judicial Studies Board Crown Court Bench Book—Directing the Jury (March 2010) into our resource. These resources supplement our Criminal Bench Book, which is also made up of material submitted by the judges of the Criminal Bench. As this Criminal Bench Book develops we hope that there will be a shift towards a homogeneous text that is distinctly native to Trinidad and Tobago.

Mme Justice A Yorke-Soo Hon, JA
Chairperson, Bench Book Committee

Mr Justice Mark Mohammed, JA
Co-Chairperson, Bench Book Committee
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Summing-Up Checklist

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 of co-accused
✓ Plea of co-accused
✓ Good/bad character
✓ Hostile witness
✓ Complainant in sexual cases—child witnesses–video evidence
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✓ Supporting evidence
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✓ Inferences from silence at interview
✓ Inferences from silence at court

Summarise the evidence
✓ Tell the story
✓ Beware the notebook summing-up

Before retirement
✓ Unanimity of verdicts
✓ Availability of exhibits

Subsequently
✓ Dispersal overnight
✓ Majority direction
Introduction

Purpose
This Criminal Bench Book is intended to be used as a resource which will assist judges in crafting jury directions which are legally sound and appropriate to the specific circumstances of each case. It is not a substitute for the judge’s own research and innovation. It addresses some of the recurring challenges which judges face when summing-up. It is a compilation of guidelines drawn from judgments of the Superior Courts; the contributions of the judges of the Court of Appeal and Criminal Bench of Trinidad and Tobago; Bench Books of other Commonwealth jurisdictions, in particular the United Kingdom, Canada, and New South Wales, Australia; and the Laws of Trinidad and Tobago. The illustrations, commentary, analysis and case notes contained herein are proposed as a reference point from which judges can obtain, at a glance, an overview of the current state of the law and the essential points which must be contained in their summations.

These suggestions ought not to be adopted inflexibly. This tool is meant to encourage the development of a culture where judges of the Criminal Bench can confidently approach the task of drafting directions modeled in their own individual style.

The value of this Criminal Bench Book will be measured by the extent to which the judges apply, adapt and refine the resources provided. It is the responsibility of the Criminal Bench to guide the growth of this resource to ensure that it develops to meet their needs and most importantly the needs of the Criminal Justice System.

Use and Content
Primarily, this Criminal Bench Book is a guide to the formulation of directions. Illustrations are provided for areas which may be particularly challenging. Some directions have been adapted from the Crown Court Bench Book 2010. Where guidance has been adopted from sources outside of the jurisdiction, they have been modified where necessary to conform to the provisions of the legislation and legal system of Trinidad and Tobago.

This Criminal Bench Book also contains commentary and analysis of appellate judgments from this jurisdiction with specific focus on the role and function of judges in shaping directions for individual cases. The notes provided attempt to explain legal developments unique to Trinidad and Tobago which may warrant departure from extra-jurisdictional specimen directions and require judges to create ‘original’ directions to address deficiencies.
The content of this Criminal Bench Book is selected to reflect the essential directions of law which juries must understand to discharge their function. Directions are intended to explain the law to juries in a manner which is clear and succinct. Where a template direction is inappropriate, guidelines which identify the key legal issues are provided.

Not a one–size–fits–all

The approach to crafting directions requires that judges engage in an evaluative exercise bringing to bear their experience, judgment and understanding of the law and the context within which the directions will be applied.

A number of appeals have successfully challenged summations which, though identical to directions that have been upheld in other cases, failed to address the unique evidential and legal issues which arose in the case in which they were applied.

In this regard, the sample directions included in this Criminal Bench Book should not be liberally incorporated in summations. Instead, where appropriate, the directions contained herein should be used as a template which identifies considerations the judge should bear in mind when proposing to direct a jury in a particular matter. The directions given to juries must state the legal principles to be applied with maximum clarity and simplicity.

This Criminal Bench Book does not carry the force of statute. The resources provided are not legally binding precedent. Directions adopted will not be relevant to every case. It is no ground of appeal that the trial judge failed to follow the directions contained herein on any subject. The judicial officer using this Criminal Bench Book will always be required to determine what is appropriate in the circumstances. As this resource develops, it may be revised from time to time for clarity and updates.

The Process of Feedback and Development

Revision and improvement are critical to the relevance of these materials. With the input of the Criminal Bench and periodic revisions, this Criminal Bench Book has the potential to develop. It is for the judges to determine where further clarity is required; with each revision, the effectiveness of this tool is expected to increase.

It is hoped that this publication, a product of the Judicial Education Institute of Trinidad and Tobago, will assist judicial officers in fulfilling their mandate to deliver justice in a timely and effective manner. Judges are therefore encouraged to take ownership of this publication and to continue to contribute positively to its growth.
1. Structure of a Summing-Up

Content

The Court of Appeal set out the elements that a summing-up must contain in *Jay Chandler v The State CA Crim No 19 of 2011* referring to the judgment of Ibrahim JA in *Ramsingh Jairam and Krishna Persad v The State CA Crim Nos 35 and 36 of 1988*:

- The directions in law, both general and specific;
- A summary of the facts of the case for the prosecution and the case for the defence;
- An identification of the issues or questions in the case which arise for the jury’s determination;
- An evaluation and analysis of the evidence on each issue or question so identified;
- The jury’s approach to verdict.

a. General Directions

These include:

- Duty of the judge;
- Duty of the prosecution;
- Duty of the jury;
- Burden and Standard of Proof.

b. Charges on the Indictment

- Outline the offence charged;
- Refer to the law;
- Relate the statement of offence to the evidence;

*Example: Rape*

‘The offence of rape is committed when a person has sexual intercourse with another person without that other person’s consent...’
'What is sexual intercourse in law? Sexual intercourse is penetration per...’

‘So what is the evidence in the case to support this element of sexual intercourse? The witness said... The medical report showed...’

- If there are multiple offences, deal with each offence separately;
- Provide explanation of Specimen Counts if applicable.

c. **Summarise the case for the Prosecution**
   - Tell the story; Engage the jury;
   - Set out all material aspects;
   - Do not recite the evidence
   (Avoid reading large segments of evidence from the transcripts or your notebook).

d. **Deal with issues arising out of the Prosecution case**
   These **MAY** include where applicable:
   - Inconsistencies in the prosecution case;
   - Hearsay matters (eg dying declarations);
   - Confessions, mixed statements, etc;
   - Identification parades;
   - Hostile Witnesses;
   - Identification evidence: Visual ID *(Turnbull)*/ Fingerprints/Identification by voice, DNA, etc;
   - Circumstantial evidence;
   - Joint enterprise (in whatever form it may arise on the facts of the case);
   - Corroboration;
   - Evidence requiring caution;
   - Bad Character.

*Give the relevant directions and place each issue in the context of the evidence led by the prosecution.*
e. **Summarise the case for the Defence**
   - Tell the other side of the story;
   - Remember, do not recite evidence;
   - Set out all material aspects of the defence case.

f. **Deal with issues arising out of the Defence case**
   (i) What Defence has the accused put forward?
   
   MAY include where applicable:
   - Alibi;
   - Self-defence;
   - Provocation.

   **Give directions and relate the law to the evidence in the defence case.**

   (ii) Conduct of the accused
   
   MAY include where applicable:
   - Lies told by the accused;
   - Silence of the accused at trial;
   - Silence of the accused upon arrest.

   (iii) Good character direction

   (iv) Other issues

   MAY include where applicable:
   - Good character witness;
   - Previous good conduct.

   **Give directions and relate the law to the evidence in the defence case.**

   (v) Directing the jury

   MAY include where applicable:
   - Jury's approach to issues.
   - Set out the order of options for verdict where applicable.

   **Example:**
   Consider the alibi of the accused. The accused said he was (...). If you accept this evidence you must find the accused Not Guilty; if you reject this evidence, it does not mean that the accused is guilty. Go back to the Prosecution's case and see if they have made you sure (...). If you are sure then you may convict.

   - Set out the order of options for verdict where applicable.

   **Jury's approach to issues**
   - Provide guidance to the jury as to how they are to reach their verdict;

   **Example:**
   Consider the alibi of the accused. The accused said he was (...). If you accept this evidence you must find the accused Not Guilty; if you reject this evidence, it does not mean that the accused is guilty. Go back to the Prosecution's case and see if they have made you sure (...). If you are sure then you may convict.

   - Set out the order of options for verdict where applicable.
## 2. Summing-Up Checklist

### 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 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 the notebook summing-up

### Before retirement
- ✓ Unanimity of verdicts
- ✓ Availability of exhibits

### Subsequently
- ✓ Dispersal overnight
- ✓ Majority direction
Chapter 2—Fitness to Plead

Guidelines:
The preliminary issue is to determine whether the accused is fit to take his trial.

Section 64 of the Criminal Procedure Act Chapter 12:02:

If any accused person appears, on arraignment, to be insane, the Court may order a jury to be empanelled to try the sanity of such person, and the jury shall thereupon, after hearing evidence for that purpose, find whether such person is or is not insane and unfit to take his trial.

The jury is sworn to enquire whether the prisoner is able to plead to the indictment: Pritchard (1836) 173 ER 135 (Nisi Prius). Alderson, B the trial judge in Pritchard’s case 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.

The question is whether he is fit to take his trial; that is not merely to comprehend the indictment but also the course of proceedings in the trial: Reid [1961] 3 WIR 404 (British Guiana Federal Supreme Court) 405.

Blackstone’s Criminal Practice 2014 states:

Following the evidence, the court (Jury: s 64 of the Criminal Procedure Act Chapter 12:02) must consider whether the accused is capable of understanding the proceedings so that he can:

(a) put forward his defence;
(b) challenge any juror to whom he has cause to object;
(c) give proper instructions to his legal representatives; and
(d) follow the evidence.

If the issue was raised by the defence, the burden of proof is on them to establish on a balance of probabilities that the accused is unfit (Rob-
Criminal Bench Book

2015 Supreme Court of Judicature of Trinidad and Tobago

Ertsen [1968] 3 All ER 557); if raised by the prosecution, they bear the burden of proof beyond reasonable doubt (Podola [1960] 1 QB 325). Whilst it will normally be raised by the defence, the prosecution might wish to assert that the accused is unfit to plead either because of the general principle that prosecuting counsel should act as a ‘minister of justice’ assisting the court, or because in certain circumstances (eg, where the offence charged requires proof of a specific or ulterior intent on the part of the accused) it may in practice be difficult to establish guilt if, at the time of trial, the accused is manifestly suffering from mental illness.

Notes

1. Paling (1978) 67 Cr App R 299 (CA): A jury is usually selected without challenge by either side as it is not yet determined if the accused is capable of giving instructions concerning challenges.

2. The same jury may be used to try the general issue s 19 of the Jury Act Chapter 6:53. See Rodriguez (1973) 22 WIR 504 (CA). This provision may only be utilised if the right to challenge had been made known and was available at the trial of the first preliminary case.

3. P [2007] EWHC 946 (Admin) sets out the following guidance on when proceedings should be stayed if an accused is found unfit to plead:

   (a) A court should only stay proceedings on capacity issues in exceptional cases where it was likely to affect the fairness of the trial;

   (b) The fact that a court of higher authority had previously held that a person was unfit to plead did not make it an abuse to try that person for subsequent criminal acts. The issue of an accused’s ability to participate effectively had to be decided afresh;

   (c) Medical evidence should be considered as part of the evidence in the case and not as the sole evidence on a freestanding application. It was the court’s opinion of the accused’s level of understanding which had to determine whether a criminal trial was to proceed;

   (d) If the court decided that it should call a halt to the criminal trial on the ground that the accused could not take an effective part in the proceedings, it should then consider whether to switch to a consideration of whether the accused had done the acts alleged. That decision was one for the discretion of the court, but the proceedings should be stayed as an abuse of process before fact finding only if no useful purpose could be served by finding the facts;
(e) It would be right for a court to stay proceedings at the outset if the accused was so severely impaired as to be unable to participate in the trial and where there would be no useful purpose in finding the facts.

4. 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.
Chapter 3— Preliminary Directions of Law

1. Burden and Standard of Proof

Adapted from the Crown Court Bench Book 2010

Directions
A direction concerning the burden and standard of proof is required in every summing-up.

When the Legal Burden is on the Prosecution
The burden of proving the case rests upon the prosecution.

The accused bears no burden of proving anything and it is not his task to prove his innocence.

The fact that an accused has given evidence does not imply any burden upon him to prove his innocence. The jury will, however, need to reach a decision about what reliance they can place on the accused’s evidence. They should, when deciding upon the truth, reliability and accuracy of the evidence, adopt the same fair approach to every witness.

Standard of Proof
The prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the accused is guilty.

Further explanation is unwise (Note the problems encountered in Majid [2009] EWCA Crim 2563 when the judge endeavoured to explain reasonable doubt to the jury).

If the jury is not sure, it must find the accused not guilty.

Note: Being sure is the same as entertaining no reasonable doubt. See Archbold: Criminal Pleading, Evidence and Practice 4-384/385; Blackstone’s F3.37-39, for a discussion of terms.

When the Legal Burden is on the Defence
The burden of proving the matter in issue is on the accused.

Standard of Proof
The accused proves the matter in issue if the jury conclude, having considered all the relevant evidence, that the matter asserted is more probable (or more likely) than not.

Note: Where an evidential burden is placed upon the defence (eg to raise sufficient evidence of self-defence or duress for the issue to be left to the jury) and
discharged, the legal burden remains on the prosecution to prove its case so that the jury is sure of guilt.

Notes

Burden of Proof

1. Ori (1975) 22 WIR 201 (CA Guyana): The direction on the burden of proof was so casual that the circumstances called for a further direction or reminder on the burden of proof.

2. Gomes (1963) 5 WIR 469 (CA British Caribbean): With respect to duress, the burden is on the prosecution to satisfy the jury beyond reasonable doubt that the act of the accused person was a voluntary one. The trial judge’s directions on duress were unambiguous.

Standard of Proof

3. If in an exceptional case the jury asks for an explanation of a reasonable doubt as in Walters [1969] 2 AC 26 (PC Jamaica) and approved in Gray (1974) 58 Cr App R 177 (CA) at page 183, the Privy Council upheld the following direction by the trial judge: ‘A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other...’ However, this explanation should only be provided in exceptional cases and it is unwise to attempt any further explanation.

4. Robinson (1979) 26 WIR 411 (CA Guyana): The word ‘satisfied’ is not a sufficient explanation of the standard of proof to be met for criminal cases.

5. Ramdat (1991) 46 WIR 201 (CA Guyana): Explanation for reasonable doubt was unhelpful and may have led to error but it did not constitute a miscarriage of justice.

6. Worrell (1972) 19 WIR 180 (CA Barbados): Jury was told that before there can be a verdict of guilt the prosecution must make the jury sure that the verdict is the right one. This was held by the Court of Appeal to be imprecise as a judge should not introduce concepts which may introduce doubt in the minds of the jury as to their function. However, there were only 2 possible verdicts—guilty of murder or not guilty on the ground of insanity. No valid criticism could be found on the manner in which insanity was dealt with and this defence had obviously been rejected by the jury. The appeal was dismissed.

7. For the distinction between a legal and an evidential burden see Archbold (2009) 4-381-383, 388, 389, 16-77, 78 and Blackstone’s F3.1/36.
2. Specimen Counts

Adapted from the Crown Court Bench Book 2010

Guidelines

Specimen counts are included in the indictment in two circumstances:

1. Where the prosecution relies upon a course of conduct by the accused, during which he commits several offences, but is unable to supply particulars of each offence, it may include in the indictment a ‘specimen’ count alleging a single offence committed on a single occasion falling between a span of dates when the course of conduct was taking place.

2. Where there is a multiplicity of alleged offences which the prosecution could separately charge if it wished, but choose not to in the interests of a manageable trial, it may select a lesser number of specific offences and charge them as ‘specimens’ or ‘samples’.

Where, for example, a child complains of sexual abuse of the same type over a period of years but is unspecific about occasions, the prosecution may charge specimen offences reflecting the age of the child during each year in which the offences were committed.

Where, for example, a finance director, allegedly steals money from a company over a period of time, using the same method on different occasions, the prosecution may choose to charge specimen offences reflecting the method used throughout the period.

In both examples the effect of laying a specimen count is to invite the jury to conclude that the single offence of its type charged was committed during the period identified in that count. The prosecution is relying on evidence of a course of conduct (or system) to prove a single specimen offence.

The judge’s directions to the jury should therefore:

- Explain why the specimen counts have been included in the indictment, ie either to make the trial more manageable or because the prosecution is unable to identify each separate occasion on which an offence was committed, or both; and
- Inform the jury whether and to what extent the course of conduct evidence is admissible to prove the specimen counts; and
- Explain that whether or not they accept the course of conduct evidence in its entirety, they must be sure that the offence charged as a specimen (or sample) count, or the further specimen (or sample) offence, which they are considering is proved.
Illustration

Counts not separately identifiable

The counts listed in the indictment are ‘specimen’ or ‘sample’ counts. The prosecution alleges that the accused also committed numerous other offences of the same kind on (state frequency) over the period (...). Instead of loading up the indictment with counts charging many offences, the prosecution has selected (number) as examples, the counts on the indictment, as they are entitled to do. However, you may convict the accused only if you are sure that he committed the particular offence charged in count 1 and/or count 2 and/or (...) whether or not you are sure that he also committed other such offences.

Separately identifiable counts

Count (...) is a specimen count. The prosecution alleges that the accused also committed numerous other offences of the same kind [particulars]. Instead of loading up the indictment with counts charging many offences, they have selected one as an example, as they are entitled to do. However, you may convict the accused only if you are sure that he committed the particular offence charged in the count (...), whether or not you are sure that he also committed other such offences.
Notes

1. **Roy George v The State CA Crim No 22 of 2008—**

   The question for determination is whether the judge was correct in treating Counts 1 to 3 as specimen counts.

   Blackstone’s Criminal Practice 2009 defines specimen counts at paragraphs D11.33–D11.34 under the rubric “Specimen of Sample Counts”:

   ‘Where a person is accused of adopting a systematic course of criminal conduct, and where it is not appropriate to allege a continuous offence or a multiple offending count, the prosecution sometimes proceeds by way of specimen or sample counts. For example, where dishonesty over a period of time is alleged, a limited number of sample counts are included so as to avoid too lengthy an indictment.

   **Procedure for Specimen Counts**

   The practice which the prosecution ought to adopt in these circumstances is as follows:

   (a) the defence should be provided with a list of all the similar offences of which it is alleged that those selected in the indictment are samples;

   (b) evidence of some or all of these additional offences may in appropriate cases be led as evidence of system;

   (c) in other cases, the additional offences need not be referred to until after a verdict of guilty upon the sample offence is returned.’

2. In **Roy George** the allegation made in each count was that rape was committed on a particular day. A specimen direction was inapplicable. Specimen counts properly defined are used where a person is accused of adopting a systematic course of criminal conduct but the circumstances make it inappropriate to allege a continuous offence or multiple offending counts. For example, a case where an accused is said to have sexually abused a child frequently over a period of time but the child is unable to particularise any specific occasion on which the abuse occurred. The sentencing judge is not permitted to sentence in respect of offences not specifically included in the indictment or in respect of conduct to which the accused has neither admitted nor been convicted of.
3. Trial in the Absence of The Accused

Adapted from the Crown Court Bench Book 2010

Guidelines

Exceptionally, a trial may proceed in the accused’s absence because he:

1. Misbehaves in court;
2. Is too ill to travel;
3. Voluntarily absents himself from his trial.

Misbehaviour

The judge will usually adjourn until the accused has had time to reflect and the trial will be resumed when he gives an assurance as to his future behaviour. If, for compelling reasons, the trial must continue, the accused will usually return to court after time for reflection.

Illness

An accused who is involuntarily unfit to attend trial is entitled to be present and the case should be adjourned until he is fit, or the jury discharged if that is not possible. If, however, the accused consents, or the trial can proceed without prejudice to the accused (eg in a multi-handed case, by calling evidence which does not affect the accused), the trial judge has a discretion to proceed, but the discretion should be exercised sparingly.

Voluntary Absence

In Hayward [2001] EWCA Crim 168 the Court of Appeal (Rose LJ, Vice-President) set out the principles to be followed:

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 accused 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 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 accused who are present.

6. If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, 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.

These observations received the approval of the House of Lords in Jones [2002] UKHL 5 save that Lord Bingham qualified the Vice-President’s references to the seriousness of the case and to the desirability of representation even where the accused is voluntarily absent:

14. First, I do not think that ‘the seriousness of the offence, which affects defendant, victim and public’, listed in paragraph 22(5)(viii) as a matter relevant to the exercise of discretion, is a matter which should be considered. The judge’s overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor.

15. Secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case.

But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a
valuable safeguard against the possibility of error and oversight. For this reason trial judges routinely ask counsel to continue to represent an accused who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances.

If the trial is to proceed in the accused’s absence, that fact should be explained to the jury, as soon as possible, in appropriate terms. When the judge has ruled that the accused has voluntarily absented himself, he will not inform the jury of that fact and will need to warn the jury against speculating upon the reason for the accused’s absence and treating the accused’s absence as any support for the prosecution case.

These directions should be repeated during the summing-up. Depending upon the stage of the trial at which the accused has absented himself, the jury may also be told that as a matter of fact the accused has given no evidence which is capable of contradicting the evidence given by witnesses for the prosecution.

If the accused gave an account in interview which was partly self-serving it is admissible as to the truth of the matters stated.

Notes

1. **Brown (1963) 6 WIR 284 (CA)** followed **Lawrence [1933] AC 699 (PC Nigeria)**: It is an essential principle of our criminal law that the trial (including sentence) for an indictable offence has to be conducted in the presence of the accused. There may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. In **Brown** the appellant fell ill and was taken outside while evidence was being given on the question of admissibility of a statement given by the appellant. The inadvertent absence of the appellant resulted in a mistrial and his appeal was allowed.

2. **Patrick and Small (1974) 26 WIR 518 (CA)**: On his arraignment S refused to plead and immediately sought to escape from the dock and generally behaved in such a violent and disorderly manner as to render it necessary for the trial judge to have him removed from the court. The trial proceeded and terminated with his being sentenced in his absence. Dismissing his appeal, it was held inter alia that the conduct of S during the trial was designed for the deliberate purpose of making it impossible to proceed with his trial, and in such circumstances the learned judge followed the correct course in proceeding with the trial (including the sentence) in his absence.
3. **David Donald v The State CA Crim No 5 of 2007**: The appellant threw peanuts at members of the jury and prosecuting counsel during the course of the trial. The trial judge discussed the issue with counsel and then excluded the appellant from the proceedings. The Court of Appeal upheld the trial judge’s decision to exclude the appellant. Considering that the appellant must take responsibility for his own actions, there was no onus on the judge to make any inquiry; however, in so doing, the judge acted favourably towards the appellant. Further, given the strong directions to the jury not to hold the incident against the appellant, the court took the view that the appellant suffered no prejudice by the approach taken by the judge.

4. See also authorities of *Lawrence [1933] AC 699* (PC Nigeria); *Abrahams (1895) 21 VLR 343* (SC Victoria) and *Jones [2002] UKHL 5* in which the House of Lords laid down six principles as to trial of an accused in his absence which were adopted by the local Court of Appeal in *David Donald v The State CA Crim No 5 of 2007*. 
4. Trial of One Accused in the Absence of Another

Adopted from the Crown Court Bench Book 2010

Guidelines

An accused named in the indictment may not be before the court because he has pleaded guilty or will be separately tried.

Sometimes, particularly by agreement between the parties, the fact of an absent accused’s plea of guilty, or conviction, will be admitted to ‘de-mystify’ the current proceedings, but it will be of no evidential significance.

Notes

1. Where the fact of a plea of guilty by another person named in the indictment is not admitted in evidence, or he is to be separately tried, the jury should be told that they are not required to reach a verdict in his case and should not speculate. They should concentrate on the evidence in the case of the accused they are considering.

2. Where the guilt of another becomes known to the jury but it is inadmissible as evidence against the accused, the jury should be explicitly directed to that effect.

3. Archbold (38th edn) at paragraph 127: The question whether there should be separate trials is one for the discretion of the judge at the trial, and the Court of Appeal will interfere in this matter only where it is shown that the exercise of the discretion has resulted in a miscarriage of justice—in other words, that improper prejudice has been created either by a separate or a joint trial.

4. Patrick and Small (1974) 26 WIR 518 (CA) (see Chapter 3:3—Trial in the Absence of the Accused): P and S were jointly charged and convicted for robbery with aggravation. During the course of the trial S disrupted the proceedings and was excluded by the trial judge. On appeal, P submitted inter alia that the judge should have ordered a separate trial in view of the likelihood of his case being prejudicially affected by the behaviour of S during the trial. The Court of Appeal dismissed his appeal. The learned judge, who gave the jury a warning against allowing their minds to be prejudiced against the applicant, P, by the behaviour of his co-accused, S, exercised his discretion correctly in proceeding with the joint trial of both prisoners. Hoggins [1967] 3 All ER 334 (CA) applied: The factor of the public interest in the administration of justice is a very powerful factor indeed and in the majority of cases where men are charged jointly it is clearly in
the interest of justice and the ascertainment of the truth that all the men so charged should be tried together.

5. **Lake (1976) 64 Cr App R 172 (CA):** It has been accepted for a very long time in English practice that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. See also **Moghal (1977) 65 Cr App R 56 (CA); Grondkowski [1946] KB 369 (CA).**

6. **Akim Carter and Clinton John v The State CA Crim No 32 of 2005:** The decision to order separate trials of accused who have properly been joined in one indictment is one for the judge in the exercise of his inherent discretion to control the proceedings before him. An injudicious exercise of such discretion may occur if the trial judge took into account irrelevant considerations, or ignored relevant ones, or arrived at a manifestly unreasonable decision. Only in any of the aforementioned instances will the Court of Appeal disturb a trial judge’s exercise of his discretion against a joint trial. The real question that determines the court’s intervention is whether the trial judge’s decision caused unacceptable prejudice to the appellant such as might have led to a miscarriage of justice.
5. Delay

Adapted from the Crown Court Bench Book 2010

Guidelines

The judge should refer to the fact that the passage of time is bound to affect memory. A witness’ inability to recall detail applies equally to prosecution and defence witnesses but it is the prosecution which bears the burden of proof. The jury may be troubled by the absence of circumstantial detail which, but for the delay, they would expect to be available. Conversely, the jury may be troubled by the witness’ claim to recall a degree of detail which is unlikely after such a prolonged passage of time. Whether reference should be made to such possibilities is a matter for the trial judge to assess having regard to the evidence and the issues which have arisen in the case.

If, as a result of delay, specific lines of inquiry have been closed to the accused the disadvantage this presents should be identified and explained by reference to the burden of proof.

Directions must make clear that the jury should give careful consideration to the exigencies of delay.

An accused of good character will be able to assert that the absence of any further and similar allegation is significant.

In H (Henry) [1998] 2 Cr App R 161 (CA) the Court of Appeal carried out a review of the authorities, as they concerned the judge’s obligation to refer to delay in his directions, of which the following is part:

Such directions would surely be called for in a case where not only had there been substantial delay but where it could be seen that witnesses who might have been able to give relevant evidence, and a large number of them, had disappeared during the interval and accordingly there was the clear possibility that the defence was not only prejudiced but seriously prejudiced as a result of not being able to produce that evidence... There is... a difference between the point being made by counsel and the submission which has been made by counsel being endorsed by the judge. It seems to us that this was a case in which it really was incumbent upon the learned judge, having taken the decision which he did at the outset of proceedings,...to, at the end of the case, point out to the jury that what was said by the defence about the possible prejudice to the defence as a result of the delay was a matter to which they could, and should properly have regard.

We consider it is plain upon the state of the authorities to which we have referred that it is desirable in cases of substantial delay that some direction should be given to the jury on possible difficulties with which
the defence may have been faced as a result of such delay. Nonetheless, such a direction is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial. Equally, such a direction should be given in any case where it is necessary for the purposes of being evenhanded as between complainant and defendant.
Illustration

Members of the jury, we are now concerned with events which are said to have taken place a long time ago [indicate the relevant period of time which has elapsed since the offence was committed]. You must appreciate that because of this delay there may be a danger of real prejudice to the accused.

This possibility must be in your mind when you decide whether the prosecution has made you sure of the guilt of the accused. You should make allowances for the fact that with the passage of time memories fail. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred (...) years ago. Sometimes the passage of time may even play tricks on their memories.

You should also make allowances for the fact that from the accused’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 in your own lives to appreciate the problems which may be caused by delay.

Now, even if you believe that the delay in this case is understandable, if you decide that because of it, the accused has been placed at a real disadvantage in putting forward his case, then take that into account in his favor when deciding if the prosecution has made you sure of his guilt.

[There is one effect of delay which you may regard as supporting the case of the accused. You have heard that the accused has no previous convictions [no further/no similar convictions since the date of the alleged offence.] Having regard to what you know about the accused and in particular (...) years having elapsed since the date of the offence, you may think that he is entitled to ask you to give considerable weight to his good character when deciding whether the prosecution has satisfied you of his guilt.]
Notes

1. The State v Dularie Peters HC No 24 of 1994; CA Crim No 34 of 2008: In this case there was a delay of twenty-four years; twelve years attributable to the state and the other 12 attributable to the appellant voluntarily removing herself from the jurisdiction. Her appeal on was dismissed and the conviction and sentence for attempted murder were affirmed.

(a) At common law, an accused who wishes to stay a prosecution on the basis that his continued prosecution would amount to an abuse of process, must show that he would suffer serious prejudice to the extent that no fair trial would be possible owing to the delay, so that the continuation of the prosecution amounted to an abuse of process; the right to a fair trial is an absolute right.

(b) The discretion to stay proceedings should be exercised only in exceptional cases, and even in those exceptional circumstances the judge is bound to consider the extent to which a suitable direction to the jury is capable of obviating any prejudice to the accused resulting from the delay. The applicant bears an onerous burden of proof to show that he would suffer prejudice so that no fair trial could be held, and, on such an application, the court should take into account any measures available to the trial judge to mitigate unfairness.

(c) Where there is no express right to a speedy trial or trial within a reasonable time, (as in Trinidad and Tobago’s Constitution), then common law principles are to be applied in order to determine whether the trial would be a fair one, this being a matter primarily for the trial judge who must decide whether the criminal proceedings should be stayed as a result of unfairness.

(d) The central issue is whether the appellant would have suffered serious prejudice to the extent that no fair trial ‘as expressly guaranteed by the Constitution of Trinidad and Tobago’ was possible owing to the delay and therefore continuation of the prosecution would have amounted and did amount to an abuse of process.

(e) Prosecutorial fault cannot, without more, justify a stay nor should a stay be used to punish the State for its deleteriousness. Prejudice simpliciter is not sufficient; what is required is prejudice which leads to unfairness that cannot be cured by the trial judge’s actions/directions.

2. The emboldened illustration above only becomes necessary if the accused is entitled to a good character direction due to a lack of previous convictions or further/similar convictions since the date of the alleged offence.
Chapter 4—Causation

Adopted from the Crown Court Bench Book 2010

Guidelines

“Result” offences sometimes create problems of causation to be resolved by the jury. The judge may need to give careful consideration to the questions (1) what the prosecution needs to prove, (2) whether it is necessary to provide the jury with an explanation of causation and, if so, (3) how to explain the concept of causation in the context of the facts of the case. As long ago as 1956 in the case of Smith [1959] 2 QB 35 (CA) 43 Lord Parker CJ said, ‘There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation’.

In its simplest form, the test for causation is whether “but for” the accused’s act the result would have happened but such a test might not permit concurrent causes and might, inappropriately, impose liability for an unforeseeable change to consequences.

General Rule

There may be more than one cause. The prosecution must usually establish that the accused’s act was a substantial cause of the “result”, by which is meant a more than minimal cause: Hennigan [1971] 3 All ER 133 (CA).

The fact that the result was unusual or unexpected in consequence of some unanticipated decision of the victim will not necessarily assist the accused. In Blaue [1975] 1 WLR 1411 (CA) for example, the victim of a wounding refused a blood transfusion which would have saved her life. Lawton LJ said:

It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.
Unlawful Act Manslaughter and Foreseeable Harm

In cases of unlawful act manslaughter the co-existence of the unlawful act and the death of the victim will not be enough unless some harm was a foreseeable risk on the facts as they were known to the accused. In *Church [1966] 1 QB 59* (CA) the accused inflicted grievous injuries. His evidence was that in panic and believing his victim to be still alive, he threw her body into a river. As Edmund Davis J explained:

...an unlawful act causing the death of another cannot simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

The accused was convicted of manslaughter. The court held that although the jury had been misdirected that the accused’s belief that his victim was alive was irrelevant, a conviction for at least manslaughter had been inevitable because either (1) the victim was dead when she was thrown into the river and the injuries the accused had already inflicted made a significant contribution to death or (2) his victim was alive and his act of throwing her into the river was an unlawful and dangerous act which any reasonable person would have realised would risk some harm.

The Court of Appeal made plain in *Dawson (1985) 81 Cr App R 150* (CA) and *Carey [2006] EWCA Crim 604* that it is not the foreseeability of the risk of any harm which will be sufficient to satisfy the test in a case of manslaughter. In *Dawson* a garage attendant aged 60 was the victim of an attempted robbery. He undoubtedly suffered an emotional reaction but was subjected to no violence. He died from a heart attack caused by the effect of stress upon an already severely diseased heart from which he was in constant danger of succumbing. The bystander would have had no reason to suspect that a heart attack might be the result of the stress the victim suffered. In *Carey* the deceased was subjected to direct physical assault during an affray but, having run away from the scene, suffered a dysrhythmia of the heart to which she was, unknown to anyone, susceptible, from which she collapsed and died. In both cases the court held that the death was not “caused” by the unlawful act. Whether the act was objectively dangerous was to be judged according to the circumstances as they were known to the accused. Accordingly, unless there were circumstances which would have given the bystander foresight that the accused’s unlawful act might cause relevant harm, death will not have been “caused” by an unlawful and dangerous act. In *Watson [1989] 1 WLR 684* (CA) on the other hand, the victim of a burglary could be seen to be a frail 87 year old man. Lord Lane CJ said at pages 686-687:
The judge clearly took the view that the jury were entitled to ascribe to the bystander the knowledge which the appellant gained during the whole of his stay in the house and so directed them. Was this a misdirection? In our judgment it was not. The unlawful act in the present circumstances comprised the whole of the burglarious intrusion and did not come to an end upon the appellant’s foot crossing the threshold or windowsill. That being so, the appellant (and therefore the bystander) during the course of the unlawful act must have become aware of Mr. Moyler’s frailty and approximate age, and the judge’s directions were accordingly correct. We are supported in this view by the fact that no one at the trial seems to have thought otherwise.

**Novus Actus Interveniens and Remoteness**

In *Pagett [1983] 76 Cr App R 279 (CA)* 288 Robert Goff LJ said:

In cases of homicide(...)Even where it is necessary to direct the jury’s minds to the question of causation, it is usually enough to direct them simply that in law the accused’s act need not be the sole cause, or even the main cause, of the victim’s death, it being enough that his act contributed significantly to that result. It is right to observe (...) that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact, that the accused’s act did in this sense cause the victim’s death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a *causa sine qua non* of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim’s death, thereby relieving the accused of criminal responsibility. Such intervention (...) has often been described by lawyers as a *novus actus interveniens*. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term 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.

Most problems of causation concern the application of the principle *novus actus interveniens*, or new and intervening act. The UK Court of Appeal has, on more than one occasion, advised against entering into an exposition of the law concerning an intervening act when it is plain that there was more than one
cause and the issue is whether the accused made a more than minimal contribution to the result.

Subject to the existence of an **Empress Car Co** duty (as to which see below), the accused will be relieved of liability for the result if the intervening act or event becomes the dominating operative cause, such as:

1. An extraordinary natural event or one which is not reasonably foreseeable (eg earthquake);

2. A third party’s free, deliberate and informed act (cf **Gamble [1989] NI 268 (CC)** and **Latif [1996] 1 WLR 104 (HL)** below);

3. A third party’s act which is not reasonably foreseeable (cf **Pagett, G [2009] EWCA Crim 2666** and the medical intervention cases below);

4. The victim’s free, deliberate and informed act (**Kennedy (No 2) [2008] 1 AC 269 (HL)** below, but compare **Blaue** above where the wound remained the operative cause);

5. The victim responded to the accused’s act in a way which was not reasonably foreseeable (cf **G** and **Lewis [2010] EWCA Crim 151** below).

In **Latif** the accused were alleged drugs importers. Customs officers seized in Pakistan heroin intended for the accused in the UK. The officers conveyed the drug to the UK where the accused took delivery. The accused were not guilty of the importation. Lord Steyn said:

The problem, as Sir John Smith pointed out in the note in the Criminal Law Review, is one of causation. The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility: see **Hart and Honore, Causation in the Law**, 2nd ed. (1985), pp. 326 et seq.; **Blackstone’s Criminal Practice** (1995), pp.13–15. For example, if a thief had stolen the heroin after Shahzad delivered it to Honi, and imported it into the United Kingdom, the chain of causation would plainly have been broken. The general principle must also be applicable to the role of the customs officers in this case. They acted in full knowledge of the content of the packages. They did not act in concert with Shahzad. They acted deliberately for their own purposes whatever those might have been. In my view consistency and legal principle do not permit us to create an exception to the general principle of causation to take care of the particular problem thrown up by this case. In my view the prosecution’s argument elides the real problem of causation and provides no way of solving it.

The accused did not, however, escape conviction because they were charged under s 170(2) **Customs and Excise Management Act 1979** by which the ac-
cused is guilty when he evades or attempts to evade the duty. There was no doubt that they had attempted to evade the duty.

Acts of Self Preservation Causing Injury or Death

In Pagett [1983] 76 Cr App R 279 (CA) the accused advanced towards armed police officers in the darkness of a stairwell using his girlfriend, whom he had taken hostage, as a shield. He fired a shot from a shotgun which produced the instinctive and self-defensive response of shots from the police officers. The girlfriend was killed by shots fired by the officers. Robert Goff LJ, recognising the analogy with the “escape” cases, said:

There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused’s own act, does not operate as a novus actus interveniens. If authority is needed for this almost self-evident proposition, it is to be found in such cases as Pitts (1842) C & M 284, and Curley (1909) 2 Cr App R 96. In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim’s death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused’s act, and a response which takes the form of self-defence. Furthermore, in our judgment, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party. Of course, it does not necessarily follow that the accused will be guilty of the murder, or even of the manslaughter, of the third party; though in the majority of cases he is likely to be guilty at least of manslaughter. Whether he is guilty of murder or manslaughter will depend upon the question whether all the ingredients of the relevant offence have been proved; in particular, on a charge of murder, it will be necessary that the accused had the necessary intent...

Thus, the accused’s unlawful and dangerous acts of (1) the assault upon his girlfriend by forcing her to act as a shield and (2) firing a shot at the police officers created a foreseeable risk of relevant harm and were a significant cause of the girlfriend’s death.
The trial judge had directed the jury that if they found these facts proved the accused would in law have caused the death. The judge should have left the issue to the jury. Robert Goff LJ continued:

The principles which we have stated are principles of law. This is plain from, for example, the case of *Pitts (1842) C & M 284*, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called *novus actus interveniens*, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, *Towers (1874) 12 Cox CC 530*, the accused struck a woman; she screamed loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from convulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact.

Nevertheless, the verdict was undisturbed because the judge’s directions had been somewhat more generous than they need have been.

If the accused’s unlawful act generates in the victim a reaction which results in the victim’s injury or death the question for the jury will be whether the victim’s reaction was a foreseeable consequence of the accused’s unlawful act. In *Williams [1992] 1 WLR 380* (CA) Stuart-Smith LJ explained:

It is plain that in fatal cases there are two requirements. The first, as in non-fatal cases, relates to the deceased’s conduct which would be something that a reasonable and responsible man in the assailant’s shoes would have foreseen. The second, which applies only in fatal cases, relates to the quality of the unlawful act which must be such that all sober and reasonable people would inevitably recognise must subject the other person to some harm resulting therefrom, albeit not serious harm. It should be noted that the headnote is inaccurate and tends to confuse these two limbs.

The harm must be physical harm. Where the unlawful act is a battery, there is no difficulty with the second ingredient. Where, however, the unlawful act is merely a threat unaccompanied and not preceded by any actual violence, the position may be more difficult. In the case of a life-threatening assault, such as pointing a gun or knife at the victim, all sober and reasonable people may well anticipate some physical injury through shock to the victim, as for example in *Reg v Dawson (1985) 81 Cr App R 150* where the victim died of a heart attack following a robbery in which two of the appellants had been masked, armed with a replica gun and pickaxe handles. But the nature of the threat is of
importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased’s conduct was proportionate to the threat; that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a novus actus interveniens and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing.

In Lewis [2010] EWCA Crim 151 the deceased was chased by the appellant into the path of an oncoming car and suffered fatal injuries. The appellant was convicted of manslaughter. Upon the issue of causation the judge posed to the jury the question whether the prosecution had proved, so that they were sure, that (1) by chasing the deceased the appellant had committed an unlawful act, (2) the deceased’s flight was the result of the unlawful act, and (3) the deceased’s flight into the road was at least one of the responses which might have been expected of the deceased in the circumstances. The directions were upheld. They correctly identified in non-legal terms the need for the prosecution to prove both that the appellant’s unlawful act was the operative cause of the fatal collision and that the unlawful act created a foreseeable risk of relevant harm in the circumstances known to the appellant at the time, and was therefore dangerous.

Death by Dangerous Driving

In the trial of offences of causing death by dangerous driving the bad driving of the accused and of others may be concurrent causes of death. In Hennigan [1971] 3 All ER 133 (CA) the accused overtook vehicles at speed. He regained his correct side of the road but in front of him to his nearside the deceased emerged from a side turning to turn left. The accused was unable to avoid a collision which killed the deceased and his passenger. Lord Parker CJ made clear that the jury was not concerned with apportionment. It was enough if the dangerous driving of the accused was a real cause of the death which was more than minimal.

In Skelton [1995] Crim LR 635 (CA) the driver of a lorry knew of the unsafe condition of its braking system. The brakes seized and the lorry came to rest in the nearside lane. Several following vehicles managed to avoid the obstruction but after about 12 minutes a lorry collided with the obstruction and the driver was killed. The question for the jury was whether the deceased’s own negligence was a new and intervening cause. Sedley J, as he then was, delivering the judgment of the court, said: ‘... the dangerous driving [of the stationary vehicle] must have played a part, not simply in creating the occasion of the fatal accident but in bringing it about’.
In *Barnes [2008] EWCA Crim 2726* the accused carried an unsafe load on his truck. A sofa worked loose, became detached and fell into the carriageway. The truck stopped a short distance further along the carriageway. A following motorcyclist managed to avoid the sofa but collided with the rear of the truck. Hallett LJ said:

13. The jury was entitled to find that the Appellant put other road users at risk by driving dangerously. He drove with a load which was insecure. Had he not done so the sofa would not have fallen off, and Mr Wildman would not have been forced to drive round it. He would not have been distracted by it or turned to warn others coming behind him. The Appellant’s car would not have been stopped in the carriageway and Mr Wildman would not have driven into the back of it. Whatever criticisms, Mr Bridge could properly make of Mr Wildman’s driving, in our judgment all those circumstances are such that it was open to the jury to find that his dangerous driving played more than a minimal role in bringing about the accident and the death.

The trial judge had directed the jury as follows:

14. Now the words ‘thereby caused the death’. You have to be sure the dangerous driving was a cause of death, not the only cause of death or the main cause of death, but a cause of death which was more than just trivial. This means you must be sure that not only the Defendant’s dangerous driving created the circumstances of the fatal collision but it was an actual cause in bringing about the death of Mr Wildman. And the Defence say here, you might be satisfied the Defendant had created the circumstances of the collision but – and they say, and they recognise it is an unattractive argument – and they say it is nonetheless right – the only cause of death was Mr Wildman failing to keep a proper look-out. And if that is so, or may be so, I direct you to acquit.

The Court held that while in some circumstances judges might have to give the jury further assistance upon the difference between bringing about the conditions in which death occurred and “causing” the death, the direction given by the judge was sufficient on the facts in *Barnes*.

The Court of Appeal gave consideration in *G [2009] EWCA Crim 2666* to the question how the jury could be assisted with the concept of foreseeability where it was the defence case that a new act intervened. The accused had driven into collision with another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction; one did not and a fatal accident occurred. The Court considered how the trial judge might best explain to the jury that the accused caused the second and fatal collision if it was a foreseeable consequence of his driving. Hooper LJ concluded:
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 could be made clear to the jury that they are not concerned with what the defendant foresaw.

**Medical Intervention**

Medical intervention is a foreseeable consequence of injury caused by the accused’s violent unlawful act; so also is the possibility of ineffective or negligent medical treatment. In *Smith* [1959] 2 QB 35 (CA) the deceased was injured by a bayonet during a fight. While being taken to the medical reception station the deceased was dropped twice. On arrival his condition was misdiagnosed and he was not given a blood transfusion. Nevertheless, the Courts Martial Appeal Court (Lord Parker CJ) held that the deceased’s death was caused by his stab wounds.

The facts of *Jordan* [1956] 40 Cr App R 152 (CA) were in this regard exceptional. The victim of a stabbing was taken to hospital where he died. The accused was convicted of murder. However, the Court of Criminal Appeal admitted fresh medical evidence which came to light after the trial. Hallett J, giving the judgment of the court said:

There were two things other than the wound which were stated by these two medical witnesses to have brought about death. The stab wound had penetrated the intestine in two places, but it was mainly healed at the time of death. With a view to preventing infection it was thought right to administer an antibiotic, terramycin.

It was agreed by the two additional witnesses that that was the proper course to take, and a proper dose was administered. Some people, however, are intolerant to terramycin, and Beaumont was one of those people. After the initial doses he developed diarrhoea, which was only properly attributable, in the opinion of those doctors, to the fact that
the patient was intolerant to terramycin. Thereupon the administration of terramycin was stopped, but unfortunately the very next day the resumption of such administration was ordered by another doctor and it was recommenced the following day. The two doctors both take the same view about it. Dr Simpson said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Mr Blackburn agreed.

Other steps were taken which were also regarded by the doctors as wrong—namely, the intravenous introduction of wholly abnormal quantities of liquid far exceeding the output. As a result the lungs became waterlogged and pulmonary oedema was discovered. Mr Blackburn said that he was not surprised to see that condition after the introduction of so much liquid, and that pulmonary oedema leads to bronchopneumonia as an inevitable sequel, and it was from bronchopneumonia that Beaumont died.

We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.

In *Cheshire* [1991] 1 WLR 844 (CA) the deceased had, after emergency treatment, made a substantial recovery from the effect of bullet wounds when he developed difficulty with his breathing. Doctors failed to appreciate that he had developed a complication of a tracheotomy carried out as a necessary emergency procedure which restricted his breathing and he died. Beldam LJ said:

In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the defendant was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the defendant caused the death of the deceased, adding that the defendant’s acts need not be the sole cause or even the main cause of death it being sufficient that his acts contributed significantly to that result. Even though neg-
ligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the defendant unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant. It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused’s acts can fairly be said to have made a significant contribution to the victim’s death. We think the word ‘significant’ conveys the necessary substance of a contribution made to the death which is more than negligible.

In Malcherek [1981] 1 WLR 690 (CA) the Court of Appeal had to consider an application to adduce fresh medical evidence to the effect that death had been caused not by the accused’s act but the treating physicians’ inappropriate decision to withdraw life support. Lord Lane CJ explained the court’s decision to refuse the application as follows:

The reason is this. Nothing which any of the two or three medical men whose statements are before us could say would alter the fact that in each case the assailant’s actions continued to be an operating cause of the death. Nothing the doctors could say would provide any ground for a jury coming to the conclusion that the assailant in either case might not have caused the death. The furthest to which their proposed evidence goes, as already stated, is to suggest, first, that the criteria or the confirmatory tests are not sufficiently stringent and, secondly, that in the present case they were in certain respects inadequately fulfilled or carried out. It is no part of this court’s function in the present circumstances to pronounce upon this matter, nor was it a function of either of the juries at these trials. Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist—for example, circulation—are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim’s death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death.

Although it is unnecessary to go further than that for the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skillfully using sophisticated methods, drugs and machinery
to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient.

Accused Assisting a Lawful Act Causing Death

The House of Lords, in Kennedy (No 2) [2008] 1 AC 269 (HL) finally resolved the question whether an accused who assisted the victim to inject a controlled drug committed the offence of manslaughter when the victim died from an overdose. When the victim by his “free, deliberate and informed act” chose to ingest a controlled drug he was committing no offence. It followed that an accused who assisted him could not be guilty as a secondary party. Lord Bingham said:

14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article ‘Finis for Novus Actus?’ [1989] CLJ 391, 392, Professor Glanville Williams wrote:

‘I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new ‘chain of causation’ going, irrespective of what has happened before’.

In Chapter XII of Causation in the Law, 2nd ed (1985), p 326, Hart & Honoré wrote:

‘The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility’.

This statement was cited by the House with approval in R v Latif [1996] 1 WLR 104 (HL) 115. The principle is fundamental and not controversial.
He continued:

17. In his article already cited Professor Glanville Williams pointed out, at p 398, that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a novus actus interveniens breaking the chain of causation:

‘Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the novus actus principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, ‘derivative’ from that of the perpetrator’.

18. This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant’s first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in R v Dias [2002] 2 Cr App R 96, paragraphs 21–24, and in R v Rogers [2003] 1 WLR 1374 and is now accepted. If the conduct of the deceased was not criminal he was not a principal offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

Statutory Context

Usually, there will be a direct cause and effect. However, a leading modern authority on causation is Environment Agency v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22 (HL) in which the House of Lords was considering the meaning of the word “causes” in section 85(1) in the Water Resources Act 1991. The section read: ‘A person contravenes this section if he causes...any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters’.
Empress Car Co stored diesel fuel in a tank at their yard adjoining the River Ebbw in Abertillery. Overnight someone mischievously opened the tap which caused the fuel to overflow and pollute the river. The question was whether the company had “caused” the fuel to enter the controlled waters. Notwithstanding the immediate and direct cause of the pollution was the deliberate act of a third party, the House held that the company had caused the pollution.

Although the decision in Empress Car Co has since been confined to its particular statutory context (environmental pollution), Lord Hoffman’s rationale for the meaning of the word “causation” received the subsequent endorsement of the House in Kennedy (No 2) [2008] 1 AC 269 (HL). Lord Hoffman explained that before a decision could be reached as to what was required, the court had to examine the scope intended by the “rule”:

Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. In Stansbie v Troman ([1948] 1 All ER 599) the law imposed a duty which included having to take precautions against burglars...

What, therefore, is the nature of the duty imposed by section 85(1)? Does it include responsibility for acts of third parties or natural events and, if so, for any such acts or only some of them? This is a question of statutory construction, having regard to the policy of the Act. It is immediately clear that the liability imposed by the subsection is strict: it does not require mens rea in the sense of intention or negligence. Strict liability is imposed in the interests of protecting controlled waters from pollution. The offence is, as Lord Pearson said in Alphacell Ltd v Woodward [1972] AC 824, 842, ‘in the nature of a public nuisance’. National Rivers Authority v Yorkshire Water Services Ltd [1995] 1 AC 444 is a striking example of a case in which, in the context of a rule which did not apply strict liability, it would have been said that the defendant’s operation of the sewage plant did not cause the pollution but merely provided the occasion for pollution to be caused by the third party who discharged the iso-octanol. And in Alphacell Ltd v Woodward [1972] AC 824, 835, Lord Wilberforce said with reference to Impress (Worcester) Ltd v Rees [1971] 2 All ER 357, which I shall discuss later, that:

‘it should not be regarded as a decision that in every case the act of a third party necessarily interrupts the chain of causation initiated by the person who owns or operates the installation or plant from which the flow took place’.

Clearly, therefore, the fact that a deliberate act of a third party caused the pollution does not in itself mean that the defendant’s creation of a situation in which the third party could so act did not also cause the
pollution for the purposes of section 85(1).

Lord Hoffman concluded that the mischievous act of opening the tap did not break the chain of causation if, on the evidence, it was one which could be expected or anticipated in the ordinary course of things. He said:

(4) If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

(5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.

Notes

1. The judge will need to identify the legal requirements of causation. The jury must decide whether the accused caused the result.

2. It may, and usually will be, enough for the prosecution to establish that the accused’s act was one of the operative causes of the result, in which case the jury should be directed that it must be a significant or substantial cause in the sense that it must be more than trivial, trifling or minimal.

3. When the evidence is that the accused set in train a sequence of events which led to the result, but the jury needs to consider whether a new event has intervened so as to break the chain of causation, the jury will need help on the issue of foreseeability. The jury should be directed to consider whether the new event is one which could sensibly have been anticipated by a reasonable person, in the circumstances known to the accused at the time, as a possible consequence of the accused’s act. If it could not, then the jury should conclude that the chain of causation was broken and the accused’s act should not be treated as an operative cause. If the result could sensibly have been anticipated the jury must be sure that the accused’s act was a substantial and not a trivial cause of the result.

4. Where the jury needs to consider the response of the victim himself to the unlawful and threatening act of the accused, the jury should be directed that they must be sure that (i) the response was a reaction to the accused’s
unlawful act and not the victim's free choice and (2) was a response which could sensibly have been anticipated by a reasonable person in the circumstances known to the accused at the time. Where the charge is manslaughter arising from the victim’s flight response the jury must also be sure that a reasonable person would have realised that the accused’s unlawful act exposed the victim to a risk of some, although not serious, relevant harm (ie in consequence of the response).
Chapter 5— Intention

1. Intention

Adopted from the Crown Court Bench Book 2010

Guidelines

The fact that a result was a natural and probable consequence of D’s action does not prove that D intended or foresaw that result. D’s actual foresight of the result may or may not enable the jury to infer intention.

• ‘Intention’ is a word incapable of further satisfactory analysis. ‘Want’ or ‘desire’ are not synonyms for ‘intend’ since it is open to the jury to infer intention from the accused’s awareness of the virtual certainty of consequences of his conduct, even though they accept that the accused hoped that the result would not occur. The word ‘intend’ is readily understood if used in the context in which the jury need to consider it.

• Intention is a state of mind which the jury can resolve only by inference or by the admission of the accused.

• Elaboration will almost never be required. If it is (where D may not have wanted or desired the kind of harm his act caused but the prosecution contends that he was aware of the likely consequence) then the jury should be directed that foresight of consequences is not proof of intent but only one factor to be considered.

• A specific direction will usually be required only when a specific intent is in issue.

• The jury should be told from what sources of evidence they can consider drawing the inference.
Illustration: Intent to cause really serious harm – the intention must accompany the act – drawing the inference from the circumstances

If you are sure that the accused unlawfully caused really serious bodily harm to V, he is guilty of count 1 if the prosecution also proves that the accused intended to cause him really serious bodily harm.

The prosecution does not have to prove that the accused set out with the intention of causing harm. The fact that afterwards the accused may have regretted what he had done does not amount to a defence. You need to reach a conclusion as to what was his intention during the moments he was using unlawful violence towards V.

Naturally, you can reach a conclusion what the accused’s intention was only by examining the circumstances of the attack on V. This includes what was done and said at the time, the nature and duration of the attack, the use of any weapon, the nature of the injury inflicted on V and the accused’s behavior immediately afterwards. You should also consider what the accused had to say about his state of mind in interview and in evidence.

The prosecution relies, in particular, on (...).

The accused told you (...).

If, having examined the evidence, and despite the accused’s denial, you are sure he intended to cause V really serious bodily harm, then your verdict upon count 1 will be guilty. If you are not sure then your verdict will be not guilty.
2. Intention Formed in Drink or Under the Influence of Drugs

A. Offences that Require a Specific Intention

Illustration

The accused is charged with an offence that requires the prosecution to prove a specific intention (for example, murder, theft, robbery, burglary, wounding with intent to do grievous bodily harm and assault with intent to rob).

Before you can find the accused guilty of the offence of (...) the prosecution must satisfy you to the extent that you feel sure that the accused had the intention to (...) at the time of the commission of the offence.

In deciding whether the prosecution has discharged the burden of proving this intention you must consider all the circumstances of the case including the evidence that the accused had indulged in alcoholic drinks (or drugs) before the commission of the offence.

Having considered the evidence carefully, if you find that the accused did not have or may not have had the intention to (...) at the time of the offence then you must find him not guilty.

If, however, having considered the evidence carefully, you are sure that the accused did have the intention to (...) at the time of the offence, then you must find that the prosecution has proved this element of the offence.

In deciding whether the accused did in fact intend to (...) you must bear in mind that a drunken (or drugged) intention is still an intention. It is not relevant that the accused may not have acted in the way that he did had he not been intoxicated (or under the influence of drugs).
B. Offences that do not Require a Specific Intention

**Illustration**

In order to find the accused guilty of the offence you must be sure that he realised or foresaw the risk that his act might cause injury, damage, death (...) or he would have realised this or foreseen the risk had he not been drinking alcohol or taking drugs.

It is not a defence for the accused to say that he would not have committed the act, or that he failed to foresee the consequences of his act or that he failed to appreciate the risk because he was under the influence of alcohol or drugs.
Notes

1. The direction should not be given unless there is an evidential basis for giving it. It is suggested that the trial judge should raise the issue with trial counsel before addresses. Examples of cases where the direction will be appropriate: manslaughter, malicious wounding, common assault, malicious damage and dangerous or reckless driving and all offences in which recklessness is sufficient to constitute mens rea.

2. Intoxication is not a special defence which involves any burden of proof on the defence. Where the issue is raised it is for the prosecution to prove intention where it is an ingredient of the offence.

3. Where intoxication is raised on the evidence in offences of specific intent the issue is not whether the accused had the capacity to form the specific intent, but simply whether he did in fact form the intent required: Garlick [1980] 72 Cr App R 291 (CA).

Sources:


3. Recklessness

Adopted from the Crown Court Bench Book 2010

Guidelines

In *G and Another* [2003] UKHL 50, the House of Lords overruled *Metropolitan Police Commissioner v Caldwell* [1982] AC 341 (HL) (which had held that an accused was reckless when his act—causing damage—presented an obvious risk of damage and either he took that risk or gave no thought to it) and returned to subjective recklessness as defined in *Cunningham* [1957] 2 QB 396 (CA).

Since *G and Another* [2003] UKHL 50, 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 the risk.

The mens rea of offences requiring malice, such as s 12 of the *Offences Against the Person Act Chapter II:08* (shooting or wounding with intent to do grievous bodily harm) remains intention or subjective recklessness and is therefore in line with *G and Another* [2003] UKHL 50 (ie the accused was aware of a risk of some harm which he then, unreasonably, went on to take).

If the accused may have been unaware of the risk of circumstance or result under consideration because he was under the influence of drink or drugs the jury must assess his state of awareness as it would have been if he had been sober (See *Majewski* [1977] AC 443 (HL)).

- When deciding whether the accused was reckless, the first stage is a judgment whether the accused was aware of the risk (subjective).
- The second stage is a judgment whether the risk taken was reasonable in the circumstances of which the accused was aware (objective).
- If the accused’s ability to appreciate the risk was or may have been impaired through drink the jury should be asked to consider his awareness as it would have been had the accused been sober. If they are sure the accused would have been aware of the risk if he had been sober, the first stage is satisfied.
Chapter 6— Criminal Attempts

Adapted from the Crown Court Bench Book 2010

Guidelines

To constitute an attempt the act must be accompanied by an intention to commit the full offence even if the full offence is one which requires a lesser degree of mens rea (eg attempted wounding requires an intent to wound, attempted murder requires an intent to kill) or is an offence of strict liability.


A person is guilty of attempting to commit an offence if, with intent to commit any offence which, if it were completed, would be triable in England and Wales as an indictable offence, he does an act which is more than merely preparatory to the commission of the offence.

The words ‘if it were completed, would be triable in England and Wales as an indictable offence’ are derived from the Criminal Attempts Act 1981 and are inserted into the common law definition.

In Cheeseman (1862) Le & Ca 140 (CC) at paragraph 145 Blackburn J said:

There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved do amount to an attempt.
Illustration

Attempting to commit a crime

What does attempting to commit a crime mean? Attempting to commit a crime means to try to commit a crime as distinct from merely intending to commit it or merely getting ready to commit it. Merely intending to commit a crime is not enough nor is merely preparing to commit it. Some act must be done in order to carry out that intention and that act must be immediately, not remotely connected with the intended crime. The act must be done with the firm intention of committing the intended crime. The act must go beyond mere preparation to commit the intended crime. It might be helpful to give an illustration.

Suppose the accused is charged with attempted armed robbery and the accused in that situation might have made up his mind some time before, and had gone into a shop and bought firearms and ammunition then went home and loaded the firearm with the ammunition and prepared a note demanding money. The police arrest him as he is hovering on the street in front of the bank. Now, he is on the street in front of the bank, they search him and find a loaded firearm, a note demanding money, and a bag. He has not entered the bank, but he was loitering in front of the bank when arrested. Nothing the accused has done could, in law, amount to an attempt to commit armed robbery. True he had a loaded firearm in his possession, true he had a note in his possession threatening to demand money, true he had a bag in his possession, but the law regards his actions as mere preparation to commit armed robbery. His acts up to that point are not sufficiently proximate to constitute an attempt to commit that crime. He could not therefore be guilty of attempting to commit armed robbery.

If, however, the accused enters the bank and points a loaded firearm towards a teller who is performing her duties at the bank, and gives her the threatening note demanding money, and gives her the bag and tells her to put the money in the bag, if he is arrested before he gets the money he could be convicted for attempted armed robbery, as his actions up to the time of his arrest would have gone beyond mere preparation to commit robbery, and his acts up to that point would have been sufficiently proximate to committing the offence of armed robbery so as to constitute an attempt to commit that offence.
Notes

1. **Shivpuri [1987] AC 1 (HL):** It does not matter that the offence which the accused is intending to commit is impossible by reason of facts unknown to him. Where impossibility has featured in the evidence, the jury should be told that they must be sure of an attempt to commit the offence intended (eg the fact that the victim's pockets were empty is no defence to attempted robbery).

2. It is common practice and, save in the obvious case, useful to explain and/or illustrate the difference between an attempt to commit an offence and acts preparatory to an offence. The jury should be told that the issue whether the act was more than merely preparatory is for them to decide.

3. **Archbold (36th edn) referring to Lord Parker CJ in Davey v Lee [1968] 1 QB 366 (DC):**
   
   It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime. The task of judging where the line falls between acts merely preparatory and the point of embarkation upon the commission of an actual crime always depends on the circumstances of the case.
Chapter 7— Conspiracy

Adopted from the Crown Court Bench Book 2010

Guidelines

Archbold (2014) states: The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself.

The issues raised may, and usually will, make it necessary to explain the structure and evolution of the conspiracy as contended by the prosecution. The fact that the accused are all charged with conspiracy does not necessarily imply that they are all as deeply involved as one another. Conspirators can join and leave a conspiracy while the conspiracy lives on. Their roles may be very different. They need not all be known to one another. They need not know all the details. Directions to the jury as to proof of the conspiracy and the accused’s participation in it should be tailored to the particular facts of the case. They will usually depend upon the issues raised by the defence. The prosecution will usually be relying on inferences from conduct and circumstantial evidence, see Chapter 9— Circumstantial Evidence.

The essence of a criminal conspiracy is the agreement to commit the substantive offence or to defraud. It is an agreement between two or more conspirators. Negotiation or mere intention is not enough.

It may be necessary to analyse the evidence in order to identify whether what is revealed is one or more than one conspiracy.

A conspiracy may take the form of a ‘chain’ (A agrees with B who agrees with C) or a ‘wheel’ (X agrees with A, X agrees with B, X agrees with C), or a combination of the two. It is not necessary for each conspirator to have met or communicated with the others or even to know their identities, but it is necessary that each of the conspirators is party to the common design and is aware that the design involves a larger scheme involving others. In the ‘wheel’ conspiracy, with X at its hub, if A, B and C are unaware of their involvement in the larger scheme but only of their agreement with X, there are three separate conspiracies, not one. Even if they are aware that X is making separate agreements with A, B and C they are not conspirators with each other unless they are parties to the wider common design.

The conspiracy may be proved by inference from conduct, including words spoken in furtherance of the common design, or by direct evidence of the agreement.
When two alleged conspirators are accused in the same trial there may be evidence admissible against one which is not admissible against the other. Thus, it will be open to the jury to convict one accused and acquit the other. These are matters which should be considered before speeches and, if they arise, the observations of the advocates sought. The trial judge should evaluate the evidence against each accused.

In Testouri [2003] EWCA Crim 3735 Kennedy LJ had the following advice in a case of an alleged conspiracy to defraud:

[9] There is some support, on the face of it, to be found for the approach adopted by the learned judge in a decision of this Court in the case of R v Ashton [1992] Crim LR 667, of which we had an opportunity to read the transcript. In that case this Court came to the conclusion that the learned judge was wrong in directing the jury that it was a situation in which they must return the same verdict in relation to each of the co-accused. But in commenting upon that decision, in the Crim LR, Professor Sir John Smith said:

‘If the evidence admissible against A proves that A and B conspired together, A may be convicted of conspiracy with B, even though B, his co-defendant, is acquitted because there is no sufficient evidence admissible against him. The usual case is that where A has made a confession which is evidence against him but not against B. The present case, however, was not like that. The tape-recordings were not of admissions or confessions but of steps taken by the parties in pursuance of the alleged conspiracy and were equally admissible against both: Blake and Tye (1844) 6 QB 126. W was entitled to rely on A’s evidence at the trial that he (A) never intended the murder to take place. The jury could not be satisfied that this evidence was untrue so far as W was concerned while finding that it was, or might be, true so far as A was concerned. It was the same evidence. The jury either believed it or they did not. If they believed it, neither defendant was guilty, if they disbelieved it, both were guilty. It is submitted that the trial judge’s direction to the jury was correct.’

[10] ...where what is alleged is a conspiracy to defraud, in which only two defendants are alleged to have participated, the judge should ask himself two questions. First: whether there is evidence of conspiracy to defraud? That means there must be evidence of an agreement to achieve a criminal purpose. If there is no evidence of that because, for example, on one view of the evidence only one defendant can be shown to have been dishonest then, if that view of the evidence is taken, both
defendants must be acquitted and the jury must be so directed. The authority for that proposition is to be found in Yip Chieu-Chung v The Queen [1995] 1 AC 111. Secondly: whether there is any evidence admissible against only one defendant? If that evidence is or could be critical, in that without it that defendant cannot be shown to have been a party to the conspiracy alleged, then it will be necessary to explain to the jury how they may reach the conclusion that although the case is proved against that defendant, it is not proved against the defendant in relation to whom the evidence may not be admissible. Where there is no such evidence the jury must be told that it is not open to them to return different verdicts in relation to two defendants. That, as it seems to us, is in practical terms what is meant by the authorities to which we have referred when they speak of evidence being of unequal weight. (emphasis added)

Notes

1. **Joseph Melville and Hilton Winchester v The State CA Crim Nos 24 and 25 of 2004**: Before the prosecution can rely upon the utterances of a conspirator against a co-conspirator there must be some independent evidence beyond the utterance itself that the co-conspirator was a party to the conspiracy. See also **Ahern (1988) 62 ALJR 440** (HC Australia) and **R v Jones and Barham [1997] 2 Cr App R 119** (CA) as to the prima facie standard of independent evidence required before a charge of conspiracy may be laid.

2. **Archbold (2008) 34-60**: The acts and declarations of any conspirator made in the furtherance of the common design may be admitted as part of the evidence against any other conspirator. The act or declaration must be made by a conspirator, although it matters not whether the maker is present or absent at the trial.

3. **Reeves (unreported) 4 December 1998** (CA): The phrase in furtherance of the common design means no more than the act must be demonstrated to be one forming an integral part of the machinery designed to give effect to the joint enterprise.

4. **R v Jones and Barham [1997] 2 Cr App R 119** (CA): The test of admissibility of statements made by a conspirator in the furtherance of the common design is whether the conversation was about the operation of the conspiracy or was simply a narrative of past events or evidence of a future conspiracy. Mere narrative is generally inadmissible against a co-conspirator. See also **Platten [2006] EWCA Crim 140** and **Arnold Huggins and Others v The State CA Crim Nos 26-28 of 2003** judgment of Hamel-Smith JA at page 19.
5. **Tripodi (1961) 104 CLR 1 (HC Australia):** The overt acts and/or declarations of a conspirator performed between him and a non-conspirator, are admissible if they occurred during the currency of the conspiracy and if they are part of the natural process of making the arrangements to carry out the conspiracy. Applied in **Joseph Melville and Hilton Winchester v The State CA Crim Nos 24 and 25 of 2004.**
Illustration

The accused in this case has been charged with the offence of conspiracy to murder. What is a conspiracy? A conspiracy is an agreement between two or more persons to do an unlawful act. The nub of the offence is the agreement to engage in a common enterprise to do the unlawful act alleged.

In the present case, the prosecution alleges that accused No 1, on (...) at (...) conspired with accused No 2 and accused No 3 to murder the victim.

Just as it is a criminal offence to commit murder, which is the unlawful killing of a person with the intent to kill or to cause serious bodily harm, so is it a criminal offence for two or more persons to agree with one another to commit the offence with the intention of carrying it out.

Before you can convict the accused of the offence, you must be sure, first of all, that there was, in fact, an agreement between two or more persons to commit the crime in question. And, secondly, that the accused was a party to that agreement in the sense that he agreed with one or more of the other persons (referred to in the indictment) that the crime should be committed and, at the time of agreeing to this, the accused intended that they 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. Generally speaking, when people make agreements to commit crimes, you would expect them to do so in private. You would not expect them to put their agreement in writing. People may, however, 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.

This is one of those comparatively rare cases where you have received direct evidence of what the prosecution alleges to be a criminal conspiracy. That evidence comes from accused No 2.

In deciding whether there was a conspiracy to murder and, if so, whether the accused was a party to it, you must look at the evidence of accused No 2. If, having done so, you are sure that there was a conspiracy to murder the victim and that the accused was a party to it, you must find the accused guilty. If you are not sure, you must find the accused not guilty.

As to the first of these matters, namely whether there was an agreement of the kind alleged by the prosecution, an agreement does not
have to be reached by any formal means. There does not have to be writing or even someone saying, ‘I agree’ for there to be an agreement. As you know from your own experience, many agreements are made informally, and people often enter into agreements without there being any expressed statements to that effect between them. The form of the agreement does not matter.

In this area of the law, all that is necessary for there to be an agreement is for two or more persons to agree, either by words or by conduct, in a common design, each having the intention to bring about the unlawful object of the agreement. If you are satisfied beyond reasonable doubt that there was an agreement to murder the victim, then that is in law an agreement to do an unlawful act.

Additionally, 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 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 that the accused did at some stage agree with a co-conspirator or co-conspirators named in the indictment, that the crime alleged in the indictment should be committed, and at that time the accused 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.
Chapter 8— Joint Enterprise

Adopted from the Crown Court Bench Book 2010

Principal and Secondary Parties

An offence may be committed by a principal or a secondary party. For present purposes a principal party (P) can be taken to mean one who personally or by means of an innocent agent committed the conduct element of the offence or the actus reus. There may be more than one principal offender when the conduct amounting to the actus reus was committed by more than one person (eg if P1 and P2 attack V with their fists, with intent to cause some harm, and together do really serious harm to V, they are both principals in the offence of causing grievous bodily harm contrary to s 12 of the Offences Against the Persons Act Chapter 11:08). A secondary party (D) is one who, while not the principal offender, aids, abets, counsels or procures the offence. For the purpose of trial, a secondary offender is to be treated in the same way as a principal.

However, ‘secondary liability’ for commission of the offence is usually derived from the conduct of the principal offender. For this reason it is important when framing directions to identify, if possible, the conduct of the principal offender(s) which comprises the actus reus. From this starting point, the conduct and mens rea required to prove the guilt of a secondary party can be more readily identified and explained. When the prosecution case is that the accused was a secondary party to the offence it may be appropriate for the indictment to say so and for the Route to Verdict to identify the elements which constitute the accused’s secondary liability.

Where the principal offender cannot be identified

It may not be possible for the prosecution to identify the principal offender, for example when one of a group carrying out an attack on V produces a knife and stabs V. That will not save an accused from conviction founded on the act of stabbing, provided that the jury can be sure that D was either the principal offender who stabbed V or a secondary party to that offence. Whether he was a principal or secondary offender he can be convicted as a principal offender.

Routes to Principal or Secondary Liability

Legal liability for a criminal offence may arise because the accused:

1. a) either alone or through the innocent agency of another or in combination with another committed the offence (principal or joint principal); b)
took part in the offence as a secondary party (aiding and abetting); Archbold 18-7/14, 18; Blackstone’s A5.1 and Attorney General’s Reference (No 3 of 2003) [2004] EWCA Crim 868; Brady [2006] EWCA Crim 2413.

2. by his own conduct and with intent assisted another to commit the offence (aiding and abetting); Archbold 18-10; Blackstone’s A5.1.

3. by words, conduct and/or presence, intentionally encouraged another to commit the offence (aiding and abetting); Archbold 18-18,19; Blackstone’s A5.13.

4. directed or, with the requisite intention, enabled the offence committed (counselling or procuring); Archbold 18-20/24; Blackstone’s A5.1; A5.11.

5. joined and participated in an enterprise to commit one offence in the course of which, as the accused either intended or realised, the other offence would or might be committed (joint enterprise) Archbold 18-15/17; Blackstone’s A5.5/12.

Secondary liability is a common law doctrine the rules of which are generally the same irrespective of the context in which the secondary accused provides encouragement or assistance and regardless of the seriousness of the principal offence: Law Commission Report (Law Com 305) “Participating in Crime” May 2007 [2.4].

Requirements for Secondary Liability

With some exceptions (for example, in some cases of ‘counselling or procuring’) the secondary liability of the accused (D) is dependent upon or derives from the commission of a principal offence by the principal offender (P).

To prove the secondary liability of D the prosecution must establish:

- Conduct by D amounting to assistance to, or encouragement of, P;
- An intention to assist or encourage P to commit the principal offence; and
- D’s knowledge of the essential matters which constitute the principal offence.

It is the third requirement which has generated most debate. ‘The principal offence’ comprises the conduct, qualifying circumstances, consequences and fault required for its commission.

However, the term ‘knowledge’ requires qualification. It is not necessary for D to ‘know’ all the details of P’s plans or of the principal offence committed provided he knows the matters essential to the principal offence. For example, if D supplies P with a crowbar to enable P to commit a burglary it is not necessary to prove that D knew the date, time and place of the burglary actually com-
mitted. Furthermore, the Court of Appeal has found, as a sufficient substitute for knowledge, the foresight by D of a real possibility that P will act as he did (Reardon [1999] Crim LR 392 (CA)). This is an application of the Powell and English [1999] 1 AC 1 (HL) test in joint enterprise cases to situations where no common purpose between P and D is alleged.

The requirement for knowledge of ‘consequences’ has been modified in cases of constructive liability for the consequence such as murder, manslaughter, inflicting grievous bodily harm and wounding, where D knows that the consequence of the act is a risk that P’s act will cause some harm. So it is enough if D knows/foresees that P will act in a way which creates an obvious risk of some harm to V which in fact causes death/grievous bodily harm/wound.

As to ‘fault’ the accused must be aware that P will act with the intention required to commit the offence. In a case of murder D must be aware of the real possibility that P will act with the intent required for murder: Powell and English [1999] 1 AC 1 (HL).

Where the foundation for the secondary liability of D for offence Y is his participation in a ‘joint enterprise’ or ‘common purpose’ to commit offence X, ‘knowledge’ of the intention of P for the commission of offence Y is to be interpreted as foresight of a real possibility that P will act with the intent required for the offence. So if P and D embark on a robbery in the course of which P kills with intent to do really serious bodily harm, D is guilty of murder if he participated in the robbery knowing there was a real possibility that P might, if confronted, attack V with intent to do really serious bodily harm.

An offence may be “counselled” if D advises or solicits it. The prosecution does not have to prove that the counselling caused the offence; only that D counselled the offence which was committed by P acting within the scope of his authority: Calhaem [1985] QB 808 (CA). ‘Procuring’, however, denotes ‘setting out to see that [a thing] happens and taking the appropriate steps to produce that happening’. There must be a causal link between the procuring and the event procured.

**Joint Enterprise and the Foresight Principle**

In Powell and English [1999] 1 AC 1 (HL) the House of Lords confirmed and endorsed a line of authority that in joint enterprise cases the test for the secondary liability of D, when P went further than D intended, was whether D, foreseeing that P may act as he did in furtherance of the common design, nevertheless participated in the joint enterprise. Lord Hutton said:

> The principle stated in R v Smith [1963] 1 WLR 1200 was applied by the Privy Council in Chan Wing-Siu v The Queen [1985] A.C. 168 in the judgment delivered by Sir Robin Cooke who stated, at p. 175:
‘The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express or is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.’

The principle stated by Sir Robin Cooke in Chan Wing-Siu’s case was followed and applied in the judgment of the Court of Appeal in R v Hyde [1991] 1 Q.B. 134, where Lord Lane CJ took account of Professor Smith’s comment on R v Wakely that there is a distinction between tacit agreement and foresight and made it clear that the latter is the proper test.

Where, however, the act committed by P is fundamentally different from that contemplated by D, D will not be liable. Lord Hutton said:

Mr. Sallon, for the appellant, advanced to your Lordships’ House the submission (which does not appear to have been advanced in the Court of Appeal) that in a case such as the present one where the primary party kills with a deadly weapon, which the secondary party did not know that he had and therefore did not foresee his use of it, the secondary party should not be guilty of murder. He submitted that to be guilty under the principle stated in Chan Wing-Siu the secondary party must foresee an act of the type which the principal party committed, and that in the present case the use of a knife was fundamentally different to the use of a wooden post.

My Lords, I consider that this submission is correct. It finds strong support in the passage of the judgment of Lord Parker C.J. in R v Anderson; R v Morris [1966] 2 Q.B. 110, 120 which I have set out earlier, but which it is convenient to set out again in this portion of the judgment:

‘It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.’

The judgment in Chan Wing-Siu’s case [1985] A.C. 168 also supports the argument advanced on behalf of the appellant because Sir Robin Cooke stated at p. 175:
‘The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.’

It should be noted that the fact that P’s act was fundamentally different from those contemplated by the common design is not identified by Lord Hutton as a separate test by which D’s liability should be excluded; rather, it is an application of the evidence to the foresight test. If the act was fundamentally different from the agreed course of action it is, on the evidence, improbable or impossible that D was aware P might act as he did in furtherance of the common design.

The issue for the jury will be whether, when participating in offence X, D foresaw that in the course of committing it:

- there was a real risk that P would commit the conduct element of the offence Y,
- with knowledge of the prescribed circumstances which make it an offence, and
- that P might commit the conduct element of offence Y with the mens rea required for offence Y.

**Extension of the Foresight Principle**

The case of Reardon [1999] Crim LR 392 (CA) is important because it applied Powell and English principles to an accused (D) who was not involved in a joint enterprise with P. P shot two men in a bar and was assisted by others to remove their bodies to the garden. P returned to the bar and said, ‘[H]e’s still alive’, not distinguishing between the two victims, and asked D to lend him his knife which D promptly handed over. P used the knife to finish off both victims. The Court of Appeal held that D was either guilty of both murders or of neither. D was guilty of both murders because he foresaw that P would use the knife to finish one of the victims; thus, he must have foreseen as a real possibility that P would use the knife to finish off the other if necessary. D’s liability was formulated upon D’s foresight of the real possibilities arising from D’s act of assistance even though there was a lack of common purpose as in Chan Wing-Siu [1985] AC 168 (PC Hong Kong) and Powell and English [1999] 1 AC 1 (HL). In his commentary upon the judgment delivered by Beldam LJ, Professor Sir John Smith QC noted the extension of the principle of common purpose.

In Bryce [2004] EWCA Crim 1231 D drove P carrying a shotgun to a caravan where P could watch the movements of V. Thirteen hours later P shot V to death. D’s defence was that he did not know P was carrying a shotgun. He was just giving him a lift. D argued that even if he was aware that P was thinking of
shooting V, he was not liable as an accessory because he could not and did not
know that P intended to shoot V when P did not form that intention for several
hours. Potter LJ observed that the Court of Appeal had already extended the
Powell and English principle to assistance given before the commission of the
offence. In Rook [1993] 2 All ER 955 (CA) Lloyd LJ said:

It is now well established that in a case of joint enterprise, where the
parties are both present at the scene of the crime, it is not necessary for
the prosecution to show that the secondary party intended the victim
to be killed, or to suffer serious injury. It is enough that he should have
foreseen the event, as a real or substantial risk: see Chan Wing-Siu v R
Thus, a secondary party may be liable for the unintended consequen-
tes of the principal’s acts, provided the principal does not go outside the
scope of the joint enterprise.

We see no reason why the same reasoning should not apply in the case
of a secondary party who lends assistance or encouragement before the
commission of the crime.

Potter LJ continued at paragraph 71:

We are of the view that, outside the Powell and English situation (vi-
olence beyond the level anticipated in the course of a joint criminal
enterprise), where a defendant, D, is charged as the secondary party to
an offence committed by P in reliance on acts which have assisted steps
taken by P in the preliminary stages of a crime later committed by P
in the absence of D, it is necessary for the Crown to prove intentional
assistance by D in the sense of an intention to assist (and not to hinder
or obstruct) P in acts which D knows are steps taken by P towards the
commission of the offence. Without such intention the mens rea will be
absent whether as a matter of direct intent on the part of D or by way of
an intent sufficient for D to be liable on the basis of ‘common purpose’
or ‘joint enterprise’. Thus, the prosecution must prove:

(a) an act done by D which in fact assisted the later commis-
sion of the offence,
(b) that D did the act deliberately realising that it was capable
of assisting the offence,
(c) that D at the time of doing the act contemplated the com-
misssion of the offence by A ie he foresaw it as a ‘real or
substantial risk’ or ‘real possibility’ and,
(d) that D when doing the act intended to assist A in what he
was doing.
In *Webster [2006] EWCA Crim 415*, D handed the controls of a car to P whom he knew to be drunk. It was argued on D’s behalf that he could not be criminally liable for P’s dangerous driving. The Court of Appeal disagreed. Moses LJ said at paragraph 23:

> The very foundation of the decision in *R v Powell & English [1999] AC 1* is acceptance of the principle that a secondary party is criminally liable for the acts of the principal if he foresees those acts even though he does not necessarily intend them to occur (see eg Lord Hutton at p 27 to p 28). Evidence that the Appellant knew that Westbrook had not only been drinking but appeared to be intoxicated was powerful evidence that he foresaw Westbrook was likely to drive in a dangerous manner at the time he permitted him to drive. But evidence of Westbrook’s apparent intoxication did not determine the issue. It was merely evidence which tended to prove the conclusion which the jury had to reach before it convicted him. In short, the more drunk Westbrook appeared to be, the easier it was for the prosecution to prove that the Appellant foresaw that he was likely to drive dangerously if he permitted him to drive.

He continued at paragraphs 25 and 26:

> Further, we must emphasise what the prosecution had to prove in relation to the Appellant’s state of mind. It accepted that it was not sufficient to prove that the Appellant ought to have foreseen that Westbrook would drive dangerously. The prosecution had to prove that the Appellant did foresee that Westbrook was likely to drive dangerously when he permitted him to get into the driver’s seat (see *Blakely, Sutton v DPP [1991] RTR 405, [1991] Crim LR 763*). We stress the need to focus upon the Appellant’s state of mind because of certain criticisms made in relation to the wording of the judge’s directions to the jury on this issue. Generally the prosecution will be able to prove the actual state of mind of the Defendant, absent any confession, by reference to what must have been obvious to him from all the surrounding circumstances. But it is important to distinguish between that which must have been obvious to a Defendant and what the Defendant foresaw. In most cases there will be no space between the two concepts; if the prosecution can prove what must have been obvious, it will generally be able to prove what the Defendant did foresee. But the danger of eliding the two concepts, namely what the Defendant did foresee and what he must have foreseen, is that it might suggest that it is sufficient to prove what the Defendant ought to have foreseen. That is not enough. It is the Defendant’s foresight that the principal was likely to commit the offence which must be proved and not merely that he ought to have foreseen that the principal was likely to commit the offence.
We conclude that in order to prove that the Appellant was guilty of aiding and abetting Westbrook to drive dangerously, the prosecution had to prove that at the time he permitted him to drive he foresaw that Westbrook was likely to drive in a dangerous manner.

It is suggested that the foresight principle is equally applicable to offences of counselling and procuring and, for the same policy reasons, if D foresaw as a real possibility that P would exceed the acts he was counselling or procuring, he should be liable as a secondary party.

The trial judge’s task

It will usually be unnecessary for the judge to embark on a full explanation of terms which define criminal liability. It is enough, and more helpful, to inform the jury what it is the prosecution must prove before the accused can be convicted. There is no need, for example, to embark on a lengthy exposition of the law of joint enterprise when it is common ground the offence was committed by at least one individual and the sole issue is whether the accused participated. It will be necessary only to identify the act of participation and the state of mind which the prosecution must prove to establish the accused’s guilt. In every case it will be necessary for the judge to identify what must be proved against an accused within the factual context of the case before him.

In the more complex cases in which the jury will need to consider the different positions of multiple accused, or where the policy of the law towards liability of secondary parties is not straightforward, it may well be necessary to give a fuller explanation and to provide the jury either with written directions or a note explaining their route to verdicts or both.
I. Participation (Simple Joint Enterprise)

Guidelines

The jury should be directed that the offence charged can be committed by one person or more than one person. If two or more people act together with a common criminal purpose to commit an offence they are each responsible, although the parts they play when carrying out that purpose may be different. For example, two burglars may enter a house together and together remove a television set. They are both guilty of burglary. Or, one burglar may enter the house while the other keeps watch for him outside. Again, they are both guilty of burglary.

The prosecution must prove participation by the accused with a common purpose. While participation with a common purpose implies an agreement to act together (a joint enterprise), no formality is required. The agreement can be made tacitly and spontaneously, and may be inferred from the actions of the accused.

When two or more people act together to bring about the result, their participation need not be precisely contemporaneous; one may begin and others join in. For example, if D1 attacks V and D2 joins in, and V suffers really serious harm, each is liable for causing grievous bodily harm contrary to s 14 of the Offences Against the Person Act Chapter 11:08 “Inflicting injury with or without weapon”. The jury need not be concerned to isolate the acts of the participants in order to decide which of them caused the really serious injury; they are both liable if they participated together in acts which they knew risked causing bodily injury and which actually caused really serious bodily injury.

The first Illustration is designed to reflect a direction in a straightforward case. The second Illustration is designed to deal with the cut-throat defence.
Illustration: Two co-accused – burglary – common purpose – inferring the common purpose – parts played in fulfilling the common purpose – verdicts need not be the same

An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose.

The agreement of the accused to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.

Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that each accused took some part.

Here the prosecution case is that D1 and D2 acted together to commit burglary. D1’s part was to enter the house and remove property. D2’s part was to keep watch outside. Their actions, the prosecution asserts, clearly had a common purpose.

D1’s defence is that he was not present; D2’s defence is that although he was outside the property, he was not there to take part in any offence.

If you are sure D1 and D2 did act together to commit the offence your verdict is guilty in the case of each accused.

You must consider the case of each accused separately. It is open to you to conclude that your verdicts should be the same in each case but it does not follow that they have to be. Provided you are sure that a burglary was committed by one or more than one person, if you are sure that one accused took some part in that offence but you are not sure about the other, your verdict can be guilty in respect of one accused and not guilty in respect of the other.
Illustration: Two co-accused – grievous bodily harm – joint assault on V – dispute which accused caused grievous bodily harm – joint enterprise to cause some harm – accused may be either principal or secondary offender

D1 and D2 are jointly charged with causing grievous bodily harm with intent, contrary to s 12 of the Offences Against the Person Act Chapter 11:08, and, in the alternative, with the lesser offence of inflicting grievous bodily harm, contrary to s 14.

They both admit that they took part together in an unlawful assault upon V by kicking him while he was on the ground. V suffered serious injuries from kicks delivered to his head. It is clear, and the accused do not contest, that whoever delivered those kicks caused really serious injury and intended to do so. However, each of them denies aiming kicks to the head; each blames the other; each says he intended to cause V only some physical harm by kicking him to his legs and body. They both say that the act of kicking to the head was quite different from the assault they intended or anticipated.

The accused jointly embarked on the unlawful assault of V and each of them accepts that he intended to cause some harm. They are each liable for the acts of the other and each of them is at least guilty of inflicting grievous bodily harm, count 2. However, the prosecution case is that they are both guilty of count 1, causing grievous bodily harm with intent.

Count 1 requires the proof of a specific intent, namely the intent to do really serious harm. There are two ways in which the prosecution can establish that intent against each accused. The first is to prove that the accused, at the time of the joint assault, kicked V in the head personally intending that V should suffer really serious harm. Alternatively, the prosecution may prove that the accused participated or continued to participate in the assault realising that there was a real risk the other may, in the course of the joint assault, kick V in the head with intent to do him really serious harm.

I have prepared a note which will enable you to approach these issues sequentially in order to arrive at your verdicts. Let us read it together.
Illustration: Route to Verdict

Please apply the following questions to the case of each accused in turn. Answer the first question and proceed as directed.

**Question 1**

Did the accused take part with his co-accused in an unlawful assault on V intending to cause some bodily injury or realising that some bodily injury may be caused?

Admitted. Go to question 2.

**Question 2**

Did V, in consequence of the joint assault, suffer really serious injury?

Admitted. Go to question 3.

**Question 3**

Did the accused either

(i) kick V in the head intending that V should suffer really serious injury; or

(ii) take part in the attack realising that there was a real risk that his co-accused might kick V in the head with intent to cause him really serious injury; or

(iii) continue to take part in the attack realising that his co-accused was kicking V in the head and might be doing so with intent to cause V really serious harm?

If you are sure of either (i) or (ii) or (iii), verdict guilty count 1, causing grievous bodily harm with intent.

If you are not sure of either (i) or (ii) or (iii), verdict guilty count 2.

**Note: If one of the accused may have injured V in a manner fundamentally different from that contemplated by the joint enterprise, eg by taking a house brick and striking V over the head with it, a further step would be required. See Chapter 8:5—Further Offence Committed in the Course of a Joint Enterprise below.**
2. Accused Not Present Assisting Another to Commit the Offence

Adapted from the Crown Court Bench Book 2010

Guidelines

This situation will arise when the prosecution case is that the accused facilitated the offence with intent but did not otherwise take part in it, for example, by the supply of a weapon, or a car, or information, with foreknowledge of the intended offence.

The jury should be directed that the prosecution must prove that:

- the offence was committed;
- the accused had foreknowledge of the offence;
- the accused intended to assist the offence, and
- the accused in fact assisted the offence.

However, foreknowledge does not have to be complete, provided that the accused knew of the kind of offence in contemplation, that he intended to assist, and that he did assist: See Maxwell [1978] NI 42 (HL) and Bryce [2004] EWCA Crim 1231.
Illustration: Supply of weapon – the elements of secondary liability

The accused accepts that he supplied a (...) to (...) on (...).

The evidence is that (...) was used by (...) to commit an offence of (...) on (...).

The prosecution case is that the (...) was supplied by the accused to assist the commission of the offence by (...); that being so, the accused is guilty of the offence just as were those who set out to commit it.

In order to prove that the accused is guilty the prosecution must prove that (1) the offence was committed, (2) it was assisted by use of a (...) and (3) the accused supplied the (...) knowing that others intended to use it for that offence or for an offence of the same kind. It is not necessary for the prosecution to prove that the accused knew of the date on which, or the precise circumstances in which, the (...) would be used or the precise crime which was to be committed. It is enough for the prosecution to prove that he intentionally assisted others to commit a crime of the kind which they then went on to commit.
3. Presence at and Encouragement of Another to Commit An Offence

Guidelines

Intentional encouragement to others at the scene to commit the offence renders the accused guilty of the offence: Clarkson [1971] 1 WLR 1402 (CA).

Mere voluntary presence at the scene of a crime is not enough to prove complicity but deliberate and unexplained presence may give rise to an inference of an intention to encourage it: Jones and Mirrless (1977) 65 Cr App R 250 (CA); Allan [1965] 1 QB 130 (CA); Clarkson [1971] 1 WLR 1402 (CA).

If the accused is present intending by his presence to encourage and is actually, by his presence, encouraging others to commit the offence then he is guilty: Coney (1882) 8 QBD 534 (DC); Wilcox v Jeffrey [1951] 1 All ER 464 (HC).
Illustration: Intentional encouragement by words or conduct

The accused admits being present at the commission of the offence charged but his case is that he took no part in it. It is not an offence merely to be present when a crime is committed; nor, indeed, in the present circumstances, to stand by without taking steps to prevent it.

The prosecution case is that the accused did take part by encouraging the others. He encouraged them by (...). The prosecution must prove (1) the accused’s presence at the scene, (2) his intention, by (...), to encourage the others to commit the offence and (3) that he did in fact encourage the others to commit the offence.

Note: When the accused is present in pursuance of a common design to commit the offence, to avoid responsibility for P’s act committed in the course of the joint enterprise he must make an effective withdrawal of support and participation: Becerra and Cooper [1975] 62 Cr App R 212 (CA).
Illustration: Intentional encouragement by presence alone

The accused admits being present at the commission of the offence charged but his case is that he took no part in it. It is not an offence merely to be present when a crime is committed; nor, indeed, in the present circumstances, to stand by without taking steps to prevent it. The prosecution case is that he did take part by encouraging the others with his presence.

The prosecution must prove (1) the accused’s presence at the scene, (2) his intention, by his presence, to encourage the others to commit the offence and (3) that he did, by his presence, encourage the others to commit the offence.
4. Counselling or Procuring  
(Directing or Enabling) the Offence

Guidelines

The terms ‘directing or enabling’ are also used since ‘procuring’ by a secondary offender does not necessarily imply a common design with the principal. Secondary liability will not necessarily be ‘derived’ from the offence committed by P. A ‘no fault’ offence may be ‘procured’ in the sense that the accused’s conduct was calculated to bring the offence about.

If D directs P to commit an offence, and P commits the offence as ordered, D is also guilty of the offence as an accessory. The direction of P by D may be consensual, or it may be the result of pressure or duress.

In a case of direction, if the harm D directed was achieved, the fact that the means used by P to achieve it was different from that contemplated by D does not provide D with a defence (eg if a killing is ordered by shooting, the accused is guilty of a murder caused by stabbing in the course of carrying out that order).

Where, however, the acts committed went beyond what the accused directed it is necessary to examine whether they were nevertheless within the scope of the direction. It is suggested that upon an application of the approach of the Court of Appeal in Reardon [1999] Crim LR 392 (CA), it is permissible to equate the ‘scope of the direction’ with the ‘scope of the common purpose’ between D and P, since the principle being applied in both cases is one of ‘parasitic liability’.

P’s acts will be within the scope of D’s direction if D realised there was a real possibility that when carrying out those directions P would act as he did. If, however, P’s acts were fundamentally different from those directed it is unlikely that the prosecution will prove his foresight of those acts.

In the case of crimes requiring a specific intent the identity of the offence committed by D is regulated by his own state of mind, but the prosecution does not have to prove that D himself possessed the specific intent, only that D foresaw the real possibility that P would, when carrying out his order, act with that specific intent. If, for example, the accused ordered a beating and the victim died from the beating delivered, he is guilty of murder only if he had the intent required for murder or he realised that the beating would or might be carried out with the intent required for murder. If not, he is guilty of manslaughter.

‘Counselling’ embraces advising, soliciting and encouraging. It is not necessary that D’s counselling caused the offence, but it is necessary that the act counselled was performed within the scope of the authority D had bestowed upon P: see Nankissoon Boodram a/c Dole Chadee and Others v The State CA Crim Nos 104-112 of 1996.
In *Calhaem [1985] QB 808* (CA), Parker LJ said:

We must therefore approach the question raised on the basis that we should give to the word “counsel” its ordinary meaning, which is, as the judge said, “advise,” “solicit,” or something of that sort. There is no implication in the word itself that there should be any causal connection between the counselling and the offence. It is true that, unlike the offence of incitement at common law, the actual offence must have been committed, and committed by the person counselled. To this extent there must clearly be, first, contact between the parties, and, secondly, a connection between the counselling and the murder. Equally, the act done must, we think, be done within the scope of the authority or advice, and not, for example, accidentally when the mind of the final murderer did not go with his actions. For example, if the principal offender happened to be involved in a football riot in the course of which he laid about him with a weapon of some sort and killed someone who, unknown to him, was the person whom he had been counselled to kill, he would not, in our view, have been acting within the scope of his authority; he would have been acting entirely outside it, albeit what he had done was what he had been counselled to do.

As with ‘procuring’, it is arguable that there is, in principle, no reason why the test for ‘parasitic liability’ should not apply to counselling P to commit an offence, where P goes beyond the acts which D counselled. The questions for the jury will be:

(i) whether the act done by P was within scope of the acts counselled by D (D counselled P knowing there was a real possibility of); and

(ii) whether D had the intention required or knew, when counselling the act, that there was a real possibility that P would act with the specific intent required.
Illustration: Prosecution case D hired P₁ and P₂ to cause V really serious harm – D’s case is that he hired them to do V some physical harm – fundamentally different act – alternative offences

On (...), two men called at the home of the complainant, V. They subjected him to a severe beating with baseball bats. They left V with broken cheekbones and a multitude of bruises. It is accepted by the defence that those injuries constituted really serious bodily harm committed with intent to do really serious bodily harm.

One of those men was P₁. On (...), P₁ pleaded guilty to the offence of causing grievous bodily harm with intent. He has given evidence for the prosecution. He told you that he and P₂ were hired by the accused to give the complainant ‘the beating of his life’.

The accused admits hiring P₁ and P₂ to assault V but only to ‘soften him up’. He says he had no idea they were going to use baseball bats and did not intend the complainant to suffer serious injury. An accused who hires others to commit an offence is guilty of the offence if they go on to commit it. Here the accused says P₁ and P₂ did not commit the offence he ordered but a more serious offence. Your task is to decide whether the prosecution has proved that the accused committed one of the offences charged as alternatives in the indictment. There are three counts in the indictment, count 1, causing grievous bodily harm with intent; count 2, inflicting grievous bodily harm; and count 3, assault occasioning actual bodily harm. [Explain]

You will need to consider (1) the scope of the agreement reached between the accused, P₁ and P₂, (2) the accused’s awareness of the possible consequences of that agreement, and (3) the accused’s state of mind when he gave his directions.

You must first decide whether you are sure the accused hired P₁ and P₂ to do really serious bodily harm to V. If you are sure he did, then it does not matter whether the accused realised they would use baseball bats to achieve it. He is guilty of the offence charged in count 1, causing grievous bodily harm with intent, because what he ordered, and therefore intended, was achieved by P₁ and P₂ as ordered. Your verdict would be guilty of count 1 and you need go no further.

If you are not sure that the accused ordered P₁ and P₂ to cause V really serious harm, then you must consider whether the prosecution has proved that what was done by P₁ and P₂ was within the scope of the agreement the accused made with them. The prosecution must prove that the accused realised that in carrying out his orders P₁ and P₂ might
use baseball bats or similar weapons. In deciding what was in the accused’s mind you are entitled to compare what the accused ordered with what P1 and P2 did.

Let us look at the first question: Was the use of baseball bats an act essentially different in quality from or essentially the same as what the accused ordered? The prosecution points out that the accused was perfectly prepared for P1 and P2 to use their fists and feet on the complainant. The use of another form of blunt instrument to ‘soften him up’ did not depart from the essential quality of what was agreed. The defence argues that these were actions of a completely different character from those ordered. You must resolve this issue. Clearly, if you think P1 and P2 may have gone well beyond what the accused ordered, the less likely it is that the accused realised they might act in that way. If, on the other hand, you are sure that what was ordered and what took place were essentially the same, the more likely it is, you may think, that the accused realised that P1 and P2 might act as they did when they carried out his orders.

You must decide whether the accused realised that, in carrying out his orders, P1 and P2 might resort to violence with weapons such as baseball bats.

If you are sure the accused realised that weapons such as baseball bats might be used to carry out his orders, the violence done was within the scope of the accused’s orders to P1 and P2.

However, he would be guilty of count 1 only if he realised that P1 and P2 would or might act with intent to cause V really serious bodily harm. If you are sure he did your verdict would be guilty of count 1. If you are not sure he did, your verdict would be not guilty of count 1 but guilty of count 2.

If, on the other hand, you are not sure that the accused realised the possibility that weapons such as baseball bats may be used, your verdict would be not guilty of count 2.

If you find the accused not guilty of count 1 and count 2 it is conceded by the defence that your verdict upon count 3 will be guilty. The accused accepts that he hired P1 and P2 to commit the offence of assault causing actual bodily harm. The accused would therefore be responsible for what he ordered but not for consequences which resulted from violence outside the scope of his directions.

I have prepared a note which explains the sequence in which you should consider these questions before arriving at your verdict. Let us read it together.
Illustration: Route to Verdict
Please answer question 1 and proceed as directed

Question 1
Are you sure P1 and P2 caused and intended to cause really serious bodily harm to V?
Admitted. Proceed to question 2.

Question 2
Are you sure that the accused ordered P1 and P2 to cause really serious harm to V?
If you are sure he did, verdict guilty count 1 (causing grievous bodily harm with intent) and proceed no further.
If you are not sure he did, go to question 3.

Question 3
Are you sure that the use of baseball bats was within the scope of the directions given by the accused to P1 and P2? See Note below.
If you are sure the use of baseball bats was within the scope of the agreement, go to question 4.
If you are not sure the use of baseball bats was within the scope of the agreement, go to question 5.

Question 4
Are you sure that when the accused hired P1 and P2 he realised that they may attack V intending to cause him really serious harm?
If you are sure he did, verdict guilty count 1 (causing grievous bodily harm with intent) and proceed no further.
If you are not sure he did, verdict not guilty count 1 but guilty count 2 (inflicting grievous bodily harm) and proceed no further.

Question 5
Are you sure that the accused hired P1 and P2 to cause and intended them to cause V some physical harm?
Admitted. Verdict guilty count 3 (assault occasioning actual bodily harm).

Note: The use of baseball bats was within the scope of the accused’s directions to P1 and P2 only if you are sure that the accused realised when he gave his directions to P1 and P2 that weapons such as baseball bats might well be used to carry them out.
5. **Further Offence Committed in the Course of a Joint Enterprise**

**Guidelines**

If the accused (D) is engaged with another (P) in a joint enterprise to commit offence X, and P, in the course of the joint enterprise, commits the further offence Y, D may be liable also for offence Y, provided that:

1. the acts done were within the scope of the joint enterprise, and
2. the acts were done with an intention within the contemplation of the accused.

If the common purpose of the enterprise was achieved (ie offence X) it does not matter that it was achieved by a means which was outside the contemplation of the accused (eg where the purpose of the joint enterprise was to kill a victim by shooting and one of the parties took out a knife and stabbed the victim to death, all are guilty of murder, because the common purpose was a killing): **Brown and Isaac v The State [2003] UKPC 10**. The reason is that P and D accomplished the purpose they set out to achieve.

Where one party to the joint enterprise (P) acted in a manner which exceeded the common purpose, the issue for the jury is whether his act was nevertheless within the scope of the joint enterprise, and, therefore, authorised by the accused (D), or the act was foreseen by D as a real possibility when he embarked upon the joint enterprise. D is liable for P’s act if he realised it was a real possibility that, in furtherance of the joint enterprise, one of the parties to it would act as he did, whether the accused personally wished it or not. If, however, P’s acts were fundamentally different from those directed it is unlikely that the prosecution will prove his foresight of those acts: **Anderson and Morris [1966] 2 QB 110 (CA); R v Smith [1963] 1 WLR 1200 (CA); Gamble [1989] NI 268 (CC)** (but see doubts expressed by the majority in **Rahman [2008] UKHL 45** as to the correctness of the decision in **Gamble** on its facts).

Where a crime of specific intent is charged (eg murder or causing grievous bodily harm with intent) D’s responsibility depends upon the answer to the following question: Did D participate or continue to participate in the joint enterprise realising there was a real possibility that another party to the joint enterprise would act as he did with specific intent?

Where the accused realised that one of the parties to the joint enterprise may, in the course of the joint enterprise, use a lethal weapon, the jury may readily draw the inference that he was also aware that he might use it with specific intent. eg (1) where in the course of a robbery P shot the cashier, D will be guilty if he knew that P carried a loaded shotgun and knew that there was a real possibility that P would use it, if necessary, with intent to kill or to cause
really serious injury, even if P and D had agreed that it would only be used to threaten; (2) where, in the course of a joint venture to do really serious injury to V, P produced a knife and stabbed V to death, D would be guilty of murder if he knew there was a real possibility that P was in possession of a knife, and might use a knife to stab V with intent to kill or to cause really serious injury, even if D had no intention that a knife should be produced or used: Rahman [2008] UKHL 45; Powell and English [1999] 1 AC 1 (HL).

If the jury is sure that the act committed by P was within the scope of the joint enterprise, but not sure that the accused realised that the act might be accompanied by the specific intent, the accused is not guilty of the offence of specific intent charged, but may be guilty of a lesser alternative offence (eg inflicting grievous bodily harm or manslaughter) because the accused remains liable for acts which were within the scope of the joint enterprise: Stewart [1995] 3 All ER 159 (CA); Gilmour [2000] NI 367 (CA).

If the act was, in the view of the jury, fundamentally different from that contemplated by the accused, so that the accused was unaware of the possibility that P may act as he did, it was outside the scope of the joint enterprise and the accused will not be responsible for the consequences of it, eg where P, D1 and D2 attack V1 and V2 with sticks with intent to cause really serious harm, and P unexpectedly produces a knife and kills V1 with intent to cause really serious harm, D1 and D2 may not be guilty of murder or manslaughter, depending on the jury’s view whether stabbing was a fundamentally different act, even though each of them set out with the intent required for murder: See, however, the speech of Lord Hutton in Powell and English [1999] 1 AC 1 (HL) 30; Lord Brown in Rahman [2008] UKHL 45 [68]; see also Yemoh [2009] EWCA Crim 930 for the application of the test to manslaughter.

Where, however, the accused continued to participate in the joint venture after he realised that another party to the joint enterprise would or might act as he did with the requisite intent, he is responsible for the outcome eg if during a fight P unexpectedly produced a knife and threatened to kill V with it and D, aware of the threat, continued his assault on V, D would be guilty of murder if P carried out his threat with intent to kill or to cause really serious injury, even if D personally did not have the intent required for murder: Rahman [2008] UKHL 45.

An accused may exceptionally escape the consequences of the joint enterprise if he withdrew from it once he realised the risk of an unintended outcome through the actions of P: Mitchell [1999] Crim LR 496 (CA). His withdrawal must be unequivocal and effective: Bryce [2004] EWCA Crim 1231; Robinson [2000] 5 Archbold News 2 (same principle applies whether the offence was spontaneous or planned); O’Flaherty [2004] EWCA Crim 526; Gallant [2008] EWCA Crim 1111; Becerra and Cooper [1975] 62 Cr App R 212 (CA).
Illustration: Prosecution case of joint enterprise (common purpose) to kill V – D admits common purpose to cause really serious harm – P stabs and kills V – whether the act of P was committed within the scope of the common purpose joined by D or was a fundamentally different act – whether D knew of a real possibility that P would use a knife with the intent required for murder

The prosecution case is that the accused, with others, set out to kill the deceased. That this was their joint intention can be inferred from their actions observed by the witnesses. They were seen advancing towards their victim, V, carrying an assortment of weapons, including sticks, a baseball bat and at least one knife, perhaps two. Members of the group were chanting words to the effect that V was a dead man. During the attack which followed, one of them thrust a knife into V’s chest causing a wound from which he died within minutes. The evidence does not establish who inflicted the wound but the prosecution accepts it was not this accused. It is common ground that whoever inflicted that knife wound intended either to kill V or to cause him really serious bodily injury, and was therefore guilty of murder.

The accused says that his intention was to attack V with the stick he was carrying. He admits that he did cause a serious injury to V’s head with intent to cause really serious harm. However, he says he was unaware that anyone was carrying a knife, had no intention that anyone should use a knife and did not appreciate that anyone might be intending to use a knife. No-one was chanting death threats towards V as far as he was aware and he would not have joined a common purpose to kill.

The accused therefore admits he joined an unlawful criminal enterprise to attack V but denies that he is responsible for V’s death.

The first issue between the prosecution and the defence for you to resolve is whether the accused participated in an attack on the deceased intending that V should be killed. If the accused participated in a joint attack whose common purpose was to kill he is guilty of murder, whether or not he was the man who delivered the fatal wound, and whether or not he thought a knife might be used. Your verdict would be guilty of murder and you need proceed no further.

If you are not sure that the accused shared a common purpose to kill, then you must next consider whether wounding with a knife was, nevertheless, within the scope of the criminal enterprise in which he took part.
The use of the knife was within the scope of the criminal enterprise in which the accused participated if the accused realised when he joined in that there was a real possibility that a knife would be used by one of the others to wound V.

Only if you are sure that the act of wounding V was within the scope of the criminal enterprise in which the accused participated could you find the accused guilty of count 1 (murder) or count 2 (manslaughter).

The accused is guilty of murder if wounding with a knife was within the scope of the criminal enterprise he joined and the accused realised there was a real possibility that V would be stabbed by one of the group with intent to cause really serious harm or death. If you are sure that wounding was within the scope of the enterprise, but you are not sure the accused realised one of the group would or might act with intent to cause really serious harm or death, the accused is not guilty of murder but guilty of manslaughter.

If you are not sure that wounding with a knife was within the scope of the criminal enterprise the accused joined he is not guilty of murder and not guilty of manslaughter. In that event you would turn to count 3.

Count 3 encompasses the accused’s admission that by his own act he caused a serious injury with intent to do V really serious bodily harm.

I have prepared a note which explains the sequence in which you should consider these questions before arriving at your verdict. Let us read it together.
Illustration: Route to Verdict

Please answer question 1 first and proceed as directed.

Question 1
Did the accused take part in the attack on V sharing a common purpose to kill him?
If you are sure he did, verdict guilty count 1 (murder) and proceed no further
If you are not sure, go to question 2.

Question 2
Was the use of a knife to wound V within the scope of the criminal enterprise joined by the accused? See Note below.
If you are sure the use of the knife was within the scope of the criminal enterprise joined by D, go to question 3.
If you are not sure the use of the knife was within the scope of the criminal enterprise joined by D, go to question 4.

Question 3
Did the accused realise when he took part in the attack on V that there was a real possibility one of the other attackers would stab V with intent to kill or to cause really serious injury?
If you are sure he did realise it, verdict guilty of count 1 (murder) and proceed no further.
If you are not sure he did, verdict not guilty count 1 (murder) but guilty count 2 (manslaughter).

Question 4
Did the accused cause really serious injury to V with a stick intending to cause him really serious injury?
The accused admits causing really serious injury with a stick intending to cause really serious injury. If you have found the accused not guilty of count 1 (murder) and not guilty of count 2 (manslaughter) your verdict will be guilty count 3 (causing grievous bodily harm with intent).

Note: The act of stabbing was within the scope of the criminal enterprise joined by the accused only if you are sure that the accused realised when he joined in, or continued to join in, that one of the other participants might well use a knife to stab V.
Notes

1. **Powell and English [1999] 1 AC 1 (HL):** The established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend. The criminal culpability lies in participating in the criminal enterprise with that foresight.

   The foresight of the secondary party must be directed to a real possibility of the commission by the primary offender in the course of the criminal enterprise of the greater offence. The liability is imposed because the secondary party is assisting in and encouraging a criminal enterprise which he is aware might result in the commission of a greater offence.

2. **Aroon Mohammed and Others v The State CA Crim Nos 7-9 of 1999:** The appellants were jointly charged for murder and convicted. On appeal the second appellant submitted, inter alia, that the act causing the death of the deceased was outside the scope of the joint enterprise. It was unknown which accused was the principal. As a consequence, the trial judge was wrong to dismiss their submission of no case to answer. Two of the appellants were armed. It was clear that violence was a real option in view of their conduct, and declared intention if the deceased did not co-operate, they were prepared to kill or do grievous bodily harm. It was immaterial who committed the fatal act. It is not necessary to determine who the principal offender was in order to find the appellants guilty. The appeals were dismissed.


   Following on from **R v Powell; R v English [1999] 1 AC 1**, the House of Lords held in **R v Rahman [2009] 1 AC 129, HL**, that where, in the course of a joint enterprise to inflict unlawful violence, the principal killed the victim intending to do so, but the secondary party only foresaw that the principal might use force with an intent to cause serious injury, the secondary party was still guilty of murder as the principal’s intention was not relevant to (i) whether the killing was within the scope of the joint enterprise or (ii) whether the principal’s act was fundamentally different from the act or acts which the secondary party foresaw as part of the joint enterprise. Consistently with Rahman, it had been held in the earlier case of **R v Day [2001] Crim LR 984, CA**, that where an alleged secondary party to murder foresaw the act of the principal that caused the victim’s death, but did not realise that the principal might act with the *mens rea* for murder, but did envisage that harm less than serious bodily harm might result, he would be guilty of manslaughter. This was confirmed post-Rahman in **R v Yemoh [2009] 6 Archbold**
News 2, CA. See also R v Gilmour [2000] 2 Cr App R 407, NICA... The obiter observation to the contrary in Att.- Gen.’s Reference (No 3 of 2004) [2006] Crim LR 63, CA, must now be regarded as wrong as being inconsistent with Rahman and with these authorities. Referring to Day in R v Parsons [2009] 2 Archbold News 3, the Court of Appeal said that a judge would only be obliged to leave manslaughter to the jury on this basis where there was evidence to support such a conclusion.

See the local cases of Leo Poulette and Ancil Poulette v The State CA Crim Nos 6 and 7 of 2007; Vivian Clarke and Others v The State CA Crim Nos 28-30 of 2009 for application of Rahman. See also Nankissoon Boodram a/c Dole Chadee and Others v The State CA Crim Nos 104-112 of 1996 on the interpretation of “counselling” and Arnold Huggins and Others v The State CA Crim Nos 26-28 of 2003 on the admissibility of the declarations of a conspirator made in the furtherance of the joint enterprise (Referred to in Chapter 7—Conspiracy).

4. See also Chan Wing-Siu v The Queen [1985] AC 168 (PC Hong Kong); Anderson and Morris [1966] 2 QB 110 (CA), Hyde [1991] 1 QB 134 (CA); and see Brown and Isaac v The State [2003] UKPC 10 on “plain vanilla” joint enterprise.

5. Archbold 18-7/32; Blackstone’s A5.1/15; Smith & Hogan 12th edn Chapter 8 as to whether it is necessary to direct the jury both as to identification of a common purpose to kill and the foresight of another’s act and intention, see Rahman [2008] UKHL 45 [63] per Lord Brown. (Note, however, that if the common purpose to kill was achieved the prosecution does not have to prove foresight of means.)
Chapter 9—Circumstantial Evidence

Adopted from the Crown Court Bench Book 2010

Guidelines

Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence; it is in this category that most controversy is generated and specific directions will be required.

A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence. The prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the accused. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence, and motive.

At the conclusion of the prosecution case the question for the judge is whether, looked at critically and in the round, the jury could safely convict: P (JM) [2007] EWCA Crim 3216. 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 accused is guilty: McGreevy v DPP [1973] 1 WLR 276 (HL).

Directions

The following is an extract from the speech of Lord Morris of Borth-y-Gest in McGreevy v DPP [1973] 1 WLR 276 (HL) on the subject of summing up in a circumstantial case:

The particular form and style of a summing up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case but also upon the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt.
A circumstantial case requires judicial scrutiny and care. It is frequently the case that circumstances, proved or admitted, are of equivocal effect in the absence of a clinching or explanatory piece of evidence. In such cases the judge should assist the jury to identify the evidence of circumstances upon which the cogency of the prosecution case depends.

Where the accuracy or the truth of evidence is in dispute, the jury may be able to derive assistance from other evidence in resolving that dispute (eg consistent accounts by different witnesses). Where, however, the accuracy or truth of evidence standing alone is in dispute (eg the quality of identification evidence), consideration of other, unrelated, evidence may or may not assist. If it does not assist, the jury should reach a conclusion on the disputed evidence without regard to any other category of evidence. If they reject the evidence it can form no part of the ‘circumstances’ to be assessed.

Where the question is not whether the evidence is accurate or true, but whether the evidence supports an inference of guilt or innocence, the circumstances should be considered in the round, since the final question, whether the jury is sure of guilt, can only be answered by assessment of the effect of all the evidence.

An interpretation of the significance of proved or admitted facts is frequently required. One of the possible dangers is an invitation to the jury by the prosecution or the defence to rely upon a single alleged fact to support the heaping of inference upon inference, or to ‘fit’ the evidence to the theory being advanced without sufficient regard to the cogency of the inference. Where the risk exists a warning may well be required.

Directions should include:

- an explanation of the nature and elements of the circumstantial case;
- a summary of the evidence in support of that case;
- a direction that the jury must decide what evidence they are sure they accept;
- a summary of the defence case as to the disputed evidence, the identification of evidence which may rebut the inference of guilt, and the disputed inferences;
- an explanation that speculation, or attempting to fit the evidence to a particular theory (by either side), is not the same as drawing an inference from reliable evidence; and
- a direction that the final question for the jury is whether the evidence they accept leads them to the conclusion, so that they are sure that the accused is guilty.
Illustration: explanation what is a circumstantial case – taking care – the categories of evidence which the jury must consider – the defence case – example of drawing inferences or reaching conclusions – beware of speculation – the ultimate decision

The prosecution has sought to prove a variety of facts by evidence from different sources. The prosecution submits that the effect of that evidence, when considered as a whole, is to lead to the inescapable conclusion that the accused is guilty. In other words, the variety of facts proved cannot be explained as coincidence. Circumstantial evidence, as it is called, can be powerful evidence but it needs to be examined with care to make sure that it does have that effect.

The categories of evidence on which the prosecution relies are these (...). The prosecution places particular emphasis on (...) because (...).

The defence case is (...).

You should examine each category of evidence in turn and decide whether you accept it. Clearly, if you reject a significant part of the prosecution evidence, that will affect how you approach your final conclusion.

In the course of their submissions to you, the advocates on both sides suggested what inferences you should draw from particular parts of the evidence. Drawing an inference is simply the process by which you find, from evidence which you regard as reliable, that you are driven to a further conclusion of fact. You need to be careful to ensure that the evidence really does lead to the conclusion the prosecution invites you to reach.

[Let me give you an example of drawing inferences which does not arise on the facts of this case but which illustrates the need for care in judging whether the fact proved supports the inference of guilt: If my fingerprint is found in the living room of my neighbour’s home, it is a sound inference that at some stage I had been in his living room. It would not, however, support an inference that I was the burglar who stole his DVD recorder from his living room. If you accepted my neighbour’s evidence that I had never been invited into his home, then, in the absence of some acceptable explanation from me, you might infer that at some stage I had been in my neighbour’s home uninvited. You may or may not be driven to the further conclusion that I was the burglar. But, if you also accept that there was found a second fingerprint of mine at the point of entry or, that in my shed there was found a DVD recorder which my neighbour recognises as the one stolen from his
living room, you would, no doubt, conclude so that you were sure that I was the burglar. You will notice how the inference of guilt becomes more compelling depending upon the nature and number of the facts proved.]

What conclusions you reach from the evidence is entirely for you to decide. When you are considering what inferences you should draw, or what conclusions you should reach, it is important to remember that speculation is no part of that process. Drawing inferences and reaching conclusions are not the same as fitting the facts to a particular theory.

Having decided what evidence you accept, consider whether, looked at as a whole, it drives you to conclude, so that you are sure, that the accused is guilty.
Notes

1. **Ramchand Rampersad v The State CA Crim No 97 of 1999**: Circumstantial evidence must be evidence which standing by itself points in one direction and one direction only that is the guilt of the appellant. Circumstantial evidence must be evidence in the first place admissible and must be capable of performing a particular function. It must point unequivocally to a particular conclusion.

2. **Jason Jackman and Chet Sutton v The State CA Crim Nos 13 and 14 of 2005**: There is no set formula for dealing with circumstantial evidence. It is not essential for a judge to make every point that can be made for the defence. The fundamental requirements are correct directions in point of law, an accurate review of the main facts and alleged facts and a general impression of fairness. It is for the jury, not the judge, to decide what evidence is to be accepted and what conclusions can be drawn from it. See also McGreevy v DPP [1973] 1 WLR 276 (HL) and Hillier [2007] 233 ALR 634 (HC Australia).

3. **Case Stated by DPP (No 2 of 1993) (1993) 70 A Crim R 323 (CCA South Australia)** King CJ stated that:

   If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of providing in a reasonable mind a conclusion of guilt beyond reasonable doubt and this is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case, that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence as not reasonably open on the evidence.

4. Illustration sources: **Archbold 10-3; Blackstone’s F1.16.**
Chapter 10—Identification Evidence

1. Visual Identification

Adapted from the Crown Court Bench Book 2010

Guidelines

The risk of honest but mistaken visual identification of suspects requires investigators to comply with the Judges’ Rules and the guidelines set out in Turnbull [1977] QB 224 (CA) and judges to be discriminating in the admission of evidence, and explicit as to the risk of mistake in their directions to the jury.

The principal safeguards provided are:

1. Making a record of a description first given by the witness, before any identification procedure takes place.

2. 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 [2009] UKPC 12; Pipersburgh [2008] UKPC 11 (Belize); Marlon G John v The State CA Crim No 39 of 2007 and Dwayne Vialva v The State CA Crim No 33 of 2008.

Judges are required to examine the state of identification evidence at the close of the prosecution case and to stop the case if it is poor and unsupported.

A Turnbull direction is required where identification is a substantial issue. This includes “recognition” evidence: See Beckford and Shaw (1993) 42 WIR 291 (PC Jamaica).

It 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.

The requirements of a Turnbull direction are as follows:

- There is a special need for caution when the case against the accused depends wholly upon the correctness of a visual identification

- The reason for caution is experience that a witness who is genuinely convinced of the correctness of his identification may be impressive but mistaken. This may be so even when a number of witnesses make the same identification

- The jury should examine the circumstances in which the identification came to be made. There are two elements to these circumstances both of which go to the reliability of the identification:
1. The opportunity to register and record the features of the suspect:
   (a) How long was the suspect under observation?
   (b) At what distance?
   (c) In what light?
   (d) Was the observation impeded in any and, if so, what way?
   (e) Had the witness seen the suspect before (ie was this recognition?)
   and, if so, how often and in what circumstances?

2. The reliable recall of those features when making the identification:
   (a) What period elapsed between the observation and the identification?
   (b) Was there any material difference between the description given by
       the witness at the time and the suspect’s actual appearance?
   (c) Any other circumstances emerging in the evidence which might
       have affected the reliability of the identification (eg press photographs,
       conversations with others).

Weaknesses

- Any specific weaknesses in the identification should be identified (eg fleeting opportunity, bad light, speed of incident, photographs inadvertently viewed)

- When directing the jury on weaknesses the judge must do it in such a way so as not to diffuse the impact of the weaknesses

- The cumulative impact of the weaknesses must be coherently brought to the jury’s attention

- It is not sufficient to review the weaknesses as part of an incidental review of the evidence; a review must be linked to the Turnbull direction

- It is insufficient to merely refer to the weaknesses; the judge must clearly explain why it is a weakness: See Fergus [1992] Crim LR 363 (CA); Pat
  tinson [1996] 1 Cr App R 51 (CA); Stanton [2004] EWCA Crim 490; R v I
  [2007] EWCA Crim 923, Moses LJ said:

    Had that matter stood alone, it might not have been sufficient to
    cause us to take the view that we do have of the directions, but
    there is another quite distinct problem with those passages, even
    though they all came under the heading of weaknesses. There was
    nothing said in the directions to the jury as to the danger of the
    identification parade four days later. Nothing was said to the jury
    to warn them that the problem with the subsequent identification
parade was that the witness might have been merely picking out those whose photographs he had seen but four days before, rather than two of those who were amongst the group who had attacked him. Had that danger been explained to the jury, then, as we have explained, there was no compulsion upon the judge to withdraw the case from the jury. **But it is never enough in this topic merely to identify weaknesses in the identification evidence without also explaining clearly to the jury why they are weaknesses.** In the instant case, the judge failed to do that. Indeed, he drew no attention to the danger in the identification parade of 21 January.

- See also *Nigel Caraballo v The State CA Crim No 11 of 2013*: appeal allowed principally because of the judge’s failure to identify specific weaknesses in the identification evidence with clarity
- Evidence capable (and, when necessary, not capable) of supporting the identification should be identified
- If the defence is alibi, the jury should be directed that if the alibi is rejected it does not (or may not) follow that the accused committed the offence, because a false alibi may be constructed for reasons other than guilt (eg because an alibi is easier to present than the true defence)

**Identification of Strangers and Recognition**

The fact that recognition may be more reliable than identification of a stranger does not absolve a judge from reminding the jury that mistakes in recognition of close relatives and friends are sometimes made: *Beckford and Shaw (1993) 42 WIR 291* (PC Jamaica). 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 [1994] Crim LR 128* (CA). See also *Pop [2003] UKPC 40* (Belize). See also *Archbold (2011) 14-19/20*.

**Recognition by Name**

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.
2. Identification Parade

Introduction

The normal function of an identification parade is to test the ability of the witness to identify the person seen on a previous occasion and to provide safeguards against mistaken identification. When a suspect is known and available, an identification procedure must be held when either (i) a witness has identified the suspect or purports to have done so prior to an identification parade, confrontation or a group identification having taken place, or (ii) there is a witness available who expresses an ability to identify the suspect or where there is a reasonable chance of the witness being able to do so, and the witness has not been given the opportunity to identify the suspect in any of the aforementioned procedures, and in either case, the suspect disputes being the person the witness has seen. An identification procedure need not be held where it is not practicable to hold one or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence: See Archbold 14-29, 14-33.

In Marlon G John v The State CA Crim No 39 of 2007 Weekes JA stated:

Guidance to Trial Judges on Appropriate Directions with respect to Identification Parades:

42. After giving the appropriate directions from R v Turnbull with assistance on the relevant evidence, the judge was required to deal with the issue of the challenged identification parade, first explaining the reason for an identification parade and pointing out to the jury that it was for them to decide whether it had been fair. The jury would have to be alerted to the consequences of each finding. If they found that it was fair, they could find that it supported and strengthened the identification of the appellant by the witnesses. However, if they were unsure whether it was fair or found that it was unfair, the appellant would have lost the benefit of the safeguard provided by a fair parade and they must take that into account in assessing the whole case and give it such weight as they think fit. Additionally, they had to be told that in the circumstances, the identification of the accused in the dock was of no value whatsoever for the purposes of supporting the identification of the accused. They must be told in the clearest of terms that their assessment of the correctness of the identification rests solely on the observations made by the witnesses on the scene since the ability of the eye witnesses to recognise their assailant had not been tested.

43. The judge then had to go on to put the issue into the context of the whole history of the matter and would have been obliged to then point
out the evidence, other than that of identification, which was capable of proving/supporting the State’s case against the appellant.

44. While the jury was not adequately assisted on the issues pertinent to the identification parade, when we consider the totality of the State’s case against the appellant, we are satisfied that even if an adequate direction had been given, the jury would have indubitably come to the same conclusion. The evidence against the appellant was, to put it mildly, overwhelming. The circumstances of observation on the scene gave the witnesses, in particularly, M, an excellent opportunity to see the accused, in particular his face, in favourable lighting conditions for an extended period of time and in close proximity. In fact, it could be said in respect of M, that there had been “a full and complete identification at the scene”. There was also the circumstantial evidence of the items recovered by the police during the execution of the search warrant which linked the accused to the events of the offences and further, there was the evidence of the oral and written admissions. When looked at in the context of all of the evidence against the appellant, the judge’s error is not fatal to the convictions.

In Dwayne Vialva v The State CA Crim No 33 of 2008 the Court of Appeal summarised the guidelines for the holding of an identification parade as stated in the Judges’ Rules:

In a case which involves disputed identification evidence a parade shall be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers it would be useful.

In John v State of Trinidad and Tobago [2009] UKPC 12, the Privy Council enumerated three situations in which an identification parade would be useful, namely:

(1) where the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so);

(2) where the suspect and the witness are not well known to each other and neither of them disputes this;

(3) when the witness claims to know the suspect but the suspect denies this.

Where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade: See Pipersburgh [2008] UKPC 11 (Belize).
Application of the Judges’ Rules

Guidelines

The Judges’ Rules are rules of practice for guidance of the police when interviewing suspects. A statement made not in accordance with the Judges’ Rules, is not in law inadmissible if it is a voluntary statement. However, the court may in the exercise of its discretion refuse to admit a statement if the court finds that it was made in breach of the Judges’ Rules.

If the judge admits the evidence notwithstanding a breach of the Judges’ Rules he should explain how the breach may affect the jury’s consideration of the evidence.

In Peart [2006] UKPC 5 (Jamaica) the Privy Council set out four guidelines for the exercise of the discretion to admit evidence obtained in breach of the Judges’ Rules:

(i) The Judges’ Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.

(ii) The judicial power is not limited or circumscribed by the Judges’ Rules. A court may allow a prisoner’s statement to be admitted notwithstanding a breach of the Judges’ Rules; conversely, the court may refuse to admit it even if the terms of the Judges’ Rules have been followed.

(iii) If a prisoner has been charged, the Judges’ Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner’s position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges’ Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.
In *Forbes* [2001] 1 AC 473 (HL), V recognised his assailant in the street. No identification parade was held. The Appellate Committee said at paragraph 27:

In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach... The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required... the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eyewitness’s identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has been an identification parade with the consent of the suspect, and the eyewitness has identified the suspect, in circumstances involving no breach of the code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also wish to alert the jury to the possible risk that the eyewitness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.
Illustration: evidence of visual identification (recognition) of an intruder at night – particulars of description taken down – witness recognises suspect in the street – no identification procedure held

Facts

The case against the accused, that he burgled the offices of X Ltd, depends upon the correctness of the identification of the accused made by Mr A, the caretaker and security guard. Let me remind you of his evidence. He was sitting in his security office at about 11 pm when he heard a crash. He left his office, went towards the noise and, as he rounded the corner to the rear of premises, he saw a broken window. Inside, on the ground floor, he saw a figure. He kept the figure under observation for about 5 minutes. During that time the person inside was moving about, apparently trying drawers to desks and filing cabinets. While Mr A was keeping observation he was making a mobile telephone call to the emergency services. Something appeared to disturb the intruder who made his way back out of the window. Mr A challenged him but the intruder ran off in the direction of the city centre. Shortly afterwards PC B arrived. Mr A told him that he thought he had seen the intruder before. He also bore a strong resemblance to one of the cleaners who worked at the offices three days a week between 7 pm and 10 pm. Mr A thought he had seen the intruder on occasions in the past congregating with others on benches around the cenotaph in the town centre. PC B wrote down the description which Mr A gave him. Mr A agreed to go with PC B in his police car to the town centre to see whether the intruder was still about. They arrived at the cenotaph at about 11.30 pm where they saw a group of young men. Mr A immediately pointed out a man, the accused, sitting on a bench with others, drinking from a can of lager. PC B approached the accused and arrested him. When cautioned the accused said, ‘I don’t know nothing about a break in. I’ve been here all night.’ It turns out that the accused is the son of one of the cleaners who works at X Ltd three days a week. The accused has now given evidence in support of his alibi and he has called two witnesses to confirm it.

Turnbull

When you are considering the identification evidence of Mr A, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past made mistakes; even a number of witnesses making the same identification. You can-
not convict the accused unless you are sure that Mr A’s identification was accurate and, in making that judgment, you need to look carefully at the circumstances in which it was made and at any other evidence in the case which may support it.

Let us consider the circumstances in which the identification took place and, first, the opportunity Mr A had to make a reliable mental note of the figure he was observing:

1. Mr A had the intruder under observation for a period of 5 minutes. However, for most of that time he was looking at a shape. The intruder was wearing a waist length top with a hood which he kept up. Only when the intruder was climbing out of the broken window, when Mr A went to confront him, did he have a clear view of his face. That view lasted for a few seconds only.

2. Mr A was a short distance from the intruder at all times and very close to him for the last few seconds. He said that he was about 6 feet away from him when he came out of the window.

3. There were no lights switched on inside the rooms where the intruder was walking about. There were, however, lamp standards in the street close by, which gave some illumination into the ground floor. Mr A said that when the intruder climbed out of the window there was a street lamp directly behind him which gave him a good view of the intruder’s face.

4. There was nothing to impede Mr A’s view as the intruder climbed out.

5. Mr A told you that he thought he recognised the accused, as soon as he saw him, as someone he had seen on several occasions, hanging about in the town centre with his mates. The reason why he had reason to remember the accused was because he bore a close resemblance to his father whom Mr A knew from work. It is more difficult, perhaps, for a witness to take in the features of a complete stranger, than it is for him to recognise the features of a person he knows already. However, you need to bear in mind that even people well known to one another make mistakes in recognition, something which you may have experienced yourselves.

Let us now look at the circumstances in which Mr A came to make the identification in the street:

1. Mr A was taken to the town centre by car within minutes after the intruder had left in that direction. This does not appear to be a case
in which time may have impaired the witness’ memory of the features he observed.

2. PC B read out the note he made of Mr A’s description of the intruder. He was about 5’10”-6’ tall. He was wearing a dark coloured waist length top with a hood. He was wearing blue jeans and a pair of trainers. Mr A could not see the intruder’s hair which was covered by the hood but he did describe a small nose and prominent front teeth. He also saw a tattoo on the fingers of one hand but he could not recall which hand. The accused was wearing clothes of this description when he was arrested half an hour later. The only discrepancy as to physical features put to Mr A was that he is 5’ 9” tall, not 5’10” or above. You should consider that difference between Mr A’s description and the accused’s height and decide whether it is a mistake or miscalculation which affects the reliability of Mr A’s evidence.

It is clear that Mr A could not have made the identification he did solely from his observation of the intruder moving about inside the premises. His identification depends upon those few seconds when he had the intruder in close view as he climbed out of the window. To that extent, Mr A had a limited opportunity to take in what he was seeing. On the other hand, he had a sufficient view to give a description almost immediately afterwards.

It was suggested to Mr A on the accused’s behalf that he had correctly identified a man he had seen before in the town centre but he was mistaken in thinking that the intruder in the office was the same man. Mr A was adamant that he had the right man. You should consider carefully whether there is any room for mistake.

Breach of the Judges’ Rules

In circumstances such as those faced by PC B, namely a witness who may be able to make an identification of a person not yet known, the Judges’ Rules exist to regulate the procedure to be followed by police officers. PC B acted properly under the Judges’ Rules when he took Mr A to the town centre in an attempt to find the unknown intruder.

The procedure was, from PC B’s point of view, successful, in that Mr A made a positive identification. However, since the correctness of Mr A’s identification in the street was disputed, the Judges’ Rules further required that a formal identification procedure should then have been carried out. It was not carried out. Furthermore, following the accused’s release on police bail he offered, through his attorney at law, to stand
on an identification parade. The offer was not accepted. The formal
identification procedure would have required Mr A to view a number
of people, either in photographs or in person, including among them
the accused, for the purpose of testing the correctness of Mr A’s iden-
tification in the street (Note Forbes [2001] 1 AC 473 (HL)). It exists as a
safeguard for the interests of those in the accused’s position, and gives
the opportunity to the witness to reflect. PC B told you he thought that
a further procedure would have served no useful purpose because Mr
A had already made his identification of the accused in the street. If he
went through another procedure Mr A would simply be recognising
the man arrested in his presence. That is an explanation which you will
wish to consider and no doubt you will see some sense in it. Neverthe-
less, one of the safeguards deliberately created to protect suspects from
mistaken identification was omitted. We cannot now know whether
Mr A would, at a formal identification procedure, have entertained sec-
ond thoughts about the correctness of his identification in the street
or would have been able to make any identification. It is said on the
accused’s behalf that his offer to take part in a formal procedure would
hardly have been made if he knew that the evidence against him would
simply be confirmed. You should bear that in mind when judging the
reliability of Mr A’s evidence.

Supporting Evidence

When you are making that judgment, you should have regard to any
other evidence which tends to support Mr A’s identification. First, I
want to remind you of evidence which you should not regard as sup-
port for Mr A. Counsel for the prosecution suggested to you that the
burglar may well have had inside knowledge of the office premises;
otherwise, why would a single burglar bother entering premises not
ordinarily associated with the storage of items of value which are easily
removable, such as money— it would not be easy for him to remove a
computer, for example. The accused’s father worked in these premises.
He is the sort of person who might have such inside knowledge. If you
reflect on this submission, it provides no support independent of Mr A
because it starts from a premise that Mr A’s identification is correct. If
you knew nothing about the accused, you could not possibly conclude
that the burglar must have had inside knowledge. This is speculation.
Furthermore, you have heard no evidence from which you could pro-
perly infer that the accused knew anything useful about the premises.
Therefore, please put this argument to one side and ignore it (Note
Jamel [1993] Crim LR 52 (CA)).
There is, however, other evidence which, depending on your view, provides support for the identification. When the accused was taken into custody his trainers were removed from him and sent for forensic examination. In the treads of both shoes, shards of glass were found which were of the same refractive index as the glass remaining in the broken window. You heard from the expert that the refractive index is relatively common but it is typically window glass and not, for example, similar to glass used in the manufacture of bottles which one might find littering the street. The burglary took place half an hour before the accused was arrested. The accused could think of no occasion in the recent past when he might have trodden on glass. This evidence is capable of adding support to Mr A’s evidence, but it is a matter for you to assess it and decide whether it does or not, and, if so, what weight you attach to it.

Alibi

Finally, on the subject of supporting evidence, I want to say something about the accused’s evidence of alibi. Clearly, if you are sure that Mr A’s evidence is reliable, it would follow that the accused’s alibi is false. You must, of course, consider the alibi evidence with care before you reach such a conclusion. However, you will recall that the accused and his witnesses were asked questions about the circumstances in which the alibi came to be advanced, and the ability of the witnesses to give evidence that the accused was with them during that critical half an hour between 11pm and 11.30pm. There were several inconsistencies between the witnesses, of which I will remind you in a moment. One of them ended up conceding that he was not in the area of the cenotaph at that time and had no idea where the accused was. Putting Mr A’s evidence on one side for a moment, if you were to conclude from the unsatisfactory way in which the evidence was given that the alibi evidence has been concocted, that fact is also capable of providing support for Mr A’s identification. But that would be a conclusion about which you should be cautious, because a false alibi may be put forward for reasons other than guilt. One example is an accused who thinks it is simpler to put forward a false alibi than to explain what he was really doing; another is an accused who has a genuine alibi but thinks he may not be believed unless he can find others to support him. Only if you can exclude such possibilities should you regard a false alibi as any support for the prosecution case.
Notes


2. Forbes [2001] 1 AC 473 (HL) [27]: Where an identification parade would have been useful but is not held:
   
   ...the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eyewitness’s identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair.

3. See also Hodge (1976) 22 WIR 303 (CA Guyana); Barrow (1976) 22 WIR 267 (CA Guyana); Steve Williams v The State CA Crim 54 of 2000: where the identification parade is rejected by the jury as being unfair, the judge must focus the attention of the jury on the issue of the reliability of the witness’ identification of the accused in court and provide consequent directions. See also Daniel Charles v The State CA Crim No 45 of 2007.
3. Identification from CCTV and Other Visual Images

Adopted from the Crown Court Bench Book 2010

Introduction

The proliferation of CCTV cameras has increased the number of cases in which relevant events are recorded and, therefore, attempts made by the prosecution to prove identification of suspects from such images.

Judges may be guided by the following:

1. When the photographic image is sufficiently clear the jury can compare it with the accused sitting in the dock, as in Dodson [1984] 1 WLR 971 (CA).

2. When a witness knows the accused sufficiently well to recognise him as the offender depicted in the photographic image, he can give identification evidence: See Fowden [1982] Crim LR 588 (CA); Kajala v Noble [1982] 75 Cr App R 149 (DC); Grimer [1982] Crim LR 674 (CA); Caldwell [1994] 99 Cr App R 73 (CA); and Blenkinsop [1995] 1 Cr App R 7 (CA). This may be so notwithstanding the loss of the image: Taylor v Chief Constable of Cheshire [1986] 1 WLR 1479 (DC).

3. A witness, such as a police officer, who does not know the accused, but has spent many hours viewing and analysing photographic images, may acquire specialist knowledge of the material. He can give evidence of his comparison between the images of the scene of the crime and a reasonably contemporary photograph of the accused provided that those images are available to the jury for the purpose of testing the witness’ evidence: Clare [1995] 2 Cr App R 333 (CA).

4. A witness, expert in facial mapping techniques, can express an opinion based on a comparison between scene of crime images and a reasonably contemporary photograph, provided both images are made available to the jury for the purpose of testing the expert’s evidence: Stockwell [1993] 97 Cr App R 260 (CA); Clarke [1995] 2 Cr App R 425 (CA); Hookway [1999] Crim LR 750 (CA).

Note: These guidelines are adopted from the Crown Court Bench Book 2010 and are subject to the UK statutory rules: Criminal Justice Act 1972; Police and Criminal Evidence Act 1984. Our research has not yielded any local authorities on this point.
A. Comparison made by the Jury

In Dodson [1984] 1 WLR 971 (CA) Watkins LJ expressed the view of the Court of Appeal as follows:

What are the perils which the jury should be told to beware of? ...We do not think the provision by us of a formula or series of guidelines upon which a direction by a judge upon this matter should always be based would be helpful. Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant’s appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of relevance in this context in a particular case, which the jury must receive guidance upon from the judge when he directs them as to how they should approach the task of resolving this crucial issue.

In the present case we do not doubt that the jury was made well aware of the need to exercise particular caution in this respect.

What is required is an adapted Turnbull direction, including its warning of the risk of mistaken identification by several witnesses. The jury is, for this purpose, the witness of the event. The suspect will be unknown to them.

The quality of the opportunity for observation will depend upon the clarity and completeness of the image which they are examining.

They will not suffer the disadvantage of a fleeting glimpse since they can study the scene of crime image at leisure, but the quality of the image will not be perfect, it will be two-dimensional, and it may provide only a limited view of the suspect.

The accused’s appearance may have changed since the suspect’s image was captured on CCTV in which case the jury must beware of speculation. A photograph of the accused contemporaneous with the CCTV image may do much to remove this disadvantage.

While the exercise of comparison will, in large measure, involve the study of similarities, the need to consider the existence of irreconcilable differences will be just as important. The existence of one difference may exclude the accused altogether. The jury should be reminded of any specific arguments addressed to them on behalf of the accused.
Illustration: Comparison by the jury of photographic images of a suspect at the scene of crime with the accused – modified Turnbull direction – quality of images – significance of similarities and any dissimilarity – supporting evidence

You have seen the CCTV films and in your bundle are several photographic stills recorded by CCTV cameras located close to the scene of the crime. There are three individuals depicted in those photographs. It is agreed between the prosecution and the defence that the person we have labelled ‘3’ on each of those stills is the complainant. The two others we have labelled ‘1’ and ‘2’ are, it is also agreed, the complainant’s attackers. The person labelled ‘2’ is unknown to the prosecution. The prosecution case is that the person labelled ‘1’ is the accused.

There is no identifying witness. The accused was arrested 3 days after the incident. His photograph was taken at the police station. You have also been able to observe the accused in court for the last 2 days. You are invited to make a comparison between all these images and the accused in person, and to conclude that they are all of one and the same man.

This is an exercise in identification in which there is a special need for caution. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked to make a comparison between images and the physical features of someone who was until this trial a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspect ‘1’ appears. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, you have the advantage of stills from two different cameras and views of the suspect’s face both frontal and in profile. The first question you need to consider is whether these images are of sufficient quality to make any comparison with the accused. If you are not sure they are, then you should abandon the
exercise altogether. If they are of sufficient quality then you have the further advantage of being able to make your comparison in your own time and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

Next, you have a contemporaneous photograph of the accused, one frontal and one in profile on each side. The main advantage of a contemporaneous photograph of the accused is that it records his body shape and the length of his hair, and demonstrates the shape of his moustache at or about the time the incident took place.

Finally, you have the accused in person, now clean shaven and wearing his hair much shorter than it was at the time, but giving you a 3-D view of the contours of his head and face.

When asked questions by his own advocate the accused accepted that the person in the CCTV film bears a striking resemblance to himself. He denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially, common to the suspect and the accused which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line up of men of similar appearance. What you do have is the ability to search for any features of suspect ‘1’ which you do not find in the accused and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

In reaching your decision you do not have to look at the images in isolation of the other evidence. Found in the accused’s bedroom was a pair of trainers. They are of a relatively common design but the expert evidence is that they are identical in all discernible respects to the footwear worn by suspect ‘1’ in the still photographs taken at the scene. When he was arrested the accused was wearing a T-shirt with a distinctive logo written on the front. The same logo appears on the T-shirt worn by suspect ‘1’. If, having considered all the evidence, you are sure that the person numbered ‘1’ in your still photographs is the accused, you can move on to consider whether he committed the offence charged. If you are not sure they are one and the same person, you must find the accused not guilty.

Please remember, if and when considering whether the film depicts the accused committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.
B. Recognition by a witness

The requirements of a modified Turnbull direction will be similar to those required when the jury makes the judgment for themselves (see also Chapter 10: 3A—Comparison Made by the Jury above).

When the prosecution relies both upon the evidence of a witness who recognises the accused and the jury’s own ability to compare the photographic evidence with the accused in person, the jury may be directed that the evidence and their own examination can be mutually supportive. If so, they should be reminded of the danger that several witnesses can make the same mistake.

Notes

1. Caldwell [1994] 99 Cr App R 73 (CA); See also Ali [2008] EWCA Crim 1522, in which the court (1) doubted that the image from which a police officer purported to recognise the suspect was of sufficient quality to permit recognition (the face was partially obscured) (2) doubted that his recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition, paragraphs 34-35.

2. Smith (Dean) [2008] EWCA Crim 1342, and Chaney [2009] EWCA Crim 21: The Judges’ Rules procedural safeguards, appropriately adapted, should be followed when a witness is asked to attempt a recognition from a scene of crime image. Thus, there should be a contemporaneous record of the witness’ reaction and its terms which would enable the jury to make a meaningful assessment of its reliability. Furthermore, an explicit warning of the dangers of recognition evidence should be given to the jury.
Illustration: recognition by witness of suspect in scene of crime images – suspect known to police witness – modified Turnbull warning – advantages and disadvantages – jury using their own judgment – supporting evidence

The police recovered CCTV film from the local authority recorded by two separate cameras. As you have seen, those films depict an attack by two men on the complainant. You have in your bundle several photographic stills copied from the film. There are three individuals depicted in those photographs. It is agreed between the prosecution and the defence that the person we have labelled ‘3’ on each of those stills is the complainant. The two others we have labelled ‘1’ and ‘2’ are, it is also agreed, the complainant’s attackers. The person labelled ‘2’ is unknown to the prosecution. The prosecution case is that the person labelled ‘1’ is the accused.

The complainant was unable to provide a description of either of his attackers and there was no witness at the scene to assist you. However, following the recovery of the films the investigating officers invited the local community policeman, PC A, to view them in controlled conditions. He was asked whether he could identify anyone on the films. PC A told you that he immediately recognised the victim and the person we have labelled suspect ‘1’. He was unable to identify the person labelled suspect ‘2’. PC A’s evidence is that suspect ‘1’ is the accused.

He knew where the accused lived and, as a result, the accused was arrested. The accused accepts that he and PC A live on the same estate and that, from time to time, they have spoken together in a local public house. The accused maintains that although they are well known to one another, PC A was, and is, mistaken in his identification of the accused as suspect ‘1’.

The prosecution case depends in large measure upon the correctness of PC A’s identification of the accused. There is a special need for caution before convicting upon such evidence. The reason is that experience shows that genuine and convincing witnesses can make mistakes in identification, even several witnesses making the same identification. While this is not identification by PC A of someone unknown to him, but the recognition of someone he knows, caution is still required because of the known danger that witnesses can make honest mistakes in recognition even of friends or family members.

There is one advantage which PC A has which he would not have enjoyed had he just been present at the scene of the assault. He has been
able, at leisure, to test his first impression by viewing the CCTV films over and over again. His disadvantage has been that he has been limited to a two-dimensional image recording the scene at night.

You need to consider, first, the nature of the images seen by PC A in order to judge their quality since, only if the images are of acceptable quality could you conclude that it is safe to rely upon his recognition. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, PC A had views from two different cameras and views of the suspect’s face both frontal and in profile. The first question you need to consider is whether these images are of sufficient quality for PC A to make any reliable comparison with the accused. If you are not sure they are, then you should place no reliance upon PC A’s evidence. If they are of sufficient quality then you will need to consider whether PC A’s knowledge of the accused’s physical appearance was recent enough to make a reliable identification.

In judging the reliability of PC A’s evidence you are able to make your own comparison in your own time and in as much detail as you need. When asked questions by his own advocate the accused accepted that the person in the CCTV film bears a striking resemblance to himself. He denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially, common to the suspect and the accused which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that neither you nor PC A has the advantage of a line up of men of similar appearance. What you do have are contemporaneous photographs of the accused, taken on his arrest, and the ability to search for any features of suspect ‘I’ which you do not find in the accused and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

You are entitled to treat PC A’s evidence and your own observation, if you agree with him, as support for each other but, before doing that, please bear in mind the danger, to which I have already referred, that several people can make the same mistaken identification. Only if you are sure that PC A has correctly identified the accused as suspect ‘I’ could you then proceed to consider whether he committed the offence charged. If you are not sure, you must find the accused not guilty.
Please remember, if and when considering whether the film depicts the accused committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.
C. Comparison by a witness with special knowledge of scene of crime images

In Clare [1995] 2 Cr App R 333 (CA) police officers had recorded good quality (colour) film of football supporters making their way to a match. After the match there was a violent confrontation between two groups of supporters outside licensed premises, recorded (in black and white) by CCTV cameras. PC Fitzpatrick studied the pre-match recordings and the lesser quality CCTV film and formed an opinion as to which accused had been engaged in which acts of violence. He was permitted by the trial judge to give evidence explaining to the jury how he had reached his conclusions.

The Court of Appeal approved his decision. The evidence was admissible for two purposes, first, to enable the jury to make their own comparison between the colour and black and white photographs and, second, as direct evidence of identification. The trial judge gave and the Court of Appeal approved, unfortunately without quoting it, his modified Turnbull direction.

For an appropriately modified Turnbull direction (see also Chapter 10: 3A—Comparison Made by the Jury above).

Notes

Clare [1995] 2 Cr App R 333 (CA) 338 Lord Taylor CJ said:

Police Constable Fitzpatrick had acquired the knowledge by lengthy and studious application to material which was itself admissible evidence. To afford the jury the time and facilities to conduct the same research would be utterly impracticable. Accordingly, it was in our judgment legitimate to allow the officer to assist the jury by pointing to what he asserted was happening in the crowded scenes on the film. He was open to cross-examination and the jury, after proper direction and warnings, were free either to accept or reject his assertions.

As to the identification by Police Constable Fitzpatrick of individual actors on the film, which was Mr Green’s principal ground of complaint, we agree with the New Zealand Court of Appeal [Howe [1982] 1 NZLR 618] that such identifications were ‘no more secondary evidence than any oral identification made from a photograph’. True, Police Constable Fitzpatrick did not know either of the appellants before the day of the match. However, he and his colleague had taken high quality colour film and still photographs of West Bromwich fans including the appellants arriving at the Stadium, sitting in it and leaving it. There was no issue that the appellants were clearly shown on the colour film and photographs. By repeated study of those likenesses, Police Constable Fitzpatrick was well qualified to say: ‘I know what A looks like, indeed what he looked like and wore on the day, and I can identify him on the black and white video film’.
Illustration: comparison by witness with special knowledge – result of witness’ research now available to the jury – modified Turnbull direction – advantages and disadvantages

Following this violent incident the police recovered from the local authority two CCTV films. It was discovered that most of the incident, but not quite all of it, was captured on these films. The technology unit prepared a composite film which you have seen. The quality is admittedly not the best and it is recorded in black and white. Secondly, officers recovered from licensed premises in the town centre further CCTV films. They were of good quality, recorded in colour. You have in your bundles still photographs taken from each film. Several individuals were shown in those licensed premises shortly before the violence erupted outside. DC A set about studying both sets of films. His purpose was twofold. First, he endeavoured to separate out the individual confrontations which are recorded on the two black and white films. Second, he sought to ascertain whether any of those individuals shown in the colour film took part in the violence which could be seen in the black and white film and, if so, to identify them. DC A told you that he had spent upwards of two hundred hours viewing these films and taking still copies.

DC A has explained how he identified D1 and D2 drinking in the X wine bar before moving quickly towards the exit moments before the violence began. He asked you to note both their features and their clothing. He then drew to your attention individuals depicted in the black and white films which DC A says are, respectively, D1 and D2. He has identified them taking part in two separate attacks on youths outside, then joining together to carry out a joint attack on a third.

D1 and D2 have made formal admissions that they are indeed to be seen in the colour film. We have marked them as ‘1’ and ‘2’ on our copies of the stills taken from the colour film. However, they deny that they are also to be seen taking part in the violence outside. Their case is that DC A is mistaken in attributing to them the actions of the suspects we have marked as ‘1’ and ‘2’ in the black and white stills. They say they are not to be seen in the black and white film because they are on the periphery watching, but taking no part in, the violence.

The prosecution case depends almost entirely upon the correctness of DC A’s identification of D1 and D2 in the black and white film. DC A was not an identifying witness in the sense that he was present at the incident and tried, later, to make an identification of the suspects from
memory. His ability to make an identification depends entirely upon his study of the two films. He has, in the process, saved you the trouble of carrying out an examination lasting over two hundred hours. However, the end result is that you are just as able to reach a conclusion about the critical few moments recorded in the black and white film as was DC A. DC A did not know either D1 or D2 before they were arrested and had no special expertise in the analysis of film. In effect he has passed on his experience of extensive viewing to you, and you are now in a position to assess whether he has made a correct identification of suspects ‘1’ and ‘2’.

There is a special need for caution before convicting on this evidence of identification, either DC A’s analysis or your own. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification, even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked, with DC A’s assistance, to make a comparison between images and the person of someone who was until this trial a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspects ‘1’ and ‘2’ appear. They are all captured at night. The street lighting is quite good and the images are reasonably focused. They are, however, in black and white while the film with which you are invited to compare them is in colour and is of much better quality. Both films are of course only two-dimensional. The first question you need to consider is whether these black and white images are of sufficient quality to make any comparison with an accused as depicted in the colour film. If you are not sure they are, then you should abandon the exercise altogether. If they are of sufficient quality then you have the further advantage of being able to make your comparison in your own time and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

I will now remind you of the evidence of DC A as it concerned D1. What you are being asked to note from the colour film and stills are the following features of D1’s appearance, including his clothing... Please
turn, next, to the black and white stills numbered 1-4. You are invited to pay close attention to the following features of suspect ‘1’ and his clothing...

Second, let us carry out the same exercise in relation to D2 and the black and white stills numbered 5-8...

In each case you will need to consider whether there are features, both of build and facially, common to the suspect and the accused which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line-up of men of similar appearance. What you do have is the ability to search for any features of the suspect which you do not find in the accused. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

It is submitted on behalf of the accused that the exercise you are being asked to perform is capable of creating an injustice. It is pointed out that the composite black and white film is an edited version of the whole incident. You cannot, it is said, receive the full picture. There may be other people who took part in this violence who were of similar appearance to the accused and wore similar clothing. This is a submission to which you should give close attention when you are reviewing the film. DC A told you he had viewed all the film available from both CCTV cameras and saw no other individuals with these combinations of features.

Full copies of those films had been made available to the defence. DC A was not asked on behalf of either accused to view an image of any other person who might have been mistaken for either of them.

If, having exercised the caution I have advised, you are sure that an accused has been correctly identified by DC A you should proceed to consider whether that accused is guilty of the offence charged. If you are not sure that an accused has been accurately identified, then you must find him not guilty. Please remember, if and when considering whether the film depicts the accused committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you see.
4. Identification by Finger and Other Prints

A. Finger and Palm Prints

A match by an expert of fingerprint impressions left at the scene of the crime and the accused’s fingerprint impressions have been admissible in evidence for at least one hundred years. In Buckley (Transcript 30 April 1999, 163 JP 561 (CA)) the Vice-President, Rose LJ, described the history of fingerprint standards and gave guidance on current minimum requirements:

It has long been known that fingerprint patterns vary from person to person and that such patterns are unique and unchanging throughout life. As early as 1906, in R v Castleton 3 Cr App R 74, a conviction was upheld which depended solely on identification by fingerprints. At that time there were no set criteria or standards. But, gradually, a numerical standard involved and it became accepted that once 12 similar ridge characteristics could be identified, a match was proved beyond all doubt.

In 1924, the standard was altered by New Scotland Yard, but not by all other police forces, so as to require 16 similar ridge characteristics. That alteration was made because, in 1912, a paper had been published in France by a man called Alphonse Bertillon. It was on the basis of his paper that the 16 similar ridge characteristics standard was adopted. However, in recent times, the originals of the prints used by Bertillon have been examined and revealed conclusively to be forgeries. It is therefore apparent that the 16 point standard was adopted on a false basis.

Meanwhile, in 1953, there was a meeting between the then Deputy Director of Public Prosecutions, officials from the Home Office and officers from several police forces, with a view to agreeing on a common approach. As a result, the National Fingerprint Standard was created, which required 16 separate similar ridge characteristics.

It is apparent that the committee were not seeking to identify the minimum number of ridge characteristics which would lead to a conclusive match, but what they were seeking to do was to set a standard which was so high that no one would seek to challenge the evidence and thereby, to raise fingerprint evidence to a point of unique reliability.

At the same time, a National Conference of Fingerprint Experts was established to monitor the application of the standard. Shortly afterwards, there was an amendment to the standard, to provide that, where at any scene there was one set of marks from which 16 ridge
characteristics could be identified, any other mark at the same scene could be matched if ten ridge characteristics were identified. Logical or otherwise, that system operated for many years.

During the passage of time, there have, of course, in this area, as in the realms of much other expert evidence, been developments in knowledge and expertise. Of course, in practice, many marks left at the scene of a crime are not by any means perfect; they may be only partial prints; they may be smudged or smeared or contaminated. However, a consensus developed between experts that considerably fewer than 16 ridge characteristics would establish a match beyond any doubt. Some experts suggested that eight would provide a complete safeguard. Others maintained that there should be no numerical standard at all. We are told, and accept, that other countries admit identifications of 12, 10, or eight similar ridge characteristics and, in some other countries, the numerical system has been abandoned altogether.

In 1983, there was a conference which recognised that all fingerprint experts accepted that a fingerprint identification is certain with less than the current standard of 16 points of agreement. It was also recognised that all experts agreed that there should be a nationally accepted standard, which should be adhered to in all but the most exceptional cases. The Conference recognised that there would be rare occasions where an identification fell below the standard, but the print was of such crucial importance in the case that the evidence about it should be placed before the Court. Therefore the conference advised that, in such extremely rare cases, the evidence of comparison should be given only by an expert of long experience and high standing.

It was this approach which led to the trial judge in R v Charles (unreported, Court of Appeal (Criminal Division) transcript of 17th December 1998) admitting evidence of 12 similar ridge characteristics. That was a decision, in the exercise of his discretion, which was upheld in the face of challenge in this Court. In the course of giving the judgment of the Court on that occasion, the Lord Chief Justice, Lord Bingham of Cornhill, said this at page 9E of the transcript, by reference to the evidence of factual match with the defendant’s print:

‘It was not suggested that there were differences between the two prints being compared; nor was it suggested that the similarities on which he relied did not exist. It was not, in other words, any part of the appellant’s case that the prints did not match. Nor was any contradictory evidence of any kind adduced at the trial. The appellant did not call a fingerprint expert who disagreed with anything that Mr Powell said’.
The learned Lord Chief Justice went on to refer to the expert’s opinion evidence that the relevant print was made by the defendant. The expert:

‘...relied on the comparison between them, on the similarities and absence of dissimilarities, on his professional experience during a long career, and on his expert knowledge of the experience of other experts as reported in the literature. He concluded that the possibility of the disputed print and the control prints being made by different people could in his judgment be effectively ruled out. In cross-examination... he agreed that he was expressing a professional opinion and not a scientific conclusion’.

It is further to be noted that in R v Giles, (unreported, Court of Appeal (Criminal Division) transcript, dated 13th February 1988) a differently constituted division of this Court over which Otton LJ presided, refused a renewed application for leave to appeal against conviction. The trial judge’s exercise of discretion, in admitting evidence of one print of which there were 14 similar characteristics and of one with only eight similar characteristics, was not regarded as being the subject of effective challenge.

It is pertinent against that background to refer to current developments so far as fingerprint experts are concerned. It was recognised that, in view of the 1983 concessions to which we have referred, the 1953 standard was logically indefensible. In 1988, the Home Office and ACPO (The Association of Chief Police Officers) commissioned a study by Drs Evett and Williams into fingerprint standards. They recommended that there was no scientific, logical or statistical basis for the retention of any numerical standard, let alone one that required as many as 16 points of similarity.

In consequence, ACPO set up a series of committees to consider regularising the position and to ensure that, if fingerprint identifications based on less than 16 points were to be relied upon, there would be clear procedures and protocols in place to establish a Nationwide system for the training of experts to an appropriate level of competence, establishment of management procedures for the supervision, recording and monitoring of their work and the introduction of an independent and external audit to ensure the quality of the work done. In 1994 an ACPO report produced under the chairmanship of the Deputy Chief Constable of Thames Valley Police recommended changing to a non numerical system and the Chief Constable’s Council endorsed that recommendation in 1996. Further discussions followed between
the heads of all the Fingerprint Bureau in this country and ACPO. In consequence, a Fingerprint Evidence Project Board was established with a view to studying exhaustively the systems needed before moving nationally to a non numerical system. The first report of that body was presented on 25th March 1998 and recommended that the national standard be changed entirely to a non numerical system: a target date of April 2000 was hoped for, by which the necessary protocols and procedures would be in place. If and when that occurs, it may be that fingerprint experts will be able to give their opinions unfettered by any arbitrary numerical thresholds. The courts will then be able to draw such conclusions as they think fit from the evidence of fingerprint experts.

It is to be noted that none of this excellent work by the police and by fingerprint experts can be regarded as either usurping the function of a trial judge in determining admissibility or changing the law as to the admissibility of evidence.

That said, we turn to the legal position as it seems to us. Fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. It may so tend, even if there are only a few similar ridge characteristics but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value. When the prosecution seek to rely on fingerprint evidence, it will usually be necessary to consider two questions: the first, a question of fact, is whether the control print from the accused has ridge characteristics, and if so how many, similar to those of the print on the item relied on. The second, a question of expert opinion, is whether the print on the item relied on was made by the accused. This opinion will usually be based on the number of similar ridge characteristics in the context of other findings made on comparison of the two prints.

That is as matters presently stand. It may be that in the future, when sufficient new protocols have been established to maintain the integrity of fingerprint evidence, it will be properly receivable as a matter of discretion, without reference to any particular number of similar ridge characteristics. But, in the present state of knowledge of and expertise in relation to fingerprints, we venture to proffer the following guidance, which we hope will be of assistance to judges and to those involved in criminal prosecutions.

If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar
ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend 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.

In every case where fingerprint evidence is admitted, 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. [emphasis added]

Since this advice was given, the police fingerprint bureaux in England and Wales have adopted a non-numerical standard. It is suggested that the guidance provided in Buckley remains valid but admissibility will depend primarily on the quality of the opinion and the matching characteristics which support it.

• Once the evidence is admitted, the jury’s conclusion upon the cogency of the evidence of match will also depend on the factors listed by the Vice-President.

• 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 a dissimilar characteristic exists, it will exonerate the accused.

• The second question is the significance of the match. 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.
Notes

On 11 May 2001 the Chief Constables’ Council endorsed the recommendation to implement the change to evidential standard for fingerprints. A Rationale (Appendix A) was issued together with a statement of process (Appendix B) and briefing and guidance notes for fingerprint experts prepared by the Project Board to which Rose LJ referred in his judgment.
5. Identification by Voice

Introduction

Northern Ireland

In O’Doherty [2002] NI 263 (CA) the Northern Ireland Court of Appeal considered an appeal against conviction for aggravated burglary. A significant part of the evidence for the prosecution comprised a tape recorded telephone call between the suspect and the emergency services. The trial judge directed the jury that they could consider the following evidence as to the identity of the caller:

1. Recognition of the voice by a police officer who knew the accused;
2. Opinion evidence of a voice expert;
3. The jury’s own comparison of the suspect’s speech with the accused’s speech.

Voices and speech can be compared by the expert listener (auditory phonetic analysis) and by acoustic recording and measurement (quantitative acoustic analysis). The Court considered evidence that it was generally accepted among experts that the inexpert listener could not alone make a reliable comparison of voice and should only attempt it with the assistance of an expert. An expert’s evidence would enable the jury to identify relevant similarities in accent or dialect but that is not generally enough to make an identification. All that auditory phonetic analysis can achieve is a judgment that the accused is among those who could have used the disputed speech. The reason for this is that:

    Phonetic analysis does not purport to be a tool for describing the difference between one speaker and another, the differences which arise from the vocal mechanisms. The way in which we hear will fail to distinguish quite a number of the features which are important in deciding whether samples came from two speakers or one. (O’Doherty [2002] NI 263 (CA) 269g)

Accordingly, it was generally accepted that quantitative acoustic analysis was an essential requirement of professional analysis of voices.

The Court reached conclusions, at page 276a-c, as to the use of voice identification evidence in general as follows:

    ... in the present state of scientific knowledge, no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis such as is used by Dr Nolan, Dr French and all but a small percentage of experts in the United Kingdom and by all experts in the rest of Europe, which includes formant analysis.
We make three exceptions to this general statement. Where the voices of a known group are being listened to and the issue is, ‘which voice has spoken which words’ or where there are rare characteristics which render a speaker identifiable— but this may beg the question— or the issue relates to the accent or dialect of the speaker (see *R v Mullan* [1983] *NIJB* 12) acoustic analysis is not necessary...

Evidence of voice recognition was admissible and, if admitted (as stated at page 276g):

It seems to us that... the jury should be allowed to listen to a tape-recording on which the recognition is based, assuming that the jury have heard the accused giving evidence. It also seems to us that the jury may listen to a tape-recording of the voice of the suspect in order to assist them in evaluating expert evidence and in making up their own minds as to whether the voice on the tapes is the voice of the defendant.

Of the practice of inviting juries to make their own voice comparison for the purpose of assessing an identification by recognition or by an expert the Court said, at page 282c:

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 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 the 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.

**England and Wales**

In *Flynn* [2008] *EWCA Crim* 970 the Court of Appeal of England and Wales considered evidence of voice recognition by police officers. It was the prosecution case that the accused were to be heard in a covertly recorded conversation. The officers were permitted to give evidence identifying what each accused said
to the other during the conversation, which implicated them in a conspiracy to rob. The accused denied that their voices were to be heard. The Court heard expert evidence and described its effect as follows:

16. In general terms the expert evidence before us demonstrates the following:

(1) Identification of a suspect by voice recognition is more difficult than visual identification.

(2) Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification.

(3) The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:

(i) the quality of the recording of the disputed voice or voices;

(ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;

(iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person.

(iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.

(v) the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong. One study used telephone speech and involved fourteen people representing three generations of the same family being presented with speech recorded over both mobile and land line telephones. The results showed that some listeners produced mis-identifications, failing to identify family members or asserting some recordings did not represent any member of the family. The study used clear recordings of people speaking directly into the telephone.

(4) Dr Holmes states that the crucial difference between a lay listener and expert speech analysis is that the expert is able to
draw up an overall profile of the individual’s speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. In contrast, the lay listener’s response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the speaker’s speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener’s voice recognitions will make it more difficult to challenge the accuracy of their evidence.

The Court held that the evidence should not have been admitted on the principal ground that the covert recording was not of sufficient quality for voice recognition to be made by the witnesses. Furthermore, the evidence should have been excluded because inadequate steps had been taken to ensure the integrity of the recognition process:

53... First, in our opinion, when the process of obtaining such evidence is embarked on by police officers it is vital that the process is properly recorded by those officers. The amount of time spent in contact with the Defendant will be very relevant to the issue of familiarity. Secondly, the date and time spent by the police officer compiling a transcript of a covert recording must be recorded. If the police officer annotates the transcript with his views as to which person is speaking, that must be noted. Thirdly, before attempting the voice recognition exercise the police officer should not be supplied with a copy of a transcript bearing another officer’s annotations of whom he believes is speaking. Any annotated transcript clearly compromises the ability of a subsequent listener to reach an independent opinion. Fourthly, for obvious reasons, it is highly desirable that such a voice recognition exercise should be carried out by someone other than an officer investigating the offence. It is all too easy for an investigating officer wittingly or unwittingly to be affected by knowledge already obtained in the course of the investigation.

Gage LJ added general observations. The Court would not follow the Court of Appeal in Northern Ireland in its view that voice recognition should never be admitted without expert acoustic analysis. Such a finding appeared to be out of step with the judgment of the Court in Attorney General’s Reference (No 2 of 2002) [2002] EWCA Crim 2373: (See Identification by CCTV and Other Visual Images above) concerning visual recognition from films or photographs but the Court had a warning to give about the use of such evidence and the need for an explicit modified Turnbull direction to the jury:
62. As appears from the above we have been dealing in these appeals with issues arising out of voice recognition evidence. Nothing in this judgment should be taken as casting doubt on the admissibility of evidence given by properly qualified experts in this field. On the material before us we think it neither possible nor desirable to go as far as the Northern Ireland Court of Criminal Appeal in O’Doherty which ruled that auditory analysis evidence given by experts in this field was inadmissible unless supported by expert evidence of acoustic analysis. So far as lay listener evidence is concerned, in our opinion, the key to admissibility is the degree of familiarity of the witness with the suspect’s voice. Even then the dangers of a mis-identification remain; the more so where the recording of the voice to be identified is poor.

63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, as outlined above, great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.

64. It goes without saying that in all cases in which the prosecution rely on voice recognition evidence, whether lay 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. [emphasis added]

There are two separate of areas of concern.

- The first is voice recognition by someone familiar with the voice of the accused. In Hersey [1998] Crim LR 281 (CA), the accused was charged with robbery. V thought he recognised the voice of one of the robbers as one of his customers, H. The police carried out a voice comparison exercise in which H and eleven volunteers read the same text. V identified the accused. The court approved the procedure and encouraged the use of safeguards and warnings to the jury as near to those employed following Turnbull as the adaptation would permit. The possible dangers and precautions which may minimise them were described by Gage LJ in Flynn [2008] EWCA Crim 970 (see paragraphs 16(2), (3) and (4), 63 and 64 of the judgment above). He did not refer to the desirability of a voice comparison exercise such as that performed in Hersey. However, the absence of such a procedure would be a matter for comment by the trial judge.

- The second area of concern is the use of expert evidence based solely upon auditory analysis without recourse to acoustic analysis. While, unlike the
practice in Northern Ireland, the courts of England and Wales are prepared to receive such evidence, its limitations were described in O’Doherty [2002] NI 263 (CA) (see above) as being unable to distinguish between the vocal mechanisms of voices. It is likely to be the subject of criticism by an expert called on behalf of the defence and directions will need to be tailored to the evidence in the case.

Sources

Archbold 14-52/52c; Blackstone’s F18.30.
6. Identification by DNA

Adapted from the Crown Court Bench Book

Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allele</td>
<td>One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.</td>
</tr>
<tr>
<td>Allele ‘drop in’</td>
<td>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).</td>
</tr>
<tr>
<td>Allele ‘drop out’</td>
<td>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.</td>
</tr>
<tr>
<td>Buccal Swab**</td>
<td>A swab taken from the inner cheek of a person to collect epithelial cells.</td>
</tr>
<tr>
<td>DNA</td>
<td>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.</td>
</tr>
<tr>
<td>DNA data**</td>
<td>Information obtained from the Forensic DNA Databank.</td>
</tr>
<tr>
<td>DNA Profile**</td>
<td>A profile of the DNA of a person obtained through forensic DNA analysis and includes a partial profile.</td>
</tr>
<tr>
<td>DNA Record**</td>
<td>A record either in textual or electronic format, that is kept in every place or institution which collects DNA samples, containing a record of every sample taken.</td>
</tr>
<tr>
<td>Electrophoresis</td>
<td>The method by which the DNA fragments produced in STR are separated and detected.</td>
</tr>
<tr>
<td>Electrophoretogram</td>
<td>The result of electrophoresis produced in graph form.</td>
</tr>
<tr>
<td>Forensic DNA analysis**</td>
<td>The analysis of genetic material in order to determine a DNA profile for the purposes of criminal proceedings.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Forensic DNA Analyst**</td>
<td>A person who conducts forensic DNA analysis on behalf of the Trinidad and Tobago Forensic Science Centre. <em>(Note: Such a person falls within the definition of ‘Government expert’ under s 19(4)(f) of the Evidence Act Chapter 7:02 and is an expert witness.)</em></td>
</tr>
<tr>
<td>Forensic DNA Databank**</td>
<td>The National Forensic DNA Databank of Trinidad and Tobago shall comprise an electronic or other collection of DNA profiles attributed to individuals or crime scenes (definition taken from s 7 of the Administration of Justice (Deoxyribonucleic Acid) Act Chapter 5:34)</td>
</tr>
</tbody>
</table>
| Incapable person**       | A person who by reason of his physical or mental condition is unable to—  
(a) indicate whether he consents or does not consent; or  
(b) understand the implications of consenting or not consenting,  
to the giving of a non-intimate or an intimate sample; |
| Insufficient **           | In relation to a sample, means insufficient in respect of quantity for the purpose of obtaining a DNA profile by means of forensic DNA analysis; |
| Intimate sample**        | A specimen of venous blood, or biological or other material taken from—  
(a) any part of a person’s genitals; or  
(b) a person’s bodily orifice other than the mouth; |
<p>| 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/         | By increasing the number of PCR (see below) cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample. |
| Low Copy Numbering:      |                                                                                                                                                                                                             |
| 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. |</p>
<table>
<thead>
<tr>
<th>Term</th>
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<tbody>
<tr>
<td>Mixed Profile</td>
<td>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.</td>
</tr>
</tbody>
</table>
| Non-intimate sample**       | A specimen of—  
(a) blood obtained by a pin prick;  
(b) epithelial cells obtained by means of a buccal swab;  
(c) plucked hair; or  
(d) saliva. |
| 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. |
| SGM Plus©                   | Second Generation Multiplex Test: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.         |
| Stain**                     | A residue of bodily fluid or biological material which may or may not be readily visible to the naked eye;                                 |
| 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. |
| Unsuitable**                | In relation to a sample, means deficient in respect of quality for the purpose of obtaining a DNA profile by means of forensic DNA analysis. |
| Voids                       | A locus at which no alleles are found in the crime specimen probably through degradation of the material. The accused may say that the alleles which should have been there might have excluded him. |

Note: ** indicates definitions adopted from s 4 of the Administration of Justice (Deoxyribonucleic Acid) Act Chapter 5:34.
Profiling DNA material

Different regions or ‘loci’ in the DNA chain contain repeated blocks of ‘alleles’. Modern analysis concentrates on 10 loci in the chain which are known to contain alleles which vary widely between individuals, one contributed by each parent. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis. Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci.

Low template DNA is the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis. Both the lack of validation for the technique and the danger of contamination were criticised by Weir J in the Omagh bombing case of Hoey [2007] NICC 49 leading to the exclusion of the evidence. As a result, the Forensic Science Regulator commissioned a review by a team of experts which, in April 2008, while making recommendations, reached favourable conclusions both as to method and as to precautions taken in UK laboratories against contamination. The state of the science was thoroughly reviewed by the Court of Appeal in England and Wales in Reed and Garmson [2009] EWCA Crim 2698. Thomas LJ expressed the conclusion of the court as follows:

74. On the evidence before us, we consider we can express our opinion that it is clear that, on the present state of scientific development:

(i) Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer from stochastic effects (such as allelic drop out mentioned at paragraph 48) which prevent proper interpretation of the alleles.

(ii) There is no agreement among scientists as to the precise line where the stochastic threshold should be drawn, but it is between 100 and 200 picograms.

(iii) Above that range, the LCN process used by the FSS can produce electrophoretograms which are capable of reliable interpretation. There may, of course, be differences between the experts on the interpretation, for example as to whether the greater number of amplifications used in this process has in the particular circumstances produced artefacts and the effect of such artefacts on the interpretation. Care may also be needed in interpretation where the LCN process is used on larger quantities than that for which it is normally used. However a challenge to the validity of the method of analysing Low Template DNA by the LCN process should
no longer be permitted at trials where the quantity of DNA analysed is above the stochastic threshold of 100-200 picograms in the absence of new scientific evidence. A challenge should only be permitted where new scientific evidence is properly put before the trial court at a Plea and Case Management Hearing (PCMH) or other pre-trial hearing for detailed consideration by the judge in the way described at paragraphs 129 and following below.

(iv) As we have mentioned, it is now the practice of the FSS to quantify the amount of DNA before testing. There should be no difficulty therefore in ascertaining the quantity and thus whether it is above the range where it is accepted that stochastic effects should not prevent proper interpretation of a profile.

(v) There may be cases where reliance is placed on a profile obtained where the quantity of DNA analysed is within the range of 100-200 picograms where there is disagreement on the stochastic threshold on the present state of the science. We would anticipate that such cases would be rare and that, in any event, the scientific disagreement will be resolved as the science of DNA profiling develops. If such a case arises, expert evidence must be given as to whether in the particular case, a reliable interpretation can be made. We would anticipate that such evidence would be given by persons who are expert in the science of DNA and supported by the latest research on the subject. We would not anticipate there being any attack on the good faith of those who sought to adduce such evidence.

The judgment is a valuable source of information upon the following topics: (1) the technique of conventional DNA analysis (paragraphs 30-43), (2) the technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects (paragraphs 44-49), (3) match probability (paragraphs 52-55), (4) expert evidence of the manner and time of transfer of cellular material (paragraphs 59-61; 81-103; 111-127), (5) the procedural requirements of CPR 33 for the admission of expert evidence (paragraphs 128-134), (6) analysis of mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing up (paragraphs 18-25; 178-215).

Interpretation of Results

Interpretation is a matter for expertise. The analyst is comparing 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 will be the match probability.

**Match Probability**

The “random occurrence ratio” (or “match probability”) is the statistical frequency with which the match in profile between the crime scene sample and someone unrelated to the accused 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 accused 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 effect upon the outcome of the trial: Gray [2005] EWCA Crim 3564 [21]-[22].

**The Prosecutor’s Fallacy**

The ‘prosecutor’s fallacy’ confused the random occurrence ratio with the probability that the accused committed the offence. In Doheny and Adams [1997] 1 Cr App R 369 (CA) 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 accused 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 accused having left the stain depend upon whether any of the other 26 is implicated.

**Mixed and Partial Profiles**

It will be recalled that 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.

There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (eg 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 accused 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 [2006]
EWCA Crim 1395. 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’.

Procedural Requirements
The Court in Doheny and Adams [1997] 1 Cr App R 369 (CA) heard evidence
from experts on both sides as to the appropriate method of statistical calcu-
lation used to produce the random occurrence ratio. Its focus was upon the
question whether the match probability for each of several matching bands in
two separate tests (single and multi-locus probes) could be multiplied to arrive
at the random occurrence ratio. The answer was negative because the scientists
could not eliminate the possibility that the results obtained from each test rep-
licated or overlapped one another. The result was detailed guidance from the
Court as to the way in which such evidence should be presented and handled
at trial. In Reed and Garmson [2009] EWCA Crim 2698, at paragraphs 128-
134 the Court emphasised the importance of pre-trial preparation and manage-
ment. At paragraph 131 Thomas LJ said:

131 In cases involving DNA evidence:

(i) It is particularly important to ensure that the obligation under
r 33.3(1)(f) and (g) is followed and also that, where proposi-
tions are to be advanced as part of an evaluative opinion (of
the type given by Valerie Tomlinson in the present case), that
each proposition is spelt out with precision in the expert re-
port.

(ii) Expert reports must, after each has been served, be carefully
analysed by the parties. Where a disagreement is identified,
this must be brought to the attention of the court.

(iii) If the reports are available before the PCMH, this should be
done at the PCMH; but if the reports have not been served by
all parties at the time of the PCMH (as may often be the case),
it is the duty of the Crown and the defence to ensure that the
necessary steps are taken to bring the matter back before the
judge where a disagreement is identified.
(iv) It will then in the ordinary case be necessary for the judge to exercise his powers under r 33.6 and make an order for the provision of a statement.

(v) We would anticipate, even in such a case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under r 33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoreograms or the evaluative opinion that is to be given.

(vi) If the order as to the provision of the statement under r 33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason.

132 This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury.

**Note:** References to Rule 33 above are to rules under Part 33 of the Criminal Procedure Rules (UK) “Expert Evidence” (this Rule has since been amended):

**Content of expert’s report**

33.3. (i) An expert’s report must—

... (f) where there is a range of opinion on the matters dealt with in the report—

(i) summarise the range of opinion, and

(ii) give reasons for his own opinion;

(g) if the expert is not able to give his opinion without qualification, state the qualification;

...
Pre-hearing discussion of expert evidence

33.6.— (1) This rule applies where more than one party wants to introduce expert evidence.

(2) The court may direct the experts to—

(a) discuss the expert issues in the proceedings; and

(b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement, the content of that discussion must not be referred to without the court’s permission.

(4) A party may not introduce expert evidence without the court’s permission if the expert has not complied with a direction under this rule.

The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by s 19(2) of the Evidence Act Chap 7:02.

Guidelines

In *Doheny and Adams (1997) 1 Cr App R 369* (CA) Phillips LJ said:

11. 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.

12. 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.

13. 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 four or five white males in the United Kingdom 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.’
Advances in the sensitivity of DNA analysis have been such that nowadays when a full profile has been obtained the match probability will be so low that the accused will concede that he was the donor of the sample taken from the scene. The summing-up will concentrate on an explanation given by the accused for his presence at the scene.

Controversy is more likely to arise in expert assessment of the significance of mixed and incomplete profiles. The trial judge will need to be aware of and explain to the jury the difference between results which are capable of bearing a match probability (and, if so, how it should be expressed in the light of the analysis) and those matches which, while not statistically significant, do not exclude the accused as the source. These were issues which arose in the appeal of Reed and Garmson [2009] EWCA Crim 2698.

The Illustration below represents an example of placing inconclusive DNA evidence into the context of a circumstantial case so that the jury understands its limitations.
Illustration: murder of deceased in her bedroom - full, partial and mixed profiles – explanation of significance – statistical probabilities – interpretation of DNA results – accused admits presence but denies murder

The DNA evidence is not in dispute. However, the conclusions you reach from it are very much in issue.

Cause of death

Ms A was found dead in her bed by a neighbour at about 9am on Sunday 17 May. The cause of death was blows to the head with a blunt instrument. A bloodstained baseball bat was found on the bed. The forensic pathologist has given evidence that the baseball bat could have caused all the injuries suffered by Ms A from which she died sometime during Saturday night or early Sunday morning.

Admitted contact between the deceased and the accused

The accused admits that during the early evening of Saturday, he and Ms A had sexual intercourse in the main bedroom of her two-bedroom flat. Semen obtained from swabs taken from Ms A’s vagina after her death was analysed by the forensic scientist, Mr B, and found to contain what Mr B described as a full match between the specimen and the accused’s DNA. The accused gave evidence that he and Ms A afterwards smoked cigarettes in the bedroom. As you have seen from the photographs, cigarette butts were recovered from ashtrays on each side of the bed. The tips were swabbed for saliva and the swabs were analysed for DNA. From the swabs recovered from one side of the bed, Mr B obtained a full DNA profile which matched the profile of Ms A; from the swabs obtained from the other side of the bed he obtained a full DNA profile which matched the profile of the accused. Mr B noted that some of the cigarette butts and the ashtrays on each side of the bed had been spattered with tiny flecks of blood. He concluded that the evidence supported the accused’s account in interview that he had smoked in the bedroom with Ms A before she was killed.

Case for prosecution and defence

The prosecution case is that the accused was her killer. The prosecution relies upon the further DNA evidence of Mr B concerning what he found on two further items, Ms A’s purse and the baseball bat. The accused’s evidence was that when he left Ms A at 9pm she was alive and sleeping in her bed. When he was in Ms A’s bedroom he was unaware of the presence of either a baseball bat or a purse and he certainly did not handle them.
DNA analysis, comparison and statistical evaluation

It is important that we understand what Mr B meant by a full DNA profile and a full DNA match. DNA profiling has been part of the forensic scientist’s tools for over 20 years now. I have no doubt you will have heard and read about its capabilities in the media. There are various ways in which it can be explained. We as individuals are made up of cells. DNA is the chemical in our cells which determines who we are. We inherit one half of our DNA from each parent. The more closely related you are the more similar your DNA will be. But apart from identical twins we are all different. So far, science has not succeeded in compiling a complete DNA profile for you or me so it is important to understand what forensic scientists mean by a full DNA profile.

As Mr B explained, he concentrates on 10 specific areas (the scientists call them ‘loci’) of the DNA chain which are known to vary widely between people. The 11th area is the sex indicator, the XX or XY chromosome. For each of those 10 loci except for one there is a component provided by dad and another provided by mum. In one of them the component provided by dad and mum is identical. That is why Mr B explained that forensic scientists were looking at 19 components in each profile. Each component at each locus is represented by a number and the number is called by the scientists an “allele”. 

Full and partial profiles

So, if Mr B and his colleagues find what they call a full profile they have found a match in those 19 alleles in different loci which are known to vary widely between individuals, and they have determined that both profiles come from either a male or female. Because the Forensic Science Service uses a database of 400 known profiles taken from a wide range of individuals, they are able to calculate the probability that a profile being examined will be found elsewhere in the population. Each time one of those alleles is matched, the chances of finding another person with the same allele in the same locus decreases at a compound rate. So when, using Mr B’s technique, a match of all 19 alleles and the sex indicator is found between the profile found on a cigarette butt at the scene and the accused’s known profile, Mr B is able to say that the chance of finding another match with a person in the UK population unrelated to the accused is 1 in 1 billion. The population of the UK is about 60 million. It is for you to decide whether in the circumstances of this case that effectively excludes anyone else but the accused accepts that he was the donor of the saliva on the cigarette butts on his side of the bed.
The quality of the specimen may be such that only a few alleles are found in the scientific test. All 19 must have been there originally but they have not been revealed by the analysis. Obviously, the fewer the number of matches, the less discriminating is the statistical result. You will have noticed that when Mr B found only 2 alleles from a swab taken from one location on the baseball bat which matched the profile of the accused, he did not put a statistical evaluation on it, because in his view his finding was statistically insignificant.

What he meant was that you cannot rely on the match of only two alleles to make any identification of the donor because there are so many people in the UK population who would match it.

**Origin, deposit and transfer of DNA material**

The next thing we need to remember is that the DNA result does not necessarily, of itself, tell us from what cellular material the result was produced. It could have been blood, or in the case of a man, semen, or it could have been saliva, as in the case of the cigarette butts, or it could have been a flake of skin or sweat. When Mr B was describing saliva on the cigarette butts and semen on the vaginal swab he was only using common sense. That is what the material probably was given the place from which the specimen was taken. Secondly, as we have heard, there has to be enough good quality material to produce a full profile. Just because you have handled an object does not mean you left your DNA. You may do or you may not. If you do, you may not leave enough material to provide a full profile. You can pick up someone else’s DNA and place it on another object which you handle. You can wipe blood with a cloth and the DNA may be transferred to the cloth. You may wipe the cloth on another surface and transfer DNA from the cloth in the process. If your hand has someone’s blood on it you can transfer it to another object. Mr B told us how he took swabs from the baseball bat and the purse. Sometimes it was obvious to Mr B from his experience of examining such material that it was blood. On other occasions it seems to have been a mixture of blood and something else. Interpretation is a matter of deduction and judgement by an expert, whose evidence you have to consider, so we have to take care to understand exactly what Mr B was saying.

**Mixed and partial profile from purse**

Recovered from inside the bedside cabinet on Ms A’s side of the bed was her purse. It was empty. Mr B found tiny smears of blood staining on the outer and inner surfaces of the wallet. He prepared the photo-
graphs at pages 5 and 6. He has marked the areas where he saw what appeared to be smears of blood and numbered them. On page 5 he has marked on the inside surface of the purse, area 1. From area 1 he obtained a swab which provided him with a DNA profile which appeared to be a mixture of two people. He could tell that two or more people had contributed because he found more than two alleles in the same locus in the profile. The major component of the mixed profile came from a woman. The minor component was provided by a man or more than one man. He obtained a full profile for the woman. It matched Ms A’s profile. Mr B told you that the minor profile was incomplete. It comprised four distinct alleles, one in each of four separate loci. Mr B told you that, assuming these four alleles came from one person, the match probability that the DNA belonged to someone unrelated to the accused was 1 in 120. In other words, for every 120 men in the male population, unrelated to the accused, one could have been the source of the DNA. There are, therefore, on Mr B’s assumption about 250,000 men in the UK who could have left their cellular material inside Ms A’s purse.

Mr B was cross examined. He agreed that he had been provided with the DNA profiles of the men known to have had a relationship with Ms A within the preceding 3 years. One of those men, Mr C, had had a relationship with Ms A which lasted for some 3 weeks about 2 years before Ms A died. Of the four components in the mixed profile inside the purse which did not come from Ms A, two of them matched Mr C and the other two did not. If, contrary to Mr B’s assumption, we assume that the minor component was contributed by two men, one of whom was Mr C, the match probability that the other two came from someone unrelated to the accused was 1 in 9. That would mean that about 10 per cent of the male population of the UK or about 3 million men could have left the profile.

Mr C gave evidence. He told you that as far as he can recall he had never handled Ms A’s purse and had certainly never opened it. Depending upon your view, the evidence of Ms A’s sister, Ms E, may be more significant. She told you that she purchased the purse for Ms A for her last birthday on 28 March last year, at least a year after her relationship with Mr C was over. She was not challenged about the accuracy of her recollection.

It follows that your judgment of the significance of the DNA evidence concerning the purse may be different depending upon your decision.
whether you can exclude the possibility so you are sure that Mr C at some stage handled Ms A’s purse.

Partial profile from baseball bat

I shall turn next to the handle of the baseball bat. Mr B swabbed the handle in an area where he would have expected the bat to be gripped but which appeared to be uncontaminated with blood. He obtained from the resulting swab an incomplete profile. He found six alleles which matched the corresponding alleles in the accused’s profile. Assuming that they came from one person the match probability of that person being unrelated to the accused was 1 in 2,500. There are, on Mr B’s assumption, about 12,000 men in the UK who could have left this material on the baseball bat.

Again Mr B was cross examined. He had compared the profile he obtained from the handle of the baseball bat with the profile of a man, Mr D, who had lived as a lodger in her flat for 6 months until New Year’s Day, some four and half months before Ms A’s death. Three of the alleles found by Mr B in the specimen from the handle matched Mr D’s profile. If we assume that it was Mr D whose cellular material produced those three alleles, then the match probability of the other three being left by someone unrelated to the accused rises to 1 in 77. That would mean that some 400,000 men could have deposited the other three alleles.

Mr D also gave evidence. During the time that he lived at Ms A’s flat he had purchased the baseball bat. There had been a spate of burglaries locally and he purchased the bat for Ms A’s protection. It was kept by Ms A in the corner of her bedroom and, to his knowledge, he had not touched it since it was put there in about October. When he left the flat in January the bat remained where it was. It is an agreed fact that at the time of Ms A’s death Mr D was on honeymoon with his wife in France. You may conclude that although no other alleles were revealed in the analysis which would be consistent with Mr D being the donor, there is every reason to think he might have done. You should therefore assume that the other three alleles could have been deposited by 400,000 men in the UK of whom the accused was only one.

Evaluation of DNA evidence

Mr B was asked to evaluate the significance of his findings. He told you that the results were what he would expect to find if:

1. The accused was present in Ms A’s bedroom before her death smoking cigarettes.
2. The accused had opened Ms A’s purse.
3. The accused had handled the baseball bat.

All of the DNA found on the purse could be accounted for by Ms A and the accused. All of the DNA found on the baseball bat could be accounted for by the accused. It was possible, however, that someone other than the accused or someone related to him had handled both the purse and the baseball bat. The DNA evidence is incapable of establishing, by itself, that the accused did handle Ms A’s purse or that he handled the baseball bat. The accused is just one of many thousands of men who could have left the cellular material which produced the profiles Mr B obtained.

Directions

The DNA evidence is not alone capable of proving the identity of the killer. All it can do, depending upon your judgment of the evidence of Mr C, Ms E and Mr D, is to narrow down somewhat the group of men who could have left cellular material on the purse and the baseball bat. Even if you were to be sure that Mr C and Mr D did not leave their DNA on those items, there remain many thousands of men in the UK, unrelated to the accused, who could have done.

However, the DNA evidence does not stand alone. You have heard from Ms A’s sister, Ms E, that she visited her sister at lunchtime on Saturday. They had a cup of coffee together. Ms A told her that she was due to pay a substantial bill for repairs to her car at her local garage. She had saved up $500 in cash. She took the money from a pot in the kitchen and placed it in her purse which she put on the kitchen table. It was still there when the accused called at the flat at about 4pm and Ms E left. That money was never paid to the garage and it was not in the purse when the purse was recovered from the bedside cabinet. At about 11pm on Saturday night the accused went to a casino in Manchester city centre and remained there until 2 am. He exchanged $500 cash for chips which, during the course of the night, he lost. He left the casino when he was refused credit and the casino refused to cash his cheque. The accused said in evidence that the $500 was accumulated winnings from previous visits to the casino.

I will remind you of this and the other evidence of the surrounding circumstances, together with the accused’s evidence, in more detail later. The prosecution invites you to infer that Ms A took her purse into the bedroom with her. While she was asleep the accused took the opportunity to steal her money. When Ms A awoke to discover what
was happening the accused beat her with the baseball bat until she was dead. The defence case is that no such inference is available or, if it is, you could not be sure of it.

Sources: Archbold 14-58; Blackstone’s F18.32.
Chapter 11—Expert Evidence

Adopted from the Crown Court Bench Book 2010

Guidelines

The purpose of expert evidence of fact (eg observation, test, calculation) and opinion is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert has expressed an opinion remains one for the jury and not for the expert. The jury should be informed that they are not bound by expert opinion, particularly when the expert has expressed an opinion on the ultimate issue in the trial: Stockwell [1993] 97 Cr App R 260 (CA), per Lord Taylor CJ at page 266. It would be a misdirection to assert that an expert’s opinion given on behalf of the prosecution should be accepted if it is uncontradicted: Davie [1953] SC 34 (Ct of Sess) at page 40. However, when there is no evidence capable of undermining unchallenged expert opinion that fact may be and, when the evidence is favourable to the defence case, should be emphasised. It may be important to distinguish between expert examination of physical objects under laboratory conditions and the conclusion drawn by the expert from the results. The jury should be discouraged from attempting to act as their own experts, eg in handwriting and fingerprint cases: Sanders [1991] 93 Cr App R 245 (CA); Lanfear [1968] 2 QB 77 (CA).

For the limitations of expert evidence at the boundaries of medical knowledge see Cannings [2004] EWCA Crim 1 and Kai-Whitewind [2005] EWCA Crim 1092, and, when medical understanding is incomplete, Holdsworth [2008] EWCA Crim 971 and Harris [2005] EWCA Crim 1980. It is common for experts from different areas of expertise to give evidence concerning the same or linked issues. For example, a consultant pathologist, neurosurgeon and an orthopaedic surgeon may all give evidence as to the cause of a death or serious injuries. The trial judge will need to be watchful for experts straying outside their areas of expertise and to explain to the jury its possible effect upon their assessment of the evidence.

Forensic scientists have access to information about the frequency with which their findings might be replicated in the UK at large (eg the refractive index of glass, a manufacture and model of footwear, DNA profiles). Whenever statistical evidence is produced to support expert conclusion it will be necessary to closely examine any data produced upon which the evidence is based and to ensure that the conclusion is supported by the data and explained to the jury, with a health warning if necessary.
Marshalling disputed expert evidence in a form calculated to provide the jury with a comprehensible summary of the issues for their decision is an important and often difficult task which will require careful preparation.

Definition of Expert Witness

The Evidence Act Chap 7:02 provides:

14D. (1) In any criminal proceeding or inquest, any record kept by a Government expert relating to anything submitted to him for examination, analysis or report shall be prima facie evidence of the particulars recorded therein.

(2) For the purposes of subsection (1) “Government expert” has the same meaning as that expression bears in section 19(4).

19...

(4) “Government expert” means the following public officers:
(a) Senior Pathologist;
(b) Pathologist;
(c) Government Chemist;
(d) Armourer;
(e) Forensic Document Examiner;
(f) Forensic Biologist;
(g) Scientific Examiner (Motor Vehicles);
(h) a Fingerprint Technician from the Criminal Records Office;
(ha) Firearm and Toolmark Examiner;
(i) the holder of any other office or any other suitably qualified and experienced person declared by the President by Notification published in the Gazette to be an officer or person to which this section applies;
(j) a Forensic DNA analyst;
Illustration: Expert Evidence – Experts on both sides – purpose of expert evidence – distinguishing fact and opinion – decision for jury – weight for jury

Both the prosecution and the defence have relied upon the evidence of expert witnesses in the following categories (...). This kind of evidence is given to help you with scientific or technical matters about which the witnesses are experts and we are not. As you have heard, experts carry out examinations and some conduct tests to see whether they yield results which are relevant to the issues you have to consider. They are permitted to interpret those results for our benefit, and to express opinions about them, because they are used to doing that within their particular area of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. Remember that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decisions.

Where, as here, there is no dispute about the findings made by an expert, you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason in the evidence to reject them.

Opinions as to the significance of those findings are certainly in dispute and judging these competing views is a matter for you. Experts are not here to argue the case for one side or the other but to assist you to understand how they have reached the opinions they have expressed. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinions. If, after giving careful consideration to the evidence of an expert, you do not accept his opinion, then you should not act upon it. The weight you attach to any conclusion you do accept is for you to determine.
Illustration: Warning against self-expertise – experts giving evidence

In judging the evidence of the experts, the advocates have invited you to reach conclusions from your own examination of the exhibits. That is a perfectly legitimate request to make. After all, how can you form a view about the accuracy of the experts’ conclusions without following what they have demonstrated to you? That does not mean, however, that you should be tempted to draw conclusions without reference to the evidence which the experts have given. We do not have the skills required to carry out an expert examination of the exhibits without the assistance of the experts. Your task is to reach a conclusion based upon an assessment of what evidence or parts of the evidence from the experts you accept; not to reach an independent judgment of your own.
Illustration: Warning against self-expertise – no experts giving evidence

An issue has arisen whether (...) [eg handwriting, voice identification]. Neither side has called expert evidence to assist you. This is an area in which you should not attempt to reach any conclusion based upon an inexpert comparison of your own. In deciding whether the prosecution has proved that (...) was the author of (...) you should concentrate only upon the evidence of (...).

Sources:
Archbold 10-61/70b; Blackstone’s F10.1/29.
Chapter 12—Corroboration and Evidence Requiring Caution

Adopted from the Crown Court Bench Book 2010

1. Corroboration

Guidelines

Corroboration is relevant, admissible and credible evidence which is independent of the source requiring corroboration, and which implicates the accused.

The trial judge should discuss with the advocates the need for and the terms of any cautionary direction it is proposed might be given. The direction will be tailored to point out to the jury the particular risk of which they need to be aware before relying upon the evidence from the ‘tainted’ source.

A particular sensitivity arises when the accused jointly charged give evidence implicating each other. There is a risk that a direction to exercise caution before acting on the evidence of either accused will have the effect of diminishing the evidence of both accused in the eyes of the jury. Judges are expected to give at least the “customary clear warning” to examine the evidence of each with care because each has or may have an interest of his own to serve.

It may be implicit that if D1’s defence is true D2 must be guilty. In order to acquit D1 the jury need only consider that D1’s evidence may be true. Since, however, the prosecution must prove its case against D2 so that the jury is sure, it does not follow that an acquittal of D1 must lead to the conviction of D2. That fact may need emphasising.

Alternatively, D1’s denial of participation may not of itself imply the guilt of D2. D1’s accusation against D2 may stand free from the denial and entirely unsupported by any other evidence. If so, the need for caution when considering the accusation against D2, now also relied on by the prosecution, might be expressed in more trenchant terms.

Section 15A of the Evidence Act Chapter 7:02 states:

(1) Any requirement at common law whereby at a trial on indictment it is obligatory for the Court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person because that person is—

(a) an alleged accomplice of the accused; or
(b) a person in respect of whom it is alleged that a sexual offence under the Sexual Offences Act, has been committed, is abrogated.

(2) Any requirement that is applicable at the summary trial of a person for an offence and corresponds to the requirement mentioned in subsection (1) is abrogated.

(3) Nothing in this section shall prevent a Judge from exercising his discretion to advise a jury of the need for corroboration.

(4) Nothing in this section applies to any trial on indictment or to any proceedings before a Magistrate’s Court which began before the commencement of this section.

Notes

1. Makanjuola [1995] 1 WLR 1348 (CA): s 15A (Case referred to UK equivalent) 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 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.

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. A 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.

8. Where the jury is advised to look for supporting evidence, the evidence which is capable of supporting the witness should be identified.

9. The need to consider a Makanjuola direction applies whenever the need for special caution is apparent. An accused may have a purpose of his own to serve by giving evidence which implicates a co-accused.

10. In Jones [2003] EWCA Crim 1966, in which each of the accused in part placed blame on the other, Auld LJ (at paragraph 47) commended the suggestion from counsel that in such cases the jury should be directed:
   (a) to consider the cases of each accused separately,
   (b) the evidence of each accused was relevant to the case of the other,
   (c) when considering the co-accused’s evidence the jury should bear in mind that the witness may have an interest to serve, and;
   (d) the evidence of a co-accused should otherwise be assessed in the same way as the evidence of any other witness.

11. The need for particular caution may arise when a witness’ evidence could be tainted by improper motive.

12. Cases of unexplained infant death 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.

13. Arnold Huggins and Others v The State CA Crim Nos 26-28 of 2003: Even before the abrogation of the rule which required that a mandatory warning be given in respect of alleged accomplices, there would have been no obligation to give an accomplice warning where the witness was not a participant or in any way involved with the crime. See also Wanzar v The State (1994) 46 WIR 439 (CA) per Hamel-Smith JA at pages 450-451.

14. Stone [2005] EWCA Crim 105: The Court of Appeal re-iterated the need to examine the particular circumstances of the case before reaching a judgment in what terms the requirement for caution should be expressed.

15. The trial judge should discuss with the advocates the need for and the terms of any cautionary direction it is proposed might be given.

16. The direction will be tailored to point out to the jury the particular risk of which they need to be aware before relying upon the evidence from the ‘tainted’ source.
17. **Petkar and Farquhar [2003] EWCA Crim 2668**: A particular sensitivity arises when accused jointly charged give evidence implicating each other. There is a risk that a direction to exercise caution before acting on the evidence of either accused will have the effect of diminishing the evidence of both accused in the eyes of the jury. **Knowlden [1983] 77 Cr App R 94** (CA); **Cheema [1994] 1 All ER 639** (CA): Judges are expected to give at least the “customary clear warning” to examine the evidence of each with care because each has or may have an interest of his own to serve.

18. It may be implicit that if D1’s defence is true D2 must be guilty. In order to acquit D1 the jury need only consider that D1’s evidence may be true. Since, however, the prosecution must prove its case against D2 so that the jury is sure, it does not follow that an acquittal of D1 must lead to the conviction of D2. That fact may need emphasising.

19. Alternatively, D1’s denial of participation may not of itself imply the guilt of D2. D1’s accusation against D2 may stand free from the denial and entirely unsupported by any other evidence. If so, the need for caution when considering the accusation against D2, now also relied on by the prosecution, might be expressed in more trenchant terms.
2. Evidence Requiring Caution

Illustration
Evidence given by an Accomplice

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 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.
Notes

Ronald John v The State CA Crim No 7 of 2006: Where prejudicial evidence of the bad character of the accused is elicited during the course of cross-examination, the trial judge should warn the jury not to use the evidence in any way prejudicial to the appellant but to use it for the single purpose for which it was admitted—that is as going towards the credibility of the witness under examination.
Chapter 13—Good Character of the Accused

Adapted from the Crown Court Bench Book 2010

Guidelines

A person is almost always to be treated as having a good character if he or she has no previous convictions. It is the duty of the trial judge to inform the jury of the relevance of the accused’s good character to the issues they are trying. Vye (1993) 1 WLR 471 (CA).

It is a matter which should be discussed with the advocates before speeches, particularly when the judge has in mind a qualified direction.

Good character is relevant to credibility as well as to propensity. Credibility is in issue both when the accused has given evidence and when, although he has not given evidence, he relies upon an account given in interview. Propensity is in issue whether or not the accused has given evidence or an account in interview.

In Moustakim [2008] EWCA Crim 3096, the Court of Appeal allowed an appeal on the sole ground that the trial judge’s direction upon the accused’s good character was insufficiently emphatic. The Court observed, following Vye and Lloyd [2000] 2 Cr App R 355 (CA), that:

1. There is no explicit positive direction that the jury should take the Appellant’s good character into account in her favour.

2. The judge’s version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.

3. The judge’s version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word “perhaps” is a significant dilution of the required direction.

4. In the judge’s direction each limb is expressed as what the Defendant is entitled to say or argue, not as it should have been a direction from the judge himself.

The terms in which the jury are directed will depend upon developments in the evidence in the particular case. In Vye Lord Taylor CJ said:
Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish to indicate, as is commonly done, that good character cannot amount to a defence... Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case.

Qualifying remarks will be appropriate where the evidence reveals that while the defendant has no previous convictions there is indisputable evidence of criminal conduct by him. In Aziz [1996] AC 41 (HL) at page 53E-G, Lord Steyn said:

Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with Vye [1993] 1 WLR 471 and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with Vye, the judge may in his discretion dispense with them.

Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions.

For the requirements of the standard good character direction see Moustakim [2008] EWCA Crim 3096.

The law has been succinctly stated in Hunter [2015] EWCA Crim 631 Hallet LJ DBE in delivering the judgment of the court said:

38. The Board’s principle i) has been interpreted by some as meaning that a defendant who has a long record of offending but not for offences in the same category as the offence charged is entitled to a good character direction on propensity. That is a misunderstanding of principle i). The defendant must be a person of good character, or, if he has previous convictions, deemed to be a person of effective good character, before he will be entitled to benefit from a good character direction.

39. As for the stark assertion at the Board’s principle ii) above as to the consequences of a failure to give the direction, in Singh v the State [2005] UKPC 35, [2006] 1 WLR 146 at paragraph 30 Lord Bingham on behalf of the Board added a rider:
‘The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.’

... 

64. A judge’s directions on good character relate to the law not the facts; nevertheless the extension of the circumstances in which advocates demand of judges a direction on good character has not helped effective trial management. It has led to lengthy discussions at trial about directions to juries, some convoluted directions to a jury, and a flood of applications for leave to appeal. As stated in the current edition of the Bench Book at page 162:

‘The application of the (good character) principles is not always straightforward in practice. The exercise of judgement as to the terms in which the good character direction will be framed usually arises where the defendant argues that he should be treated as being of good character notwithstanding the presence of (usually minor and/or spent) convictions or where a defendant with previous convictions seeks a favourable direction as to propensity’.

65. Our review of the case law leaves us in no doubt that those observations are justified. The application of the principles is not straightforward; attempts by this court to promote consistency of approach have failed.

66. The Vye and Aziz principles began life as good practice. Good practice became a rule of practice in Vye because the court needed a pragmatic solution to a problem of inconsistency and uncertainty. The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction. Yet, the principles in Vye and Aziz have now been extended to the point where defendants with bad criminal records (as in these appeals) or who have no right to claim a good character are claiming an entitlement to a good character direction. Many judges feel that, as a result, they are being required to give absurd or meaningless directions or ones which are far too generous to a defendant. Fairness does not require a judge to give a good character direction to a man whose claim to a good character is spurious (per Lord Steyn in Aziz
67. Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend.

(b) Impact of Vye and Aziz

68. We return therefore to the principles we derive from Vye and Aziz and by which we remain bound.

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.

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.

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 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.

69. 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 good character directions;

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;

70. It is clear to us that the good character principles have therefore been extended too far and convictions have been quashed in circumstances we find surprising. The decisions in H ([1994] Crim LR 205 (CA)) and Durbin ([1995] 2 Cr App R 84 (CA)), are usually cited as justification but it is sometimes forgotten that the previous conviction in H was old, minor and irrelevant to the charge. The defendant H fell into the category of someone with an effective good character. His conviction was not simply irrelevant to the charge. Further, the court in Durbin, perhaps unaware of the decision in Buzalek and Schiffer, does not seem to have appreciated that the principle of giving a good character direction only applied where the defendant was of previous good character “in the proper sense”. This led the court in Durbin to proceed on the false basis that a man with an undoubtedly bad character as far as propensity and credibility were concerned was entitled to the benefit of a good character direction. We are satisfied that the law thereby took a wrong turn.

71. In any event, Durbin was decided before Aziz in which Lord Steyn stated expressly that judges should not be required to give absurd or meaningless directions. A good character direction on the facts of Durbin and, in our view, PD ([2012] EWCA Crim 19) would have been absurd and meaningless. Subsequent reliance upon Durbin in cases like Gray ([2004] EWCA Crim 1074) and PD (in so far as PD relied on Gray) to extend the principles of good character to defendants who do not have a good character was therefore misplaced. (emphasis added)

Notes

1. The essence of the standard direction is that good character is relevant to credibility and propensity, and should be considered in those respects in favour of the accused, but it is for the jury to assess what weight they give to it— Miah [1997] 2 Cr App R 12 (CA).

2. Where the judge agrees to treat the accused as of good character the full good character direction should be given— M (CP) (Practice Note) [2009] 2 Cr App R 54 (3) (CA).

3. In a joint trial, where one accused is of good character and the other not, an accused of good character is entitled to the full standard direction. If an accused of good character has been interviewed but elects not to give evidence, the good character direction should be given. There is no inconsistency between the good character direction, a lies direction and a direction
in compliance with s 13 of the Evidence Act Chapter 7:02 on the right to remain silent; right against self incrimination.

4. Julia ES Ramdeen a/c J-Lo and David Abraham v The State CA Crim Nos 42 and 43 of 2008 referring to Teeluck and Another [2005] UKPC 14:

...at paragraph 33, the Privy Council set down a series of propositions dealing with the circumstances under which a good character direction ought to be given. These include as follows:

... 

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a good character direction is always relevant: Berry v The Queen [1992] 2 AC 364, 381; Barrow v The State [1998] AC 846, 850; Sealey and Headley v The State [2002] UKPC 52, Para 34.

(v) The defendant’s good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: Barrow v The State [1998] AC 846, 852 following Thompson v The Queen [1998] AC 811, 844. It is a necessary part of counsel’s duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself. Thompson v The Queen, ibid.

5. Hunter [2015] EWCA Crim 631: The court of appeal has summarised the current state of the law as regards good character directions and the discretion to give or withhold such a direction:

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.

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.
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 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.

The Court also noted that 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 good character directions;

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.
Chapter 14—Bad Character of the Accused

1. The Statutory Regime in Trinidad and Tobago

Introduction

Bad character, for the purpose of s 15K(1) of the Evidence Act Chapter 7:02 is evidence of ‘misconduct’ on other occasions, other than that which ‘has to do with the alleged facts of the offence with which the accused is charged’, or is evidence of misconduct in connection with the investigation or prosecution of that offence.

Misconduct is the commission of an offence or other reprehensible behaviour (s 15K(2)). The word ‘reprehensible’ connotes culpability or blameworthiness. If the misconduct alleged ‘has to do with the offence’ it may still be admissible as evidence relevant to proof that the accused committed the offence.

The gateways to admissibility

Evidence of misconduct by the accused may be admitted into evidence for any of the reasons provided by s 15N(1), that is where:

(a) all parties to the proceedings agree to the evidence being admissible;

(b) the evidence is adduced by the accused himself or is given in answer to a question asked by him in cross-examination and intended to elicit it;

(c) it is important explanatory evidence;

(d) it is relevant to an important matter in issue between the accused and the prosecution;

(e) it has substantial probative value in relation to an important matter in issue between the accused and a co-accused;

(f) it is evidence to correct a false impression given by the accused; or

(g) the accused has made an attack on another person’s character.
Handling of bad character issues

- Judge decides admissibility;
- Judge decides whether the evidence should nevertheless be excluded under s 15N(3) of the Evidence Act and gives reasons under s 15W of that Act;
- Judge, when appropriate, decides whether the case should be stopped because the evidence is contaminated— s 15T of the Evidence Act;
- Judge discusses with the advocates at the close of the evidence for what purposes the ‘bad character’ evidence may be considered by the jury;
- Judge directs the jury in summing-up upon the relevance and limitations of the bad character evidence which has been adduced;
- Jury decides on weight and value of the bad character evidence when determining the issue of relevance and, depending upon the centrality of the issue, guilt.

Purpose for which evidence may be used

Bad character evidence, once admitted, may be used by the jury for any purpose for which it is relevant: Edwards [2005] EWCA Crim 3244. When summing-up, the trial judge’s task is to explain to the jury for what purpose(s) the evidence may (and, perhaps, may not) be used. Thus, the judge may direct the jury that the bad character evidence is relevant, depending on their view, to any of the matters listed under s 15N(1).

It should be noted that the purpose of the legislation is to ‘assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice’: Hanson [2005] EWCA Crim 824.

Notes

Rampersad Ramberan v The State CA Crim No 14 of 2010 referring to Somanathan [2005] EWCA Crim 2866: Evidence of bad character is now admissible if it satisfies certain criteria and the approach is no longer one of inadmissibility subject to exceptions (...). If the evidence of an accused’s bad character is relevant to an important issue between the prosecution and the defence then, unless there is an application to exclude the evidence, it is admissible. Leave is not required.
2. **Distinguishing Between Evidence of ‘Misconduct’ and Evidence which ‘Has to do with’ the Offence Charged**

Adopted from the Crown Court Bench Book 2010

**Introduction**

The jury should be given appropriate legal directions as to the purpose for which the evidence may be used and those directions may need to include a warning as to its limitations. Accordingly, the judge will need to distinguish between:

(i) Evidence of misconduct which has to do with the offence charged and is admissible at common law because it is relevant; and

(ii) Evidence of misconduct which requires a gateway to admissibility.

The importance to the trial judge of the distinction between evidence admitted under the common law as “having to do with” the offence charged and evidence of misconduct on other occasions is that (1) the latter requires a gateway for admission and (2) if the evidence is admitted, a bad character direction is required.

Whenever bad character has been admitted in evidence, including, and perhaps especially, where the evidence has been admitted by agreement, the judge should discuss with the advocates before speeches the purposes for which the jury may use the evidence. The question whether the jury may be directed that bad character evidence admitted through gateways (a), (b), (c), (d), and (f) can be considered when they are assessing the credibility of the evidence of the accused is discussed below.

The bad character evidence may take the form of criminal convictions or evidence of behaviour which has not resulted in any criminal charge or conviction (even evidence which has previously led to an acquittal). The bad character evidence should be identified and, where it is disputed, the extent of the dispute summarised.

It is not usually necessary to explain the technicalities of admission of the evidence, but it is necessary to explain for what purposes the evidence may be used in its appropriate factual context, and that it is not to be used as mere prejudice. It may be appropriate to warn the jury against using the evidence for an inappropriate purpose. For example, evidence admitted because the accused has made an attack on another person’s character may not be sufficient...
to establish a propensity to commit the crime charged. Where there is a risk that the jury might use the evidence inappropriately, they should be told both of the limited purpose for which the evidence can be used and directed that the evidence cannot otherwise support the prosecution case.

The jury should be directed that they should make the following decisions:

- Where the bad character is disputed, whether they are sure the bad character is proved and, if so, to what extent;

- Whether and to what extent the bad character evidence has the effect for which the party relying on it contends (eg explaining the background, proving a propensity, undermining an attack on another person’s character);

- When the evidence is capable of supporting the assertion of guilt, whether and to what extent the bad character evidence assists them to decide that issue.

The jury should be reminded of the defence case upon each of these issues. The jury should be assisted to place the bad character evidence within the perspective of the evidence as a whole. They should be reminded that bad character evidence is merely part of the evidence in the case and does not of itself prove guilt. To whichever issue the bad character evidence is relevant, the jury should be careful not to place so much emphasis on it that the accused would be unfairly prejudiced.

A direction to treat the evidence of bad character proportionately may not, however, be appropriate where the prosecution case depends exclusively, or almost exclusively, upon the similarity of other misconduct by the accused to prove the current charge, or where the prosecution case is that he left his ‘signature’ on the offence charged.
3. Bad Character Directions

Illustration: Introductory words

In this trial you have heard that the accused is a person of bad character, in the sense that he has previous criminal convictions or has otherwise misconducted himself. It is important that you should understand why you have heard this evidence, and how you may use it.

You have heard of his bad character because (identify as appropriate):

1. All parties to the proceedings have agreed to it;

2. The accused has told you about it [and/or] asked questions [by his attorney] that brought it up;

3. It may help you to understand other evidence in the case [namely that (briefly describe)] as well as the case as a whole;

4. It may help you to resolve an issue that has arisen between the accused and the prosecution [namely that (briefly describe)];

5. It may help you to resolve an issue that has arisen between the accused and his co-accused [name], [namely that (briefly describe)];

6. It may correct a false impression given by the accused [namely that (briefly describe)];

7. The accused has made an attack on the character of [name], [namely that (briefly describe)].

(Only if one or more of points (3) to (6) above apply and it is accepted that the accused has given a false impression):

You the jury may therefore use the evidence of the accused bad character for the particular purpose(s) I have just indicated, if you find it helpful to do so.

(Only if case (6) applies, and it is disputed that the accused has given a false impression):

If you are not sure that the accused has given you that false impression, you should disregard the evidence of his bad character altogether. But if you are sure, you may use that evidence to correct the false impression, if you find it helpful to do so.
Illustration: If the evidence is admitted under the credibility gateway only

If you think the evidence right [namely that *(briefly describe)*], you may take it into account when deciding whether or not the accused’ evidence to you was truthful. A person with a bad character may be less likely to tell the truth, but it does not follow that he is incapable of doing so. [Indeed, the accused argues that his character means that he is more likely to be telling the truth.]

In fairness to the prosecution witnesses and to you, it would be wrong for you to be left in ignorance of the character of the man making the accusation against the prosecution witnesses. In judging whether the accusations made by the accused against some of the prosecution witnesses have any truth in them, the law says that it is only right and fair that you should know the character, in a general sense of the word ‘character’, of the man making that accusation. In considering what the truth is, and the creditworthiness of the accusations of the accused against these witnesses, whether you believe them, and whether they are creditworthy, you are entitled to have regard to the accused’ own convictions [or misconduct as appropriate] when deciding what the truth is. So, in determining whether you believe those accusations made by the accused, you may have regard to the character of the accused. It is your decision whether your knowledge of these events helps you to resolve the central issue of truthfulness in this case and if so, what weight you give to it. It is for you to judge whether and to what extent it assists you. You must decide to what extent, if at all, his character helps you when judging his evidence. You will need to decide whether you accept the evidence of the prosecution witnesses, and, in order to do so, you will have to consider whether the accusation of lying and/or fabrication made by the accused is worthy of belief.

You must decide to what extent, if at all, his character helps you when you are considering whether or not he is guilty. But bear in mind that his bad character cannot by itself prove that he is guilty. You must not use the fact that the accused has committed a crime [misconduct himself] in the past as evidence that he committed the crime charged. You may consider the prior conviction [or misconduct as appropriate] only to help you decide how much weight to give to the testimony of the accused. Some convictions [or misconduct as appropriate], for example ones that involve dishonesty, may be more significant than others when assessing the credibility of the accused. As well, an old conviction [or misconduct as appropriate] may be less important than a more recent
one. You must not assume that the accused is guilty or that his version is not worthy of belief because he has previous convictions [or has previously misconducted himself]. In other words, you must not convict him simply because he has a bad character [include this if there is direct evidence of bad character]. His convictions [or misconduct as appropriate] are not relevant at all to the likelihood of his having committed the offences, nor are they evidence that the accused committed the offence/s for which he stands trial before you now. They are relevant only as to whether you can accept his version of events.

It would therefore be wrong to jump to the conclusion that he is guilty just because of his bad character. A previous conviction [or misconduct as appropriate] does not necessarily make the evidence of the accused unbelievable or unreliable. It is only one of the large range of factors, for example, plausibility; incongruity; reasonableness; consistency and demeanor assessment for you to consider in the evaluation of the testimony of the accused.

You do not have to allow this/these conviction/s [or misconduct as appropriate] to affect your judgment. It is for you to decide the extent to which, and if at all, his previous conviction/s [or misconduct as appropriate] help you decide the case. Keep in mind that evidence of the bad character of the accused cannot be used to prop up a weak case by the prosecution.

[If applicable]: Now, as you are aware, the accused, although he has this/these conviction/s [or misconduct as appropriate], has pleaded guilty on his previous appearance/s before the court. This is a matter which you may take into account when deciding what impact his convictions [or misconduct as appropriate] have upon his truthfulness.
Illustration: Evidence admitted under the propensity gateway

The prosecution also submits that this evidence is capable of establishing ‘propensity’, meaning a tendency to commit the same type of offence the accused is charged with in this matter. In other words, whether he has a tendency to commit an offence of the kind with which he is now charged. The word ‘propensity’ also means a character trait.

The accused may have a propensity to commit (where appropriate) a crime if he has a desire to commit a particular type of crime [such as this one he is charged with]. Proof of propensity is not limited to commission of the same kind of offences, but could include any evidence that made it more likely that the accused has behaved as charged. The prosecution, by the evidence adduced, is saying that the accused has such a tendency and the fact that the accused possessed such a tendency makes it more likely that he did indeed commit the offence with which he is charged. The prosecution contends that it is no coincidence that [these two witnesses described similar conduct by the accused toward them (briefly describe evidence of propensity)]. The closer the similarity of the conduct alleged, the less likely it may be that the evidence can be explained away as mere coincidence or malicious invention. This is wholly your decision to make, to accept or reject this conclusion as right. You must examine the evidence very closely and with care.

(Continue where applicable)

If you are sure that collusion or influence by any one witness over the other, deliberate or unintentional, can be excluded, then you are entitled to regard the evidence as supportive of the other. Furthermore, the extent to which it is supportive is also for you to decide. The purpose of this evidence is not to generate prejudice against the accused, and you must most meticulously and carefully guard against that. Those events cannot, of themselves, prove the guilt of the accused for this offence and you should not convict him, that is, find him guilty, just because of or mainly because of those events.

By way of an example:

The defence, however, contends that the past behavior of the accused cannot or should not assist you because it does not reveal that the accused has a propensity to commit an offence of the kind with which he is now charged. The defence says that there are important and marked differences between those events and the one under which he is indicted. The defence also says that you must be mindful of character evolution over the course of time. The defence says that for all of these
reasons, you must not pay attention to this evidence and you cannot properly and reasonably and justifiably and surely find from it that the accused has the propensity contended for by the prosecution.

So, you should first consider whether this evidence establishes, to begin with, that the accused has a propensity or a tendency to engage in the type of behavior, or commit an offence of the kind with which he is now charged. You must first decide whether the propensity that the prosecution says he has is proven so that you feel sure, the prosecution bearing the burden of proving it to the standard that you feel sure.

If the alleged propensity, which the prosecution says he has, is not proven to you from the evidence so that you feel sure of it, then you cannot act on this evidence. So, if you are not sure that the alleged propensity is proven by the prosecution so that you feel sure of it, it cannot assist you in this way.

[If you are not sure that this is the right conclusion, then you must disregard this particular evidence and ignore this direction (linked with good character direction if applicable: a contingent direction vis-a-vis the facts)]

If you are sure this is the right conclusion, you must assess whether, and if so, to what extent, it helps you decide whether the accused is guilty of the charge that you are considering. So, if it is proved so that you feel sure from the disputed evidence [or the agreed facts, as applicable] that the accused has the propensity, which the prosecution says he has, the second question is, you must decide whether, if at all to begin with, and if so, to what extent and degree that it helps you when you are deciding whether the accused is guilty of the offence charged.

Even if you do decide that the accused has a propensity to act as the prosecution alleges, it does not follow that he must be guilty of the offence charged. Even if you accept that the accused has the propensity contended for by the prosecution, it does not necessarily and automatically follow that he is guilty on this occasion. If you are sure that the alleged propensity is proven by the prosecution, it is open to you to rely on it, together with all the other pieces of evidence on the prosecution case, in deciding the question of whether the accused is guilty.

Please bear in mind, that this evidence of the admitted previous behaviour of the accused is but a small part of the evidence in the case. You will appreciate that it is not direct evidence that the accused committed the offence with which he is charged, but of circumstances concerning the accused and an alleged character trait which the prosecu-
tion says he has, which you are entitled to take into account as part of all the evidence in the case, when deciding whether he is guilty or not guilty. Propensity is only one possibly relevant factor, and you must assess its significance in light of all the other evidence, keeping at the forefront of your mind that the critical evidence is that of the witnesses in this present matter.

[Summarise fully competing factual arguments on bad character evidence with respect to the prosecution saying why it is relevant and probative, and why the defence contends that it is not.]

I have described and I have given you directions in the law, once you are sure that all the legal criteria are complied with, it is open to you to act on this evidence. If you are not sure that the legal criteria as defined in the direction are complied with, you will put aside this bit of evidence completely and look at all the other evidence on the prosecution case, being mindful of the fact that this is only part of the evidence on the prosecution case. So, if you come to the position where you find yourself putting it aside, you have to go on to consider the other evidence on the prosecution case. And the last point is that, it is open to you to conclude that the evidence is relevant for some purposes or one purpose, but not for another purpose or purposes. So it is open to you to say it is relevant for one purpose but not for another purpose.
Chapter 15— Bad Character of a Person Other than the Accused

Guidelines

Bad character, for the purpose of s 15K of the Evidence Act Chapter 7:02 is evidence of ‘misconduct’ on a different occasion, other than that which ‘has to do with the offence’. Misconduct is the commission of an offence or other reprehensible behaviour. The word ‘reprehensible’ connotes culpability or blameworthiness.

The Evidence Act abolishes the common law rules on admissibility of bad character evidence.

Section 15M provides:

Non-accused’s bad character

(1) In criminal proceedings evidence of the bad character of a person other than the accused is admissible where—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole; or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a), evidence is important explanatory evidence if—

(a) without it, the Court or jury would find it impossible or difficult to understand other evidence in the case; and

(b) its value in understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purpose of subsection (1)(b), the Court shall have regard, in particular, to the following factors:

(a) the nature and number of the events to which the evidence relates;
(b) when those events are alleged to have happened or existed;

(c) where—

  (i) the evidence is evidence of a person’s misconduct; and
  (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

  (i) the evidence is evidence of a person’s misconduct;
  (ii) it is suggested that that person is also responsible for the misconduct charged; and
  (iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the accused, must not be given without leave of the Court.

Accordingly, bad character evidence of a non-accused can only be admitted under s 15M if (1) all parties agree to its admission, or (2) it is important explanatory evidence or (3) it has substantial probative value in relation to a matter which (i) is a matter in issue in the proceedings and (ii) is of substantial importance in the context of the case as a whole.

The credibility of an allegation made by a witness against the accused is capable of being a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole, but the evidence of W’s bad character must be of substantial probative value to the resolution of that issue if it is to be admitted.

In order to be relevant to credibility it is not necessary that the bad character evidence demonstrates a propensity for untruthfulness.

In assessing whether the evidence has substantial probative value the judge must consider, among any others he considers relevant, the factors identified in s 15M(3).

Reasons must be given for the ruling (see s 15W).
Illustration: V is the principal witness for the prosecution alleging unprovoked attack by the accused– V has convictions – relevance to issues in the case (adopted from the Crown Court Bench Book 2010)

The principal witness in the case against the accused was V. You heard that V has three previous convictions for dishonesty committed within the last twelve months. Two years ago V was convicted of assault occasioning actual bodily harm.

It is the prosecution case that the accused made an unprovoked attack on V. The case for the accused is that it was V who was the aggressor. He aimed a punch at the accused who acted instinctively in self-defence.

When assessing V's evidence you are entitled to take into account that V has convictions for dishonesty and has in the past acted aggressively towards another. V’s convictions do not, of course, mean that V’s evidence is untrue or that he was the aggressor on this occasion. It is for you to assess whether and to what extent his previous behaviour may assist you in assessing V’s evidence and resolving the question whether the accused did act or may have acted in self-defence.

Note: Save where it is alleged that the non-accused committed the offence the issue will usually be one of credibility of the evidence which implicates the accused.
Chapter 16—Cross-Admissibility

Adopted from the Crown Court Bench Book 2010

Guidelines

Introduction

Section 15N(1)(d) of the Evidence Act Chapter 7:02 (together with s 15P(1)) enables evidence proving guilt of one offence charged in the indictment to establish a propensity to commit offences charged in other counts in the indictment. This has added a second dimension to the expression ‘admissibility’ but it is important to distinguish between the two.

The question which has caused difficulty is whether, in a case in which evidence supporting one count is cross-admissible to support another count, a bad character direction is required and, if so, in what terms.

These difficulties have largely been resolved by guidance given by the Court of Appeal in Freeman and Crawford [2008] EWCA Crim 1863. Latham LJ in Freeman and Crawford said:

In some of the judgments since Hanson, the impression may have been given that the jury, in its decision making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the Defendant’s guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment. A good example is the judgment of this court in S ([2008] EWCA Crim 544). We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a Defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the Defendant’s guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility.

The first question which the trial judge needs to resolve is whether the evidence the prosecution has adduced in support, say, of count 1 is evidence of “a disposition towards misconduct” by the accused, not having “to do with the facts of
the offence with which he is charged” charged in, say, counts 2 and 3. If it is, then, for the purposes of counts 2 and 3, it is evidence of bad character within the meaning of s 15K. If, therefore, the evidence of complainant A (count 1) is to be admitted in support of the evidence of complainant B (count 2), and complainant C (count 3), it must pass through one of the s 15N(1) gateways to admissibility, and a bad character direction may be required. Commonly, A’s evidence will be relevant to an important matter in issue between the accused and the prosecution upon counts 2 and 3 because it is supportive of the truth of B’s and C’s complaints.

The second question for the judge is for what purpose the jury may use the evidence. It is at this point that it is important to distinguish between (i) evidence which tends to negative coincidence (or to rebut a defence) and for that reason strengthens the prosecution case and (ii) evidence of propensity to commit the offence:

i. The fact that several complaints of a similar kind are made by different witnesses who have not colluded or been influenced deliberately or unintentionally by the complaints of the other, may be powerful evidence that coincidence or malice towards the accused (or innocent association between the accused and the complainants) can be excluded (In DPP v Boardman [1975] AC 421 Lord Cross at pg 421 said, “...the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion into his mouth.”) Thus, the evidence of each complainant is supportive of the truth of the others.

ii. A propensity to commit an offence is also relevant to guilt on other counts but, before the propensity can be utilised by the jury, it must be proved. Only if the jury is sure that the evidence of A is true can they conclude that the accused had a propensity to commit the kind of offence alleged by complainant B.

The third question for the judge is whether the evidence of bad character may be used by the jury both (i) to negative coincidence or rebut a defence and (ii) to establish propensity. If so, the jury may require an explanation how the evidence should be approached in these two different ways.

Finally, if the evidence may be used to establish propensity, the jury should receive the conventional warnings about its limitations based on the factual context of the case.
When to give both directions?

The judgment whether to explain that a conclusion favourable to the prosecution on one count may be evidence from which the jury can in addition find a propensity to commit the offences charged in other counts is not always straightforward.

It is suggested that where the evidence on, say, count 1 is, independently compelling and, consequently, the jury is likely to wonder how a verdict of guilty in respect of count 1 may affect their consideration of counts 2 and 3, the propensity direction should be given, because it is only if the jury is sure of the propensity that they can utilise the evidence for that purpose.

On the other hand, where there is little to choose between the strength of the evidence supporting each of the counts the propensity direction may serve only to confuse because (1) the direction, if given, will be burdened with conditional clauses and (2) in any event, the real question for the jury in such a case is whether the evidence supporting each count tends to strengthen the prosecution case on the others.

In Freeman and Crawford [2008] EWCA Crim 1863 the accused was charged with two street robberies, three weeks apart and committed in similar circumstances. Each complainant identified her attacker. There was little, if anything, to choose between the strength of the evidence in each count. In addition, however, the prosecution was permitted to adduce evidence of previous convictions for similar offences. The trial judge gave both a propensity direction in relation to the previous convictions and a cross-admissibility direction in relation to the two counts in the indictment. His directions were upheld.

The jury should always be reminded of the need to return separate verdicts on each count.
Chapter 17—Hearsay

Adapted from the Crown Court Bench Book 2010

Guidelines

The Evidence Act Chapter 7:02 has reposed in the trial judge the responsibility of assessing whether hearsay evidence should be admitted. The underlying policy is that evidence from an absent witness should be received if it is probative and reliable. If the evidence is admitted, that judgment is ultimately for the jury. Accordingly, there is a responsibility upon the trial judge to provide the jury with appropriate directions, set in the factual context of the case, which will enable them to make it. 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.

Hearsay evidence may also be given to challenge, or support, a witness who is present and does give evidence. The factors to be considered by the jury will therefore be different from case to case depending upon the purpose for which the evidence is being used.

The emphasis to be given to the reliability and effect of hearsay evidence may, by reason of the burden and standard of proof, depend upon whether the hearsay is relied upon by the prosecution or the defence or between accused.
1. Witness Not Present

Guidelines

The hearsay statement is given in evidence in lieu of oral evidence from the witness. Once admitted the issue for the jury is whether they can rely on the evidence as truthful and reliable. Some of the matters which they may need to consider can be borrowed from s 15C(2) of the Evidence Act Chapter 7:02 (whether hearsay should be admitted by the judge in the interests of justice):

Leave may be given by the Court under subsection (1)(a), (e) and (f) only if the Court considers that the statement ought to be admitted in the interest of justice, having regard to—

(a) the statement’s contents;

(b) any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the person who made the statement does not give oral evidence); and

(c) any other relevant circumstances.

Additional matters for the jury will include:

1. when the statement was oral, the reliability of the reporter;
2. the extent to which the hearsay is supported by or is consistent with other evidence;
3. the scope for error or the existence of a reason to be untruthful.

Thus, the jury’s attention will be drawn to the risks of:

- Insincerity
- Faulty recollection
- Ambiguity
- Misperception

Evidence is admissible to challenge the credibility of the absent witness, including hearsay evidence of any matter which could have been put in cross-examination and any previous inconsistent statements. If such evidence is adduced it will be relevant to the jury’s task (see s 15D of the Evidence Act).

The source of evidence admitted as res gestae may be unknown. The reliability of the evidence is derived from the spontaneity of the statement and the unlikelihood of calculation. The reliability and accuracy of the witness reporting the statement is, however, relevant.

If the reason the witness is absent is fear, it will not be appropriate to disclose that fact to the jury unless the defence has introduced the issue before the jury.
In Grant [2006] UKPC 2 (Jamaica) at paragraph 21(4) Lord Bingham described the requirements of a direction when a statement is given in evidence in lieu of the witness as follows:

The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: see, for example, Scott v The Queen [1989] AC 1242, 1259; Henriques v The Queen [1991] 1 WLR 242, 247. It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury’s attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge’s directions are a valuable safeguard of the defendant’s interests, it may.

Where the hearsay evidence is the basis for the prosecution case the importance of caution should be emphasised. Where, however, the statement is relied upon by the accused, or by one co-accused against another, care will need to be taken with the terms of the direction so as to adequately reflect the burden and standard of proof.

Evidence admitted by agreement is nonetheless hearsay and the jury should be told how they should approach and how they may make use of it.

The terms of a direction should be discussed with the advocates not only when the evidence is controversial but also when hearsay is admitted by agreement, so that the judge and the parties are clear about the purposes for which it may legitimately be used.
A. Witness unavailable

Guidelines

A distinction must be drawn between a witness who is absent (not present) and a witness who is unavailable (statute). A witness may be absent from proceedings for a myriad of reasons: illness, fatigue, traffic. It may be that an absent witness may also be an unavailable one.

An unavailable witness however is unavailable to assist the court with his testimony for the reasons specified in s 15C of the Evidence Act Chapter 7:02 which specifies that an unavailable witness is one who:

1. is deceased;
2. is unfit, by reason of his bodily or mental condition, to attend as a witness;
3. is outside of Trinidad and Tobago and it is not reasonably practicable to secure his attendance;
4. cannot be found after all reasonable steps have been taken to find him;
5. is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person; or
6. is fearful and no reasonable steps can be taken to protect the person or others or to protect him or others from financial loss.

In these circumstances, leave may be given by the court to admit a statement given by the unavailable witness provided that statement is contained in a document.

Where the witness is unavailable as defined under (a) deceased, (e) kept away from proceedings by threat, or (f) fearful, the court may only grant leave if it considers the statement ought to be admitted in the interests of justice having regard to s 15C(2). that is:

1. the statement’s contents;
2. any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the person who made the statement does not give oral evidence); and
3. any other relevant circumstances.

The term “fearful” is to be construed widely and includes fear of death or injury of another person or financial loss (see s 15C(5)). However, where the witness is unavailable due to fear, this should be kept from the Jury.
The statement admitted may be challenged by: evidence that is relevant to the credibility of the unavailable witness; evidence that could have been put to the unavailable witness in cross-examination had he been present (provided leave is granted); and evidence of any other inconsistent statement made by the unavailable witness (see s 15D).
Illustration

The statement that has just been read to you by the clerk contains hearsay evidence. This means the person who gave the information contained in that statement is not here to give testimony. Nonetheless, the law allows me to admit this statement into evidence and I have done so.

On 1st April, the day after the incident took place, A gave this statement to PC Gibbs. PC Gibbs recorded A’s account and A was allowed to read it when PC Gibbs finished. PC Gibbs would have asked A to verify that the statement was correct and then A signed each page and placed the date on each page.

As this statement is now evidence you may consider the reliability of the information you have heard read to you. Do you believe what was said? Is it reliable? Is it truthful? In so doing you must apply your common sense and your experience gained from everyday life.

You must remember that the information contained in the document is that witness’ version of events. However, that witness has not given evidence before you. You have not been able to observe him while giving evidence and his evidence has not been tested by cross-examination. You did not have the opportunity to see him respond to questions raised by the defence. You must not speculate or try to guess what his behavior would have been like had he been here. You should approach his evidence cautiously.

You may give the statement as much weight as you see fit. It is for you to decide whether you find the version of events contained in the document to be reliable evidence. You have been given no reason to doubt the credibility of this witness and you must not think unfavourably of his evidence simply because he is not here.

When you come to consider this statement, you must also consider all the other evidence you have heard. You must look at the evidence as a whole [Point out inconsistencies/disputes if any...].

You must not attach more weight to this statement simply because it is on paper. You must apply your knowledge to determine which evidence or which parts of the evidence you accept or find reliable and which parts you reject as unreliable.

If you find A’s evidence reliable then you must consider to what extent it supports the prosecution’s version of events. Remember, you must only convict the accused if the prosecution has made you feel sure that the accused is guilty of the offence charged.
B. Computer Records

Guidelines

Pursuant to the provisions of s 14B of the Evidence Act Chapter 7:02, computer records are admissible.

I must explain to you the relevance of [description of the computer record relied upon] and the approach you must take in relation to it.

The issue you must decide is whether the prosecution has proved that the accused was the man driving the car. PC Gibbs has testified that the person he arrested at the scene gave his name as A. That person then ran away from the scene. The police eventually traced this person and when questioned he said his name was B, and that he had never heard of the name “A”. He also said he did not drive that car at the time of the accident and challenges PC Gibbs’ identification evidence.

In assessing the identification evidence, you are entitled to consider the fact that the computer records of the Licensing Division of the Ministry of Transport show a man carrying the name “A” whose date of birth, and address are identical to this accused.

You have heard evidence that since the creation of the database, the policy of the Ministry has been to compile information submitted by citizens applying for permits and certified copies. This information is made available to police officers responsible for road traffic and safety who may refer to these records for tracing.

The officers responsible for taking the information and creating the record cannot be identified with certainty. Attorneys for the State say the only way the name “A” could appear in the computer records is if this accused gave the name “A” to the licensing officer on an earlier date.

Attorney for the defence has submitted that a computer database of this kind is not perfect. The accuracy of the record depends on the accuracy of the information put in to it. The information, the name, date of birth and address contained in the database may have been recorded incorrectly through human error.

This evidence is called hearsay because the person(s) who recorded the information over the counter and the person(s) who created the computer record are not here to give evidence. They have not given sworn evidence and the reliability of the evidence contained in the record has not been tested by cross-examination.

Although this evidence is hearsay, it has been admitted into evidence. You are therefore entitled to assess this evidence and you must decide whether you find it is reliable. As you have been told before, you must bring to bear your com-
mon sense and every day experiences in assessing the evidence. It is for you to consider the likelihood of PC Gibbs and an unknown licensing officer making unrelated mistakes about the man using the name “A”. You may also consider the likelihood that the officer whose job it was to create the record entered the information incorrectly.

If you are sure that there was no realistic chance of mistake in the making of the report of the incident by PC Gibbs, or the creation of the record, you may find that the licensing database record is strong and reliable evidence that the accused calls himself “A”. If you find the evidence to be reliable you may use it as evidence in support of the identification evidence of PC Gibbs.

You are to give consideration to both sides of the argument. You must determine for yourselves whether you consider the computer records to be accurate and, if it is accurate, what support, if any, does it give to the identification evidence of PC Gibbs.
C. Interests of Justice—Prosecution

Illustration: Prosecution adduced hearsay in the interests of justice – registration number of getaway car recorded by one witness on the instructions of another – Witness Unavailable (Dead/Kept away by threats/Fearful and cannot be protected) [Note: The judge has, after careful consideration of the relevant factors in the Evidence Act, ss 15C(2)(a), (e) and (f) admitted the evidence under s 15C(2)]

An important part of the prosecution case is that the car of the accused was used by the bandits to escape from the scene. The accused’s car is a white Nissan Almera, licence plate number PBK 1234.

Mr John is the owner of John’s Roti Shop which is opposite the Bank where the robbery took place. Mr John gave evidence that on the day of the robbery, a man ran into his shop and told him “The Bank just got robbed. The Bandits just drove off. Write this down.” The man then called out a licence plate number which Mr John wrote down. You have been shown the exhibit of what Mr John wrote and you saw that it was the licence plate number PBK 1234.

The man who ran into Mr John’s shop has passed away. The prosecution says that this man witnessed the bandits escaping in the getaway car, observed the licence plate of that car and then ran into the roti shop with the plate number in his head. He gave this number to Mr John who wrote it down immediately and double checked it with the man before he left.

The words spoken by the dead witness are critical. It is these words that connect the car of the accused to the crime. Unfortunately he is no longer available to give you this evidence. You must ask yourself whether you can be sure that he really witnessed the getaway. [The accused has not challenged this inference. He accepts that the only reason the man would have ran into the shop as Mr John says was to quickly record the licence plate of the getaway car so it could be identified later.

The accused denies that he was one of the bandits and also denies that his car was anywhere near the scene of the crime. He says that the deceased man must have been mistaken in his observation of the licence plate or in dictating it to Mr. John. Because the man is now deceased/unavailable this assertion cannot be tested by questioning him on oath. This evidence is disputed. Had the man been available you would have been able to assess his behavior and demeanor while testifying. Your observation would have helped you in determining whether his evi-
dence was truthful and correct. You must therefore be cautious in assessing the written evidence of what he said.

However, you must look at the evidence as a whole. You must consider the events at John’s Roti Stop in relation to all the other evidence that has been presented. You may look at all the strands of evidence the prosecution has laid before you to see what you accept and what you reject. If you accept that the events transpired at John’s Roti Shop were as you have been told, then this evidence can support the accuracy of identification of the getaway car made by the dead man. It is for you to decide whether these events and all the evidence presented to you make you sure that the accused was one of the bandits.
D. Interests of Justice—Defence

Illustration

The general rule in the courts is that evidence is given orally from the witness box, or by the reading of agreed statements or admissions. However, the law allows evidence to be given in other ways. In this case you have heard the evidence of John Smith by reading entries made in his personal diary even though Mr Smith did not come to court and his evidence is not agreed.

You are unable to hear from Mr Smith today as he has since passed away. However, the personal diary entries are said to have been made by him personally and the defence has been given leave to produce this evidence for you. According to the personal diary entries Mr Smith had recorded that he was with the accused, at Tom’s Restaurant and Bar on the date the alleged offence is said to have occurred. The case for the accused is alibi.

Although it is for you to decide what weight, if any, you attach to Mr Smith’s evidence, you should examine it with particular care, bearing well in mind that it does have certain limitations, which I must draw to your attention:

1. You have not had the opportunity of seeing and hearing Mr Smith in the witness box and of assessing him as a witness. When you do see and hear a witness you may get a much clearer idea of whether his evidence is honest and accurate.

2. Mr Smith’s statement was not made or verified on oath.

3. His evidence has not been tested under cross-examination, and you have not had the opportunity of seeing how his evidence survived this form of challenge.

4. Mr Smith’s statement forms only a part of the evidence and it must be considered in light of all the other evidence in the case.

You must reach your verdict having considered all the evidence. You should consider the discrepancies between the statement and the oral evidence of other witnesses. You would note that the victim, Anita Ramkissoon has herself identified the accused as her attacker in relation to the alleged offence. Also note the evidence of Mr Smith’s wife, Joan Smith who testified that she discovered that her husband would sometimes forge entries in his personal diaries and had confronted him about it on many occasions when she suspected that he was having an affair.
[Where necessary, refer to any particular matters canvassed during the trial which might further affect the jury’s view of Mr Smith’s evidence: for example, its probative value, its importance, the circumstances in which Mr Smith made his statement and Mr Smith’s reliability.]
2. Witness Present

Guidelines

When composing directions about the effect of previous out of court statements received in evidence it is necessary to have in mind the question whether the previous statement is relied upon by the prosecution or the defence. If the effect of the previous statement would be to assist the prosecution the question, depending on the centrality of the issue, may be whether the jury is sure it is an accurate account. If the effect would be to assist an accused the question may be whether the previous statement is or may be an accurate account (Billingham [2009] EWCA Crim 19 [68]).

A. Previous Inconsistent Statement

Guidelines

Section 15H of the Evidence Act Chapter 7:02 provides:

Inconsistent statements:

(1) Where in criminal proceedings a person gives oral evidence and—
   (a) he admits making a previous inconsistent statement, or
   (b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7,
   the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

(2) Where in criminal proceedings evidence of an inconsistent statement made by a person is given under section 15D(1)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

Thus, the statement will have been put to the witness either because the opposite party is challenging the consistency of the witness or because the witness is hostile to the party calling him.

Directions to the jury will concern the reliability of the witness’ present and previous account, and the jury’s ability to make a judgment which account, if either, they accept.

When composing directions about the effect of previous out of court statements received in evidence it is necessary to have in mind the question whether the previous statement is relied upon by the prosecution or the defence. If the effect of the previous statement would be to assist the prosecution the question, depending on the centrality of the issue, may be whether the jury is
sure it is an accurate account. If the effect would be to assist an accused the question may be whether the previous statement is or may be an accurate account: Bollinham [2009] EWCA Crim 19.
Illustration: Statement by prosecution witness inconsistent with oral evidence

It emerged that there were inconsistencies between A’s oral evidence and the statement he made two days after the incident you are considering. In some respects, A accepted that his memory at the time was fresher and therefore more likely to be accurate than it is now. In other instances, he insisted that his statement was wrong and that his present recollection was right.

A’s statement was made almost 12 months ago. You may think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Where there is an inconsistency it is necessary to decide first whether it is significant.

If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may conclude that the underlying reliability of the account is unaffected. But what if the inconsistency is fundamental to the issue you are considering? You will be less willing to overlook it. To what extent such inconsistencies in A’s account influence your judgment of his reliability is for you to decide.

The fact that on an important subject A has been inconsistent, and the inconsistency is not satisfactorily explained, may lead you to conclude that you cannot rely on A’s oral evidence on that subject. However, the account given in A’s statement also forms part of the evidence in the case. You are not bound to accept either account but if in any respect you conclude that his statement is accurate and his oral evidence is not, then you may act upon the statement in preference to his oral evidence.

You may think that the change between A’s statement and his oral evidence is fundamental to your consideration of count 2. If you consider that A’s statement is, or may have been, the accurate account and that his oral evidence is, or may have been, mistaken, it would follow that A’s evidence cannot support the prosecution case upon count 2.
Illustration: Inconsistent statement of hostile witness for the prosecution

You will recall that A was an unwilling witness. When he first entered the witness box he would say nothing. Eventually he agreed that he had made a statement, which he identified. I permitted counsel to ask him questions about that statement. In it A said he had seen the incident which took place a matter of yards from where he was standing outside the public house. He saw the accused run towards V and deliver a haymaker of a punch to the left side of V’s face. V went to the ground, striking his head on the pavement with a sickening thud, and there he remained motionless. A told you in evidence that he had seen no such thing. He only made the statement because he thought that is what the police wanted to hear. I will remind you in more detail of his evidence in a moment.

A is a witness who has changed sides. He has given one account in his statement and a different account in the witness box. One approach would be to treat his evidence as completely unreliable and therefore worthless. If that is your conclusion A’s evidence could be of no assistance to you. It is, however, open to you to reach a contrary view. A’s statement is evidence on which you are entitled to act if, after careful consideration, you think it right to do so.
Notes

1. Jay Chandler v The State CA Crim No 19 of 2011 applying the principle in Blake [1977] 16 JLR 60 (CA Jamaica): A document may be shown to a witness by cross-examining counsel, who may then ask the witness whether he sees what the document purports to record, without the cross examiner going into the contents of the document. If the witness responds that he sees it and accepts the contents as being true, the witness may then be cross examined on the contents of the document. If the witness does not accept the document as being true, or is not in a position to say whether it is, then it constitutes hearsay evidence for all intents and purposes, and the cross examiner can go no further with the document. See also Michael Wiltshire and Jennifer Wiltshire v Windell Flaviney PC No 13248 CA Mag No 2 of 2006.

2. See also the ruling of Mohammed J in The State v Andy Brown and Others HC No 112 of 2003 approved in Jay Chandler v The State CA Crim No 19 of 2011: The document shown to the witness need not be admissible. The purpose of the procedure is to challenge the credibility or reliability of the witness, or to elicit a fact in issue. The purpose is not to get the document or its contents into evidence without calling the maker. What becomes evidence in the case is the response of the witness having seen the document, provided that he accepts the contents of the document to be true.

3. See Jashier Daniel v Roody Sookdeo PC No 13935 CA Mag No 66 of 2012 at paragraph 10 where the Court of Appeal provided a summary of the procedure to be adopted when a witness is accused of contradicting his previous statement, after he has been declared hostile.
B. Statement to Refresh Memory

Guidelines

In Trinidad and Tobago we are still guided by the common law rules which were summarised by the Court of Appeal of Jamaica in Harvey (1975) 23 WIR 437 (CA Jamaica) at page 440:

It is, perhaps, convenient to start with the proposition that certainly for more than 200 years a witness has not been allowed to give his evidence by reciting the contents of some document previously prepared. See, for example, Anon ((1753), 3 Keny 27. 96 ER 1295). During the course of his evidence, however, a witness has always been permitted to refresh his memory by reference to documents or memoranda of one kind or another, subject to certain well-defined conditions, eg contemporaneity, and the production, if required, of the document to the other party to the cause or his attorney to enable him to inspect it and, if he so wishes, to cross-examine the witness as to its contents. The jury are also entitled to see the document— if the witness is cross-examined as to parts of it not used by him to refresh his memory with the consequence that the document is rendered admissible as an item of evidence and may be so admitted at the instance of the party calling the witness—since it may assist them in assessing the witness’s credit-worthiness.

But the first and essential prerequisite that must be demonstrated to the court by the witness is the necessity for him to refresh his memory. Unless it becomes manifest that his memory is faulty with respect to some particular matter on which he is being examined (including cross-examination and re-examination) no question can arise as to his memory being refreshed. Unless, therefore, a witness indicates his desire to refresh his memory because of his imperfect recollection as to some fact about which he is required to testify, it would be quite improper for an attorney to suggest to a witness that he consult some previously prepared document in order to confirm his testimony. Clearly, any such course must be calculated to offend the rationale of the well-established rule against proof of consistency or, as it is sometimes called, the rule against self-corroboration...

While it is accepted that witnesses may refresh their memories, the Caribbean Court of Justice has noted that there is a difference between refreshing one’s memory from a document and putting the very document into evidence (see Francis [2009] CCJ 9 (AJ) [62] Saunders JCCJ). In the former case the document is used as a mere stimulus to revive one’s present memory, while in the latter case, past recollection, as recorded in the document, is allowed to be adduced. In this case, the issue raised was whether a police officer, who was permitted to refresh his memory, effectually adduced inadmissible evidence...
by reading out the entirety of his notebook. There was no evidence to suggest that the officer had in fact read out loud from his notebook and so that ground failed. While the case was determined primarily on statutory provisions enacted in Barbados, Saunders JCCJ noted that if and when a witness is permitted to read out loud from such a document, the impact of the jury is not very different from a situation where the inadmissible document itself is placed before the jury.
Illustration

WPC E was permitted to refresh her memory from a statement made approximately a month after the alleged incident. Two years have since passed. When counsel for the accused asked questions about it, WPC E declined to adopt it in full and was taken through the relevant parts of the statement in some detail. As a result I have decided that you can only make sense of WPC E’s responses to counsel’s questions if you have the statement before you.

I will remind you of WPC E’s evidence and the differences between the statement and her oral evidence in a moment. In these circumstances you are entitled to have regard to the contents of the statement for two purposes: first, to assess the effect of WPC E’s oral evidence and, second, you may treat the statement as part of her evidence. It follows that after careful consideration you may prefer any part of the account given in the statement or any part of WPC E’s present recollection given orally in evidence, as you think right.

I will explain when we arrive at the relevant parts of the statement how that direction may have an impact on your deliberations. However, that previous statement is evidence you may take into account, if you think it fit, when considering the case.
C Statement to Rebut an Accusation of Fabrication

Illustration

It was suggested to Mr X in cross-examination that his evidence is a tissue of lies designed to cover up his personal involvement in the robbery. It is implied that after the robbery there was no evidence implicating the accused. It is suggested that one week after the robbery Mr X telephoned the Crimewatch programme and gave information about the robbery. He said he recognised the man in the CCTV film as the accused. Mr X did not give his name to Crimewatch but said he was giving the information because he was disgusted at the treatment meted out to the security guard. It has since been confirmed that a man did indeed telephone Crimewatch and gave precisely this information.

You have heard about the anonymous call because it is relevant to the question whether Mr X’s evidence is true or false. Provided that you are sure that it was Mr X who made the call you may, if you think it right, treat that evidence as an effective rebuttal by Mr X of the accusation made against him of fabrication for his own purposes. Furthermore, as long as you are sure Mr X was the caller, the information he gave, which is consistent with his account to you, is evidence in the case. You may take it into consideration when deciding whether the actions of Mr X did anything to undermine the truth of what he says.
Notes

This direction only becomes relevant when hearsay evidence is admitted to rebut allegations of fabrication. The UK has statutory provisions which dictate that such a direction be given (see page 212 of the Crown Court Bench Book 2010). Trinidad and Tobago does not have such a provision. It is doubtful whether this direction is necessary given that the requirement for such has not been legislated as in the UK.
3. Statements in Furtherance of a Common Enterprise

Acts done and statements uttered in furtherance of a common criminal enterprise are admissible to prove the participation of an accused not then present.

Before admitting the evidence the judge must be satisfied that there is evidence that the accused participated in the enterprise. That evidence may include the act or statement in question provided there is some other evidence (eg circumstantial evidence) that the accused participated.

If it turns out that there is in fact no reasonable evidence of participation by the accused other than the act or statement of a joint participant, the case should be withdrawn from the jury.

Directions to the jury should explain that the potency of the evidence derives from its character as the enterprise in action. The jury should not, therefore, rely solely upon the hearsay evidence.

Notes

1. Donat (1985) 82 Cr App R 173 (CA); Gray and Liggins [1995] 2 Cr App R 100 (CA); Devonport and Pirano [1996] 1 Cr App R 221 (CA); Jones and Barham [1997] 2 Cr App R 119 (CA): Acts or declarations in the course or furtherance of any conspiracy are admissible against a co-conspirator to prove his participation in the joint enterprise. See also Chapters on Conspiracy (7) and Joint Enterprise (8) above.


   It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another. In particular, the judge must be satisfied that the act or declaration (i) was made by a conspirator, (ii) that it was reasonably open to the interpretation that it was made in the furtherance of the alleged agreement and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other party was a party to the agreement.

   See also Jones and Barham [1997] 2 Cr App R 119 (CA) at p 127.
Illustration

Generally speaking, members of the jury, an accused is not to be held liable for the acts or statements of others if he is not present when those acts were done or those statements were made. However, there is an exception to this rule in the case of a charge of conspiracy.

This exception permits, in certain circumstances and for certain limited purposes, evidence of acts done and statements made by other alleged conspirators in the absence of one of their number to be admissible in the case against him.

In this case, the prosecution seeks to rely upon statements made and acts done by A, B and C after the alleged meeting in A’s bedroom, as part of the case against the accused. The prosecution contends that these things reportedly said and done are evidence of the conspiracy to murder entered into in the bedroom at A’s house. And the prosecution is relying on the following things [briefly outline the evidence].

Now, on the prosecution case, Mr Foreman, members of the jury, the accused was not present when these various things were allegedly said and done, and the accused is, therefore, unable to confirm or deny the truth of what was reportedly said; and the accused is also unable to approve or disapprove of what was reportedly done. For that reason, you should treat these pieces of evidence that I have just identified for you with caution when you come to consider their effect on the case against the accused. You should scrutinise these pieces of evidence very carefully.

Before you hold those pieces, or any part of it against the accused, you should consider all of the evidence on which the prosecution relies, and all of the evidence called on behalf of the accused, and then ask yourself these two questions: Firstly, are you sure, first of all, that this evidence is true? And, secondly, that it amounts to evidence of things said or done by A, B and C in the course of and for the purpose of carrying out the conspiracy?

If the evidence passes both of those tests, then you may take it into account when you consider the case of the accused, and it is for you to decide what weight you should attach to it. If it fails one or both tests, you must completely ignore these pieces of evidence that I have just identified in the accused’s case.
4. Res Gestae

Introduction

Res gestae refers to an event at issue and things said or done contemporaneously, typically in close proximity. In relation to evidentiary matters, something said res gestae is often considered to be a spontaneous response to stimuli and generally considered to be credible pieces of evidence, an exception to or not at all hearsay. An example would be the statement of a person, as witness to a crime, so emotionally overwhelmed by an event there is no possible way for distortion or concoction of the utterance: Andrews [1987] AC 281 (HL).
Illustration

Now, members of the jury, in relation to this evidence, you must first decide whether the deceased said anything in response to the question he was asked by a police officer, if he knew who had shot him. Consider all the evidence. Is PC S making a mistake when he said that the deceased did not respond orally or is he deliberately lying to you? Is it that he just did not hear the response of the deceased?

Consider the evidence you have heard about the condition of the deceased at this point in time. He was lying on the floor, he was bleeding from a wound to his right thigh, he appeared to be in pain, he was agitated, restless and apprehensive, he was moving his head back and forth and from side to side. Is it the witnesses who are making a mistake about what the deceased said? You saw the witnesses as they gave evidence. Is this something they would make a mistake about? You will recall that witness “X” said that when the deceased said [name of accused/alias] she then said, [name of accused/alias], because she knew that was who her brother was referring to; this was someone they both knew. Would she have said [name of accused] if her brother had not said the name first? Or was this statement concocted by both witnesses?

These are some of the questions you may wish to ask yourself as you resolve this issue. It is for you to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said by the deceased. You must be sure that the deceased did not concoct or distort the statement to his advantage or the disadvantage of the accused. Ask yourselves: Did the deceased concoct this statement? Did the deceased distort this statement? Consider the condition of the deceased as I have outlined to you above. It is only if you are sure that the deceased did make a statement in response to a question from the police officer, whether he knew who had shot him, and it is for the prosecution to make you sure that the deceased made a statement, and it is for the prosecution to make you sure what the content of that statement was; it is only then that you can act on this evidence.

If you are sure that the deceased identified the accused as the person who shot him, then this evidence provides support for the identification of the accused as the person in the red jersey with the bandanna tied around his face identified by witnesses “V” and “W”. If, however, you conclude that the deceased did not make any oral statement in response to the question by a police officer as to whether he knew who shot him, or if you are not sure whether the deceased made any response, then you must disregard this evidence, put it to one side, it should play no further part in your deliberations.
Notes

1. See the summation in the case of The State v Walter Borneo Cr 42 of 2008 for the illustration above.

2. When determining the admissibility of a statement via the res gestae exception to the rule against hearsay, trial judges should be guided by the principles recited in Andrews [1987] AC 281 (HL) 300 by Ackner LJ, which was adopted by the Court of Appeal in Walter Borneo v The State CA Crim No 7 of 2011:

   1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?

   2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

   3. In order for the statement to be sufficiently “spontaneous” it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

   4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O’Neill and the appellant because, so he believed, O’Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any
concoction or distortion to the advantage of the maker or
the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the
statement, if only the ordinary fallibility of human recollec-
tion is relied upon, this goes to the weight to be attached to
and not to the admissibility of the statement and is there-
fore a matter for the jury. However, here again there may be
special features that may give rise to the possibility of error.
In the instant case there was evidence that the deceased
had drunk to excess, well over double the permitted limit
for driving a motor car. Another example would be where
the identification was made in circumstances of particular
difficulty or where the declarant suffered from defective
eyesight. In such circumstances the trial judge must con-
sider whether he can exclude the possibility of error.

3. See also the cases of Ratten [1972] AC 378 (PC); Tickle v Tickle [1968] 2 All
ER 154 (HC); Spittle v Spittle [1965] 3 All ER 451 (CD) and for a further defi-
Res Gestae: 759.
Chapter 18—Statements and Behaviour of the Accused

Adopted from the Crown Court Bench Book 2010

1. Confessions

Guidelines

In Mushtaq [2005] UKHL 25, the accused unsuccessfully sought to exclude his statements of admission on the ground of oppression. Before the jury, questions were asked of police witnesses whose object was to elicit evidence of oppression, which, as in the voir dire, was denied. The trial judge directed the jury that even if they thought the confession was or may have been obtained by oppression they could act upon the confession if they were sure it was true. The House of Lords held this to be a misdirection.

In Wizzard [2007] UKPC 21 (Jamaica), the Privy Council analysed the decision in Mushtaq in great detail as the most significant ground of appeal, complained that the fairness of the appellant’s trial was severely compromised since the facts of the case warranted a Mushtaq direction, and the trial judge had failed to give one. The primary evidence against the appellant consisted of admissions alleged by the prosecution to have been made to the police in a statement under caution. The appellant did not give evidence under oath but made an unsworn statement from the dock that he was severely brutalised by the police and threatened to be killed if he did not sign a piece of paper with writing on it. It was not read to him, and it was in those circumstances that he put his signature to the document. The trial judge’s direction in relation to the said document was reproduced at paragraph 25 of the judgment 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.

A direction similar to that above was, of course, disapproved by the House of Lords in Mushtaq, which essentially held that a jury should be directed to disregard a confession even if they were sure it was true, if they conclude that it was, or may have been, obtained by oppression. In holding that the facts of Wizzard did not call for a Mushtaq direction, the Privy Council seems to have made a distinction between cases where an accused accepts that he made a statement attributed to him, but alleges that he made it as the result of maltreatment or
oppression, and those where the complaint is that the statement was a fabrication and did not represent what the accused told the interviewing officers (see Charles [2007] UKPC 47 [14] (Saint Vincent and the Grenadines). The former is a proper case for the application of a Mushtaq direction, and the latter which essentially alleges that the appellant was forced to put his signature to a statement that was prepared without his input, did not require a Mushtaq direction as ‘there was no need for the judge to give the jury a direction that presupposed that the jury might conclude that the appellant had made the statement but had been induced to do so by violence.’

The apparent qualification in relation to the requirement for a Mushtaq direction, as highlighted in Wizzard, was applied in Trinidad and Tobago in the cases of Vernon Mahadeo v the State CA Crim No 21 of 2008 and Deenish Benjamin and Deochan Ganga v The State CA Crim Nos 50 and 51 of 2006; and by the Privy Council in the case of Miguel v State of Trinidad and Tobago [2011] UKPC 14. However, this apparent qualification has recently been questioned by the ruling in the case of Benjamin and Another v The State of Trinidad and Tobago [2012] UKPC 8 which overruled the Court of Appeal decision of Deenish Benjamin and Deochan Ganga. Though the Privy Council upheld the Court of Appeal’s ruling on the requirement for a Mushtaq direction, the Privy Council, at paragraphs 16 and 17 said:

[16] The Board in Wizzard considered that the fact that the appellant in that case had made an unsworn statement from the dock, denying that he had made the confession which the police claimed he did, meant that a Mushtaq direction was not required. It is, with respect, somewhat difficult to understand why this should be so. Simply because the appellant had denied making the statement, it does not follow that the jury could not find that he had done so.

[17] … The claim that the statements had not been made does not extinguish as an issue which the jury had to decide, whether, if they had been made and were true, they had been procured by violence. A Mushtaq direction was therefore required. The question is whether the judge’s charge to the jury contained the elements of such a direction.

In light of the rulings in Mushtaq [2005] UKHL 25, Wizzard [2007] UKPC 21 (Jamaica), Benjamin and Another v The State of Trinidad and Tobago [2012] UKPC 8 and subsequent cases:

- Juries should be directed that if they think the confession was or may have been obtained by oppression, they should put it aside and place no reliance upon it.
- Where breaches of the Judges’ Rules/Police Standing Orders capable of affecting the reliability of admissions are explored before the jury, the judge
should explain their relevance since they may affect the weight which the jury can attach to the evidence.

- Where the confession of an accused who is mentally handicapped was not made in the presence of an independent person but is nevertheless admitted in evidence, and the case against the accused depends wholly or substantially on the evidence of confession, ‘the court shall warn the jury that [for these reasons] there is a special need for caution before convicting the accused in reliance on the confession’.

- Any evidence which is reasonably capable of undermining the reliability of a confession should be pointed out to the jury.

For the permitted use of an inadmissible confession see *Archbold* 15-352 and *Blackstone’s* 17-53. The question may legitimately be posed whether, if in the course of a confession obtained by oppression the accused reveals information only the culprit could have known, his guilty knowledge is admissible while the confession is not.
2. Out of Court Statement by Another Person as Evidence For or Against the Accused

Guidelines

- In the usual case, the jury will require a specific direction that the out of court statement of one accused is not admissible in the case of another.

- If, however, the confession of an accused’s co-accused or other person has been admitted against him upon an application by the prosecution under s 15M of the Evidence Act Chapter 7:02, appropriate directions will be required to enable the jury to make an assessment of its reliability and the jury should receive a specific warning about the possible self-interest, if any, for the hearsay assertions made against the accused.

- If the confession of a co-accused or another has been admitted upon an application by the accused under s 15M of the Evidence Act, appropriate directions will be required to enable the jury to make an assessment of its reliability. If the effect of the confession is to implicate the maker of the statement while exonerating the accused it will be appropriate to remind the jury of the burden and standard of proof – if the statement is true or may be true then it is (or may be) inconsistent with the accused’s guilt.

- In a joint trial, there may have been, at the close of the evidence, an application by D1 for a direction that a hearsay statement in the interview of D2 which implicates D3 is admissible in D1’s case (supporting D1’s case that D3 was responsible). The trial judge will need to ascertain the purpose for which the accused is seeking to rely on the evidence. In the example given, if the statement is admitted the legal directions will need to be framed so as to reflect the burden and standard of proof in the cases of D1, D2 and D3 respectively. If the statement may be true, it may exonerate D1; D2 may, however, have had an interest of his own to serve; and in the case of D3 the prosecution must satisfy the criminal burden and standard of proof.
3. **Oral Statements by the Accused**

**Illustration**

Members of the jury as I have told you earlier an issue in this case is whether the accused made the alleged oral statement/admission/confession to [Officers X and Y]. I will now give you directions on how you should approach this alleged oral statement/admission/confession.

The prosecution says that the accused made certain oral statements/admissions [date, place, time] on which you may rely. I will remind you of the contents of the alleged statement(s). [Set out statement(s)].

The accused has denied he made these statements, [If applicable, state whether all or parts of the statements are denied and whether he was cautioned and read rights etc.] The accused is in effect saying that these alleged oral statements were made up by Officers X and Y.

The first question then for you to consider, members of the jury, is whether the accused did make the oral statement. If you are sure the statement was made, then you next consider if it is true. If you conclude that the statement is true you will then decide what weight you will attach to it bearing in mind the circumstances in which you find it was made.

_Are the statements the only evidence on which the prosecution is relying to establish its case? Then go on to give the following directions._

In order to secure a conviction on an oral confession alone the prosecution has a heavy burden to prove that the accused made the alleged statement. Let me remind you that there is no onus, no burden on the accused to prove anything in this case. It is not for the accused to prove that he is innocent. It is for the prosecution to prove that he is guilty. The accused does not have to prove that he did not make the statement, it is the prosecution who has to make you sure that he did make the oral confession.

Allegations that police officers make up oral admissions have been made for many years. This type of evidence is filled with inherent dangers because it is easy to fabricate an oral statement. It is easy for police officers to say that an accused made an oral confession and it is often difficult for an accused to refute that these statements were made.

You must therefore approach this evidence with caution. Consider all the evidence. Consider the cross-examination of [Officers X and Y] by defence counsel. [Examine aspects of the cross-examination which relate to this issue.]
There are guidelines on what procedure a police officer should adopt when questioning a suspect or when a suspect makes a statement. These guidelines are contained in the Police Standing Orders. [Examine provisions of the Police Standing Orders relevant to the issues raised in the case and also the evidence on which both sides rely in relation to these issues] The police also receive guidance from the Judges’ Rules. [Examine provisions of the Judges’ Rules relevant to the issues raised in this case and the evidence on which both sides rely in relation to these issues.]

Further guidance was also provided in the case of Frankie Boodram v The State CA Crim No 17 of 2003. The Court of Appeal set out certain guidelines for the police with respect to oral statements made by suspects [refer to the guidelines where appropriate]:

- We would suggest that where the State’s case depends substantially or exclusively on oral admissions, that it would be advisable for the police officers investigating to make contemporaneous notes of them which should be read to the accused and then ask him to sign them. It would be a matter of record and evidence whether he does so or not. If the note is disputed, copies could be made available to the jury.

- On some occasions it may not be practical to take the notes contemporaneously because of the way in which the interrogation is conducted.

- In such case, the police officer should write up his pocket diary as early as possible and again ask the accused to sign it after either allowing him to read it if he can and if he cannot, it be read to him. If there are senior officials about, they should initial the notes taken.

- Again, it may be very helpful and advisable that on arrival at the police station, a proper entry be made and if taken into custody duly acknowledged by the accused, by putting his initials to the entry.

Further directions on oral statements where applicable.

Consider whether the note of the alleged oral statement was signed by the accused. If it was not signed, consider why? Consider any evidence for the State and the accused on this issue. Consider any arguments/submissions by the prosecutor and the defence on this issue.
Consider whether the note was signed/authenticated/initialed by any of the officers or other persons involved.

Consider whether the alleged oral statement was read over to the accused or given to him for him to read it over. Was the accused shown the note that was allegedly made by Officer X? What does the prosecution say? What does the defence say?

Consider all the circumstances of how the note was made. For example, was it made in the officers’ pocket diary or on sheets of paper?

Consider all the explanations given by the officers for why certain things were not done.

Consider the guidelines given by the *Judges’ Rules*, the *Police Standing Orders* and the case of *Frankie Boodram v The State CA Crim No 17 of 2003*.

Ask yourselves, are you sure that Officers X and Y are truthful and honest witnesses? Assess their evidence. Weigh it up. Scrutinise it carefully taking into account all the matters that were raised in cross-examination of the officers. Are you sure that the accused made these alleged oral statements?

*Where oral statement is the only evidence*

If you find that the accused did *not* make these oral statements then that is the end of this case, your verdict must be not guilty. If you *are not* sure that the accused made these oral statements then equally your verdict will be not guilty.

If on the other hand having considered all the evidence you are sure that the accused did make these oral statements then you must go on to consider whether the oral statements are true. Look at all the evidence. If you are sure that the oral statements were made by the accused and that they are true then you may act upon them.
Notes


3. Police Standing Orders [in particular Standing Order 16 (Pocket Diary) and Standing Order 17 (Station Diary)].

   - Delaney (1988) 88 Cr App R 338 (CA);
   - Keenan [1990] 2 QB 54 (CA);
4. Mixed Statements by the Accused

Illustration

Members of the jury the prosecution says that the accused has made a statement on which you may rely. The accused says [outline what the case for the accused is in relation to the statement]. [Summarise the evidence with respect to the statement].

The first issue for you to decide is whether the accused did make the statement. Consider all the evidence. [Give directions on how the jury should approach any issues raised by the accused in relation to the making of the statement, such as failure to caution, assaults by police officers, failure to inform of his rights etc.] If you are not sure that the accused made the statement then you must disregard it. It must play no further part in your deliberations. If however you are sure that the accused made the statement then you must go on to consider whether the statement is true and what weight you should attach to it.

[If the case for the accused is that he did make the statement indicate that the accused admits to making the statement.]

The statement contains incriminating parts and explanations and the whole statement must be considered by you in determining where the truth lies. [Outline the incriminating parts and the explanations].

You may consider that the incriminating parts are likely to be true, otherwise why say them, whereas the explanations may not have the same weight. [You may also comment, in relation to the explanations, upon the election of the accused not to give evidence. In other words the accused has not come into the witness box and repeated the explanations.]

If you are sure that the accused did make the statement and that it is true you may take it into account in arriving at your verdict.
Notes

5. Post-Offence Conduct

Illustration

In this trial you have heard evidence that the accused [describe briefly the words and/or conduct complained of/occurring after the alleged offence].

[This evidence would have been allowed in as relevant evidence of misconduct in connection with the investigation or prosecution of the offence. What is the use of this evidence?] Evidence of what an accused did or said might help you decide if he is guilty or not guilty of the offence for which he is charged.

[Review/summarise the relevant evidence].

The first issue you have to decide is whether the accused actually said or did these things. Consider all the evidence.

If you conclude that the accused did not say or do these things, or you are not sure whether he did or not, then you must discard this evidence in arriving at your verdict. Ignore it. It must play no further part in your deliberations. You may also consider whether or to what extent your decision on this issue affects your view of the credibility of witness X/Y etc.

If you are sure that the accused did in fact do or say these things, you should next consider why the accused did or said these things. Was it because the accused committed the offence charged? Or could there be some other explanation for his conduct?

The conduct of an accused after a crime [such as fleeing or attempts to threaten a witness] is evidence that could lead to an inference of guilt in certain circumstances. However, equally, there can be other explanations for the behavior of the accused. For example, a person may run from the police to avoid apprehension simply because he is scared or may respond to an incident in a threatening manner as a result of frustration or anger.

[Put the behavior/conduct in the context of how the particular incident occurred; the circumstances of the incident].

Consider these alternative explanations/meanings of the actions of the accused. [Give relevant alternative explanations/meanings].

You must not therefore leap from a finding that the accused did do and/or say these things to a conclusion of guilt. And you must not decide
as to the meaning of the conduct until you have considered all the evidence in the case. This includes any explanation given by the accused in relation to [the conduct].

You, the jury, must therefore decide, on the evidence as a whole, whether the conduct of the accused is related to the crime charged or if there is some other reason for it. If you find that the accused did and/or said these things for some other reason, you should not consider that as evidence of guilt. If you find that the accused did in fact do and/or say these things because he committed the offence charged, then this evidence must be considered together with all the evidence in the case in helping you decide whether the accused is guilty or not guilty of the offence.

At the end of the day, as with all the other evidence, you must consider how much weight, if any, such evidence should be given.
Notes

1. **Franklyn Gonzales v The State (1994) 47 WIR 355 (CA):** a case which dealt with the issue of post-offence conduct which was admitted to by the appellant in a statement given to a police officer. It was held that although admissible evidence, where the prejudicial effect of the evidence outweighed its probative value, it might be excluded by a trial judge in the interests of a fair trial. In this case, in the interests of fairness (which were not restricted to fairness to the accused), the trial judge had properly admitted evidence of the appellant setting fire to the curtains in the deceased’s house even though it occurred after the killing as it tended to show his behavior at the time to be consistent with a sense of revenge.

2. **Apabhai [2011] EWCA Crim 917:** the trial judge was entitled to find that the evidence relating to the blackmailing of the appellant by a co-accused was “connected with” the prosecution or investigation of the offence of conspiring to cheat the Public Revenue.

3. **White [1998] 2 SCR 72 (SC Canada):** the locus classicus on post-offence conduct in that jurisdiction. At paragraph 19 of its judgment, the Supreme Court stated that under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the culpability of the accused for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the accused has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence, it went on to cite the dicta of Weller JA in Peavoy (1997) 117 CCC (3d) 226 (CA Ontario) at page 238 in which it was stated that:

   Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

   (Emphasis added)

4. **Other Canadian Cases:**
   - **Tran [2001] NSCA 2:** a decision of the Nova Scotia Court of Appeal. During the course of the appellant’s trial, evidence was led of a plot to kill the main witness in the case. The court held at paragraph 27 that post-offence evidence of interference with witnesses is generally held to have probative value. Specifically, post-offence evidence of plots to kill key witnesses has been admitted by courts as important evidence of “consciousness of guilt”. Further at paragraphs 26-28, the court held
that the judge does not have the discretion to withhold otherwise relevant and admissible evidence simply because it tends to prove the guilt of the accused. See paragraphs 28, 29, 34.

- **Duguay [2007] NBCA 65**: a decision of the Court of Appeal of New Brunswick. The court had to consider whether evidence of the appellant’s attempts to silence an incriminating witness should have been admitted at trial. The court held at paragraph 31 that the evidence had some probative value in the sense that, under the circumstances, such an attempt could be looked upon by the jury as the conduct of a person with “consciousness of guilt”. The court went on to state at paragraph 51 that: ‘the probative value of evidence of post-offence conduct is informed by the extent to which the conduct goes to prove an accused’s “consciousness of guilt” with respect to the charge he or she is facing.’

- **In Vivar [2003] OTC 1068 (SC Canada)**: a judgment at first instance from the Supreme Court of Canada. The Crown had alleged that there was an attempt by the appellants to threaten two witnesses while they testified at the preliminary inquiry by making a “gang hand signal”. The court held that the description of the meaning of the signal given by the witness was too conjectural and therefore the evidence was of trifling probative value which was clearly outweighed by its prejudicial effect. However, the court noted at paragraph 38 that:

  ... threatening hand signals made by an accused and directed at a witness, while obviously a serious interference with the administration of justice, is generally as consistent with the accused believing that the witness is implicating him untruthfully as truthfully. I would nevertheless be inclined to leave such evidence to the jury if the threatening nature of the hand signal stood on a reasonable foundation. The meaning of some threatening gestures is well known, and requires no explanatory evidence.
6. Silence of the Accused

Illustration

Now, members of the jury, you have heard the evidence of Police Officer X. When the two accused were approached they were cautioned about the offence/s and they remained silent. When they were charged for these offences they also remained silent.

From the words of the caution ie “You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence” it is clear that persons who are suspected and accused of having committed an offence have a right to remain silent. It is a right given by law, and he is entitled to stand upon that right and say nothing. And when a person has been accused by the police, and that person says nothing, no adverse inference can be drawn against that person.

You the jury can’t say: “Well, why didn’t they say anything?” or “They didn’t say anything; that must mean something suspicious” or, “Because they didn’t say anything that must mean they are guilty”. The right to silence is a right given by law, and when that right is exercised, no adverse inference can be drawn from it.

So you can’t equate his silence with any guilt or culpability. His silence is a right given to him by law and he is entitled to stand up on that right with no adverse consequences to him at all.
Illustration: Where the accused has not been cautioned

It is correct, as counsel has pointed out to you, that even if a person has not been cautioned, if an accusation is made against him and he either says nothing at all, or makes a comment to that effect, like: “No comment”, or “I have nothing to say”, you must not automatically say that that means he is guilty. That would be quite wrong.

Nevertheless, you must consider the circumstances set out in the evidence you have heard, the situation whereby Constable Johnson came to the accused and informed him of the investigation and of the fact that Joe Blogg had given a statement to the police to the effect that he had stolen the cow [set out the nature of the information from the accomplice/witness] at his behest. It is for you to decide whether it was reasonable, on being informed of that information, with specific information of the name of the witness and his allegation; that the accused would not seek to refute the allegation, to express surprise, to flatly deny the allegation or by some other means protest his innocence.

You must have regard to all of the evidence, including that of Constable Johnson, and you must decide whether you are of the view that the failure by the accused to respond in some way to the allegation/information of his involvement in the crime does not in some way support or corroborate the evidence of Joe Blogg.

It is important for you to bear in mind that the silence of the accused, by itself, cannot convict him; the fact that he remained silent when confronted with the allegation does not mean that his evidence in this court before you is untrue. However, you are entitled to consider whether you consider silence to be a reasonable response to the information communicated by Constable Johnson, and if you do not consider it to be a reasonable response, whether the failure of the accused to respond supports the evidence of Joe Blogg.

[If the accused and his accuser were on even terms]: The law considers that when persons are speaking on even terms, as the accused and Mrs Smith were in Charlotte Street, and an accusation is made, and the person accused says nothing, expresses no indignation, and does nothing to repudiate the charge, that is evidence to show that he admits the charge to be true. If you find that the accused did and said nothing when confronted with the incriminating facts by Mrs Smith, and you conclude that his silence meant acceptance of the accusation, you are entitled to consider what effect that acceptance has on his testimony before you.
Notes

1. This direction relates to the silence of the accused when confronted with the allegation of commission/suspicion of involvement in the offence. Although the silence of the accused could be treated as something which had a bearing on the weight of his evidence, it was not something which could support an inference that the story told by him in court was untrue, still less that it amounted to corroboration of, or support for, the evidence given against him (see Colin Tapper, Cross & Tapper on Evidence (10th edn LexisNexis 2004)).

2. In Hall [1971] 1 WLR 298 (PC Australia): the Privy Council acknowledged the clear and recognised principle of the common law 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 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 the information is communicated accepts the truth of the accusation.

3. Hall was doubted and not followed in Chandler [1976] 1 WLR 585 (CA), where the accused was questioned by the police in the presence of his solicitor. Both before and after being cautioned he answered some questions and remained silent or refused to answer other questions. The English Court of Appeal noted that the law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend on the circumstances of the case. Based on Christie [1914] AC 545 (HL), the Court of Appeal found that the presence of his solicitor meant that the appellant and the police officer were speaking on equal terms. In the circumstances, some comment on the appellant’s lack of frankness before he was cautioned was justified, provided the jury’s attention was directed to the right issue which was whether in the circumstances the appellant’s silence amounted to an acceptance by him of what the detective sergeant had said. To suggest, as the judge did, that the appellant’s silence could indicate guilt was to short-circuit the intellectual process which has to be followed.

4. There may be circumstances in which an accusation or suggestion of crime may call for an indignant repudiation. In Feigenbaum [1919] 1 KB 431 (CA), a police officer testified that he went to the appellant’s house, and had told
him that certain boys who had been arrested, giving their names, had informed the police that he had sent them to steal, that they had stolen for the appellant on other occasions, giving the dates, and that the appellant had paid them specified sums for the stolen goods. The appellant had made no reply to this statement. It was held that non-denial of an accomplice’s incriminating statement may be corroboration; and that the jury had been rightly directed that they were entitled to consider whether the appellant’s failure to reply was not in the circumstances some corroboration of the boys’ evidence.
Illustration: Comment on the silence of the accused at trial

The accused has not given evidence. That is his right. He is entitled to sit back and have the prosecution prove its case against him. He has nothing to prove. He does not have to prove his innocence. It is the prosecution who must prove his guilt. You cannot therefore hold his silence against him. While you have been deprived of having his explanation tested in cross-examination, the one thing you must not do is assume that he is guilty because he has not gone into the witness box.
Notes

I. Dexter Brown and Nichia Outram v The State CA Crim Nos 19 and 20 of 2013: The Court of Appeal considered Michael Francois v The State CA Crim No 9 of 1984 and concluded that a trial judge was entitled to comment on the failure of an accused to give evidence on oath after the accused had made allegations of police impropriety. To the extent that the judge adequately reminded the jury that it was the prosecution’s duty to prove guilt; that the accused had a right to remain silent; and emphasised that silence was not to be equated with guilt, the comments could not be criticised. The combined judgment of the court read:

29. In Michael Francois v The State Ca Crim No 9 of 1984, serious allegations of Police impropriety were made and denied and a similar question arose for determination. After considering a number of authorities, Bernard J.A. (as he then was) concluded that the trial Judge was perfectly entitled to make the comment which he did and that there was no question of any miscarriage of justice since the Judge had adequately warned the Jury of the Prosecution’s duty to prove the case to the extent that they felt sure of the appellant guilt and reminded them of his right to remain silent. In his judgement Bernard J.A. made reference to the observations of Lord Russell C.J. in R v Rhodes 1899 1 QB 77:

‘The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge’

...

33. In this case the Judge clearly warned the Jury of the appellant’s right to silence and the burden of the Prosecution to prove guilt. He went on to warn them that they should not assume that she is guilty because she has not given evidence and emphasized that her silence is not to be equated with guilt. We are therefore satisfied that the Judge properly exercised his discretion to comment on the appellant’s silence at trial and that his comments did not go beyond the permissible limit.
Chapter 19— Lies

Adopted from the Crown Court Bench Book 2010

Guidelines

In Goodway [1993] 4 All ER 894 (CA) the court held that where lies are relied on by the prosecution as supportive of guilt, the conditions set out in Lucas [1981] QB 720 (CA) must be fully met. These are:

1. the lie must be deliberate;
2. the lie must relate to a material issue;
3. the motive for the lie must be a realisation of guilt and a fear of the truth; and
4. the statement must be clearly shown to be a lie by admission or by evidence from an independent witness.

The case of Burge and Pegg [1996] 1 Cr App R 163 (CA) sets out the circumstances in which a Lucas direction should be given. Kennedy LJ stated that it is appropriate for a judge to give a Lucas direction:

1. Where the defence relies on an alibi.
2. 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 the defendant.
3. 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.
4. 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.

The purpose of a Lucas direction as explained by Judge LJ in Middleton [2001] Crim LR 251 (CA) is to ensure that the jury does not engage in an incorrect line of reasoning. That is:

20. ...to assume that lying demonstrates, and is consistent only with, a desire to conceal guilt, or, putting it another way, to jump from the conclusion that the defendant has lied to the further conclusion that he must therefore be guilty...
22. Where, however, there is no risk that the jury may follow the prohibited line of reasoning, a **Lucas** direction is unnecessary. On the whole, approaching the matter generally, it is inherently unlikely that such a direction will be appropriate in relation to lies which the jury conclude that the defendant must have told them in his evidence. In this situation, the consequence of the jury rejecting the defendant’s evidence is usually covered by the general directions of law on the burden and standard of proof, and if a **Lucas** direction about lies told by the defendant in his evidence to the jury is given, it will often be circular and confusing in its effect.

Importantly, in **Taylor [1994] Crim LR 680** (CA) it was stated that ‘The fact that an inconsistent statement had been made did not itself call for a **Lucas** direction.’

- Discussion with the advocates is essential both as to the question whether a **Lucas** direction is required at all and, in any event, as to the terms in which the issue of lies is to be left to the jury.
- The lies on which the prosecution relies, or which the judge considers may be used by the jury to support an inference of guilt, should be identified for the jury.
- The jury must be sure that a deliberate lie was told either because the lie is admitted or because it is proved.
- Any explanation for the lie tendered by the accused or advanced in argument on his behalf should be summarised for the jury.
- The jury may be told that the accused’s lie is relevant to the credibility of the accused’s account in interview and/or evidence.
- The jury should be directed that before they can treat the accused’s lie as additional support for the prosecution case they must exclude, so that they are sure, the possibility that the lie was told for an ‘innocent’ reason (meaning a reason other than guilt). Such directions should always be framed within the context of the facts of the case.
- Should the accused advance a reason why he lied, it is not incumbent upon the judge to list others unless it is a reasonable possibility that they may arise on the facts; nor, when none is advanced, is it necessary to cover every theoretical possibility, only those which might reasonably arise on the facts.
- What weight the jury attaches to the lie is a matter for them. However, it may be necessary to ascertain whether the lie alleged is capable of supporting an adverse inference on some only, or all, of the issues between the prosecution and defence. Where, therefore, the offence charged requires specific intent and the motive for the lie could have been an attempt to
avoid a charge even of the lesser offence, the jury should receive a direction to be cautious before using the lie as any support for the inference of specific intent.

- The jury should be told that lies cannot of themselves prove guilt. They may, depending on their view, provide support for the prosecution case or a specific part of it.

- One of the reasons why directions in relation to lies can be confusing to juries is that concepts such as ‘credibility’, ‘consciousness or realisation of guilt’, ‘the accused’s lies may support an inference of guilt’, and ‘support for the prosecution case’, are unfamiliar and capable of being misunderstood unless explained through the factual context of the case.

Notes

1. Local cases applying Burge and Pegg (1996) 1 Cr App R 163 (CA):

   (a) Walter Borneo v The State CA Crim No 7 of 2011: held that the trial judge was correct in not giving a Lucas direction as the prosecution did not rely on any utterance of the appellant as corroboration of any aspect of its case, or as evidence of guilt. Nor was there any real danger that the jury might have relied on any lie as evidence of guilt.

   (b) Dwayne Vialva v The State CA Crim No 33 of 2008 per Yorke-Soo Hon JA at paragraph 24:

   Nothing suggests that the judge invited the jury to find that if the appellant had deliberately lied that the lies were capable of making the correctness of the identification “more correct”. The judge adequately addressed the necessary issues in his summation. There is no need to specifically direct the jury that the lie must relate to a material issue. The view of Kennedy LJ in Burge at page 174 is endorsed, where he stated that a Lucas direction will normally suffice if it makes two basic points: first, that the lie must be admitted or proved beyond reasonable doubt; second, the mere fact that the defendant lied is not of itself evidence of guilt since defendants may lie for innocent reasons, so that only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case. The above direction did so adequately.

   (c) Marlon Daniel and Others v The State CA Crim Nos 9-12 of 2001, Hamel-Smith JA stated at page 12: ‘In this case, it was a matter of credibility as to whether the Justice of the Peace was present when the written statement was taken and had nothing to do with an alibi defence’.
2. In *Burge and Pegg (1996) 1 Cr App R 163* (CA) the Court of Appeal stated that a *Lucas* direction was not required in every case where an accused gave evidence even if he gave evidence on a number of matters, and the jury might conclude in relation to some matters at least that he was telling lies. It is only required if there is a danger that the jury may regard that conclusion as probative of his guilt of the offence.
I. Motive to lie

Illustration

You have heard the evidence of the witness X. (He was a prisoner (or cellmate) awaiting trial/sentence and he has given evidence of an admission/confession allegedly made by the accused). (He was present and was a participant in the commission of the offence, and has been granted immunity from prosecution on condition that he gives evidence against the accused). (He has pleaded guilty to a lesser offence, which the state has accepted on condition that he gives evidence for the prosecution).

I direct you that you must approach his evidence with caution. You must consider that his evidence may be tainted by an improper motive. You must consider whether he has fabricated or embellished his evidence in the hope of gaining an advantage for himself for example, a lighter sentence, prosecution for a lesser offence, or immunity from prosecution.

In cases involving oral confessions/admissions of the accused allegedly made to a prison informer the following direction is applicable:

You must consider that such confessions/admissions are often easy to concoct and difficult to disprove. You must consider that prison informants may be motivated to lie in order to obtain more favourable attention from the authorities. Such witnesses may be inherently unreliable, since they may be motivated by the prospect of obtaining a personal advantage rather than a genuine desire to see that justice is done.

Notes

Blackstone’s (2011) paragraph 75.12.
2. Lucas Direction

Illustration

It is alleged by the prosecution (or the accused has admitted) that the accused lied to the police (or to a witness), (or in his evidence before you). It is for you to decide whether or not the lie supports the case against him. In deciding this issue, you must consider the following questions:

Did the accused tell a deliberate lie (to the police) (to the witness) (in his evidence)? If you are not sure whether he did, then you need not consider this matter any further. If, however you are sure that the accused told a deliberate lie, then you go to the next question.

Is there an innocent explanation for the lie? You must bear in mind that the fact that an accused tells a lie is not necessarily evidence of guilt. An accused may lie to bolster a genuine defence, or to conceal some disgraceful conduct, or out of panic or confusion or embarrassment or for some other reason not related to the commission of the offence. In this case his explanation is (summarise explanation if one is given).

If you conclude that this is, or may be an innocent explanation for his lie, then you must disregard it, and consider it no further. However, if you are sure that the accused has told a deliberate lie, and you are sure that there is no innocent explanation for it, then it is open to you to consider the lie in deciding whether or not the accused has committed the offence.
Notes

1. It is suggested that the trial judge should first consider whether or not a Lucas direction is required at all. In doing so, it is advisable that he should seek the views of the prosecution and the defence before closing addresses and summing-up.

2. In most cases, where the prosecution gives one version of the incident, and the accused gives another version, there is no need to give a Lucas direction at all, since it would simply be a matter of credibility for the jury to decide which version of the event they prefer. It is usually in relation to collateral issues on which the prosecution alleges that the accused lied, or the accused admits that he lied, that the need to give the direction arises.

3. Lies and Bad Character

Adopted from the Crown Court Bench Book 2010

In Campbell [2009] EWCA Crim 1076 the accused was charged with murder. He had earlier pleaded guilty to unlawful possession of firearms and ammunition found in his possession 11 days after the shooting. There was also found on a glove in his possession firearms residue. The prosecution relied on these convictions and the glove as evidence of bad character from which the jury could infer a propensity to commit firearms offences. The accused advanced explanations which, if accepted, would remove the potential for a finding of propensity. It was argued on appeal that the trial judge should have given a lies direction. The court held that an occasion for a lies direction had not arisen. Either the jury could not exclude the accused’s explanation (in which case the accused had not lied), or the jury would disbelieve the explanation (in which case the jury would find propensity). Since the jury would be given a propensity warning (as they had been) the accused was adequately protected against an assumption of guilt.

It may not be that in all such situations both a bad character and a lies direction will be inappropriate. There may be a risk that the jury will find not only propensity but also that the accused would not have lied about his bad character unless he was guilty. A lies direction in Campbell could simply have pointed out that the accused had an obvious possible motive for placing an ‘innocent’ gloss on the bad character evidence. Even if he had lied about his access to and familiarity with unlawful firearms it did not automatically follow he was guilty of this murder.
Illustration: Allegation of wounding with intent – accused admits lying in interview when claiming to have been elsewhere – accused denies having knife in his possession – evidence that he left his home with a knife – lies direction – warning against using lies to infer specific intent

Miss A gave evidence that she saw a fight between V and Y taking place outside the pub. A man she later identified as the accused approached. She saw the glint of something shiny in his right hand. With the same hand the accused appeared to deliver a blow to V’s stomach and V went to the ground suffering a wound to the abdomen.

The prosecution invites you to conclude that when he was interviewed under caution the accused lied about important matters. First, he maintained throughout his first interview that he was not present at the scene of the assault on V. Secondly, the accused said in interview, and has maintained in his evidence, that he did not take a knife to the scene of the assault on V. The prosecution has suggested to you that these lies were told in an attempt to conceal the accused’s guilt.

I need to provide you with a specific direction how you should approach evidence of alleged lies.
Notes
The following represents good practice:

1. Discussion with the advocates is essential both as to the question whether a Lucas direction is required at all and, in any event, as to the terms in which the issue of lies is to be left to the jury: Codsi [2009] EWCA Crim 1618 [27].

2. The lies on which the prosecution relies, or which the judge considers may be used by the jury to support an inference of guilt, should be identified for the jury.

3. The jury must be sure that a deliberate lie was told either because the lie is admitted or because it is proved.

4. Any explanation for the lie tendered by the accused or advanced in argument on his behalf should be summarised for the jury.

5. The jury may be told that the accused’s lie is relevant to the credibility of the accused’s account in interview and/or evidence.

6. The jury should be directed that before they can treat the accused’s lie as additional support for the prosecution case they must exclude, so that they are sure, the possibility that the lie was told for an ‘innocent’ reason (meaning a reason other than guilt). Such directions should always be framed within the context of the facts of the case.

7. Should the accused advance a reason why he lied, it is not incumbent upon the judge to list others unless it is a reasonable possibility that they may arise on the facts; nor, when none is advanced, is it necessary to cover every theoretical possibility, only those which might reasonably arise on the facts.

8. What weight the jury attaches to the lie is a matter for them. However, it may be necessary to ascertain whether the lie alleged is capable of supporting an adverse inference on some only, or all, of the issues between the prosecution and defence. Where, therefore, the offence charged requires specific intent and the motive for the lie could have been an attempt to avoid a charge even of the lesser offence, the jury should receive a direction to be cautious before using the lie as any support for the inference of specific intent: Bullen [2008] EWCA Crim 4 [40].

9. The jury should be told that lies cannot of themselves prove guilt. They may, depending on their view, provide support for the prosecution case or a specific part of it: Woodward [2001] EWCA Crim 2051 [24]-[25].
10. One of the reasons why lies directions can be confusing to juries is that concepts such as ‘credibility’, ‘consciousness or realisation of guilt’, ‘the accused’s lies may support an inference of guilt’, and ‘support for the prosecution case’, are unfamiliar and capable of being misunderstood unless explained through the factual context of the case.
Chapter 20—Defences

1. Alibi

Guidelines

The first requirement of the direction to the jury is that they understand that there is no burden on the accused to prove that he was elsewhere. The prosecution must prove its case beyond a reasonable doubt and that includes the need to prove that the accused was not elsewhere but at the scene committing the offence.

The second requirement is to guard against the danger that, if the jury disbelieves the alibi of the accused, whether it is a mere denial of presence or a positive assertion that he was elsewhere, they might assume he is guilty.

Particular care is required when the contest is between identifying witnesses and the evidence of alibi. The jury should be reminded that if they are convinced that the accused has told lies about where he was at the material time, this does not by itself prove that he was where the identifying witness said he was.
Illustration

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.

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.

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 may be 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.
Notes

1. **Ramserran v R** (1971) 17 WIR 411 (CA).

2. **Goodway [1993] 4 All ER 894** (CA): Whenever lies are relied on by the prosecution, or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the accused’s credibility, a judge should give a full direction in accordance with **Lucas [1981] QB 720** (CA). A lie can only strengthen or support evidence if the jury are satisfied that (a) it was deliberate, (b) it relates to a material issue, (c) there is no innocent explanation: ‘It is only if you are sure that he lied about where he was in a deliberate attempt to deceive you that you may use his lie in support of the prosecution case.’

3. There is no rule of law or practice that a trial judge must give a **Lucas** direction in every case where the issue of alibi is raised. See **Lennox Millette CA Crim No 22 of 2001** approving **Burge and Pegg [1996] 1 Cr App R 163** (CA).

4. **Francis Young v The State CA Crim No 2 of 2001**.

5. **Shazad Khan and Timothy Hunt a/c Timmy v The State CA Crim Nos 18 and 19 of 2008** at page 32.

6. **Melvin Phillip v The State CA Crim No P-018 of 2013** at page 7.

7. The trial judge must explain to the jury not only the clear consequences if they accepted or rejected the alibi but also the consequences that would follow if they find themselves in the middle position where they could not say if they believe or disbelieve the alibi evidence. In that case, the jury must be told that they have to acquit the accused.
2. Self-Defence

Guidelines

The accepted statement of law on self-defence is found in Palmer [1971] AC 814 (PC Jamaica). The Court of Appeal of Trinidad and Tobago synthesised the essential principles to be extracted from Palmer in Stephen Robinson a/c Psycho a/c Tony v The State CA Crim No 12 of 2009 as follows:

1. A person who is attacked is entitled to defend himself.
2. In defending himself he is entitled to do what is reasonably necessary.
3. The defensive action must not be out of proportion to the attack.
4. In a moment of crisis, a person may not be able to weigh to nicety the exact measure of his necessary defensive action.
5. In a moment of anguish, a person may do what he honestly and instinctively thought was necessary; and
6. If there has been no attack, then the issue of self-defence does not arise.

In Baptiste v The State (1983) 34 WIR 253 (CA), Sinanan and Others v The State (No 2) (1992) 44 WIR 383 (CA) and Fabien La Roche v The State CA Crim No 32 of 2009, the Court of Appeal directed that trial judges must direct the jury that an intention to kill is not inconsistent with self-defence.

7. A trial judge ought not to make reference to ‘the defence of self-defence’ in self-defence cases as this may give the jury the impression that the accused has to prove his defence. See Shiffie Roberts v The State CA Crim No 1 of 2009, approving Wheeler [1967] 3 All ER 829 (CA).
Illustration

The accused has raised the plea of self-defence. The first question for you to consider is whether the accused honestly believed that it was necessary to use force in defence of himself or another. The question you must ask yourselves is, did the accused honestly believe or may honestly have believed that he needed to defend himself because he was under attack or in imminent danger of attack?

If you come to the conclusion that the accused honestly believed, or may have honestly believed that he was being attacked and that force was necessary to protect himself then the prosecution has not proven its case.

If you find that the accused did not honestly believe that he was being attacked, then that is the end of the issue of self-defence, it means you have not accepted that he was acting in lawful self-defence. (However, even if you find that the accused was mistaken in his belief that he was being attacked, it is not the end of the matter.)

The important question is not whether the accused was under attack or was in fact in imminent danger of attack but whether he honestly believed that he was. So in asking yourself about the accused’s belief, if you find he did not believe or may not have believed himself to be under attack or imminent attack, then that is the end of the matter. Self-defence does not arise.

However, if you find that the accused honestly believed or may honestly have believed that it was necessary to use force to defend himself, then you must go on to consider the second question.

The second question you must decide is whether the type of force and the amount of force used was reasonable. Reasonable force means force proportionate to the nature of the threat the accused honestly believed was posed. If the accused went well beyond what was needed to defend himself from the force offered by his assailant, that is good evidence that the accused acted unreasonably.

In considering what is reasonable force you must also consider that obviously a person who is under attack or who honestly believes himself to be under attack reacts to the attack and cannot be expected to work out to an exact point how much force he needs to defend himself. So, if having considered the circumstances of this case, in that the accused [briefly state evidence], you think the force used was or may have been reasonable, the accused is entitled to be found not guilty. The law is that if you find the accused did only what he honestly and instinctively
thought was necessary, that is strong evidence that he responded reasonably.

Now, if you believe that the accused was attacked and used such force as he reasonably believed to be necessary, he is not guilty of any crime, even if the force used was intentional. If, on the other hand, you are sure that the force used was unreasonable in all the circumstances, then self-defence does not arise.

If you find the accused was or may have been acting in lawful self-defence, he is entitled to be found not guilty. If, on consideration of the evidence, you are sure that he was not acting in lawful self-defence then a plea of self-defence does not arise.
Notes

1. Beckford [1988] 1 AC 130 (PC Jamaica): The Court of Appeal approved the following passage from the judgment of Lord Lane CJ in Williams [1987] 3 All ER 411 (CA), as correctly stating the law of self-defence:

   The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant’s actions, second, that if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not. 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, however, the defendant may genuinely have been labouring under it, he is entitled to rely on it.

   (Mistaken belief does not arise in every case of self-defence.)

2. It is critical that the judge directs the jury that an intention to kill or cause grievous bodily harm is not inconsistent with self-defence— see Shiffie Roberts v The State CA Crim No 1 of 2009 paragraphs 39–50 per Yorke-Soo Hon JA:

   **Direction on Intention to Kill and Self-Defence**

   39. Self-defence in Trinidad and Tobago is governed by the common law and thus a trial judge’s direction to the jury must accurately reflect the common law. Palmer v R [1971] AC 814 is still regarded as the classic pronouncement upon the common law relating to self-defence. Lord Morris approved as correct the self-defence direction given by the trial judge, who had stated:
'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable ground he believes is necessary to prevent and resist the attack; and if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional'.

It must be clearly conveyed to the jury that a man can act in self-defence even if he has the intention to kill.

40. It was in Baptiste ((1983) 34 WIR 253) that the Court noted that it is “important” for the trial judge to direct the jury that on a charge of murder, a plea of self-defence is not inconsistent with finding an intention to kill. Although the appeal in Baptiste was allowed primarily on another ground, this does not reduce the applicability of the Court’s obiter statements on self-defence and intention to kill. It was said:

‘Another important direction that the judge must give to a jury in appropriate cases is that an intention to kill is not inconsistent with the establishment of the plea, not only of self-defence, but also of provocation...’

41. The phrase in appropriate cases above must be taken to mean cases where the facts give rise to the need for the jury to be told in the clearest of terms that the intent to kill is not inconsistent with the plea. On these facts, the jury could easily have found that there was an intention to kill, hence it became necessary for the trial judge to make it abundantly clear that such an intention was not inconsistent with the plea of self-defence.

42. Further, it was said:

On the question of mens rea the judge should direct the jury that whereas an intention to kill negatives the plea of accident, this is not so in respect of self-defence and of provocation, where the pleas may succeed even though the defendant had formed the intention to kill.

43. The point was re-emphasised nine years later in Sinanan v The State (1992) 44 WIR 383 where the main ground of appeal was the failure of the trial judge to direct the jury that an intention to kill was not necessarily inconsistent with a plea of self-defence. It was contended that since the trial judge had rightly pointed out to the jury that intent to kill was an essential ingredient in proof of murder, it was fatal to the conviction that
he, nevertheless, failed to tell them what was the consequence in law if this mental element existed when a person was acting in lawful self-defence. The Court of Appeal held that a failure to direct the jury with regard to intent to kill where self-defence had been pleaded was a miscarriage of justice. Indeed, Bernard CJ regarded it as a “grave error”.

44. The issue arose again for consideration in Allan Phillip v The State Cr. App. No. 88 of 1995. The trial judge in his summing-up did not use the form of words suggested in Baptiste and although the Court of Appeal found the direction to be a bit muddled, in the end their Lordships held that the trial judge gave a sufficient direction. Ibrahim JA said:

‘Before us three grounds of appeal were argued. The first ground of appeal was that the learned trial judge misdirected and confused the jury by giving them conflicting directions on the issue of intent in relation to self-defence. He told them:

“In considering the plea of self-defence you must finally decide whether the act done was really done with the intent to defend or with the intent to kill or inflict grievous bodily harm which constitutes aforethought […] By way of summary, in considering the issue of justification, you must clearly differentiate between an intent to kill or inflict grievous bodily harm on the one hand, and an intention to defend oneself on the other hand […] The intent to kill or cause grievous bodily harm to an attacker is not inconsistent with the intent to defend oneself, and is often included with the intent to defend. The issue is on self-defence’.”

The above demonstrates that there are no precise words a trial judge must use when giving a direction on intention to kill in relation to self-defence. It is clear that what is of paramount importance is that the jury understands that an intention to kill or to do grievous bodily harm and a plea of self-defence are not mutually exclusive concepts.

45. In the instant case, we find that no such direction was given in relation to self-defence. There can be no doubt that it is important for a trial judge to generally convey to the jury that the intention to kill is not inconsistent with the issue of
self-defence. However there is certainly no “magic formula of words” as to how this is to be communicated. The specificity with which such a direction need be given will invariably turn on the evidence proffered in the given case. In this particular case, aside from alibi, the trial judge was called upon to deal with three different justifications for the death of the deceased: accident, provocation, and self-defence.

46. The trial judge in her summing up stated:

‘Now, the issue of provocation can be raised when an accused is charged with the offence of murder. Even where you the jury find that in fact the accused did in fact kill the deceased with the intention to kill him or cause serious bodily harm the fact that the action of the killing with the intent is there does not preclude the defence of provocation being available to the accused.’

The clear import of these words is to indicate to the jury that the plea of provocation is not inconsistent with an intention to kill.

47. In a case such as this, where both self-defence and provocation were raised, it was even more critical for the trial judge to clearly direct the jury on the compatibility of an intention to kill with respect to both pleas and perhaps, its incompatibility with accident. Not having done so, the jury may have erroneously given weight to the fact that such direction was applicable only to the plea of provocation. That is, the jury may have considered that of these two defences, if they found that the accused formed an intention to kill, only provocation, and not self-defence, would have been available to the appellant. This approach would have the effect of depriving the appellant of the jury’s full consideration of the plea of self-defence.

48. It is true that the trial judge defined the various elements of murder and in discussing the meaning to be attributed to the word “unlawfully” she pointed out:

‘Now, of course, a killing may be justified where it is either in defence of oneself or in defence of another. Another example of unlawful killing, of course, may be, that carried out by some lawful authority. The allegation on the Prosecution’s case is, of course that these two accused, without any issue of self defence arising, ambushed, together with three other men, the
deceased and his friends, and they chopped him until he died. It would be a matter for you, Ladies and gentlemen of the Jury, at the end of the day, having considered all of the evidence, whether you are satisfied to the extent that you feel sure that this killing was carried out unlawfully, that it was done by the accused.’

Although the judge attempted to explain the lawfulness of self-defence and intention, we find the above insufficient in light of the specific direction to provocation. When contrasted with the clear and express direction on intention in relation to provocation, we consider that the direction given on self-defence and intention had the potential to confuse the jury.

49. We are therefore of the view that, in the circumstances of this case the trial judge ought to have given a specific direction on intention to kill in relation to the plea of self-defence. This was a material omission and is fatal to the conviction.

50. This ground therefore succeeds on the basis that the learned trial judge failed to direct the jury on the correlation between an intention to kill and the plea of self-defence.
3. Provocation

Guidelines

Provocation is a partial defence to murder only. Once there is evidence of provocation to be left to the jury, the burden is on the prosecution to disprove provocation to the required criminal standard. If the elements of murder are proved and provocation is not disproved the accused is entitled to a verdict of manslaughter.

Provocation was described by Devlin J in *Duffy* (1949) 1 All ER 932 (CA) as follows:

> Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

However, in a slew of cases including:

- *Bunting* (1965) 8 WIR 276 (CA Jamaica);
- *Attorney-General for Ceylon v Perera* [1953] AC 200 (PC Sri Lanka);
- *Lee Chun-Chuen* [1963] AC 220 (PC Hong Kong);
- *Fabien La Roche v The State CA Crim No 32 of 2009*.

The definition of provocation which is now accepted is:

Provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to cause him to retaliate.

The phrase “for the moment not master of his mind” should be omitted. While the trial judge should leave to the jury an alternative verdict available on the evidence, whatever stance was taken by the parties at trial, there is no obligation to leave to the jury the defence of provocation where the evidence discloses no provocative words or conduct which could have caused the accused to lose his self-control, notwithstanding evidence that the accused did in fact lose his self-control. Where there is evidence of provocative words or conduct the trial judge should leave the defence to the jury, including the issue whether the accused lost his self-control. *Section 4B of the Offences Against the Person Act Chapter 11:08* provides:

> 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.

The section is drawn in wider terms than the definition given by Devlin J in Duffy. Words alone or conduct alone or words in combination with conduct may constitute the provocation. There need be no quality of wrongfulness about the words or conduct if they do in fact cause a loss of self-control (see Doughty [1986] 83 Cr App R 319 (CA): the persistent crying of a baby may be enough). 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 (see Davies [1975] QB 691 (CA)). The words or conduct may be aimed at a third person causing the accused to lose his self-control (see Pearson [1992] Crim LR 193 (CA)).

The loss of self-control must be sudden and temporary.

Section 4B of the Offences Against the Person Act Chapter 11:08 provides that the judge must leave to the jury the question of whether everything said or done was enough to make a reasonable man act as the accused did.

The Privy Council in Holley [2005] UKPC 23 (Jersey), considered the question whether the reasonable man test as explained in Camplin [1978] AC 705 (HL) survived notwithstanding the decision of the majority of the House of Lords in Smith [2001] 1 AC 146 (HL). The test remains as in Camplin. Lord Nicholls, expressing the view of the majority in Holley said:

10. Before 1957 loss of self-control had to be brought about by things done. Words would not suffice to constitute provocation. Section 3 extended the scope of the defence by providing that in future loss of self-control could be provoked either by things done or by things said or by both together. This extension had an effect on what evidence was relevant, and therefore admissible, on the issue of the gravity of the provocation, that is, the first element in the objective ingredient. As explained by Lord Diplock in Camplin, at page 717, when words alone could not amount to provocation the gravity of provocation depended primarily on degrees of violence. Once words could amount to provocation, the gravity of provocation could depend upon “the particular characteristics or circumstances of the person to whom a taunt or insult is addressed.” Lord Diplock expressed his view, at page 718, on what would be a proper direction to a jury on the question left to their determination by s 3:

‘He should ... explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the
accused, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did’.

• 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.

• The jury should be told that the burden of disproving provocation lies upon the prosecution to the criminal standard.

• 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.

• The provocative words or conduct should be identified, as should the development of cumulative or ‘slow-burn’ provocation.

• Any relevant characteristics of the accused should be identified and their relevance to the stage 2 objective test explained.

• Intention to kill is not inconsistent with provocation. See Bunting (1965) 8 WIR 276 (CA Jamaica) approved in Antoine and Bass v R (1968) 13 WIR 289 (CA).

• The trial judge must tell the jury that if they were not sure as to whether or not the accused was provoked, they had to return a verdict of guilty of manslaughter. Fowler (2010) JMCA Crim 51, Rahim (2013) 81 WIR 388 (CA Guyana).
Illustration

Before you can convict this accused of murder the prosecution must make you sure that he was not ‘provoked’ to do as he did. Provocation has a special meaning in this context which I will explain to you in a moment. If the prosecution does make you sure that he was not provoked to do as he did, he will be guilty of murder. If, on the other hand, you conclude either that he was or that he may have been provoked, then the accused will be not guilty of murder, but guilty of the less serious offence of manslaughter.

How then do you determine whether the accused was (or may have been) provoked to do as he did? There are two questions which you will have to consider before you are entitled to conclude that the accused was or may have been provoked on this occasion:

1. May the deceased’s conduct, that is things he did or things he said or both have ‘provoked’, that is caused, the accused suddenly and temporarily to lose his self-control?

If you are sure that the answer to that question is ‘No’ then the prosecution will have disproved provocation, and providing that the prosecution has made you sure of the ingredients of the offence of murder to which I have referred, your verdict will be guilty of murder. If, however, your answer to that question is ‘Yes’, then you must go on to consider the second question:

2. May that conduct have been such as to cause a reasonable and sober person of the accused’s age and sex to do as he did?

A reasonable person is simply a person who has that degree of self-control which is to be expected of the ordinary citizen who is sober and is of the accused’s age and sex. If you think that the conduct would have been more provoking to a person who, like the accused, was [characteristic of the accused] then you must ask yourselves whether a person with that, and the other relevant characteristics of the accused, might have been provoked to do as he did.

When considering this question you must therefore take into account everything which was done and/or said according to the effect which, in your opinion, it would have on that ordinary person.
If you are sure that what was done and/or said would not have caused an ordinary, sober person of the accused’s age and sex [and other special characteristics] to do as he did, the prosecution will have disproved provocation. Then providing the prosecution has made you sure of the ingredients of the offence of murder, your verdict will be guilty of murder. If on the other hand your answer is that what was done and/or said would or might have caused an ordinary, sober person of the accused’s age and sex [and other characteristics] to do as he did, your verdict will be not guilty of murder, but guilty of manslaughter (by reason of provocation).
Notes

1. Marvin Nedd a/c Teddy v The State CA Crim No 14 of 2008: It is the duty of the judge to first decide whether there was evidence of provoking conduct which resulted in the accused losing his self-control. If there is evidence of provocative conduct the issue should be left to the jury.

2. Villaruel v The State (1998) 55 WIR 353 (CA) 357: The English Court of Appeal stated that on a charge of murder, wherever there is material which is capable of amounting to provocation however tenuous it may be, the trial judge should leave that issue for the jury’s determination.

3. Rossiter (1992) 95 Cr App R 326 (CA) 332: In Rossiter, although there was no evidence coming from the accused that she lost control, the Court took a broader approach and inferred a loss of control from the surrounding circumstances, including the injuries sustained by the accused.


6. The role of the judge in Provocation Cases: Richard Daniel v State of Trinidad and Tobago [2014] UKPC 3, per Lord Hughes:

   56. In the view of the Board, the objections to the Camplin practice, as it has solidified over the years, are well founded. It is of great importance that judges respect the clear principle that the question whether the second, objective, part of the provocation test is met is one for the jury. It is necessary to re-state and to emphasise the rule that provocation must be left even if it is not the defendant’s primary case if, taking the evidence at its most favourable to him and remembering that the onus of proof is on the State to rebut it, manslaughter by reason of provocation is a conclusion to which the jury might reasonably come. It behoves every trial judge to be very cautious about withdrawing the issue from the jury. He clearly cannot do so simply because he would himself decide the issue against the defendant, nor even if he regards the answer as obvious. But in a case where NO jury, properly directed, could possibly find the test met, it is in the interests of fair trial and of coherent law that an issue which does not properly arise ought not to be inserted into the jury’s deliberations.
7. It is critical that the judge directs the jury that an intention to kill or cause grievous bodily harm is not inconsistent with provocation: See Shiffie Roberts v The State CA Crim No 1 of 2009 paragraphs 39–50 per Yorke Soo Hon JA.

8. Self-Induced Provocation: Richard Daniel v State of Trinidad and Tobago [2014] UKPC 3:

31. The Board is satisfied that there is no room for any general rule of law that provocation cannot arise because the accused himself generated the provocative conduct in issue. Edwards ([1973] AC 648 (PC Hong Kong)) should not be taken as justifying the withdrawal of the issue of provocation on that ground. Subject to the proper role of the judge (as to which see below) the issues are for the jury. It is very doubtful that it will be wise to use the expression “self-induced provocation” in directing the jury, lest it convey the impression that some rule of law exists. The jury should, however, ordinarily be directed that, if it finds conduct by the accused which generates the provocative behaviour in question, that conduct will be directly relevant to both the subjective and the objective limbs of provocation. As to the first, it will go to both (a) the question whether the accused killed as a result of the provocative behaviour relied upon and (b) whether he lost self-control as a result of the provocative behaviour relied upon. Generally, the more he generates the reaction of the deceased, the less likely it will be that he has lost control and killed as a result of it. He might of course have been out of control of himself from the outset, but that is not loss of control as a result of the provocative behaviour of the deceased. There can, however, be cases in which the provocative behaviour, although prompted by the act of the accused, has caused him to lose control of himself and to kill. As to the second limb, it will go to whether the provocative behaviour was enough to make a reasonable man in his position do as he did. Generally, the more he has himself generated the provocative behaviour, the less likely it will be that a reasonable man would have killed in consequence of it. There can, however, be cases in which the jury may judge that the provocative behaviour may have induced a similar reaction in a reasonable man, notwithstanding the origins of the dispute between the accused and the deceased. On both limbs of the test of provocation, the extent to which the provocative behaviour relied upon was or was not a predictable result of what the accused did, ie how far it was to be expected, is itself a jury question and clearly a relevant factor, which the jury should take into account along with all the other circumstances of the killing.
4. Duress By Threats

Guidelines


2. In considering the objective test of what a reasonable person would have believed, and whether a reasonable person would have acted as the accused did, it is not relevant that the accused happens to be more pliable, vulnerable, timid, or susceptible to threats, than a normal person of his age and gender. However, the jury may be directed to consider whether the accused falls within a category of persons who may be more vulnerable or susceptible to threats than others, for example pregnant women who may fear for the safety of the unborn child, young children, persons suffering from a serious physical disability or a recognised mental illness or a psychiatric condition that renders a person more susceptible to pressure or threats. Psychiatric evidence is admissible to establish such mental illness or impairment or such a psychiatric condition: Bowen [1997] 1 WLR 372 (CA).

3. In deciding whether a reasonable person in the position of the accused would have acted as he did, the jury is entitled to consider whether there was any opportunity available to the accused to escape or to evade the threat and seek assistance from the police (or from persons in the vicinity, or could have telephoned someone for assistance). If a reasonable person would have taken the opportunity to escape or evade the risk, the defence of duress is not available.

4. If an accused voluntarily associates with other persons that he knows or ought reasonably to know may coerce or force him to commit unlawful acts, he cannot rely on duress as an excuse for his unlawful acts.

5. The jury must never be told that the threat may be a threat in fact rather than something that the accused reasonably believed to be a threat before such a defence could be raised: Safi [2003] EWCA Crim 1809.

6. The defence of duress may also arise from circumstances which pose a threat to the life or safety of the accused or of persons who are close to him or for whom he reasonably regards himself as responsible. In such circumstances, the defence is available where, viewed objectively, the actions of the accused are reasonable and proportionate having regard to the characteristics of the accused. The same directions outlined above are applicable mutatis mutandis.
Illustration

The case for the accused is that he committed the act but only did so because he was acting under duress.

That is, that [facts relied upon, for instance, that he committed the offence because of threats made to him by (...) that he would kill [or do serious bodily harm] to the accused [or to a member of his family or someone close to him, or someone for whose safety he reasonably regarded himself as responsible]].

You must keep in mind that the accused bears no burden of proving that he acted under duress. So that once it is raised on the evidence, the burden lies on the prosecution; who must convince you so that you are sure beyond a reasonable doubt that the accused was not acting under duress at the material time.

In deciding whether the accused was acting under duress at the material time, you must consider the following matters:

1. Was the accused in fact threatened by X or driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not commit the offence, he or his family would be killed or seriously injured?

   If you are sure that no such threat was in fact made to the accused, then you must consider the issue of duress no further.

   If you are sure that the threat was in fact made or may have been made to the accused then you go on to the next question.

2. Did the accused honestly and reasonably believe that the threat would be carried out immediately or shortly thereafter, if he did not comply?

   If you are sure that the accused did not honestly or reasonably believe this, then you will consider the issue of duress no further.

   If you are sure that he did honestly and reasonably believe that the threat would be carried out, or you conclude that he may have honestly and reasonably held that belief, then you go on to consider the next question.

3. Was the threat the direct cause of the accused committing the act of (...)?

   If you are sure that the accused would have committed the act whether or not he was threatened, then you must not consider the issue of duress any further.
If you are sure that the accused committed the act as a direct result of the threat or you conclude that he may have done so, then you go on to the next question.

4. Would a reasonable person in the position of the accused have been driven to act as the accused did?

For the purposes of the law, a reasonable person is a person of the accused’s age and gender, who is sober and not unusually timid and possesses the kind of firmness that one would expect of a person of that age, gender and intelligence.

If you are sure that a reasonable person so described would not have acted as the accused did, then you must find that the accused did not act under duress at the material time.

If you find that a reasonable person so described would have acted as the accused did, or may have acted as he did, then you must find that he acted under duress, and you will find him not guilty of the offence.

You must then ask yourselves, could the accused have avoided acting as he did without harm coming to him or his family? If you are sure that he could, the defence fails and he is guilty. If you are not sure, go on to ask yourself another question.

Did the accused voluntarily put himself in the position in which he knew he was likely to be subjected to threats? If you are sure he did, the defence fails and he is guilty. If you are not sure, he is not guilty.
5. **Insane and Non-Insane Automatism**

**Guidelines**

1. ‘...the defence of automatism requires that there was a total destruction of voluntary control on the defendant’s part. Impaired, reduced or partial control is not enough’. *Attorney General’s Reference (No 2 of 1992) [1994] QB 91 (CA)* 105.

2. Malfunctioning of the mind caused by a disease cannot found a defence of non-insane automatism. Temporary impairment of the mind, resulting from an external factor may found the defence eg concussion from a blow, therapeutic anesthesia but not self-induced by consumption of alcohol/or drugs. *Sullivan [1984] AC 156 (HL)*.

3. The evidential burden is on the defence and it is for the judge to decide whether the medical evidence supports a disease or an “external factor’. (If the former, the jury may require a direction as to the defence of insanity.)

4. The prosecution must disprove automatism.

5. Malfunctioning of the mind which does not amount in law to insanity or automatism and does not cause total loss of control is not a defence: *Isitt [1978] 67 Cr App R 44 (CA)*.

6. Automatism due to self-induced intoxication by alcohol and/or dangerous drugs: is not a defence to offences of basic intent, since the conduct of the accused was reckless and recklessness constituted the necessary mens rea; may be raised where the offence is one of specific intent.

7. Automatism not due to alcohol, but caused by the accused’s action or inaction in relation to drugs (eg failure by a diabetic to eat properly after insulin) may be a defence to offences of basic intent unless the prosecution proves that the accused’s conduct was reckless. For example, in assault cases the prosecution must prove that the accused realised that his failure was likely to make him aggressive, unpredictable or uncontrolled: *Bailey [1983] 2 All ER 503 (CA)*.

8. *Thompson (1986) 40 WIR 265 (CA Jamaica):* (1) Where automatism is raised as a defence (and evidence of lack of intent is adduced) the onus is on the prosecution to disprove the defence (unlike the position when the issue of insanity is raised by the defence). (2) An automaton’s acts are automatic and unconscious. His will and consciousness are not applied to what he is doing. He is not in conscious control of his actions. The question to be asked is: was the accused man knowingly doing what the prosecution said he did, or was he acting as an automaton without any control or knowledge of the acts which he was committing? If he did not know what he was doing, if his actions were purely automatic and his...
mind had no control over the movements of his limbs, then the proper verdict is “not guilty”.

9. **Gaston [1978] 24 WIR 563** (CA Grenada): (1) The burden of proof in insanity rests upon the accused. (2) Once a proper foundation is laid for automatism the matter becomes at large and must be left to the jury but when the only cause that is assigned for it is a disease of the mind then it is only necessary to leave insanity to the jury and not automatism. (3) The onus is on the prosecution to disprove automatism.
Illustration

The accused is relying on the plea of automatism. Let me explain to you generally what it means and then I will explain to you how it relates to this accused in particular.

A person is generally taken to be responsible for his actions unless they are accidental. That is because a person is presumed to be in control of his actions, in the sense that his mind exercises control over his physical movements.

However, it may be that a person has completely lost the ability to control his actions as a result of some medical or other event for which he is not responsible. In other words, he is acting as an automaton. Only if the loss of control is complete can the plea of automatism succeed. Now that the accused has raised the issue in the evidence, you must consider it. The burden of proving that the accused acted unlawfully rests on the prosecution. It is, therefore, the prosecution which must prove to you, so that you are sure beyond a reasonable doubt, that the accused had not completely lost his ability to control his actions; in other words, that the accused was not, when he did the act, acting as an automaton. In other words he was not acting like a robot.
Illustration: The accused has raised non-insane automatism

Once evidence is raised by the defence that when the accused did the act alleged he had lost all self-control, it is for the prosecution to make you sure that the accused had not completely lost his ability to control his actions.

If you consider that the accused did or may have completely lost the ability to control his actions and his disability arose from some wholly involuntary cause (eg an unforeseen reaction to prescribed medication) then this means that you must find the accused not guilty.

Now an accused is presumed to be responsible for his actions unless the contrary is proved. The accused must establish this defence on a balance of probabilities. That is, the accused must show you it is more likely than not that he was suffering from impaired mental faculties of such a degree that he did not know what he was doing.
Notes

1. The following direction may be included above where applicable:

   If you consider that the accused did or may have completely lost the ability to control his actions and his disability arose from the voluntary consumption of alcohol or drugs, you must find him not guilty of a crime of specific intent but may be guilty of a crime of basic intent (to be worded accordingly).

2. Roach [2001] EWCA Crim 2698: (1) If external factors are operative upon an underlying condition which would not otherwise produce a state of automatism, then a defence of (non-insane) automatism should be left to the jury. (2) It is incorrect to direct the jury that if the accused does not prove the defence on the balance of probabilities the defence fails. (3) The jury must be directed in clear terms that the onus is on the prosecution to disprove the defence.
Illustration: If the accused has raised insane automatism

The accused has raised the plea of insane automatism. I will now explain to you what this is. Let me start off by telling you about insanity. A person is assumed to be sane and therefore responsible for his actions unless the contrary is proved. But if a person acted while suffering a defect of reason, from a disease of the mind, which caused him either not to know what he was doing or not to know that what he was doing was wrong, there is a special verdict available of ‘not guilty by reason of insanity’. These words ‘defect of reason’ and ‘disease of the mind’ were first used in the 19th century and may sound odd. They are in fact not complicated. There are two questions:

Was the accused suffering from an impairment of his mental faculties caused by a medical condition? If so, was it so severe that he did not realise what he was doing or that what he was doing was wrong?

The burden of establishing the defence of insanity rests on the defence. The accused must satisfy you on a balance of probabilities, that is, it was more likely than not that he was suffering from a disease of the mind which caused him to either not know what he was doing or not know what he was doing was wrong. Whenever a burden is placed on an accused person it is of a lesser standard than that placed on the prosecution. The burden on the prosecution to prove anything in a criminal trial is always very high. That is, the prosecution must satisfy you beyond reasonable doubt that the accused was not suffering from a disease of the mind so that he did not know what he was doing or that he did not know that what he was doing was wrong. It means that, before you could return the special verdict of not guilty by reason of insanity, you would have to find that it was more likely than not that the accused’s mental faculties were impaired in this way. So that is the legal definition of insanity.

JURY’S APPROACH TO INSANITY

When the accused has raised the issue of insane automatism, you must consider the issue using a particular route which I will now outline to you.

First, you need to consider whether the accused was suffering a disease of the mind, in other words an impairment of mental functioning caused by a medical condition. If you consider that it is more likely than not that the accused was suffering from a disease of the mind
then you need to consider the second question which is whether the degree of impairment of the accused’s mental faculties was such that when he committed the act, he did not know what he was doing or did not know that it was wrong. If you conclude it is more likely than not that he did not know what he was doing or did not know it was wrong, your verdicts must be ‘not guilty by reason of insanity’.

If, on the other hand, you decide that it is more likely than not either (1) that the accused was not suffering a disease of the mind or (2) that he knew what he was doing and knew that it was legally wrong, then you will have rejected the defence of insanity and it is open to you to find him guilty as charged. So this is how you should approach the issue of insanity. Now I will explain to you how to approach insane automatism.

JURY’S APPROACH TO AUTOMATISM

You should first consider the issue of automatism. Automatism does not apply if the accused’s condition arose from a disease of the mind, in other words a medical condition arising naturally from within. It only applies if you consider that the accused lost or may completely have lost voluntary control of his actions because of the unknown effect upon him of prescribed drugs and alcohol.

You must decide whether you accept that his opinion is right or may be right. If his opinion may be right, your next decision is whether the effect of drugs and alcohol was such as completely to deprive the accused of his ability to control his actions. If you conclude that the accused’s ability to control his actions may have been completely removed you should find the accused not guilty.

If, however, you are sure either (1) that the cause of the accused’s loss of control was his personality disorder and not the alcohol and prescribed drugs, or (2) that he did not suffer a complete loss of control, you will have rejected the defence of automatism and you should turn next to the defence of insanity.
6. Diminished Responsibility

Guidelines

1. Where the defence relies on diminished responsibility, there is no contest as to the actus reus and mens rea for murder. The accused must raise and prove diminished responsibility. The jury need only be satisfied on a balance of probabilities. *Cyrus Braithwaite v The State CA Crim No 57 of 2002*.

2. Medical evidence should be carefully scrutinised in order to see how much of it depends upon hearsay or upon statements made to a doctor by the accused himself, the truth of which is not admitted by the prosecution: See *Bradshaw (1985) 82 Cr App R 79* (CA).

3. Where more than one basis for manslaughter has to be considered (such as lack of intent, provocation or diminished responsibility), the jury must be directed that in order to return a verdict of manslaughter they must agree (subject to the majority verdict rule) on which basis they arrive at that verdict. *McCandless [2001] NI 86* (CA) 98, disapproving *Jones (1999) Times 17 February* (CA) and *Gribben [1999] NIJB 30* (CA).

4. It is best to omit references to “insanity” in a direction on diminished responsibility. (*Adams (unreported) 29 January 1985*).

5. When the accused has raised diminished responsibility, 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: *Walton (1977) 29 WIR 29* (PC Barbados).

6. 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 (1975) 61 Cr App R 261* (CA). 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 [1967] 1 QB 175* (CA), *Gittens [1984] QB 698* (CA). *Dietschmann [2003] UKHL 10*: the jury should be directed, eg:

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 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.

7. Where the defence alleges that the accused suffers from alcohol dependency syndrome, whether or not observable brain damage has occurred, the jury has to be directed to consider whether the accused’s mental responsibility for his actions was substantially impaired as a result of the syndrome. See Lord Judge CJ in Stewart [2009] EWCA Crim 593. In such circumstances the direction will have to be carefully tailored to the circumstances of the individual case, but the following is offered as a starting point.

8. Moore v The State [2001] UKPC 4: There was a serious and fundamental misdirection which left the jury with the impression that if the appellant intended to kill or cause serious bodily harm he was guilty of murder; and his defence of insanity or diminished responsibility could not avail him. The real question is whether in doing the act, he was deluded in thinking he was being attacked or harassed. The critical question for the jury was a simple one: ‘Are you satisfied on a balance of probability that the appellant shot the victim because he was under the delusion that he was going to be attacked by him?’ If the answer to that question was ‘Yes’, then the defence of diminished responsibility was made out.

9. Daniel (Marcus) v The State of Trinidad and Tobago [2012] UKPC 15: The rejection of the jury of the defence of lack of intent at the time of the killing did not carry the implication that the jury were sure that the appellant was able at that time to form a rational judgment as to whether his acts were right or wrong or had the ability to exercise will power to control his acts. The jury was not asked to decide whether the appellant knew that what he was doing was wrong or whether he was able to exercise will power to control his acts. In those circumstances, no relevant inferences could be drawn from the jury’s verdict. Self-induced intoxication could not avail an accused unless the consumption of alcohol or the ingestion of drugs was fairly to be regarded as the involuntary result of an irresistible craving or compulsion.
Illustration

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.

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.
7. Insanity

Illustration

Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. In order to establish insanity, it must be clearly proved that, at the time of the committing of the act, the accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the acts he was doing, or if he did know, that he did not know that what he was doing was wrong.

Therefore, the first thing you need to consider is whether the accused was suffering a disease of the mind, in other words an impairment of mental functioning caused by a medical condition. If you consider that it is more likely than not that the accused was suffering from a disease of the mind then you need to consider the second question which is whether the degree of impairment of the accused’s mental faculties was such that when he committed the act, he did not know what he was doing or did not know that it was wrong. If you conclude it is more likely than not that he did not know what he was doing or did not know it was legally wrong, your verdicts on both counts would be ‘not guilty by reason of insanity’.

If, on the other hand, you decide that it is more likely than not either (1) that the accused was not suffering a disease of the mind or (2) that he knew what he was doing and knew that it was wrong, then you will have rejected the defence of insanity.

In order for you to consider the question of insanity, there must be evidence placed before you which you must then consider. However, once the evidential foundation has been laid so that the question of insanity is before you, then the burden of proof is on the prosecution to show that the accused acted consciously and voluntarily.
Notes

1. **Jacob (1997) 56 WIR 255** (CA Eastern Caribbean States): The trial judge ought to distinguish between the defences of insanity and automatism. The judge must identify evidence of insanity for the jury. It is for the jury to determine whether the evidence meets the requirements of insanity as defined.

2. **Baird v R Criminal Appeal No 49 of 1964**.

3. **Benjamin v The Queen Criminal Appeal No 5 of 1994** (Grenada).
8. Felony Murder

Felony murder generally and the non-applicability of certain defences

Section 2A of the Criminal Law Act Chapter 10:04 provides:

(i) Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm.

(2) For the purpose of subsection (1), a killing done in the course or for the purpose of—

(a) resisting a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;

(b) resisting or avoiding or preventing a lawful arrest; or

(c) effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an arrestable offence involving violence.

The summing up must incorporate all the core elements of the statutory definition.

The Basis of the Prosecution Case

Where felony murder and joint enterprise both arise on the facts of the case, the route taken determines the sentence that can be imposed. In cases of joint enterprise, the mandatory death penalty applies. In cases of felony murder, the death penalty is not mandatory (see Miguel v State of Trinidad and Tobago [2011] UKPC 14).

The prosecution must indicate at the outset of the trial the route it will be pursuing to found criminal liability. Settling a position at the inception of the trial avoids the need for confusing directions in an attempt to cover all bases. Where the evidence is capable of supporting either felony murder or joint enterprise, the trial judge should inquire from the prosecution as to the precise basis upon which the prosecution case is based. If the prosecution case is reasonably capable of being premised on both joint enterprise and felony murder, both sets of directions must be given. In such a situation, not to do so could deprive the accused of potentially available defences.
Felony murder and provocation, accident and self-defence

The Privy Council in Richard Daniel v State of Trinidad and Tobago [2014] UKPC 3 per Lord Hughes at paragraphs 45-47, clarified that provocation, accident and self-defence are not available to an accused acting in the commission or in furtherance of an antecedent crime of violence.

- It must be noted with particular care however, that issues in a case often leave open for determination the possibility that the predicate arrestable offence involving violence had come to an end. If this issue arises, provocation, self-defence and accident can apply and appropriate directions must be given.

Lord Hughes said:

31. The Board is satisfied that there is no room for any general rule of law that provocation cannot arise because the accused himself generated the provocative conduct in issue. Edwards ([1973] AC 648 (PC Hong Kong)) should not be taken as justifying the withdrawal of the issue of provocation on that ground. Subject to the proper role of the judge (as to which see below) the issues are for the jury. It is very doubtful that it will be wise to use the expression “self-induced provocation” in directing the jury, lest it convey the impression that some rule of law exists. The jury should, however, ordinarily be directed that, if it finds conduct by the accused which generates the provocative behaviour in question, that conduct will be directly relevant to both the subjective and the objective limbs of provocation. As to the first, it will go to both (a) the question whether the accused killed as a result of the provocative behaviour relied upon and (b) whether he lost self-control as a result of the provocative behaviour relied upon. Generally, the more he generates the reaction of the deceased, the less likely it will be that he has lost control and killed as a result of it. He might of course have been out of control of himself from the outset, but that is not loss of control as a result of the provocative behaviour of the deceased. There can, however, be cases in which the provocative behaviour, although prompted by the act of the accused, has caused him to lose control of himself and to kill. As to the second limb, it will go to whether the provocative behaviour was enough to make a reasonable man in his position do as he did. Generally, the more he has himself generated the provocative behaviour, the less likely it will be that a reasonable man would have killed in consequence of it. There can, however, be cases in which the jury may judge that the provocative behaviour may have induced a similar reaction in a reasonable man, notwithstanding the origins of the dispute between the accused and the deceased. On both limbs of the test of provocation, the extent to which the provocative behaviour
relied upon was or was not a predictable result of what the accused did, ie how far it was to be expected, is itself a jury question and clearly a relevant factor, which the jury should take into account along with all the other circumstances of the killing.
Chapter 21—The Trial of Sexual Offences

Adopted from the Crown Court Bench Book 2010

1. Caution Against Making Behavioural Assumptions

Introduction

Making Assumptions

Research by those who are experts in the subject ([Home Office Research Study: Rape and sexual assault of women March 2002](#)) discloses several subjects for stereotyping which could lead the jury to approach the complainant’s evidence with unwarranted skepticism.

They include but are not limited to:

- The complainant wore provocative clothing; therefore he/she must have wanted sex;
- The complainant got drunk in male company; therefore he/she must have been prepared for sex;
- An attractive male does not need to have sex without consent;
- A complainant in a relationship with the alleged attacker is likely to have consented;
- Rape takes place between strangers;
- Rape does not take place without physical resistance from the victim;
- If it is rape there must be injuries;
- A person who has been sexually assaulted reports it as soon as possible;
- A person who has been sexually assaulted remembers events consistently.

Judges who try sexual offences are aware that each one of these stereotypes does not accord with experience. The purpose of comment, approved by the Court of Appeal in [D [2009] EWCA Crim 2557](#), is merely to caution the jury against making unwarranted assumptions about the behaviour or demeanour of the complainant if the judge considers the circumstances require it.

It is essential that advice from the trial judge does not implant in the jury’s minds any contrary assumption. It is not the responsibility of the judge to
appear to support any particular conclusion but to warn the jury against the unfairness of approaching the evidence with any pre-formed assumptions.

Assistance such as that proposed should not, we propose, be given without discussion between the judge and the advocates before speeches. The judge should take the opportunity to formulate his words carefully having received the views of the parties, the object being to ensure he does not stray from the commonplace to the controversial and, thus, appear to be endorsing argument for one side at the expense of the other.

Judicial advice should be crafted and expressed in a fair and balanced way. The trial judge should not be, or be seen to be, endorsing the arguments deployed by the prosecution but ensuring that the jury is approaching the evidence without being hampered by any unwarranted assumptions.

Notes

Feroze Khan v The State CA Crim No P-015 of 2013: It was contended on appeal that the use of the phrase ‘in the experience of the courts’ by the trial judge had the effect of leaving the jury with the view that issues covered could only be decided in the manner suggested by the judge. The trial judge was quoted using this phrase when he gave the following directions:

i. ‘...experience tells the Courts that there is no stereotype, that there is no standard pattern for a sexual offence, the victim or the perpetrator. The offence can take place in almost any circumstances, between all kinds of different people who react in a variety of ways’;

ii. ‘At first thought, you may assume that stranger rape, that is rape by a man who is a stranger to you would be far more traumatic, violent and frightening, it can be, but experience tells the Courts that this is not necessarily the case. The experience of a victim of a sexual assault by someone she knows or trusts may be just as traumatic whether or not physical violence or the threat of physical violence was involved’;

iii. ‘The experience of the Courts is that those who have been the victims of sexual offences react differently to the task of speaking about it in evidence’;

iv. ...

v. ‘The experience of the Courts is that victims of sexual offences can react to trauma in different ways’; and

vi. ‘In many cases which allege sexual offences, the experience of the Courts has been that the State’s case rests wholly and solely upon
the evidence of the alleged victim, ...since many sexual offences take place privately, with no witnesses to them, so it would be word against word, in many cases’.

(see paragraph 11 of the judgment).

After considering the arguments for both sides Weekes JA, at paragraphs 21-23, concluded:

21..... the impugned passages deal with the circumstance surrounding reports of sexual offences. The matters are general and common to both jurisdictions. It cannot be doubted that sexual offences are within their own particular category and that special attention needs to be paid by jurors to the evidence. The judge had the duty to draw the jurors’ attention to certain stereotypes so that they would not apply them when considering the evidence of the virtual complainant. A good example of this would be the need in most sexual offence cases to tell the jury that one would be unlikely to find many more witnesses than the virtual complainant him/herself, given the nature of the offence.

22. In our opinion the judge’s use of the expression “in the experience of the courts” did not deprive the jury of their freedom to assess the evidence. What he did, was to better equip them so to do by ensuring that they gave due consideration to all the factors that might impact on their eventual findings of fact. It is telling that counsel for the appellant conceded that the substance of the individual directions was unexceptionable. What the trial judge said has been the experience of the courts, and each time in the plural, signifying the collective experience of the courts in the jurisdiction, has indeed been that experience.

23. While judges are not to slavishly follow the specimen directions provided in the JSB Bench Book, they may pay heed to them once they are relevant in this jurisdiction. This ground is without merit.

Note: It is important to give the jury appropriate assistance of the contextual aspects of the matter: Feroze Khan CA Crim No P-015 of 2013.
2. Allegations of Historical Sexual Abuse

Guidelines

Directions to the jury concerning the evidence of the complainant will need to deal with the circumstances in which the complainant felt unable to reveal the subject matter of the complaint during the period concerned. The complainant will usually be describing events which took place during childhood, and the jury will need to assess the reasonableness of the failure of a child to make a complaint within the context of the physical and emotional environment in which the child was living at the time. Once the complainant left that environment or reached adulthood or both, other reasons may be advanced as to why the complainant remained silent, usually including a wish not to disturb painful memories. The trigger for the decision at last to make a complaint may be an adult relationship in which past experiences are exchanged, or a concern that the behaviour about which complaint is now made will be visited by the accused upon the next generation of children in the family.

When providing the jury with such assistance it should be even-handed. What the judge can do is to assist the jury with the common experience of the court in dealing routinely with such cases and to point out those features of the evidence which will assist them fairly to assess the complainant’s explanations.
Illustration: Complaint first made when complainant was an adult – suggestion by the defence that the complaint is not true – consideration of reasons for complainant’s delay in making her complaint – as a child – as an adult

During cross-examination of the complainant it was suggested to her that nothing untoward had happened to her as a child; that if it had, she would have complained at least to another member of the family; that her childhood had imposed on it the responsibility of helping to care for her brother and sisters; and that her motivation for making her current complaint is her jealousy of the accused’s relationship with her mother and their joint relationship with their natural children. Those suggestions have been repeated in the closing argument of counsel for the accused.

I will, in a moment, remind you in more detail of the evidence. First, I wish to make some preliminary remarks about the complainant’s response to these questions. You are not bound to accept them; whether they are of assistance is for you to judge. Please remember that all decisions concerning the quality and reliability of the evidence are for you to make.

The complainant is the natural daughter of the accused’s wife, and she is the accused’s stepdaughter. When the accused married her mother the complainant became a member of their family. However, the three natural children of the accused and Mrs A came along in succession shortly afterwards. The first, B, is 9 years younger than the complainant. The complainant told you that the sexual abuse began not long before B was born. After B was born, mother’s attention was focused on the babies. Rightly or wrongly, the complainant said she felt the least important member of the household and, at times, isolated and lonely.

She said she was told by the accused from the start that she should say nothing to her mother. If she did, they would both be in trouble. ‘It’s our secret’, he said. The accused would buy her small gifts and spend time with her, but the complainant thought her mother was too busy with the other children to take her worries to her. The complainant said she felt guilty, but unable to do anything about it. She told you that the last act of abuse took place when she was 14. She agrees that she had become a handful. She left home as soon as she could, at 16, and tried to put an unhappy period of her life behind her. She met her husband when she was 22. Only when her first child was born two years later did she begin to worry again about the treatment she had received at the
hands of the accused. She wanted her daughter to have a satisfactory relationship with her own mother, but could not bear the thought that her daughter might be left alone with the accused. She decided to reveal the past to her husband who, she said, insisted that she notify the police. That is how these matters came to light.

In order to judge whether the suggestions put to the complainant in evidence have or may have any basis in truth, you will therefore be considering two important periods in the complainant’s life, the first, when she was a child, and, the second, when she was an adult, married woman with a child of her own.

It is important that, when you are considering the question why these matters did not come to light when the complainant was still a child, you remember the complainant is providing her present explanation from an adult perspective. She was bound to because she was looking back after many years and trying to explain how she felt as a child. A child, however, does not have the same ability as an adult to bring perspective and judgment to bear on her relationship with others. Life viewed through the eyes and mind of a child may appear very different. You need to consider how this child, aged 9 to 14 years, in the family environment in which she was placed, might have reacted to behaviour from the accused such as she has now described.

It would depend, you may think, upon several factors: among them, the emotional chemistry between members of the family, the personality of the individuals concerned, the nature of the relationship between the adults in the house, and the words spoken between the adults and the child. Does the complainant’s description of a feeling of isolation and loneliness within the family unit strike a chord with you? Were there conflicting emotions and loyalties? The complainant has told you that, on the one hand, the accused gave her welcome attention; on the other, he was sexually abusive towards her. Are these the sort of circumstances in which a young girl might experience feelings of guilt? Might a child who had such feelings identify with the man and be fearful that she too had something to lose from discovery? There is no denying that the complainant had the opportunity to complain to her mother, her friends, her teachers, and members of her wider family. The fact she did not take those opportunities is an important matter for you to consider. But, when you are considering the significance of her failure to complain, you should be careful to place it in the context of her circumstances at the time.
The second period of time which you need to address is that in which the complainant decided to make her complaint to the police. By then she was, of course, an adult. Her perspective on life would undoubtedly have been different. You are asked to consider whether a young woman who left home at 16 might make false allegations of abuse against her stepfather eight years later because she felt alienated from her mother’s new family, and bitter that she was treated in a different manner as a child than were her siblings; because she was the eldest by some years and because she was the stepchild. The complainant said that although it was hard work sometimes she was not resentful about that. She told you that her reasons were very specific and related only to the danger to which she thought her own child would be exposed if she was to enjoy a conventional relationship with her grandmother. She told you that she did not see why she should take exceptional measures to ensure that her daughter was never left alone with the accused because that was bound to lead to questions, and, in any case, it was the accused’s fault she was in this situation at all. It is again important that you do not consider this evidence in the abstract, but that you examine carefully the complainant’s explanation for the course she took, when she took it.

The ultimate decision you have to make is whether you are sure the complainant has given truthful and reliable evidence about the accused’s conduct towards her. The period of delay before the complaint was made and the motivation for the complaint being made when it was made are just two features of the evidence which you need to consider. How important they are and how they should be resolved are for you to judge.
3. Evidence of Children

Guidelines

The trial judge will need to assess whether it is appropriate to say anything at all to the jury about the evidence of child witnesses. However, a child who gives evidence has always viewed the events described through the eyes and with the mind of a child and, where that is so, it will probably be necessary to give the jury some assistance. The function of the judge is not to give expert evidence about the child under consideration but to assist the jury with the common experience of the courts. The advice will concern the different stages of intellectual and emotional development of children, the way in which they experience events, and their ability to register and recall them.
Illustration

Jurors, you have heard evidence in this case from a child aged (...) at the time of the alleged incident. Young witnesses do not always have the same ability as adults to observe and recall precise details or to describe events fully and accurately, therefore, assess his evidence in a careful fashion. You must carefully examine (...)’s capacity to observe; his capacity to recollect; his capacity to understand questions and to frame intelligent responses, and his moral responsibility at that age. The capacity to remember refers to the capacity of the person to maintain a recollection in their mind of actual perceptions of a prior event and the ability to distinguish the retained perceptions from information provided to the person by other sources; the capacity to communicate— whether it be to the police at the time of giving a statement or in answer to the court here, to attorneys— refers to the ability to understand questions and formulate intelligible responses. The capacity to perceive entails an ability to perceive events as they occur, as well as an ability to differentiate what is actually perceived and what the person may have imagined, been told by others, or otherwise have come to believe.

Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realise that what they are describing is, by adult standards, bad, in their perception. They may be embarrassed about it and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority – the policeman in the interview, or an advocate in court, or indeed me. That can make it difficult for them. Remember how you normally talk to children of this age. How difficult must it be if the form in which a question put is complicated or challenging and you should bear those difficulties in mind when you consider the answers given.

Consider (...)’s ability to understand the questions that were asked and to give truthful, credible, reliable, accurate answers. Take into account his understanding at the age of [age of the child when offence occurred], of the difference between truth and falsehood. Use your common sense.

Your task is to judge whether the essential parts of his evidence were truthfully given and, if so, whether they are reliable. Errors and inconsistencies in detail and in the sequence of events may not, in the case of a child, be any indication of untruthfulness or unreliability on the
essential matters. Those decisions are, however, for you to make. Having made due allowance for the age and immaturity of the witness, you should act on his evidence only if you are sure it is right to do so.

Where the case for the Prosecution is based primarily on the evidence of the child:

[The prosecution for the State rests on the evidence of (...). His evidence is critical and core to the State’s case. If you are not sure that he is a truthful, honest, credible, accurate and reliable witness, then you must reject his evidence and find the accused not guilty.

If you are, however, sure that [name of the child], having first approached his evidence in a careful fashion for the reasons explained, if you are sure that he is a truthful, honest, credible, accurate and reliable witness, then it is open to you to accept his evidence and rely on it; once you are sure of these things, it is open to you, on his evidence alone, to find the accused guilty.]

All decisions about the evidence are for you to make. I only advise caution against judging children by the same standards as you would an adult.

Notes

4. Consent, Capacity and Voluntary Intoxication

A. Consent

The Sexual Offences Act Chapter 11:28 does not define consent. In the UK the position is different. Part 1 of the Sexual Offences Act 2003 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’.

Section 4 of the Sexual Offences Act Chapter 11:28 does define circumstances in which consent, though present, is ineffectual:

(i) Subject to subsection (2), a person (“the accused”) commits the offence of rape when he has sexual intercourse with another person (“the complainant”)—

(a) without the consent of the complainant where he knows that the complainant does not consent to the intercourse or he is reckless as to whether the complainant consents; or

(b) with the consent of the complainant where the consent—

(i) is extorted by threat or fear of bodily harm to the complainant or to another;

(ii) is obtained by personating someone else;

(iii) is obtained by false or fraudulent representations as to the nature of the intercourse; or

(iv) is obtained by unlawfully detaining the complainant.

In Marlon Roberts v The State CA Crim No 19 of 2007 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
B. Capacity and Voluntary Intoxication

Adopted from the Crown Court Bench Book 2010

Voluntary intoxication of the complainant

The state of drunkenness of the complainant is relevant in the following ways:

(1) Alcohol or drugs may have a disinhibiting effect upon the complainant;

(2) 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.

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 [2007] EWCA Crim 804 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

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

(i) 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.

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.
Illustration: 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 the 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:
Illustration: 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?
Chapter 22—Jury Management

Adopted from the Crown Court Bench Book 2010

1. Discharge of a Juror or Jury

Guidelines

Following Mirza [2004] UKHL 2, the Court of Appeal issued a practice direction now incorporated within the UK Consolidated Criminal Practice Direction:

Guidance to Jurors

(IV.42.5) The following directions take effect immediately.

(IV.42.6) Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.

(IV.42.7) Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge’s attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.

(IV.42.8) The Judge should consider, particularly in a longer trial, whether a reminder on the lines of the further warning is appropriate prior to the retirement of the jury.

(IV.42.9) In the event that such an incident does occur, trial judges should have regard to the remarks of Lord Hope at paras 127 and 128 in R v Connor and Mirza [2004] 2 WLR 201 and consider the desirability of preparing a statement that could be used in connection with any appeal arising from the incident to the Court of Appeal Criminal Division.

The judge has the discretion to discharge a juror when the necessity arises. The size of the jury should not be reduced below nine. Necessity may arise through illness, although an adjournment of a day or so will usually accommo-
date temporary indisposition. In Hambrey [1977] QB 924 (CA) the trial judge discharged a juror who wascommencing her holiday on the next sitting day.

If a juror has personal knowledge of the accused which should have been disclosed and would have resulted in an invitation from the judge to stand down, it may be necessary to discharge him.

Misconduct by a juror may give rise to necessity. Jurors are customarily provided with comprehensive warnings against discussing the case with others and against seeking information about the case from extraneous sources. A disregard of those warnings will amount to misconduct.

The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.

Investigation by the judge

Where the judge acquires notice of possible misconduct or irregularity among jurors, he will need to investigate it. It is important not to pre-judge the issue. The jury may, with appropriate directions, be able to continue either as originally constituted or without jurors who have been discharged in consequence of the inquiry. The test is whether the jury is subjectively or objectively biased. Objective bias is the appearance to a fair minded and informed observer, having considered the facts, that there was a real possibility that the tribunal is biased.

If the irregularity is external in origin (eg overheard conversation between a juror and a member of the public leading to a suspicion of improper discussion of the case), the judge may be able to decide the matter without the involvement of the rest of the jury. In Ramzan and Farooq [1995] Crim LR 169 (CA) a juror made unauthorised telephone calls to her family from the hotel in which the jury was lodged overnight. The following morning the trial judge conducted a private inquiry of the juror through the court clerk. In the result no harm was done but the Court found that the judge should have questioned the juror in open court.

Where the suspected irregularity is internal and affects the jury as a whole it may not be prudent to isolate one or more jurors from the others. In Orgles [1994] 1 WLR 108 (CA) two members of the jury reported informally to the jury bailiffs that there was friction in the jury room. Those two jurors were questioned in the absence of the others and the Recorder afterwards addressed the whole jury. The Court of Appeal concluded that it would have been more
appropriate to have asked the whole jury through their foreman whether they were able to continue and gave general advice as follows:

Before this court, it was submitted that the procedure adopted by the recorder was wrong so as to amount to an irregularity. We agree. By way of preface, we have sympathy for him: the problem was unexpected; it was unusual (it is not encompassed within the joint experience of the members of this court); there was no precedent to guide him; and counsel could not provide an agreed submission. That said, in the judgment of this court an appropriate approach to the problem is as follows:

(a) Each member of a properly constituted jury has taken an individual oath to reach a true verdict according to the evidence; or has made an affirmation to the like effect.

(b) Circumstances may subsequently arise that raise an inference that one or more members of a jury may not be able to fulfil that oath or affirmation.

(c) Normally such circumstances are external to the jury as a body. A juror becomes ill; a juror recognises a key witness as an acquaintance; a juror’s domestic circumstances alter so as to make continued membership of the jury difficult or impossible; so far, we give familiar, inevitably recurring circumstances. Less frequent, but regrettably not unfamiliar, is the improper approach to a juror, alternatively a discussion between a juror and a stranger to the case about the merits of the case, in short, that which every jury is routinely warned about.

(d) Occasionally, as in the instant case, the circumstances giving rise to the jury problem are internal to such as a body. Whereas the duty common to all its members normally binds the 12 strangers to act as a body, such cannot always occur. From time to time there may be one or more jury members who cannot fulfil the duty, whether through individual characteristics or through interaction with fellow jury members.

(e) However the circumstances arise, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial, to that end exercising at his discretion his common law power to discharge individual jurors...

(f) The question arises as to whether and in what circumstances that duty should be exercised by the trial judge in the absence of the jury as a body. As to this, first, there is no doubt but that the judge’s discretion enables him to take the course best suited to the circumstances (see Reg v Richardson [1979] 1 W.L.R. 1316 for an extreme course) and frequently it is appropriate to commence and continue the inquiry with the juror concerned separated from the body of the jury. Such a course
cannot readily be faulted if the circumstance giving rise to the inquiry is external to the jury as a body; indeed if the problem is an approach to a juror, alternatively some external influencing of a juror, only such a course is feasible. The “infection,” actual or potential, of one juror must be prevented if possible from spreading to the rest of the jury, and it is common form to have the individual juror brought into open court with the rest of the jury absent so that the trial judge may make an inquiry in the presence of the defendant and counsel without jeopardising the [trial]... Given that there was this further irregularity, was it material so as to provide a further justification for quashing the conviction? We observe that after this trial proceeded there was no reason to think that this jury did not as a body seek to fulfil its duty. There were no further complaints and the range of verdicts are consistent with being true according to the evidence.

**Time for reflection**

Such eventualities, by their nature, occur unexpectedly. It is sensible not to take precipitate action, unless there is an emergency, and to involve the advocates in the decision making process as soon as possible. If the source of the problem is believed to be external it may be necessary to isolate the juror concerned immediately in the hope that contamination by discussion can be avoided. The advocates should, in any event, be consulted as to the course appropriate to the exigency which has arisen.

On the discharge of a juror or jurors it would be prudent for the trial judge to warn them not to discuss the circumstances with any person in the court centre in which they are engaged. In some circumstances it may be necessary to discharge them altogether from current jury service. In *Barraclough [2000] Crim LR 324* (CA) the trial judge discharged the jury and gave a warning that they should not discuss the matter with anyone else. A new jury was empanelled the following day. In view of the size of the court centre and the explicit warning given, the Court of Appeal held there was no irregularity threatening the safety of the verdict. If the same were to occur in a smaller centre the court might have to discharge the jury from further attendance in that session.
2. Conducting A View

Guidelines

A view of the locus in quo may be requested by one or both of the parties, usually when it is argued that photographs do not give a sufficient impression of scale and proportion, or where the nature of terrain is relevant to issues in the trial. If a view is to be held, it must be held before the jury’s retirement.

Arrangements should be made in advance and all those attending should know the itinerary and the procedure to be adopted. It is useful to prepare a proposed timetable for the use of the participants. The court should assemble at court as usual. At a view the court has simply moved its place of sitting temporarily.

A view should be attended by the advocates, the judge, the jury, their jury bailiffs and a shorthand writer. The jury must be accompanied at all times by their jury bailiffs. Other travel arrangements are at the discretion of the judge.

All communications between the judge and/or the advocates and the jury should be recorded.

The accused must be permitted to attend a view if he wishes but he is not bound to attend.

It is not usually necessary to receive evidence at a view but if evidence is taken it should be within earshot of the judge, jury and the advocates, and recorded. One or both of the parties may wish to point out specific features. Agreement can usually be reached by the parties that a police officer who has no immediate connection with the case can perform the function of pointing out those features which can, if practicable, be included in the written itinerary. Otherwise each side should nominate an advocate to do so. While features can be identified, further comment upon them at the view is undesirable.

The jury may have questions at the view. If so, they can be asked to make a note of their questions and the note handed to the judge. The judge will consider the questions with the parties to ascertain whether answers can be provided there and then. If so, the jury can be provided with an agreed answer or evidence can be taken. In either case the communication should be recorded. If the parties require time to consider adducing further evidence on the subject or to reach agreement, the jury may be told that further evidence will be received at court or a written agreement produced. It may be that a feature has been identified at the view which will require a further plan or photographs.

At the end of the view the jury should be accompanied by their jury bailiffs back to court. If, however, no further business is to be conducted at court on that day, the jury can be released upon their return to court until the next sitting day.
3. The Watson Direction

Guidelines

At the commencement of the trial the jury will usually have been advised by the trial judge that it will be their joint responsibility, in due course, to make an assessment of the evidence but that they should defer judgment until all the evidence has been heard. If the jury has received a majority verdict direction they will have been informed that it is desirable, if possible, for the jury to be unanimous in their decision but, if that is not possible, the judge can accept such a majority verdict as the circumstances allow. It may not be appropriate to give the jury any further direction about the desirability of reaching a verdict because the majority verdict direction will have concentrated the jury’s mind in that direction.

It is a matter for the trial judge whether to say anything further. If anything further is said, it is essential that no undue pressure is exerted on the jury. In Watson [1988] QB 690 (CA) Lord Lane CJ formulated a further direction which might be given as follows:

Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that 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 scope of your oath. That is the way in which agreement is reached. If, unhappily [10 of] you cannot reach agreement, you must say so.

Departure from the words used by Lord Lane is dangerous.
Chapter 23— Verdicts

1. Written Directions

Guidelines

*When are written directions given?* It is a matter to be determined in the trial judge’s discretion.

*Note: No local legislation exists on this point.*

Green [2005] EWCA Crim 2513:

26. This was not an easy case to sum-up, and no complaint has been made to us about the summing-up, but there was a lot of law for the jury to remember, and the evidence was not easy to distil. Legal directions had to be given, and were given correctly in relation to murder, manslaughter, robbery, joint enterprise, self-defence, lies and the rule against hearsay and a dying declaration, and good character, but nothing was reduced to writing in the form of a series of questions or a note which the jury could take with them. In a case of this complexity, and in particular in a situation where it was known in advance that the deliberations would be interrupted, we consider that to be regrettable.

Guidelines to be considered:

1. Decision should be made after consultation with counsel.
2. Is it a matter of substantial complexity?
3. Is it a lengthy case?
4. Has a written route to verdict been provided?

Even in jurisdictions where there is legislation governing the issue, a statutory discretion is applied:

New South Wales Jury Act 1977—

- Allows judges to give written directions where it is considered appropriate to do so and may thus provide useful guidance.
- s 55B—
  ‘Any direction of law to a jury by a judge or coroner may be given in writing if the judge or coroner considers that it is appropriate to do so’.
Written directions— the content

- Written directions are not an aide memoire, the oral directions must be taken into account;
- The jury should be informed that the document is not intended to be a replacement for, but an addition to, the legal directions given orally;
- Care must be taken to ensure that the written directions are accurate and without the possibility of misunderstanding;
- The oral elaboration does not conflict with the written directions.

In New South Wales and in the UK, jury and judge read directions together.

- It is customary for the judge to read these directions to the jury whilst they have it in front of them.
- It has been suggested by Bench Book authorities that a Route to Verdict should be read together at a suitable point either following the judge’s explanation of elements of offence and/or defence or just before the jury retires.
- The judge should elaborate on the elements of the offence and assist the jury by explaining how they may be applied to the facts of the particular case.

Benefits of written directions

- Improve jurors’ comprehension;
- Reduce deliberation time;
- Assist in resolving disputes between jurors;
- Help identify the final issues in the trial;
- Provide something to refer to in order to bring clarity. Exposure leads to deeper understanding and better application of legal principles;
- Jurors spend less time trying to recall directions and speculating on which directions were given;
- Allow judge and counsel to consider with some care how best and in what order to tackle legal and factual issues in light of the evidence.
2. **Written Route To Verdict**

Adapted from the Crown Court Bench Book 2010

**Guidelines**

A written Route to Verdict is different from a direction in law.

A written Route to Verdict is no more than a logical sequence of questions framed in words which address essential legal issues to be assessed by the jury in order to arrive at verdict(s).

Example—Self-defence: ‘Ask yourself the question – was it necessary for the accused to defend himself. If the answer is yes – proceed to question 2 – Was the force used proportionate?’

Where the case is complex the judge should consider whether there is likely to be advantage in providing the jury with a written Route (or Steps) to Verdict, which is no more than a logical sequence of questions, couched in words which address the essential legal issues, to be answered by the jury in order to arrive at their verdict(s). Occasionally, a judge may also wish to consider providing a written legal definition for the jury’s use.

Whether the case demands any written assistance is for the judge to decide. Some judges, in complex or lengthy cases, provide the jury with a written Route to Verdict or with written Directions of Law, or both. If the judge does intend to provide a Route to Verdict or written Directions of Law to the jury, the document should, if circumstances allow, be shown to the advocates in advance of speeches and in any event before the summing-up, so that they can comment and suggest amendments if they wish. The writer has, on several occasions, been much assisted by the advocates in the preparation and amendment of a Route to Verdict but the suggestions do not, of course, have to be accepted if the judge disagrees with them. Written directions of law should be an integral part of the summing-up which the judge and the jury read together. A Route to Verdict should be read together at a suitable point following the judge’s explanation of the elements of the offence and/or defence, or just before the jury retires.

If the Route to Verdict or written directions do not encapsulate every word of the judge’s legal directions, as they almost certainly will not (they will not, for example, include any directions concerning the separation of roles and the jury’s proper approach to evidence), the jury should be informed that the document is not intended to be a replacement for, but an addition to, the legal directions given orally.
3. Further Directions

Where the jury requires further directions, the judge should consult with the advocates. Provided the original direction was accurate and comprehensible, it should be repeated in the same terms. Any further explanation which is required should be crafted so as to minimise the danger of confusion. Any further direction should be guided by the specific requirements of the jury.
4. Deadlock

Before three hours

What happens if the jury returns (without a verdict) before the expiration of the statutory four hour period?— see s 28 of the Jury Act Chapter 6:53 as amended by the Miscellaneous Provisions (Administration of Justice) Act No 11 of 2014.

Illustration

I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.
After three Hours

If a verdict is returned it must be clear and precise. If after three hours there is a deadlock, the judge should enquire whether if given more time a verdict can be arrived at.

Illustration

Experience has shown that after juries are able to agree in the end if they are given more time to consider the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged. So in light of what I have already said I ask you to retire again and see whether you can reach a verdict in this trial.

Notes

If no agreement can be concluded on a verdict then the judge may in the appropriate case take the majority verdict (see s 28 of the Jury Act Chapter 6:53). If a unanimous verdict is required, the judge should order a retrial. Note however that the judge should not order a retrial and then send the jury to deliberate further. The jury is functus officio after ordering a retrial.
5. Taking The Verdict

Unanimous Verdict

Illustration

Your verdict, whether it be guilty or not guilty must be a unanimous one. All twelve of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of guilty or not guilty must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.
Notes

1. Murder and treason require unanimous verdicts (see s 19 of the Jury Act). The judge should explain the meaning of unanimous.

2. **La Vende v The State** (1979) 30 WIR 460 (CA):
   
   You cannot, assuming that you retire to consider your verdict, return to give your verdict before three hours, unless all of you are agreed on a verdict one way or the other. That is the meaning of the word ‘unanimous’. I give you this reminder so that you will bear it in mind. All of you must be unanimous one way or the other before you can come out here within three hours to give your verdict.

3. **Dunstan Johnson v The State** CA Crim No 55 of 1999:
   
   …all of you must say one thing. The verdict must be unanimous, that is, all nine of you together saying one thing. If all of you say the accused is not guilty that’s your verdict. If you disagree you must say so.

4. **Evans Xavier v The State** CA Crim No 78 of 1988:
   
   ‘Lastly, I must tell you that your verdict must be “unanimous”. And by unanimous I mean this: That all of you...must agree one way or the other.’

   It was held in this case that the right to disagree was taken away.

5. **Daniel Davis v The State** CA Crim No 75 of 1988:
   
   I have to tell you- that is that your verdict must be unanimous. I am certain you know what “unanimous” means. That is it means you must all agree one way or the other. One way or the other, I mean, that he is guilty or not guilty. Once you have agreed, then you knock and you let the Marshals know that you are ready and you come and you give your verdict. If you all are not agreed and three hours pass, then I will send to find out if you need more help. That is the meaning of “unanimous”.
Majority Verdicts

Majority verdicts do not apply in capital cases.

If manslaughter is offered in the alternative and the jury finds the accused not guilty on the charge of murder, the court has the discretion to accept a majority verdict on manslaughter ie 9 out of 12 jurors agree. If the jurors disagree then a retrial should be ordered.

In non–capital cases, when the jury has been charged and retired, a majority verdict (7 out of 9 jurors agree) may be received and entered, at the discretion of the trial judge (see s 28(1) of the Jury Act Chapter 6:53).

The jury should be asked how they are divided (number) without disclosing in whose favour the majority lies.

Alternative Verdicts

It is a preferable practice that the issue of whether an alternative verdict is available should be dealt with 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.

There may be the need to consult with counsel. Alternative verdicts are available for:

1. Attempted murder/wounding with intent;
2. Wounding with intent/unlawful wounding;
3. Murder/manslaughter;
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.
Illustration: Attempted Murder

If you find him guilty on count 1 of attempted murder ie 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.
Notes

In the sample direction given above, where the jury is sure that the accused was guilty of wounding with intent the verdict will be: not guilty of attempted murder; guilty of wounding with intent.
Inconsistent or Ambiguous Verdicts

It is incumbent on the trial judge to ensure that verdicts are truly inconsistent. The judge should put questions to clear up the inconsistency and direct the jury to retire to reconsider the verdicts.

Notes

1. Shirley (1964) 6 WIR 561 (CA Jamaica): The jury returned a verdict of guilty of murder; not guilty of manslaughter. These were incompatible verdicts. A verdict of not guilty of manslaughter must of necessity negate an unlawful killing. An unlawful killing is an essential element of murder.

2. Steele (1975) 24 WIR 317 (CA Jamaica): There were 4 counts of indecent assault and robbery with aggravation. The appellant was found guilty on count 1, but not guilty on 3 other counts. The trial judge refused to accept the verdicts in favour of the appellant holding they were a compromise. The judge then directed the jury to retire to reconsider. The jury returned verdicts of guilty on all four counts.

3. It was held on appeal that the verdict on the second count was not inconsistent with the verdict on the first count or with the evidence. The trial judge therefore had no authority to refuse to accept the verdict of not guilty on the second count. Accordingly the trial judge had erred in directing the jury to reconsider the verdicts.
6. Reasons For Verdict

Guidelines

Currently, judges have no power to question the jury as to the basis for verdict. In exceptional cases the trial judge possesses the discretion to request reasons of the jury but this discretion must be exercised with great care. Judges should deal with this issue using common sense, experience and judgment. The case of Isaacs (1997) 41 NSWLR 374 (CA) suggests that before the jury retires to consider their verdict, the judge should indicate that he will be asking the jury to state the basis for their verdict.

Reasons for Verdict—cases where appropriate

In cases where diminished responsibility and provocation are pleaded together, it has been considered especially important: Cawthorne [1996] 2 Cr App R (S) 445 (CA). In Cawthorne the jury was asked for a basis for the verdict but declined to give it. It was held that the basis was not necessary. The commentary in this case suggested that the safest course may be for the judge to form his own view on the evidence which has been heard. It is a discretion which has to be exercised. In that case Swinton Thomas LJ said:

Following a verdict the judge was entitled to sentence the accused on the basis of the facts which he heard in evidence as they appeared to him to be. On the facts of this particular case we have absolutely no doubt that the judge was right to sentence on the basis that the jury’s verdict was based on absence of intent to kill or to cause really serious harm. In our judgment, as in his, any other basis of sentencing would fly in the face of the clear evidence in the case and in the face of commonsense.

Notes

Byrne [2002] EWCA Crim 632: Manslaughter directions were given; lack of intent; provocation. The jury was not invited to give a basis for the verdict. It was held that asking for a basis for the verdict is discretionary. The court had properly exercised the discretion, but, in passing sentence, the judge should give reasons and explanations for his conclusions.
7. Discharge After Trial

The jury must be discharged immediately upon delivery of verdict. They cannot be recalled. Once discharged the jury is functus officio and cannot be recalled for any purpose.

Notes

1. Peter Holder v The State (1996) 49 WIR 450 (PC) per Steyn LJ at pages 453-454:

   Finally, counsel for the appellant submitted that the judge erred in directing the jury to retire and deliberate at 6.40 pm. That the jury did not feel under undue pressure is demonstrated by the fact that they retired for more than an hour before bringing in their verdict. That is a substantial retirement in local conditions. Their lordships agree with the Court of Appeal that no prejudice to the appellant was caused by the late retirement. Nevertheless, in agreement with the Court of Appeal, their lordships must record that such a late retirement of the jury in a capital case is undesirable.


   Counsel for the prosecution, in helpful address to the court, has submitted that once the jury have been told they are discharged from reaching a verdict in the matter that is the end of that particular trial, and that any subsequent proceedings are a nullity because the jury, having been discharged, are functus officio.

   In our judgment, that is a good argument. When the jury returned the Assistant Recorder should have asked them whether there was any sensible prospect of their reaching agreement if they had more time. He did not ask them that; he took upon himself the view, which was a wrong view, that they would be unable to reach a verdict, and he consequently discharged them. In our judgment, the subsequent proceedings were a nullity; the jury had already been discharged. Accordingly this conviction must be quashed and the appeal allowed.
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