SPECIMEN DIRECTIONS IN JURY TRIALS

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Judicial Studies Board, Hong Kong

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FOREWORD

This is a revision of the set of directions issued by the Judicial Studies Board in 1999.

The primary responsibility of a trial judge in a criminal trial is to ensure a fair trial. To that end the summing-up must be tailored appropriately to the particular circumstances obtaining in each different case. The benchmark by which a summing-up is to be judged was described by Lord Mackay of Clashfern in his speech in *Regina v Adomoko* [1995] 1 AC 171 at 189 D-F as being :

> *"I believe that the supreme test that should be satisfied in such directions is that they are comprehensible to an ordinary member of the public who is called to sit on a jury and who has no particular prior acquaintance with the law. To make it obligatory on trial judges to give directions in law which are so elaborate that ordinary members of the jury will have great difficulty in following them, and even greater difficulty in retaining them in his memory for the purpose of application in the jury room, is no service to the cause of justice."*

Subject to any indications to the contrary by the appellate courts, no particular form of words is required and a judge is free to depart from the suggested directions, provided that the directions are in accordance with the law. Above all, judges are enjoined to avoid converting these specimen directions into a series of formulae to be incanted whether or not they are appropriate to the unique facts and circumstances of each particular case.

Note: We are grateful to the Judicial Studies Board in England which has kindly granted permission for the use of their specimen directions, suitably amended for our own purposes and, pursuant to that permission, the directions have now been placed online which enables professional and public access.

Judicial Studies Board, Hong Kong

July 2009

I GENERAL

1. FUNCTIONS OF JUDGE AND JURY

Our functions in this trial – that is, my function as judge and your function as jury – have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.

It is also my function to remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case. You and you alone must decide what evidence you accept, what evidence you do not accept and what evidence you are not sure about; and when you come to consider your verdict, you and you alone, must do that.

You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the defendant has been proved. You will do that by having regard to the whole of the evidence [including the agreed/admitted evidence] and forming your own judgment about the witnesses, and which evidence is reliable and which is not. The evidence consisted of the oral testimony of witnesses [both prosecution and defence] who were called to the witness box [and the agreed statement of facts][and the witness statements that were read to you].

[*Add something along the following lines, if you believe it may be of assistance in the particular case:* You have sworn an oath or affirmed that you will deliver a true verdict according to the evidence. Therefore you must decide this case only on the evidence which has been placed before you. There will be no more. You must not speculate about what evidence there might have been, or allow yourselves to be drawn into speculation.][3]

The facts of this case are your responsibility. You will wish to take account of the arguments in the speeches you have heard, but you are not bound to accept them. Equally, if in the course of my review of the evidence, I appear to express my views concerning the facts, or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them; and if I do not mention something which you think is important, you should have regard to it in any event, and give it such weight as you think fit. When it comes to the facts of this case, it is your judgment alone that counts.

Notes :

1) It is important to remember that the above directions concerning the functions of judge and jury are for reference only. Each case is obviously different and may well require a different emphasis to be placed on different aspects of the directions or even additions to them.

2) If, as rarely but sometimes happens, evidence is misrepresented in a closing speech, it should be corrected in the summing up.

3) On speculation, see also Circumstantial Evidence, **Direction 21**.

Archbold (2009) 4-376
Archbold Hong Kong (2009) 4-190
Blackstone (2009) D 17.26

2. BURDEN AND STANDARD OF PROOF

Burden of Proof :

> In this case the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.

Standard of Proof :

> How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. [But see note 1] Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of "Guilty". If you are not sure, your verdict must be "Not Guilty".

Notes :

1) Normally, when directing a jury on the standard of proof it is not necessary to use the phrase 'beyond reasonable doubt'. But when it has been used in the trial, e.g. by counsel in their speeches, it is necessary to give the following direction: 'The prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt.' See R *v Adey* [1998] EWCA Crim 781, where the Court of Appeal in England cautioned against any attempt at a more elaborate definition of "being sure" or "beyond reasonable doubt". Similarly in *R v Stephens* (2002) The Times 27 June the Court of Appeal said it was unhelpful to distinguish between being "sure" and "certain". See also *R v LEE Yuk Wah* [1985] HKLR 193 and *HKSAR v Wong Hiu Shui*, CACC 598 of 2002.

2) When in the body of the summing up the judge deals with the defence/defences which has/have been put forward in a case, whether put forward in cross-examination or in evidence by the defendant or by witnesses on his behalf, the jury should be reminded that it is not for the defendant to prove that defence (where that is so) and there should be added to that reminder, in respect of each defence canvassed in the summing up, a statement that if the defence thus put forward is or **may** be correct, then the defendant is entitled to be acquitted :

> The defence put forward in this case/in this regard is that (*e.g. the defendant acted in lawful self defence*). It is not for the defendant to prove that (*he acted in lawful self defence*). On the contrary, it is for the prosecution to prove that (*he did not*). Of course, if the account [given by the

> defendant/put forward by the defence] is true, then he must be acquitted, but he must also be acquitted if that account **may** be true.

In this regard see *Sze Kwan Lung & others v HKSAR* (2004) 7 HKCFAR 475 and *Law Chung Ki v HKSAR* (2005) 8 HKCFAR 701. It is clear from these decisions that it is objectionable to direct a jury that it must act only upon evidence that it finds to be true. That is because evidence favourable to the defence that *may* be true must also be acted upon, and that is a point that must always be made to a jury. The message that has always to be imparted is that even if the jury does not positively believe the evidence for the defence, they cannot find an issue against the defendant contrary to that evidence if that evidence gives rise to a reasonable doubt about that issue: *Liberato & others v R* (1985) 159 CLR 507, 515, referred to in both Court of Final Appeal decisions.

See also **Direction 44A**.

Archbold (2009) 4-380
Hong Kong Archbold (2009) 4-195
Blackstone (2009) F3.1.
Bruce "Criminal Procedure" Vol. 1, Div. VI para. 1101.

2A. REVERSE ONUS AND EVIDENTIAL BURDEN

Reverse onus

A reverse onus arises where the law places an onus on a defendant to prove any matter or fact relevant to the offence : see Mason NPJ in *HKSAR v Lam Kwong Wai and another* (2006) HKCFAR 574 at 594. A distinction is drawn between, on the one hand, the "legal" or "persuasive" burden of proof and, on the other, the "evidential" burden. The distinction is important for the purpose of any summing up. A persuasive burden requires an accused to prove that it is more likely than not that his version of a fact in issue is true, whereas an evidential burden requires only "... that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case." The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. See *R v DPP ex p Kebilene & Others* [2002] 2 AC 326 at 378H-379A, cited by Mason NPJ in *Lam Kwong Wai* above at 594J-595A. See also Archbold (Hong Kong) (2009) para 4-192 to 4-196.

If an issue arises on which the defence bears the burden of proof, that is to say, the persuasive burden, because, for example, of a statutory provision, then in the body of the summing up when he deals with that issue, the judge should provide a direction such as the following :

> If the prosecution has not made you sure that the defendant has (*state generally what the prosecution must prove*), that is an end of the matter and you must find the defendant "Not Guilty". However, if and only if, you are sure of those matters, you must consider whether the defendant [e.g. had a reasonable excuse etc. for doing what he did]. The law is that that is a matter for him to prove on all the evidence; but whenever the law requires a defendant to prove something, he does not have to make you sure of it. He has to show that it is probable, which means more likely than not, that [e.g. he had a reasonable excuse etc. for doing it]. If you decide that probably he did [e.g. have a reasonable excuse etc. for doing it], you must find him 'Not Guilty'. If you decide that he did not, then providing that the prosecution has made you sure of what it has to prove, you must find him "Guilty".

Hong Kong Archbold (2009) 4-196
Archbold (2009) 4-386

Blackstone (2009) F3-40

Evidential Burden

Where the burden that is imposed on a defendant is merely an evidential burden, the practical approach is that commonly used in cases of provocation or self-defence and the following points, noted at paragraph 144 of *Hung Chan Wa and Another v HKSAR* [2005] 3 HKLRD 291, should be noted :

(1) it is for the judge to determine whether sufficient evidence has been adduced to constitute an issue to be left to the jury;

(2) the burden may be discharged regardless of the quarter from which the evidence derives. In other words, the evidence upon which the accused may rely in this regard may emanate from the prosecution or in the testimony produced by the accused;

(3) as said by Lord Hope in *R v Lambert* [2002] AC545, at 588 :

> "... an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence."; and

(4) judges should avoid giving directions as to what does and what does not constitute an evidential burden and whether or not such a burden has been discharged. By the time of the summing up, the issues will have crystallised and the judge himself should by then have determined, if necessary after discussion with counsel, whether sufficient evidence as to the point in contention has been adduced to raise an issue to be left to the jury.

"An evidential burden stands in contrast to a reverse persuasive burden. It does not require the accused to establish anything as a matter of proof. An evidential burden arises where the defendant wishes to put in issue some matter that is potentially exculpatory while the prosecution continues to bear the persuasive burden throughout. In such cases, there must be evidence supporting such exculpatory matter which is sufficiently substantial that it raises a reasonable doubt as to the defendant's guilt. Unless such reasonable doubt is removed, the prosecution fails to prove its case. If, on the other hand, the accused fails to adduce or point to any evidence on the relevant issue or if the evidence adduced is rejected or is not sufficiently substantial to raise a reasonable doubt, the potentially exculpatory matter places no obstacle in the way of the prosecution proving its case beyond reasonable doubt. An evidential burden, functioning in this manner, is wholly consistent with the presumption of innocence." : see *HKSAR v Ng Po On*, FACC6/2007 *per* Ribeiro PJ.

Hong Kong Archbold (2009) 4-194
Archbold (2009) 4-382

3. SEPARATE TREATMENT

Two or more defendants and one count

> You must consider the case against and for each defendant separately. [The evidence concerning each defendant is different and therefore your verdicts need not be the same.]

One defendant and two or more counts

> You must consider the case against and for the defendant on each count separately. [The evidence concerning each count is different and therefore your verdicts need not be the same.]

Two or more defendants and two or more counts

> You must consider each count separately and the case against and for each defendant separately on each count. [The evidence concerning each count and each defendant is different and therefore your verdicts need not be the same.]

Notes:

1. Illustrate from the indictment, and deal with the necessity to consider the counts and defendants separately both in the directions on the law and, when appropriate, in the summing up of the evidence.

2. In some circumstances it may be desirable for the jury to consider the evidence against one defendant on all the counts first, in which case the direction should be adjusted accordingly, always stressing that the evidence on each count must be considered separately. For an example, see Note 2 at Direction 31.

3. There may be cases, where, on the facts, if the jury finds a defendant guilty, or not guilty, on one count, it would be difficult for them to come to a different conclusion on another count. If so, direct the jury accordingly. It will more often be appropriate, in telling the jury to consider each count and/or each defendant separately, to emphasise that if they were to conclude that a defendant was guilty or not guilty on one count, it did not necessarily follow that he was similarly guilty or not guilty on the other; and so, too, with separate defendants.

4. For a direction where a co-defendant has pleaded guilty, see Direction 10.

5. In some cases it may be appropriate to tell the jury that their important obligation to consider each count separately on its merits does not mean that

there is not evidence common to all counts or a number of counts. There may well be evidence which will assist them in reaching a verdict on separate counts.

6. In a case involving a number of counts it could be (depending on the circumstances) that the jury's decision on the facts of one count might well assist them in coming to a conclusion on another/other counts. In an appropriate case, they should be directed accordingly, adding that nevertheless, they must reach separate verdicts on each count having focused on each separately and having formed a separate decision about it.

Archbold (2009) 4-377.
Archbold Hong Kong (2009) 4-190D.
Bruce "Criminal Procedure, Trial on Indictment"
Vol. 1 Div. VI para. 1102.
Blackstone (2009) D17.28.

4. IRRELEVANT / EMOTIVE CONSIDERATIONS

In some cases it will be necessary for judges to address emotive but irrelevant comments or prejudicial publicity; or the very nature of the charge may require an appropriate warning. What, if anything, is said depends, of course, on the circumstances which have arisen. The following are but examples:

Prejudicial publicity

> Do not be sidetracked in your task by irrelevancies. Your task is to reach a verdict according to the evidence, not according to newspaper or media reports. The [kidnapping of Mr. X] gave rise to considerable publicity, both at the time of the [kidnapping] and recently in the reporting of this case. But you do not decide the case on publicity, for publicity is not evidence. Your task is to decide whether it is proved that [*this* man was party to the kidnapping] on the evidence presented to you in this trial, and you must ignore any newspaper or media report you have seen or heard.

See *R v Bowditch* [1991] Crim LR 831, CA (Eng).

A shorter example of a direction which could be given where there has been some though not extensive publicity in the press concerning the case is:

> If there has been anything in the newspapers, or magazines, or on the television about this case, or on the radio, disregard it. Your task is to reach a verdict according to the evidence presented to you in this court room not according to newspaper or media reports.

Emotive considerations

Equally on occasion it may be wise specifically to direct the jury to ignore any sympathy they may feel for a victim or anger or dislike generated by the nature of the offence and remind them that they are to base their verdict on an objective appraisal of the evidence. An example of such a direction is:

> Some of you may feel [considerable sympathy for (the victim)][angered by the crime of kidnapping]. But you are not in any way to base your findings of fact or your verdict upon any emotional reaction to the evidence in this case. You are to base your findings of fact and your verdict on an objective appraisal of the evidence.

Sentence

Do not mention sentence at all unless it is necessary to do so as a result of counsel's speech suggesting that if the jury were to convict the defendant he would be sentenced to a substantial prison sentence. In that case an example of what could be said is as follows:

> You should ignore what counsel said to you about any sentence which may be imposed upon the defendant if you were to convict him. In the event of conviction sentence is a matter for me, not for you. Thoughts about what may happen to the defendant if you were to convict him do not assist you in your task of deciding whether or not he is guilty or not guilty of the offence with which he is charged. So put any such thoughts out of your mind and simply concentrate on the evidence.

Note: Where a jury has been told or has learnt that the trial is a retrial, see *Chan Ka Man v HKSAR* FACC 9/2007 at paragraphs 9, 15 to 19.

Archbold (2009) 4-74a.
Hong Kong Archbold (2009) 4-44.
See also *R v Abu Homza* (2007) 1 Cr.App.R. 27
at para. 98.

5. ALTERNATIVE OFFENCES

More than one count: a primary and a lesser offence

> Counts 1 and 2 are alternative counts. You cannot find the defendant guilty on both. First consider count 1, [which is the more serious one]* involving (*set out allegation briefly*). If you find the defendant guilty on that count, do not consider count 2 at all. But if you are not sure that the defendant is guilty on count 1, then you will find him not guilty of that count and go on to consider count 2 [which involves etc].

* Where the alternative offences do not fall easily into a category of a primary and a lesser offence, then the direction should be adjusted accordingly.

A lesser offence within one count: pursuant to section 51(2) of the Criminal Procedure Ordinance

> Sometimes an allegation of one offence necessarily includes an allegation of a lesser offence. In such circumstances, the law provides that if a jury finds the defendant not guilty of the offence specifically charged in the indictment, they may find him guilty of the alternative, lesser, offence even though the lesser offence is not specified in a separate charge or count. In this case, you will see that [in relation to count 1] the defendant is charged with (e.g. trafficking in dangerous drugs). It is an offence to [e.g. be in possession of drugs for the purpose of trafficking] but it is also an offence merely to [e.g. be in possession of a dangerous drug]. If you are sure that the defendant [e.g. was in possession of a dangerous drug] but you are not sure that he [e.g. had possession of them for the purpose of trafficking], you will find the defendant not guilty of [e.g. trafficking in dangerous drugs] but guilty of the lesser charge of [e.g. possession of dangerous drugs].

Note:

Where the provisions of section 51(2) of the Criminal Procedure Ordinance apply, the judge should, at least before closing speeches, canvass with counsel whether the possible lesser alternative should or should not be left for the jury's consideration. Generally however it is wise to raise this matter with counsel as early as possible.

Criminal Procedure Ordinance section 51(2).
Archbold (2009) 4-453.
Archbold Hong Kong (2009) 4-263 to 269.
Bruce "Criminal Procedure, Trial on Indictment" Vol. 1 Div. VI para. 1103.

5A. SPECIMEN OR SAMPLE COUNTS

A. Where the specimen is a separately identifiable offence (see Note 1).

Count… is a specimen Count. The prosecution allege that D also committed [numerous/state number] other offences of the same kind. 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 D 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.

B. When the specimen is not a separately identifiable offence (see Note 2)

Count… is a specimen Count. The prosecution allege that, during the period referred to in that Count, D committed [numerous/state number] other offences of the same kind. Instead of loading up the Indictment with Counts charging many offences, they have selected one as an example, as they are entitled to do. To convict D you must be sure that he committed one such offence during the period concerned, whether or not you are sure that he also committed other such offences.

Notes

1. An example would be a Count of obtaining by deception from the Social Welfare Department a specific sum of money on a specific day, evidence being adduced of a pattern of other such offences.

2. An example would be a Count of indecent assault on a child who claims to have been abused in the same way on many occasions, but cannot say precisely when or how often.

3. These directions will, of course, need adapting when there is more than one specimen Count.

Archbold (2009) 1-131.
Hong Kong Archbold (2009) 1-116.
Blackstone (2009) D11.33.

6. CHILD DEFENDANT, CRIMINAL RESPONSIBILITY

You are trying a child of [12]. The law is that a child of that age cannot be guilty of a criminal offence unless at the time of the alleged offence he knew that what he was doing was seriously wrong.

Even if you are sure that he did the acts alleged and that he did them with the intention of [*state mens rea of the offence, e.g.* the intention of killing or causing serious bodily harm] you must not convict him unless you are also sure that he knew that what he was doing was seriously wrong. A 'seriously wrong' act is one to be distinguished from an act of mere naughtiness or childish mischief.

The mere fact that the defendant did the act charged, or the mere fact that **you** think that the act was an obviously wrong [or even horrifying] thing to do, does not of itself entitle you to conclude that **this** defendant must have known that the act was seriously wrong. Similarly, even if you were to decide that any normal youth of the defendant's age would know the act to be seriously wrong, that does not necessarily mean that **this** defendant knew that. The question is whether **this defendant** knew the act to be seriously wrong. When you decide that question you do so upon the evidence[4] concerning this defendant's ability to distinguish right from wrong. You examine that evidence in the context of the evidence of what the defendant in fact did, and all the surrounding circumstances, which include what the defendant said and what he did before and after the act. Now, if in the light of that evidence, you are sure that the defendant knew that what he was doing was seriously wrong, then you will convict him.

Notes:

1. A child under the age of 10 is in law incapable of committing a crime. Over the age of 14 he is fully responsible for his actions. A child between those ages is presumed not to be capable of criminal behaviour and not to know the difference between right and wrong unless and until that presumption is rebutted by the prosecution.

2. Where a specific intent or state of mind is an ingredient of the offence, an appropriate direction must be given in addition to the above.

   See C (*A Minor) v DPP* [1996] 1 A.C. 1, HL; *CC (A Minor) v DPP* [1996] 1 Cr App R 375 and the general guidance given in *S (A Minor)* February 1996 CA 94/7189/W2 and *L and Others v DPP* [1996] 2 Cr App R 501. In *W* (*A Minor) v DPP* [1996] Crim LR 320, the Divisional Court in England said that courts must be alive to the trap of applying the presumption of normality. See also *L and B v DPP* [1998] 2 Cr App R 69.

3. In a prosecution of this sort there must be some independent evidence (apart from the evidence of the crime itself) which allows the jury to determine the

question of whether the defendant knew what he was doing was seriously wrong.

4. The relevant evidence should be summarised in an appropriate part of the summing up.

Juvenile Offenders Ordinance (Cap. 226) section 3.
Archbold Hong Kong (2009) 20-343.
Archbold (1999) 1-91 page 45 et seq. (which sets out the position in England prior to September 30 1998 when the Crime and Disorder Act 1998 abolished the rebuttable presumption that a child aged 10 but under 14 is incapable of committing an offence).
Blackstone (2009) A3.39.
Bruce & McCoy II [403].

7. FITNESS TO PLEAD AND STAND TRIAL

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

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

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

The test which you must apply is this: Is the defendant capable of understanding [his trial/these proceedings] so that he can:

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

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

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

Note: See *R v Pritchard* (1836) 7C & P 303; *R v Robertson* [1968] 52 Cr App R 690 and *R v Berry* Cr App R 156 and *R v O'Donnell* [1996] 1 Cr App R 286. A person is not unfit because, in consequence of hysterical amnesia, he has no recollection of the events giving rise of the charge, see *R v Podola* (1959) 43 Cr App R 220, CCA.

Archbold (2009) 4-166a onwards.
Archbold Hong Kong (2009) 4-37.
Blackstone (2009) D12.2 et seq.
Bruce: Criminal Procedure VI [254].

8. JOINT RESPONSIBILITY AND ACCESSORIES

The question of joint responsibility and its application to a particular case is difficult enough for a judge and, save in straightforward cases where the basic direction may suffice, is likely to be especially difficult for a jury. It is important therefore for the directing judge not only to be accurate and precise in the direction as a matter of law, but to make the direction comprehensible to the jury *in the context of the particular case*. A general direction as to what constitutes joint responsibility in law should be supplemented, at an appropriate point in the summing-up, by an explanation of how it is alleged in the instant case that the defendant was a party to the crime, what his answer (if any) is, and what would and what would not, on the facts, suffice to have constituted him or her a party.

It is a matter for the court to ascertain from the evidence (and from prosecuting counsel) on what basis the prosecution case is being put, whether on the basis of joint enterprise (in which case direction A or B will likely suffice) or of otherwise assisting or bringing about the offence (in which latter case direction C or D may suffice). In some cases the directions could overlap in their applicability and considerable care should be exercised in the phraseology of the direction used. It follows that these specimen directions must be recognized as starting points only, as guides to the proper approach.

Joint Enterprise

Direction A is a **basic direction** and it, or a direction along its lines, will suffice in most cases. However, the situations and combinations of factual issues which can and do present themselves are varied and can be complex, especially in murder/manslaughter cases and it is **essential** to adapt a joint enterprise direction to the particular circumstances of the case.

In cases of doubt or complexity judges should discuss the proposed direction with counsel before final speeches.

Direction B: Where the case is that the particular act complained of is not the subject of pre-planning, but may e.g. have arisen spontaneously and/or e.g. where it is open to the jury to find that the injury or damage could have been caused by one person A acting alone, and it is the case of the other defendants B and C that they should not be criminally responsible for A's act. Typically this arises where it is suggested that one of a group acted alone or went outside what was agreed and contemplated.

Examples are given of situations which may arise where there is evidence of unusual/unforeseen consequences etc. and of non-participation of defendant B because it is said that the act of another, A, was outside his contemplation or foresight.

Accessories

Direction C: Where it is the prosecution case that the defendant was absent from the scene of the offence, but he had 'counseled or procured' its commission.

Direction D: Where it is the prosecution case that the defendant 'aided and abetted' the offence.

Handouts:

It is a matter for the discretion of a judge whether and in what circumstances to reduce a specific direction to written form as a handout. It is likely to prove useful in cases of murder, for example, where alternative defences have to be considered and explained. If handouts are used they should be concise, and the jury told not to elevate the status of the written direction above that of directions delivered orally.

Note:

In murder cases involving an attack by several persons, careful attention must be paid to the implications of the House of Lords' decision in *R v Powell* and *R v English* [1999] 1 AC 1. Also note *R v Uddin* [1998] 2 All ER 744, *R v Greatrex* [1999] 1 Cr App R 126 and *R v O'Flaherty* [2004] 2 Cr App R 20. These cases relate to what degree the secondary members of the joint enterprise must have the nature of the acts perpetrated by the primary member of the joint enterprise in their contemplation. An important recent decision (2 July 2008) is *R v Rahman* [2009] 1 AC 129. In *Hayden Jackson v The Queen* [2009] UKPC 28 (7 July 2009) the Privy Council (paragraph 11) cited with approval the re-statement of principle stated by Lord Brown of Eaton-under-Heyword in *Rahman* at paragraph 68:

> " If B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplate that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B." (The italicised words are designed to reflect the *English* qualification.)"

See also *Sze Kwan Lung v HKSAR* (2004) 7 HKCFAR 475.

See also *R v Gilmour* (2000) 2 Cr App R 407 as to the situation where though both primary and secondary members of the joint enterprise contemplate the committing of the same act, their intentions differ (e.g. as to whether the act is intended to kill or simply to cause actual bodily harm).

See also Law Commission Report Consultation Paper 177 "A new Homicide Act for England and Wales" (2005) pages 120–133 and Report 305 "Participating in Crime" page 22.

For **Acts & Declarations** in the course of a joint enterprise see Conspiracy, 12.3, post.

Joint Enterprise

A ***Basic direction:*** *(In most cases this will be sufficient)*

The prosecution's case is that [the defendants committed this offence together][the defendant committed this offence jointly with …]. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty.

The words 'plan' and 'agreement' do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look, or it can be inferred from the behaviour of the parties. **The essence of joint responsibility for a criminal offence is that each defendant shared a common intention to commit the offence and played his part in it [however great or small] so as to achieve that aim.**

Your approach to the case should therefore be as follows: if, looking at the case of either/any defendant, you are sure that with the intention I have mentioned he took some part in committing it [with others/with B and C] he is guilty.

Only where appropriate.

Mere presence at the scene of a crime is not enough to prove guilt. But if you find that a particular defendant was at the scene and intended and did by his presence alone encourage the others [in the offence] he is guilty.

B Where it is open to the jury to find that one defendant acted alone, or went beyond what was 'agreed'.

(First give the basic direction A and add the following, suitably adjusted to the facts of the case. For further assistance see the three examples below):

Even if there was a plan to [e.g. commit a burglary] if what A did [e.g. in committing an assault on the occupant of the premises] went beyond anything that the other(s) had agreed or realised he might do, A alone is responsible for that act and is therefore guilty of the offence. [The others would not be guilty of that offence [although they would be guilty of burglary]].

But if you are sure that B did realise that A might [e.g. commit an assault in furtherance of the burglary] the law is that by taking part in the burglary with that knowledge, he is taken to have accepted the risk that A would act in that way, and so he adopts those acts and is responsible for them [even if he would have

preferred that A had not acted like that at all].

Example 1 - the 'spontaneous act' (The examples are provided for the benefit of the judge.)

If a gang of youths goes out looking for trouble and one of them, A, starts a fight, all the others who join in to back him up will be acting unlawfully, and will be guilty of common assault at least. If the victim suffers some bodily harm then each one who participated will be guilty of assault occasioning actual bodily harm, no matter which one actually caused the damage. (Basic direction).

If one of the gang, A, has a knife and in the course of the fight uses it to kill/or cause serious bodily harm to the victim A will be guilty of murder/section 17 if the prosecution proves that he intended to kill or to cause serious bodily harm.

But in addition, each of the other gang members B and C who take part in the fight may also be guilty of murder/section 17, but only if [when he took part]:

1. He knew A had a knife, and

2. He shared A's intention to kill or do really serious bodily harm or realised that A might use the knife with that intention, and nevertheless took part.

If – on the other hand – the prosecution proves against a defendant that he participated in the fight unlawfully and that when he did so:

1. He knew that A had a knife, and

2. He realised that A might use the knife to cause some injury falling short of really serious harm,

then that defendant is guilty of manslaughter if A kills the victim or section 19 (or AOABH) if he does not.

Suggested concluding direction in this example (assuming the jury have been directed as to the elements of murder and manslaughter):

Therefore, before you convict A of **murder** you must be sure:

1. That he caused or inflicted the fatal wound or injury.

2. That when he did so he then intended to kill or cause really serious bodily harm to the deceased.

[And if you find him not guilty of murder, then]

before you convict A of **manslaughter** you must be sure:

1. That he caused or inflicted the fatal wound or injury by [unlawful act];

2. That he intended to [do the unlawful act]; and

3. That the act was one which all sober and reasonable people would realise must subject the victim to the risk of some harm.

In respect of other members of the gang against whom there is no evidence to prove any one of them did the act which resulted in the death of the victim:

Before you can convict B [or C] of **murder** you must be sure [looking at their cases separately]:

1. That he took part in the attack on the victim with A; [and]

2. That when he did so he either shared A's intention to kill or cause really serious bodily harm OR realized that A might attack the victim with the knife either intending to kill him or cause him really serious injury; [and]

3. (*Only when the issue arises – and see Note to Example 3(a) below:*) That B [or C] had not had a change of mind and withdrawn from the joint enterprise before A had started to [do the relevant act which constitutes the offence from which B [or C] claims he had withdrawn.]

[And if you find him not guilty of murder, then before you can convict B [or C] of **manslaughter** you must be sure [looking at their cases separately]]:

1. That he took part in the attack on the victim with A [and other members of the gang];

2. That he intended OR realized that A [or other members of the gang] would or might do an act of the sort which caused the death of the victim; and

3. That the act was one which all sober and reasonable people would realise must subject the victim to the risk of some harm; and

4. (*Only where the issue arises – and see Note to Example 3(a) below:*) that B [or C] had not had a change of mind and withdrawn from the joint enterprise before A [or other member of the gang] had started to [do the relevant act which constitutes the offence from which B [or C] claims he had withdrawn].

Example 2 – The *R v English* problem

A and B set out to attack their victim with wooden stakes. A, unknown to B, has a knife and uses it to stab the victim, who dies.

Suggested concluding direction in this example:

If you are sure that A and B set out to attack [the victim with wooden stakes which each of them carried] but A [killed by stabbing the victim with a knife], and you think B may be telling the truth when he says he had no idea that A [had or would use the knife] then you must consider whether A's [use of the knife] was fundamentally different from any act which B realised A might do.

If you are sure that it was not fundamentally different, and you are satisfied A is guilty of murder, then B is also guilty of murder, providing you are sure that he realised that A might assault the victim intending to kill or cause really serious bodily harm. If B realised that A might cause injury falling short of really serious harm he would be guilty of manslaughter. But if A's act was, or may have been, fundamentally different from any act which B realised A might do then B is not guilty [either of murder or manslaughter].

Example 3(a) – 'Unusual consequences'

Two men unlawfully enter a building which they know to be occupied. A steals part of a lift's mechanical equipment. B knew that A would do this in the course of the burglary or realised that he might do so. As a result of the removal of this equipment the lift is left in a dangerous condition and when next operated causes a fatality. They are both guilty of burglary and of manslaughter if a reasonable man sharing their knowledge of the situation would have realised that what A did might cause a risk of some physical harm to the lift user.

Suggested concluding direction in this example (assuming the elements of manslaughter have been explained to the jury):

Therefore, before you can convict B (of manslaughter in this example) you must be sure:

1. That there was an agreed plan to commit the [burglary];

2. That B took part in [the burglary], either intending that A should do the act which in fact caused death, or realising that he might do this act and

3. That a reasonable man with B's knowledge of the situation would have realised that this act might cause a risk of some harm to the householder.

4.	(***Only*** where the issue arises – and see Note below:) That B had not had a change of mind and decided to withdraw from the agreed plan before A had started to perform the relevant act [which constitutes the offence].

Note:

As to withdrawal from a joint enterprise, see Archbold (2009), paras. 18–26 to 18–29 page 1731–2, *R v Mitchell and another* [1999] Crim LR 496 and *R v Robinson* [2000] 5 EWCA Crim 8.

Example 3(b) – 'Unusual consequences'

Two men agree to commit a burglary intending to steal anything of value. Both know that the house is occupied. Whilst A is opening the safe upstairs, B without A's knowledge, turns on the gas taps in the kitchen and lights a candle. In the resulting explosion, the householder is killed. B is guilty of burglary and at least manslaughter. A is guilty of burglary only, for in this illustration B's act is obviously fundamentally different from anything A anticipated he might do.

Accessories

C Counsel or Procure

Where it is the prosecution's case that the defendant B was not present at the scene of the offence, but there is a specific allegation that he had 'counselled or procured' A to commit it.

It is the prosecution's case that the defendant B was not present when the offence of […] was committed, but that he is nevertheless guilty of the offence because he counselled or procured its commission. **Counselling** means that he ordered, advised, encouraged or persuaded [A] to commit the offence. **Procuring** means that he intended that [A] should commit the offence and took steps to ensure that he did (e.g. by threatening him with violence if he did not, or by paying him to do so).

Before you can convict B of this offence you must be sure:

1. That A in fact committed the offence of […]; **and**
2. That **either B counselled** A to do it in the sense that he ordered, advised, encouraged or persuaded him to do it **or** that B **procured** A to do it, in the sense that he set out to cause him to do it, and in fact [directly or indirectly] did cause A to do it; **and**
3. That the offence which A committed was within the scope of what B counselled/procured him to do.
4. (***Only*** *where the issue arises:)* That B had not had a genuine change of mind before A committed the offence and expressly instructed A not to do it.

D Aid or abet

Where it is the prosecution's case that the defendant B, whether he was present at the scene of the offence or not, had by some act "aided or abetted" A to commit the offence.

It is the prosecution's case that although the defendant B did not himself do [or commit] the [act/offence] he nevertheless assisted and intended to assist A in committing the offence.

A person who assists or helps another person to commit an offence can also be guilty of that offence as an aider and abettor.

Before you can convict B of the offence, you must be sure:

1. That A in fact committed the offence of […]

   That B assisted or helped A to commit the offence by [act or acts of assistance]

2. That B intended to assist or help A commit the offence.

Archbold Hong Kong (2009) 17-7 to 17-22.
Archbold (2009) 18-15.
Blackstone (2009) A5.1 to A5.15.

9. ASSISTING OFFENDERS PURSUANT TO SECTION 90, CRIMINAL PROCEDURE ORDINANCE CAP. 221

Before you may convict the defendant A of [the offence], you must be sure of three things:

1. That B committed an arrestable offence, which the offence of … is; **and**
2. That A knew or believed that B was guilty of that offence [or some other arrestable offence]; **and**
3. That A, in that knowledge or belief, did an act [namely …] with intent to impede [that is hinder] B's arrest or prosecution.

Note: Section 90(1) provides for a defence of lawful authority or reasonable excuse.

Archbold (2009) 18-34.
Archbold Hong Kong (2009) 17-32 to 17-35.
Blackstone (2009) B14.48.

10. PLEA OF GUILTY/CONVICTION OF ONE DEFENDANT, EFFECT ON DEFENDANT ON TRIAL

A Joint charge where one or more defendants have pleaded guilty but no reference to this has been made to jury

> The defendant whom you are trying is alleged to have committed the offence together with B. That is why you see B's name in the indictment. You are not trying B. Do not concern yourselves in any way with what has happened in his case. Do not speculate about that. You must concentrate upon the case of this defendant alone and decide whether the evidence before you makes you sure of his guilt.

B Joint charge where jury is informed of plea of other defendant (see Note 2)

> You have heard that B, who is named in the same count of the indictment as the defendant, has pleaded guilty. The fact that he has pleaded guilty is now known to you, but it can have no bearing on your decision in the case of this defendant. The prosecution has to prove its case against this defendant so that you are sure of his guilt, just as it would have to if B had not pleaded guilty.

Note:

1. In referring to English cases concerning the admission of evidence of the conviction of a person other than the accused, note that sections 74 and 75 of PACE 1984 have not been enacted in Hong Kong.

2. In *R v Hall* [1993] Crim LR 527, the Court of Appeal said that the fear that a jury might be mystified by the absence of a co-accused who had pleaded guilty is more imagined than real.

3. There are a number of ways in which a co-offender's plea of guilty might become known to a jury. Any direction should be carefully tailored to the facts of the case.

Bruce & McCoy V [1101].
Archbold (2009) 4-269.

11. ATTEMPTS

Before you can convict the defendant you must be sure of two things: first that he intended to commit [the offence in question] and second, that, with that intention, he did something which was more than mere preparation for committing that offence. It is for you to decide whether what he did was more than mere preparation.

Notes: 1. The offence of attempt at common law has now been abolished in Hong Kong: see section 159G et seq. Crimes Ordinance, Cap. 200.

2. It is inappropriate to refer to any of the tests for an attempt that were in use before enactment of Part XII A of the Crimes Ordinance. See Archbold (2009) 33-127; *R v Jones (KH)* [1990] 1 WLR 1057, CA; *R v Campbell* [1991] Crim LR 268; and *R v Qadir and Khan* [1998] Crim LR 828. Part XIIA of the Crimes Ordinance is modelled on the Criminal Attempts Act 1981 (UK) so English authorities after that date have applicability.

3. It is for the judge to determine whether there is evidence from which a reasonable jury properly directed could conclude that the defendant had done acts which were more than merely preparatory to the commission of the full offence: see e.g. *R v Geddes* [1996] Crim LR 894 and *R v Tosti* [1997] EWCA Crim 222. It is for the jury to decide, having regard to the burden and standard of proof, where the line has to be drawn, but the judge may help them in an appropriate case by indicating by way of examples, one circumstance well on each side of the line.

   See *R v Lin Kuo Liang* [1997] HKLR 694; *R v See Lee Shek* [1976] HKLR 636; *R v So Ching Kwan* Crim App No. 439 of 1991 (unreported).

Archbold Hong Kong (2009) 36-83 to 36-102.
Archbold (2009) 33-119 to 33-138.
Blackstone (2009) A6.60.

ATTEMPTING THE IMPOSSIBLE

Where the issue arises first give the direction above and continue Here, the commission of the offence of [handling] was impossible because [the goods which the defendant is alleged to have attempted to handle were not in fact stolen goods]. But that does not prevent him from being guilty of **attempting** [to handle stolen goods]. You may convict the defendant of **attempting** [to handle stolen goods]

if you are sure (1) [that he believed them to be stolen goods] and (2) that, with that belief, he [dishonestly handled or attempted to handle them.]

Note: Section 159G(2) Crimes Ordinance allows the commission of the offence of attempt even though the full offence is impossible. See also *R v Shivpuri* [1987] AC 1, HL.

Archbold Hong Kong (2009) 36-93.
Archbold (2009) 33-129.
Blackstone (2009) A6.69.

12. CONSPIRACY

Just as it is a criminal offence to (*here specify the substantive offence e.g. steal, rob, commit murder)*, so is it a criminal offence for two or more persons to **agree** with one another to commit that offence. An **agreement to commit an offence** is called a **conspiracy**; and that is the offence which is charged here.

Before you can convict either/any of these defendants of this offence, you must be sure:

1. That there was in fact an agreement between two or more persons to commit (e.g. *robbery*); **and**

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

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

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

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

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

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

* See below: "Things said and done in course/in furtherance of conspiracy."

It may be necessary or desirable - should the specific point/s arise - to add one or more of the following directions, explaining the point by reference to how it arises in the case:

1. To prove conspiracy, it is not necessary to prove that the crime was carried out. The agreement plus the intention to take part is sufficient.
2. To prove conspiracy, it is necessary to prove that an agreement was reached. Mere discussion about the possibility of committing the crime does not suffice to complete the offence of conspiracy.
3. If in fact there was an agreement to commit the offence, to which agreement the defendant was a party, intending to take part, withdrawal by him after the agreement is made and before the crime is committed is immaterial, and in such circumstances, the defendant would nonetheless be guilty of conspiracy.

Notes as to conspiracy generally:

(1) See section 159A Crimes Ordinance, Cap. 200. In *Yip Chiu-cheung v R* (1994) 99 Cr App R 406 Lord Griffiths said (at page 410), 'The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime which constitutes the necessary mens rea for the offence.'

(2) Depending on the conspiracy alleged the judge will have to give directions to the jury as to the elements constituting the offence the subject of the conspiracy. In some cases the necessity to prove an agreement will render any direction concerning intention as an element of the substantive offence otiose.

(3) On the question of jurisdiction in respect of certain conspiracy offences undertaken in a different jurisdiction, see Criminal Jurisdiction Ordinance, Cap. 461.

(4) Where a conspiracy is alleged and the particulars of the offence assert a number of ingredients, for example, several false representations; or where there is charged a conspiracy to defraud two or more victims rather than just one, judges must before summing up consider the principles in *Brown (Kevin)* (1984) 79 Cr App R 115 and *HKSAR v Tai Chi-wan* CACC 497 of 2006; but bear in mind that in many cases such a direction will be unnecessary and might serve only to confuse: see *D* [2001] 1 Cr.App.R. 194 and particularly *R v Mitchell* [1994] Crim.L.R. 66 at page 67 and *R v K* (2005) 1 Cr App R 25. See also Bruce "*Criminal Procedure*" V1 [1105]; *Hancock* [1996] 2 Cr App R 554; *R v Fussell* (1997) EWCA Crim 1764; *R v de Mendonca* [1997] Crim L R 812, and *R v Roberts and Ors* [1998] 1 Cr App R 441. It may be wise to discuss with counsel whether a specific direction is required to cater for the possibility of the

failure of the prosecution to prove all specific representations, or an agreement to commit an offence against all victims.

(5) **Single or Multiple Conspiracies.** It may be that the prosecution has charged and alleges a single conspiracy, though on one possible view of the evidence there may have been a series of separate albeit similar conspiracies. In that case the jury should be directed that they should only convict of the charged conspiracy if they are sure there was in fact one single conspiracy (although people may have entered it and left at different times) and that the defendant was party to *that* conspiracy.

See *R v Griffiths* [1966] 1 Q.B. 589 (especially the example at 598) and *R v Greenfield* 57 Cr. App. R 849 and Archbold (2009) 33-52 to 33-57 Archbold Hong Kong (2009) 36–48; Blackstone (2009) A6.43.

Things said and done in the course/in furtherance of the conspiracy:

In a case in which the conduct of one defendant, A, is relied upon as evidence against another, B, the judge must be careful to identify into which category that evidence falls:

1. **Where there is evidence against A of things said and/or done by him which implicates B, but that evidence although admissible against A is in B's case inadmissible hearsay.** For example, where A keeps a private diary of events for his own purposes which relates to the conspiracy and which appears to implicate B, but the dairy is not kept in the course and furtherance of the conspiracy. Here see *R v Blake and Tye* (1844) 6 QB 126; *R v Steward* [1963] Crim LR 697; and *R v Windass* (1988) 89 Cr App R 258. **In this case the evidence is altogether inadmissible against B, and the jury should be so directed.**

2. **Where there is evidence of things said and/or done by A in the course and furtherance of the conspiracy, which is relied upon as evidence against B.** For example, in a drugs case where there is evidence of a recorded conversation between A and C, and A can be heard to instruct C to deliver the drugs to B; or where A is alleged to have kept contemporaneous accounting records of the conspiracy, which have not been seen by B, but which refer to e.g. drugs supplied to him and money received by him. In this case the evidence will only have been admitted if there is other evidence of the existence of the conspiracy charged and of some involvement by B in it: i.e. its admissibility is conditional:

   See *R v Donat* (1986) 82 Cr App R 173
   R v Jones & Ors (1997) 2 Cr App R 119
   HKSAR v Booth [1998] 1 HKLRD 890
   Article by Professor J.C. Smith "*More on Proving Conspiracy*" [1997] Criminal Law Review page 333.
   R v Au Shui Yuen (1993) 2 HKC 219
   HKSAR v Heung Yu Nam (1997) 3 HKC 632

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

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

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

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

1. That this evidence is true? **and**

2. That it amounts to evidence of things said or done by A in the course of and for the purpose of carrying out the conspiracy? *

3. ***Only*** *where appropriate*: That A in saying/doing what he did was not maliciously and falsely involving B in a conspiracy to which in truth he was not a party.

If the evidence passes these tests then you may take it into account when you consider the case of B, and it is for you to decide what weight you should give it. If it fails either/any test you must ignore it in B's case.

* It may be helpful to provide the jury with an example of something said which is clearly said in the course of and for the purpose of carrying out a conspiracy, and something which is said but which conversely would not fulfil the criterion.

On evidence of acts and declarations, see:

Bruce and McCoy V [1102]-[1151].
Archbold Hong Kong (2009) 36-1 et seq.
Blackstone (2009) A6.53; F16.40
Archbold (2009) 33-1 to 33- 66.
Phipson on Evidence 16th Edition 31-43 et seq.

II INTENTION, RECKLESSNESS AND CAUSATION

13. INTENTION

> You must be sure that, when the defendant did the act, he intended [e.g. to kill the victim].

Notes:

1. It is generally unwise to elaborate on the above simple direction on intent: see *R v Woollin* [1999] 1 Cr App R 8, HL and *HKSAR v Lee Kwan Kong*, CACC 198/2004 at paras. 47 & 48 (approved in FAMC 7 & 8 of 2006). In *R v Moloney* [1985] 1 AC 905 at 926 (to which reference was made in *Nedrick)* Lord Bridge said :

> "The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding. *In trials of murder or wounding with intent, I find it very difficult to visualise a case where any such explanation or elaboration could be required, if the offence consisted of a direct attack on the victim with a weapon,* except possibly the case where the accused shot at A and killed B, which any first year law student could explain to a jury in the simplest of terms. Even where the death results indirectly from the act of the accused, I believe the cases that will call for a direction by reference to foresight of consequences will be of extremely rare occurrence." (Emphasis added.)

   However, if you do consider it necessary, it could be along the following lines:

> You decide intent by considering what the defendant did or did not do [and the effect of his actions or inaction] and by what he said or did not say. You should look at his actions before, at the time of and after (the alleged offence). All these things may shed light on his intention at the critical time.

2. In *R v Woollin* (above) which was a case of murder in which the defendant's foresight of death or really serious bodily harm was in issue, the House of Lords at pp 20 and 21 approved the following passage in the circumstances stated:

> "Where the charge is murder, and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case." [emphasis added]

Note that despite its omission in the passage cited, it is usual but not necessarily essential to insert 'really' before 'serious bodily harm'. See *R v Janjua and Choudhury* [1999] 1 Crim App R 91. In *R v Matthews and Alleyne* (2003) 2 Cr App R 30 the Court of Appeal stressed that the defendant's appreciation of death or serious bodily harm as a virtual certainty does not constitute the necessary intention for murder, but is something from which that intention can be inferred. See also *LAU Cheong v HKSAR* [2002] 2 HKLRD 612.

3. If the evidence that the defendant's wish may have been something other than to cause the result in question, see *R v Nedrick 83* Cr App R 267, *R v Walter and Hayles* 90 Cr App R 226 and *R v Woollin* (above).

4. It may be necessary to tell the jury that the prosecution only has to prove that the defendant had the necessary intention at the time of the alleged offence, that it need not have been a long-standing intent and that it is sufficient for it to have been formed in a matter of seconds, say in a sudden flash of temper.

5. Most case authorities are concerned with murder, but the same principles apply to all offences of specific intent: *R v Moloney* [1985] AC 905. See also *R v Hancock* [1986] A.C. 455.

With offences of general intent the simple direction above will almost always suffice.

Archbold Hong Kong (2009) 16-24.
Archbold (2009) 17-34.
Blackstone (2009) A2.2.

14. INTENT/INTENTION - THE RELEVANCE OF DRINK/DRUGS

A When voluntarily (knowingly) consumed (see also Direction 52 below)

Crimes of Specific Intent

If, in order to establish the defendant's guilt, the prosecution has to prove he had a specific intention (for example, to cause grievous bodily harm) at the time of the relevant conduct, and there is evidence that the defendant had been consuming alcohol at or about the material time, that is a factor to which the jury must have regard when considering whether the prosecution has proved the necessary intent. The classic statement of the principle is to be found in Lord Lane's judgment in *R v Sheehan and Moore* [1975] 60 Cr App R 308 at 312. The relevant passage from the judgment serves as an excellent basis for a direction upon this topic:

"… in cases where drunkenness and its possible effect on the defendant's mens rea is in issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

A direction based on this passage is at **Direction 52** below.

See also *R v Bowden* [1993] Crim L R 380, and the commentary by Professor Smith at page 381.

Crimes of basic intent (e.g. assault and rape)

Where a drunken defendant would otherwise have had the intent/knowledge/foresight required for such an offence, the jury should be directed that proof of that being the case is sufficient and that it is not a defence for the defendant to say he would not have behaved in the way he did had he not been drunk, or failed to foresee the consequences of his act because he was drunk.

A direction based on Lord Lane's judgment is at **Direction 52** below.

B When involuntarily (unwittingly) consumed

See *R v Kingston* [1995] 2 A.C. 355, HL

1. Involuntary intoxication (or a drugged state resulting from the involuntary ingestion of drugs), is not a defence to a criminal charge if the prosecution proves that the defendant had the necessary intent, albeit that intention arose as a result of his intoxication for which the defendant was not responsible.

2. The decision in *Kingston* (a case of indecent assault requiring a direction upon intention) considered that to allow involuntary intoxication to be an answer to a criminal charge would be to create a new defence in the common law and the court was not prepared to do that. It also thought in any event such a defence would be practically unworkable. The decision proceeded on the basis that "the ingestion of the drug … brought about a temporary change in the mentality or personality of the respondent which lowered his ability to resist temptation so far that his desires overrode his ability to control them. Thus we are concerned here with a case of disinhibition. The drug is not alleged to have created the desire to which the respondent gave way but rather to have enabled it to be released."

Archbold Hong Kong (2009) 16-72 et seq.
Archbold (2009) 17-102 et seq.
Blackstone (2009) A3.8 et seq.

15. RECKLESSNESS / GROSS NEGLIGENCE - IN MANSLAUGHTER

It is not possible to provide a single standard specimen direction appropriate for all cases of involuntary manslaughter involving breach of duty. That is because of the enormous range of possible duties and types of breach and surrounding circumstances. (See the comments to this effect in *R v Adomako* 99 Crim App R 362; [1995] 1 AC 171, and *R v Prentice* [1994] QB 302, 322). Nevertheless a sample direction is provided at Direction 63A. It incorporates the elements of the offence as stated in *Adomako* and in *R v Misra* [2005] 1 Cr App R 328. **In these cases it is vital for the judge to tailor the summing up according to the specific circumstances of the case**. The following points should be noted:

1. Following the decisions of the Court of Appeal in *Prentice* and the House of Lords in *Adomako* it will now rarely be necessary for a manslaughter direction to make reference to the concept of recklessness. In *Adomako* the House of Lords gave guidance as to the correct approach to be taken in cases of this nature. In his speech at pages 369-370 Lord Mackay LC said: 'The decision of the Court of Appeal (Criminal Division) in other cases with which they were concerned at the same time as they heard the appeal in this case indicates that the circumstances in which involuntary manslaughter has to be considered may make the somewhat elaborate and rather rigid directions inappropriate.' (This refers to the directions given in *R v Lawrence* [1982] AC 510.) He went on to say: "I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter apply are so various that it is unwise to attempt to categorise or detail specimen directions."

2. In any event it is desirable in a case such as this that the proposed direction should be discussed with counsel before final speeches.

3. In motor manslaughter cases also it appears that the *Lawrence* test is now replaced by that in *R v G* (2004) 1 A.C. 1034. But the issue is unlikely to arise. See Direction 19 below.

4. The jury has in essence to be told, when considering manslaughter by negligence, that before they may convict a defendant they must be sure:

   (1) that he had a duty of care towards the victim such as doctor/patient or parent/child (see in this regard note 6);

   (2) that he failed to do what in the circumstances he ought to have done [for the patient/child etc];

   (3) that his failure was a substantial cause of the death of the [patient/child etc.]; and

   (4) that the failure constituted gross negligence which the jury consider justifies a criminal conviction. (See also *R v Khan* (1998) EWCA Crim 971 and *R v Yaqoob* (2005) EWCA Crim 2169.

This breakdown of ingredients is *not* provided as a standard direction – ingredients (1) and (4) in particular, will require amplification according to the circumstances of the case, or it might on rare occasions be inappropriate to use the words 'gross negligence' at all and to couch the direction in terms of recklessness (see note 5 below).

The classic distinction between gross negligence which gives rise to criminal liability on the one hand, and ordinary negligence which does not, is found in the judgment of Hewart CJ in *R v Bateman* (1927) 19 Cr App R 8, 11: "… in order to establish criminal liability the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." See also *R v Adomako* at page 187.

5. It nonetheless remains open to judges to use the word 'reckless' in its ordinary non-legal sense in directions under this head if that is what feels most appropriate in the case. The law seems to be that in cases where it is open for the jury to conclude the defendant consciously took an obvious risk then it may be appropriate to direct the jury by reference to 'recklessness'. How the ordinary connotation of 'reckless' is explained will, again, depend on the facts of the case. In *Adomako* Lord Mackay said: "In cases of criminal negligence involving a breach of duty it is a sufficient direction to the jury to adopt the gross negligence test … it is not necessary to refer to the definition of recklessness in *Lawrence* [1982] AC 510, although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case." See Blackstone (2009) B1.54 and *R v Mark* [2004] EWCA Crim. 2490.

6. Does the judge or the jury decide whether on the facts a duty of care has arisen? There has been some conflict on the authorities : see *Khan* (*supra*) and *R v Singh* (1999) Crim.L.R. 582 and the commentary to *Khan* in (1998) Crim.L.R. 830. But the position has been clarified by the decision in *R v Willoughby* [2005] 1 WLR 1880, [2005] 1 Cr.App.R. 29 at paras. 21–23, namely that "… it is a question normally for the jury's determination."

The best course would appear to be to direct the jury as to what the prosecution must prove to establish such a duty existed. It would then be a matter for the jury as to whether a duty of care existed and whether it had been breached : see also *Archbold* (2009) 19–111. There will be exceptional cases (eg doctor and patient, or statutory duty) where the duty clearly exists in which event the judge can properly direct the jury that a duty exists: see *Willoughby*, para. 23.

It is for the judge to direct the jury what standard of care to apply and for the jury to decide whether that standard has been reached. In case of those professing a special skill and knowledge see Jackson and Powell on *Professional Negligence*, and the comments of Lord Hewart CJ in *Bateman* at

pages 12-13. See also *R v Kelly* [2005] EWCA Crim. 1061 as to the breach of a statutory duty.

Archbold Hong Kong (2009) 20-113 to 20-120.
Archbold (2009) 19-108 et seq.
Blackstone (2009) B1.52 et seq.

16. RECKLESSNESS - IN ASSAULT/OFFENCES AGAINST THE PERSON ORDINANCE, CAP 212

MALICIOUSLY – OFFENCES AGAINST THE PERSON ORDINANCE (SECTIONS 17 AND 19)

In most cases involving assault it will NOT be necessary to leave the issue of recklessness to the jury, see *R v Nash* (1991) The Times, 11 June. This should normally be done only when the word appears in the count, or when the circumstances of the particular case plainly call for such a direction. In many cases a direction on recklessness will only serve to confuse the jury, and in the event of a conviction will create a potential for difficulty in sentencing. Naturally, it is preferable that the position be clear before the case is opened to the jury; but in any event if the judge is of the view that such a direction is appropriate, or in case of any doubt, then it is desirable that the matter be broached with counsel before closing speeches.

The following directions comply with *R v G* (2004) 1 AC 1034 which departed from *R v Caldwell* (1982) AC 341 and removes the "objective" element in recklessness brought into the common law by *Caldwell*. The second limb (as to reasonableness) established by *R v G* has been incorporated in these directions though it will rarely be a material issue. The separate limbs of *R v G* are set out in Direction 18 below. There is some doubt as to how far the "subjective" principle established by *R v G* extends beyond the offence of criminal damage: See Blackstone (2009) A2.1. Although Lord Bingham in *R v G*, at para 28, expressly restricted himself to recklessness in the context of the law of criminal damage, English texts suggest that the subjective test is now for wider application (see Smith & Hogan *Criminal Law* 11 ed., p 104 and Archbold (2009) 17-50 and 17-51). Be that as it may, the principle as stated in *R v G* now apparently applies generally in Hong Kong's law: see *SIN Kam Wah v HKSAR* (2005) 8 HKCFAR 192.

In *SIN Kam Wah* Sir Anthony Mason NPJ in referring to the criticism of *R v Caldwell* which had, before *R v G*, been the leading case on recklessness in the common law said:

> "Because these criticisms are soundly based, it is appropriate that this Court should take this opportunity of overruling *R v Chau Ming Cheong* (1983) HKC 68 and *R v Dung Shue Wah* (1983) 2 HKC 30 (the two cases which incorporated the principles of *R v Caldwell* in Hong Kong's law). Henceforth juries should be directed in terms of the subjective interpretation of recklessness upheld in *R v G*. So juries should be instructed that, in order to convict for an offence, it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as

culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions."

A Common Assault

(a) In the (unusual) case where no physical force is actually applied

The mental element in the offence of assault is established where it is proved that the defendant intentionally or recklessly caused another to **fear** that he would be subjected to immediate and unlawful violence. It is therefore sufficient to prove that the defendant was reckless as to whether the complainant might fear that he was to be subjected to immediate and unlawful violence.

> To prove recklessness you must be sure that the defendant realised that X might **fear** that he would **then and there** be subject to immediate and unlawful force and nonetheless went on and took that risk [when in the circumstances known to him it was unreasonable to do so.]

(b) In the case where physical force is actually applied

The mental element in the offence of common assault is established where it is proved that the defendant intentionally or recklessly applied unlawful force to another person. The mental element in the offence of assault occasioning actual bodily harm is precisely the same. Whether actual bodily harm was 'occasioned' (caused) is simply a question of causation and does not involve any consideration of recklessness, see *R v Savage*; (sub nom) *DPP v Parmenter* [1992] AC 699, HL.

> To prove recklessness you must be sure that the defendant realised that X might be subjected to unlawful force (however slight) as a result of what he was about to do and yet took the risk that that might happen [when in the circumstances known to him it was unreasonable to do so.]

B The Meaning of 'Malicious' in Section 17 and 19 of the Offences Against the Person Ordinance, Cap 212 (Unlawfully and Maliciously Wounding or Inflicting Grievous Bodily Harm)

(a) 'Malicious' (in this Ordinance) means either intentionally or recklessly see *R v Cunningham* [1957] 41 Cr App R 155; *DPP v A* [2001] Crim LR 140.

(b) 'Recklessly' in this context means that the defendant foresaw the risk that the [in the case of section 17] or some [in the case of section 19] physical harm might result from what he was going to do and yet ignoring that risk he went on and did the act: see *DPP v Parmenter* [1992] 1 AC 699, HL (which now must be read in the light of *Sin Kam Wah (supra)*).

Before you may convict the defendant of this offence [*under section 17*] you would first have to be sure of the following matters:

1. that the injury X suffered amounted to really serious bodily harm;
2. that the defendant caused that injury suffered by X; and
3. that the defendant intended to cause really serious bodily harm to X or actually foresaw that his acts might cause really serious bodily harm to X and yet ignored that risk and went on with his actions [when in the circumstances known to him it was unreasonable to do so.] That is what is meant by the word 'maliciously' in the indictment.

Before you may convict the defendant of this offence [*under section 19*] you would first have to be sure of the following matters:

1. that the defendant caused the wound suffered by X [or caused X really serious bodily harm]; and

2. that the defendant either intended to cause physical harm to X; or actually foresaw that his act might cause physical harm to X, and yet ignoring that risk went on and did the act [when in the circumstances known to him it was unreasonable to do so.] This is what is meant by the word 'maliciously' in the indictment. The prosecution does not have to prove that the defendant intended or foresaw the extent or the gravity of the injury caused by his actions.

Note: Where an issue arises as to the assault being lawful (e.g. in self defence or as a result of mere accident) the Directions will have to be amended accordingly.

Archbold Hong Kong (2009) 16-35 and 16-39.
Archbold (2009) 17-45, 19-167 and 19-210.
Blackstone (2009) B2.10; B2.49

C The Relevance of Alcohol/Dangerous Drugs

(a) The fact that the defendant's voluntary consumption of alcohol (or dangerous drugs) prevented him (or may have prevented him) from foreseeing [the relevant risk] is no defence to a charge of assault (including battery), assault occasioning actual bodily harm or malicious wounding or inflicting grievous bodily harm (section 19). If the jury are sure that but for the drink/drugs he would have foreseen [the relevant risk] the ingredient of recklessness will have been established: *R v Majewski* [1977] AC 443, HL and *R v Richardson and Irwin* [1999] 1 Cr App R 392. See Archbold (2009) 17-52, 17-105 and 17-112, and the Directions at **Direction 14** above and **52** below.

(b) As to the **involuntary** consumption of drink/drugs, see Archbold (2009) 17-104 and *R v Kingston* [1995] 2 AC 355 HL and the notes to **Direction 14** above.

(c) As to the proof of 'recklessness' if the defendant had voluntarily taken a drug which is not well known for being liable to cause unpredictability or aggressiveness, see *R v Hardie* [1985] 80 Cr App R 157, CA; Archbold (2009) 17-105.

(d) As to mistake of fact induced by drink/drugs, see Archbold (2009) 17-16.

17. RECKLESSNESS - IN RAPE - SEXUAL OFFENCES

(First direct the jury in relation to the ingredients of the offence, and then where the issue is raised, that it is for the prosecution to make the jury sure that the defendant did not believe that the victim was consenting. See Direction on Rape 65 post.)

As a result of *R v G* [2004] 1 AC 1034, *R v Caldwell* [1982] AC 341 has been overruled. That is now recognised as the law in Hong Kong: *SIN Kam Wah v HKSAR* (2005) 8 HKCFAR 192 (see Direction 16 above).

In *Sin Kam Wah* Sir Anthony Mason NPJ said (at para. 44) :

> *"… Henceforth juries should be directed in terms of the subjective interpretation of recklessness upheld in R v. G. So juries should be instructed that, in order to convict for an offence under s.118(3)(a) of the Crimes Ordinance, it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions."*

Accordingly, the prosecution have to prove that the defendant actually appreciated a risk that the victim was not consenting and (unreasonably) carried on regardless. The standard direction has been amended accordingly.

The defendant was reckless as to whether Ms [X] consented to sexual intercourse if you are sure that he realised there was a risk that she was not consenting and carried on anyway [when in the circumstances known to him it was unreasonable to do so.]

Add where appropriate:

However, if due to his age or personal characteristics [give details] the defendant genuinely did not appreciate or foresee the risk that Ms [X] was not consenting to sexual intercourse, he was not reckless.

Note:

1. It is difficult to imagine the second limb of *R v G*, (above), (i.e. whether it was reasonable in the circumstances known to a defendant to take a risk of which he was aware) being an issue in any rape count. In the light of *Sin Kam Wah,* above, we have included that limb in parenthesis in the specimen direction to be used if the issues in the particular case so require. Judges should discuss with

counsel in advance of speeches whether that aspect should be included in the direction.

2. In *HKSAR v Li Kim Ching* CACC 208/2006 it was held that the "classic" formulation of recklessness such as was proposed by Lord Lane in *R v Taylor* 80 Cr App R 327 was already a subjective test which met the requirements of *Sin Kam Wah* : see also *HKSAR v Wai Sze Lim* CACC 442/2006. That direction, accordingly, is still good law in Hong Kong. It is as follows :

> "The defendant was reckless if he did not believe that the woman was consenting and could not have cared less whether she was consenting or not but pressed on regardless."

See also *HKSAR v Siu Tat Yuen* [2007] 4 HKLRD 734.

3. For a full direction on rape see **Direction 65**.

4. In Attempted Rape - see *R v Khan & Others* (1990) 91 Cr.App.R 29; Archbold Hong Kong (2009) 16-32 and 21-28.

Where on the evidence there is room for a possible finding of a genuine mistaken belief that the victim was consenting ADD :

> "If the defendant may genuinely have believed that [she] consented, although such belief may have been mistaken, then he is not guilty of rape. When you are considering whether he genuinely believed that [she] consented, you should have regard to the presence or absence of reasonable grounds for such belief together with any other relevant matters."

Note: In cases of rape as in others where the commission of the offence (as opposed to the identity of the offender) is in issue judges should avoid the word 'victim' since it prejudges the issue.

<u>Alcohol - Voluntary intoxication and rape:</u>

If you are sure that the prosecution has established that the defendant was reckless then the fact that this was or may have been due to his voluntary consumption of alcohol is no defence.

and where appropriate

If you come to the conclusion that because of the drink he had consumed the defendant did not **or** may not have applied his mind at all to the question of whether (Ms X) was consenting - in other words, if you are sure that because of

the drink he had voluntarily consumed his mind on this topic was or may have been virtually a blank, then he will nevertheless have been reckless if you are sure that had he been sober he would have realised that there was such a risk that she was not consenting.

Archbold Hong Kong (2009) 16-86.
Archbold (2009) 17-102 to 17-116 (particularly 17-116).
Blackstone (2009) A3.9 to A3.10.

Mistake of fact as a result of the voluntary consumption of alcohol. *(Additional direction, if the issue arises)*

Drink can of course seriously affect a person's judgment. A person can misinterpret a situation; he can misjudge the circumstances; he can make a mistake. If you come to the conclusion that the defendant mistakenly believed that [Ms X] was consenting to having sexual intercourse with him, then you must acquit him unless you are sure that his mistaken belief was wholly due to his [voluntary] consumption of alcohol. If it was, then he will have been reckless and you must convict.

Archbold Hong Kong (2009) 16-13.
Archbold (2009) 17-16.
Blackstone (2009) A3.10 and A3.37.

(a) Involuntary intoxication

See *R v Kingston* [1995] 2 A.C. 355, HL.

Archbold Hong Kong (2009) 16-73.
Archbold (2009) 17-104.
Blackstone (2009) A3.9.

(b) Drugs

For 'dangerous' controlled drugs (cannabis, heroin and the like) the position is the same as for alcohol. However, where it is said that the presence (or absence) of a medically prescribed drug has had disinhibiting consequences, see:

R v Bailey [1983] 1 WLR 760;
R v Hardie [1985] 80 Cr App R 157.

Archbold Hong Kong (2009) 16-72.
Archbold (2009) 17-52 and 17-102.
Blackstone (2009) A3.9.

18. RECKLESSNESS – IN CRIMINAL DAMAGE AND ARSON CRIMES ORDINANCE CAP 200 SECTION 60(1) AND (2)

Since the decision in *R v G* [2004] 1 AC 1034 which has now been followed in Hong Kong, it may be safely taken that *R v Caldwell* (1982) AC 341 has been overruled. See *SIN Kam Wah v HKSAR* (2005) 8 HKCFAR 192 per Sir Anthony Mason NPJ at Directions 16 and 17 above.

On that basis the standard directions have been altered as follows:

A Crimes Ordinance Cap 200 section 60(1)

The prosecution will have proved that D was reckless if, having regard to all the available evidence, you are sure:

1. that he was aware of a risk that [property] would be [destroyed][damaged]; and went ahead and [state act]
2. that in the circumstances which were known to him it was unreasonable for him to take that risk.

Note: There is no need to qualify, the word 'risk' by adjectives such as 'obvious' or 'significant'. See *R v Brady* [2006] EWCA Crim 2413; [2007] Crim L.R. 564.

Archbold (2009) 23-1 to 23-12.
Blackstone (2009) B8.8.

B Crimes Ordinance Cap 200 section 60(2)

The prosecution will have proved that D was reckless as to whether the life of [X] would be endangered if, having regard to all the evidence, you are sure:

1. that he was aware of a risk that the [destruction][damage] would endanger the life of [X]; and went ahead and [state act]
2. that in the circumstances that were known to him it was unreasonable to take that risk.

Archbold (2009) 23-13 to 23-23.
Blackstone (2009) B8.17.

Notes:

1. Where an attempt to cause damage is charged, mere recklessness is insufficient, see Archbold (2009) 23-12.

2. For the relevance of intoxication (drink/drugs) see notes below.

3. For the appropriate direction in a case in which a defendant causes damage by an act of which he is initially unaware, but upon becoming aware of his act and continuing events as a result of it, he does nothing to prevent or reduce the risk of damage or destruction - see *R v Miller* [1983] 2 AC 161 (a case where a vagrant unwittingly started a fire). The suggested direction is in Archbold (2009) 23-10.

4. See **Direction** for Arson at **59** post.

Alcohol/Drugs

Notes:

1. Self induced intoxication is no answer to an allegation of criminal damage whether simple, aggravated or by fire if the mental element relied upon is recklessness: see *R v Caldwell* [1982] AC 341 at 356, HL (still good law in this regard). In other words, if due to self induced intoxication the defendant was or may have been unaware of the risk, that constitutes no defence. The position is the same if the defendant voluntarily consumed dangerous drugs: see *R v Majewski* [1977] AC 443, HL. *Aliter* where the drug does not fall into that class: see *R v Hardie* [1985] 80 Cr App R 157. (In relation to involuntary intoxication, see *R v Kingston* [1994] 3 All ER 353, HL): see Archbold (2009) 23-11.

2. As to the position where the mental element relied upon is 'intention' see **Direction 14**.

Archbold Hong Kong (2009) 16-74.
Archbold (2009) 17-105 and 23-11.
Blackstone (2009) A3.8-A3.11.

19. RECKLESSNESS - DRIVING

By section 2 of Ordinance 1 of 2000, the Road Traffic Ordinance Cap 374 was amended so as to remove the offences of reckless driving causing death and reckless driving (previously section 36 and 37 of the Ordinance) and replace them with new offences of causing death by dangerous driving (section 36) and dangerous driving (section 37).

It is therefore most unlikely that there remain any offences under the old provisions yet to be tried. Prosecutions of dangerous driving offences will be governed by the statutory definition of what amounts to dangerous driving in section 36(4) and (5) and section 37(4) and (5). The two definitions are identical and are as follows:

> "(4) A person is to be regarded as driving dangerously within the meaning of subsection (1) if—
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver; and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (5) A person is also to be regarded as driving dangerously within the meaning of subsection (1) if it would be obvious to a competent and careful driver that driving the motor vehicle concerned in its current state would be dangerous."

See **Archbold Hong Kong (2009) 34-13**

20. CAUSATION

In every "result" crime causation is by definition an element of the offence. Although the issue of causation often arises in the context of homicide it is relevant to all result crimes. In many cases it is not a contentious issue because it is not disputed.

Even in homicide cases it is rarely necessary to give the jury any direction on causation as such. In most cases it will not be a real issue and all that then needs to be said is that the prosecution must make the jury sure that the act of the defendant caused death, but that that is not a disputed issue in the case and that it is one which the jury might have little difficulty in resolving.

If causation is a live issue, the following contains directions from which some paragraphs might be utilized or adapted as appropriate to the particular case (the specimen direction uses murder/manslaughter as an example).

The law is that before you may find the defendant guilty of [murder/manslaughter] one of the matters about which you must be sure is that the [defendant's act][the act to which the defendant was party] was a significant cause of [the death of X].

It is not necessary for the prosecution to prove that the [defendant's] act was the **only** cause of death. Nor is it necessary for the prosecution to prove that the act was the **main** cause of death. But the prosecution must prove that the act was **one** of the causes of the death of X and was one that was more than a minimal cause. So if you were to find that that the defendant's act contributed only in some trivial way in causing death, or that that might be the case, then the defendant must be acquitted of [murder/manslaughter of X]. [Furthermore, it suffices for the prosecution to prove that the act accelerated death. If the act brought forward the time of death, the law regards the act as a cause of death, so long however as the act of the defendant contributed to death in more than a trivial or minimal way.]

What is meant by 'a trivial or minimal way'? We are all going to die sometime. Killing is a mere acceleration of death. A factor which produces a trivial acceleration of death is said not to be a cause of death. So if the prosecution establishes a cause of death which is only a trivial acceleration of, or a trivial contribution to, the deceased's death, then the prosecution has not proved that the defendant committed an act that was a cause of death.

(Where the egg-shell skull situation arises, in whatever manifestation) It has been suggested to you that [the defendant has been very unlucky because, unbeknown to him, the deceased suffered from …]. The rule is that an accused takes his victim as he finds him. So, if there is something unusual about the victim or he has some particular characteristic such that the consequence of the defendant's act is more serious than could have been foreseen, this is irrelevant to the issue of whether the defendant's act was a cause of death. In other words, if you are sure that the defendant's act was a cause of death, the fact that another person, or even most other people, would not have died as a result of that act is

irrelevant to the issue of causation which you have to try. This is so even if the unusual or particular characteristic is one about which the defendant was unaware.

(Where it is suggested that the defendant's act was not itself the very act which caused death - e.g. a passenger in a moving vehicle suffering injury when escaping from an assault by the defendant) If a person dies as the result of some act (Act A) which would not have occurred but for the act of the defendant, the defendant's act is still a cause of death if (Act A) was a natural consequence of the defendant's act. In other words, it is enough, in such circumstances, if the prosecution proves that the death was a natural consequence of the defendant's act. On the other hand, if there was, or may have been, an intervening act or event, independent of any act of the defendant, which intervening act caused the deceased to die that day in the way he did, then the prosecution has failed to prove that the defendant's act was a cause of the deceased's death.

Archbold Hong Kong (2009) 20-12.
Archbold (2009) 19-6 et seq.
Blackstone (2009) A1.21 et seq.
Smith & Hogan 11th Edition page 52 et seq.

III EVIDENCE

21. CIRCUMSTANTIAL OR INFERENTIAL EVIDENCE

In most cases in which the prosecution is relying on circumstantial or inferential evidence in whole or in part it is unnecessary to give the jury any special direction, so long as the jury are directed that they may not convict unless they are sure of guilt.

See *Tang Kwok Wah v HKSAR* [2002] 5 HKCFAR 209; the CFA approved the principle enunciated in *Mcgreevy v D.P.P* [1973] 57 Cr.App.R. 424 as an authoritative and correct statement of the law and applied in Hong Kong in *Lam Tsz Wah v The Queen* [1984] HKLR 54; *R. v Yu Wai Chun & Another* (unrep., Crim.App.No. 179 of 1987, [1987] HKLY 182); *R v Pang Shun Yee & Others* [1988] 2 HKLR 146; *R v Chan Ho Kuen & Another* [1988] 2 HKLR 334; *The Queen v Tsao Wing Tak* [1989] 1 HKLR 285; *R v Chua & Another* [1993] 1 HKCLR 272, [1993] 2 HKC 35.

Sir Anthony Mason p.228I-J §66

> *"… There is no rule of law or rule of practice that requires the giving of a direction to the jury in terms of Lord Diplock's statement in Kwan Ping Bong & Another v. The Queen [1979] HKLR 1 in cases in which the prosecution is relying on circumstantial or inferential evidence to establish the accused's guilt or an essential element in the offence charged. No distinction in principle can be drawn in this respect between cases in which the prosecution is wholly circumstantial and cases in which the prosecution seeks by inference to establish an essential element in the offence."*

The following direction may be appropriate where there is no direct evidence but the prosecution case is complicated and made up of a number of pieces of evidence. In most cases it may be that no direction is necessary. In other cases it may be that the entire direction need not be given. In cases of difficulty or where much has been made in argument of the fact that the case is "only circumstantial" it may be sensible to give the full direction.

Circumstantial evidence :

Reference has been made to the type of evidence which you have received in this case, and it has been labelled '*circumstantial* evidence', and the point has been made that there is no *direct* evidence which proves the defendant guilty of this offence. The position is this :

Sometimes a jury is asked to find some fact proved by **direct** evidence**.** For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him.

On the other hand it is often the case that direct evidence of a crime is not

available, and the prosecution relies upon **circumstantial** evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime

[It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say 'We now know everything there is to know about this case'. But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him.]

Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care — as with all evidence — and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient reliability and strength to cast doubt upon or destroy the prosecution case.

Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence, nor you should do that.

And/or :

Inferences :

Of the exceptional circumstances in which a special direction on the drawing of inferences may be desirable or even necessary see Bokhary PJ in *Tang* (supra) at paragraph 16 :

> *"… No question of giving such a direction even arises where all that the jury is really being invited to do is to assess a witness's credibility and reliability in the light of other evidence. No such question arises unless the jury is being invited to find the prosecution's case or a part of it proved by or partly by the drawing of inferences from primary facts. If the jury is being asked to do that, then the trial judge should give consideration to whether the jury would, in all the circumstances, be assisted by a special direction. The trial judge should, at the same time, also carefully consider the risk that the special direction might confuse the jury having regard to the issues which they had to decide, the rest of the evidence in the case, and the other directions which the jury will be given. On this last point I would emphasise that the jury must not be left with the impression that the standard of proof varies depending on whether direct or circumstantial evidence is concerned".*

You are entitled to draw inferences — in other words, if you find certain facts proved, you are entitled to infer the existence of other facts. But you may only do

so if that inference is the only reasonable inference to draw from the proved facts. So, if from a set of facts which you find proved there is a reasonable inference to draw against the defendant as well as one in his favour, then you must not draw the adverse inference. [In this particular case, the prosecution says that there is direct evidence that (*specify one or a number of primary facts which the prosecution say are clearly shown)* and the prosecution says that the only reasonable inference to draw from those facts is that …. On the other hand the defence says that although that might be one inference which could be drawn, it is not the only reasonable inference to draw; and that another inference one might reasonably draw is that ….]

Archbold Hong Kong (2009) 10-3.
Bruce & McCoy Criminal Evidence; I –52 et seq. and III 152 et seq.
Archbold (2009) 10-3 et seq.
Blackstone (2009) F1.16 et seq.

22. SIMILAR FACTS

The following specimen directions are designed to be of assistance in three 'classic' similar fact situations. In *DPP v P* [1991] 2 AC 447; 93 Cr App R 267 Lord Mackay LC said (page 279)

> *"Once the principle has been recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved."*

The directions below involve illustrations of specific offences. They do not cover all similar fact situations. They are given by way of general guidance only, and must of course be carefully adapted to suit the needs of each individual case. In *HKSAR v Zabed Ali* [2003] 2 HKLRD 849 the CFA approved of the statement in Archbold : Criminal Pleading Evidence and Practice 2003, 13-41 of the necessity for the jury to be given an adequate direction in respect of such evidence, if admitted:

> *"… the jury should be directed as to the matter in issue to which such evidence might be relevant and how it might be relevant. And the jury should be told that the fact that the accused has a bad character or the propensity as shown by such evidence does not mean he is guilty of the offence charged. …"*

Evidence led in previous trials where a defendant was acquitted may be admissible in a subsequent trial of that defendant as 'similar fact' evidence : *R v Z* [2000] 2 Cr App R 285.

A Where there is no direct evidence that the defendant committed the offence charged or any of the 'similar offences' (as in the cases of *Makin v Attorney General for New South Wales* [1894] AC 57 PC and *R v Smith* 11 Cr App R 229)

There is no direct evidence that the defendant [killed A or that he did so with intent to kill or cause him really serious harm]. There is evidence that he had the opportunity to do so, but that, in itself, is far from sufficient to enable you to be sure that he did.

You have, however, heard evidence suggesting the commission of [a number of] other similar offences, all of which the defendant had the opportunity to commit.

If *(where it is not admitted)* **you are sure that the events to which the witnesses have testified took place, you must look at the whole of this evidence and ask yourselves: is the relationship between the circumstances of these offences/occurrences** *(eg in time, place and (... state other circumstances highlighting in particular unusual characteristics))* **so close that you are sure that they must be a series of similar offences committed by the same person.**

If that is so, looking at the case against this defendant is it possible that he can have an innocent explanation for the fact that [all of those bodies of children were found buried in gardens of houses in which he had carried on a business of fostering children] [three women whom he had married under false names had all made wills in his favour and drowned in their baths shortly afterwards]; **or is the only reasonable explanation** that these [children] [women] were killed by the defendant [or with his assistance or encouragement]?

If, but only if, you are sure that there is no credible innocent explanation you may take the whole of this evidence into account in deciding whether you are sure that [the defendant killed, or was a party to the killing with intent of A]. Remember that it is for the prosecution to prove that there is no credible innocent explanation, and not for the defendant to prove that there is.

B Where there is no direct evidence that the defendant committed the offence charged but there is independent evidence that he committed other 'similar offences' (as in *R v Straffen* 36 Cr App R 132).

There is no direct evidence that the defendant [killed A or that he did so with intent to kill or cause really serious harm]. However, there is [evidence that] [the defendant has admitted that] he killed B and C. You have also heard evidence as to the circumstances in which those offences were committed.

The prosecution say that the circumstances of the offence which is presently charged and which you must decide **so closely resemble those of the other** [two] [earlier] [later] **offences that the only reasonable conclusion is that all three offences are the work of one person,** and that it therefore follows that the defendant is guilty of the offence charged. *(Here state the circumstances). You* must therefore consider three questions:

1. **Are you sure that the defendant committed offences B and C?** If you are not sure of that, the evidence relating to those offences is of no value, and you must ignore it. If, however, you are sure that he did commit these offences, go on to consider:
2. **Are you sure that the circumstances of those offences were as alleged by the prosecution?** If you are not sure of that ignore them. Equally if you are not sure that any particular alleged circumstance existed, ignore it. If you are sure that all, or some of those circumstances existed, go on to consider :
3. **Are you sure that the circumstances in which offences B and C were committed so closely resemble the circumstances which you are sure existed in the present case that you can have no doubt that the three offences must have been the work of one person ie, the defendant?** [It is suggested on behalf of the defendant that it is possible that the resemblance between the circumstances of these offences might be purely coincidental. If you think that there is any realistic possibility that the resemblance between the circumstances of the offences might be no more than a coincidence, and that the offence might have been committed by someone else, the evidence is of no value and you must ignore it.]

"… And the jury should be told that the fact that the accused has a bad character… as shown by such evidence does not mean he is guilty of the offence charged. …" HKSAR v Zabed Ali (supra)

The judge should point out to the jury that the evidence is admitted before them only because it goes beyond mere evidence of disposition, and should tell them that if they think it merely contains evidence of disposition they should not take any notice of it: *R v Rance & Herron* (1976) 62 Cr App R 118, 122 interpreting Lord Hailsham in *Boardman* [1975] AC 421, 453; though this may not always be necessary.

> Normally juries are not told about any convictions a man has because there is a grave danger that they will think that he is more likely to commit another offence or the present offence with which he is charged. It cannot mean that, and it would be illogical and unfair to make such an assumption against any man. The only reason you heard about these other offences in this case was because the prosecution seeks to say that the coincidences between the offences, and the circumstances in which they were allegedly committed, were so strong that they went in proof of the defendant's guilt of the offence charged in this indictment. Therefore, if you are not sure that the circumstances of the offence were as alleged by the prosecution or, even though you are sure of that, you are not sure that the resemblance of circumstances was such that the offences must have been the work of the defendant, then you must ignore the evidence of those other offences, and it is important that you then put them out of your mind for all purposes and reject any notion that the other offences nonetheless somehow prove that the defendant has a tendency to commit this type of offence and must therefore be guilty of the offence now charged.

C Where there is direct testimony that the defendant committed the offence and the question is whether the witness (W) who says that he did was speaking the truth. X and Y testify to similar offences on other occasions.

> 1. Ask yourselves: **Are you sure that W, X and Y did not put their heads together to make false accusations against the defendant?** If you are not sure of that, the evidence of X and Y is of no value, and you must ignore it. If you are sure that there was no collaboration of that kind, you are entitled to consider the evidence of X and Y in deciding whether W was speaking the truth [and vice versa if eg three offences are charged].
> 2. You must then ask: **Is it reasonably possible that the three persons, independently making the similar accusations which you have heard, could all be either lying or mistaken?** If you think that is incredible then you may well be satisfied that W was speaking the truth. In answering this question you must consider two important aspects of the evidence:
>
>   (i) **The degree of similarity between the accusations.** The greater the degree of similarity, the more likely it is that independent witnesses are speaking the truth, for you may think it would be a remarkable coincidence if they hit upon the same lies or made the same mistakes as to matters of detail. On the other hand, the less the degree of similarity,

the less weight should be given to this evidence; **and**

(ii) **Whether W, X or Y may have been consciously or unconsciously influenced in their evidence through hearing of complaints made by others.** If you think it is possible that they, or any of them, may have been influenced in making the accusation at all, or in the detail of their evidence, you must take that into account in deciding what weight, if any, you give to their evidence.

Notes: (1) The leading case relating to the principles to be applied in similar fact cases is *DPP v P* [1991] 2 AC 447, cited with approval by the CFA in *HKSAR v Zabed Ali* [2003] 2 HKLRD 849. Also, see *HKSAR v Wong Tin Chuk* CACC 761 of 1997 and *R v Musquera* [1999] Crim L R 857.

(2) In relation to the issue of collusion, see *R v Ryder* 98 Cr App R 242 and *R v H* [1995] 2 AC 737.

(3) In relation to the issue of identification, *see R v Brown* [1997] Crim L R 502 and *R v John W* [1998] 2 Cr App R. 289.

(4) In relation to when a 'sequential' or 'cumulative approach' is appropriate see *R v Wharton* [1998] 2 Cr App R 289 at 304.

(5) Note: The position in England and Wales is now subject to the provisions of the Criminal Justice Act 2003.
Archbold (2009) 13-39, et seq.
Blackstone (2009) F12.1 et seq.

Archbold Hong Kong (2009) 13-1 et seq.
Bruce & McCoy, Criminal Evidence; VIII

23. CORROBORATION / EVIDENCE REQUIRING CAUTION

Section 60 of the Criminal Procedure Ordinance, Cap 221, has abrogated the obligation of a judge to direct the jury that it is dangerous to convict on the uncorroborated testimony of an accomplice; section 4A of the Evidence Ordinance has abrogated the same rule in relation to the uncorroborated testimony of a child, and section 4B has abrogated the rule in relation to the testimony of victims of alleged sexual offences

In such cases, it is now a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness.

In *R v Makanjuola and R v E* [1995] 2 Cr App R 469 Lord Taylor CJ gave the following guidance in cases of this nature (at page 472-3):

> *"1. Section 32(1) [the equivalent of section 60] 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 those categories.*
>
> *2. It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.*
>
> *3. In some cases it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant in a sexual case 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 should 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 a whole florid regime of corroboration rules.**

> *7. … Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.*
>
> *8. … Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense (see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223)."*

*The judgment also contains the following guidance (page 472):

> *"Whether, as a matter of discretion, a judge should give any warning and if so its strength must depend upon the context and manner of a witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, [the judge] may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought to be appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."*

(See also *R v R* [1996] Crim LR 815.)

Where the jury is enjoined to look for supporting material before acting on impugned evidence, it is incumbent on the judge to identify what evidence was and what was not capable of amounting to supporting evidence: see *R v B (MT)* [2000] Crim L R 181.

Notes:

1. The observations in *Makanjuola* were adopted by the Court of Appeal in *R v Chu Ip Pui* [1997] HKLRD 549 and approved of by the Court of Final Appeal in *Leung Chi Keung* (2004) 7 HKCFAR 526 at paragraph 24 page 538 C-H.

2. Further important guidance has been given by the Court of Appeal in *R v Muncaster* (unreported 1998 EWCA Crim 296) [1999] Crim LR 409 and see Archbold (2009) 4-404m. The need to consider whether such a warning should be given is not confined to accomplices in the strict sense and complainants in sexual cases, but also to witnesses in 'analogous categories'. However, it has no application to particular types of evidence (e.g. identification) where rules have been developed as to how a jury should be directed.

3. In *R v Cairns and Others* [2003], 3 Cr App R 38 the Court of Appeal held that the Crown was entitled to call a witness only part of whose evidence they relied on, and part of whose evidence was likely to be unreliable, but that there would need to be a special direction to the jury when such a witness gave evidence [see paragraphs 44-46 at page 671].

4. Judges should bear these principles in mind in cases where evidence may be suspect on grounds other than those identified thus far: for example, where the evidence relates to events long ago, where inconsistent statements have been made, or where a witness has, for any reason, an axe to grind.

5. In *Wong Chi King v HKSAR* FACC 10/2008, the Court of Final Appeal affirmed that where there was an evidential basis to suggest that the testimony of a witness was not reliable, a judge should consider giving a warning to exercise caution when considering that testimony and that if he decides to do so the terms of the caution are a matter within his discretion. One of the relevant circumstances which the judge should take into account is whether the danger of relying on the evidence of the witness is obvious to the jury.

6. In cases of substantial delay, it is desirable that a direction should be given to the jury as to possible difficulties which the defence may face as a result of such a delay, although such a direction is not invariably required: see *Henry H* [1998] 2 Cr. App R 161. See **Direction 29.**

Archbold Hong Kong (2009) 4-217 et seq.
Archbold (2009) 4-404a et seq.
Blackstone (2009) F5. et seq.
Bruce & McCoy, Criminal Evidence – XIII.

24. EVIDENCE OF CHILDREN

Corroboration :

1. There is no longer any rule of law requiring corroboration of the unsworn evidence of a child (that is, a person under the age of 14) and no longer any rule of practice requiring a warning of the danger of convicting on the uncorroborated evidence of a child simply because [he][she] is a child (see section 4A Evidence Ordinance). Note also that unsworn evidence of a child may corroborate evidence, sworn or unsworn, of another person (Evidence Ordinance, section 4).

2. It may be appropriate to warn the jury to take particular care with the evidence of a very young child.

3. Suggestions as to the factors to be taken into account in deciding what assistance to give to a jury are helpfully canvassed in Bruce & McCoy XIII [302].

Competence :

Section 3 of the Evidence Ordinance provides that only persons of unsound mind (in circumstances there defined) shall be incompetent to give evidence in any proceedings. In *R v Lam Chi Keung* [1997] HKLRD 421 Mortimer JA in the judgment of the Court of Appeal noted that in consequence it would appear that :

> *"… even a child who is unable to give intelligible evidence is competent if otherwise of sound mind. Clearly, a child witness is to be regarded as competent at least until the contrary is shown."*

His lordship went on to say that if a child was to give unsworn evidence it would usually be necessary for the judge to bring home to such a witness the importance of telling the truth, citing the observations in the judgment of Auld J of the Court of Appeal in England and Wales in *R v Hampshire* [1995] 2 Cr.App.R. 319 as to an apposite softly spoken reminder which might be delivered to the child witness :

> *"Tell us all you remember of what happened. Don't make anything up or leave anything out. This is very important."*

Archbold Hong Kong (2009) 8-40 et seq.
Bruce & McCoy, Criminal Evidence; IX –51 to 151 et seq.
Archbold (2009) 8-41 et seq.
Blackstone (2009) F4-18 et seq.

Child witnesses

(i) Video recorded evidence :

Section 79C of the Criminal Procedure Ordinance provides that the court may admit into evidence a video recording of an interview between an adult (as defined) and a

child in respect of limited stipulated offences. In *Chim Hon Man v. HKSAR* (1999) 2 HKCFAR 145 (CFA) Sir Anthony Mason said of the effect of the provision (page 156E) :

> *"… a statement made by the child in the recording shall have the same effect as if given in oral testimony."*

When such evidence is admitted, the judge should, at the time of its admission as well as in the summing up, instruct the jury as to the status of the interview, namely, that statements made by the child in the course of the interview are treated in law as if given in direct oral testimony. It will often be helpful first to tell a jury that the practice has developed by which children can be interviewed on video by skilled personnel when an investigation is under way, and that a court has the power to permit such an interview to be adduced in evidence.

1. Should the interviewer of a child make comments such as 'You are doing very well', a judgment should be made whether that comment or repetition of such comment may suggest to the jury that the interviewer is impressed by the quality or content of the evidence. If there is such a danger then, after discussion with counsel, the judge might direct the jury at an appropriate moment in the summing up to ignore such comments, saying that it is for them to assess the reliability of what has been said in the interview and that in any event the comment is merely the sort made by persons seeking to encourage a young person to concentrate on the issue at hand.

2. Replaying the videotape to the jury:

   The replaying of video evidence of witnesses is a departure from the normal method of conducting a criminal trial and should only take place for exceptional reasons: see *R v Mullen* [2004] 2 Cr. App R 18. In *Mullen* the Court of Appeal of England and Wales approved of the following passage in Archbold 2003 at 4-423 in respect of the procedure to be adopted and the direction to be given to the jury when a video is to be replayed:

   > *"If the video is replayed, (a) the recording should be replayed in court with the judge, counsel and defendant present, (b) the judge should warn the jury that because they are hearing the complainant's evidence in chief a second time, after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case, and (c) to assist in maintaining a fair balance the judge should, after the tape has been replayed, remind the jury of the cross-examination and re-examination of the complainant, whether the jury asked him to do so or not*

(ii) Video link evidence :

Section 79B(2) of the Criminal Procedure Ordinance provides that the court may in respect of the same limited stipulated offences, permit a child to give evidence or be examined by way of a live television link.

Where a child does give evidence, the judge bears the central responsibility for ensuring that the evidence is handled sensitively and with adequate preparation. Judges are strongly urged to view the tape entitled 'A Case for Balance' prior to any PTR which relates to a child witness case. The tape may be obtained from the library.

Archbold Hong Kong (2009) 20-352 to 353; 4-239 to 240.
Archbold (2009) 8-52 et seq.; 4-421 to 423.
Bruce and McCoy, Criminal Evidence; IX-651 to 653.

24A. Directions when evidence is given by an adult or child witness behind a screen/ by video recording/ live video link

Where evidence is given behind a screen, by video recording or by video link it is desirable to tell the jury both at the time the witness starts her/his evidence as well as in the course of the summing up that no inference adverse to the defendant should be drawn from the procedure used. So, for example :

> In this case the witness[es] X [Y and Z] gave evidence by means of [video recorded evidence-in-chief] [live-link television] [behind a screen].
>
> The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness[es] to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness[es] give[s].
>
> The fact that the evidence has been so given must not in any way be considered by you as prejudicial to the defendant.

Archbold Hong Kong (2009) 20-352 to 353; 4-240.
Archbold (2009) 8-52 et seq.
Bruce and McCoy, Criminal Evidence; IX-651 to 653.

25. CROSS-EXAMINATION ABOUT EVIDENCE 'ON A PREVIOUS OCCASION'

Where cross examination is directed to evidence given by a witness 'on a previous occasion', (e.g. a voir dire or a previous trial) some explanation by the judge in the summing up (or earlier as well if the references are repeated and the atmosphere so dictates) may be necessary.

> During this trial, you have heard reference to evidence given by [e.g. police officers] on a [previous occasion] [recent occasion in your absence]. Please do not speculate about the nature of that occasion. In our system, there are various circumstances in which witnesses give evidence in relation to the subject matter of a trial on more than one occasion, and it is unnecessary and unhelpful to describe all the instances in which that can happen.
>
> The fact that in this case there has been such an earlier occasion when witnesses have given evidence, was put by [defence] counsel to certain [prosecution] witnesses in an attempt to suggest inconsistencies between the evidence on a particular point given by a witness before you, and the evidence given by that witness on that point on a previous occasion. That is why it was necessary to refer to the previous occasion. But it is not necessary to explain the nature of that occasion, and it is not a matter about which you should speculate.

See also Previous Inconsistent Statement, **Direction 27** post.

26. HOSTILE WITNESS

> X was called by [the prosecution], but gave evidence which did not support [the prosecution's] case. [The prosecution] was therefore allowed to treat him as a 'hostile' witness — a witness who had in effect 'changed sides' — and to cross-examine him to show that he had earlier made statements which are inconsistent with the evidence he has now given in court. The contents of those earlier statements are not part of the evidence in the trial, except for those parts of them which he has told you are true. Those statements were put before you by [the prosecution] to throw doubt on the reliability of his evidence here in court.
>
> You have to decide whether you can accept any part of the evidence which he has given in court and, if so, what part of it. If you decide that there is serious conflict between the evidence he gave you and statements previously made by him, you may think that you should reject his evidence altogether and not rely upon anything he has said in the witness box.

[see section 12 of the Evidence Ordinance, Cap 8]

Notes: 1. See *Driscoll v R* (1977) 51 ALJR 731; *R v Pestano* [1981] Crim LR 397; *R v Thomas* [1985] Crim LR 445; and *R v Yip Moon-ting* [1984] HKLR 443.

2. The previous statement may be oral or written: *R v Prefas and Pryce* [1987] Crim LR 327; [1986] 86 Cr App R 111.

3. **Procedure**: It is undesirable to proceed immediately, on not getting the expected answer, to treat the witness as hostile. For guidance on procedure, see *R v Maw* [1994] Crim LR 841, *R v Pestano, R v Thomas supra,* the commentary to which is commended, and Bruce & McCoy X [405]-[454]. The report in *R v Maw* is included at Section B Part 2; as is the report of *R v Thomas*. Whether a voir dire should be held is a question within the judge's discretion : see *R v Honeyghon and Sayles* [1999] Crim L R 221.

4. 'Where a witness has, with leave, been treated as hostile, but on cross examination he says that the contents of the previous statement are true the judge must warn the jury to approach any testimony given by that witness that incriminates the defendant with caution, pointing out that the incriminating evidence thus adduced, after he has been treated as hostile, only emerged as a result of cross-examination by counsel for the prosecution' : see Archbold 2009 chapter 8-101, referring to *R v Ugorji* [1999] EWCA Crim 1604.

Archbold Hong Kong (2009) 8-95 et seq.
Archbold (2009) 8-94 et seq.
Bruce & McCoy, Criminal Evidence; X- 353 to 503.
Blackstone (2009) F 6.28 et seq.

27. STATEMENT: PREVIOUS INCONSISTENT STATEMENT, WITNESS NOT HAVING BEEN TREATED AS HOSTILE

[You may be satisfied that X] [X has admitted that he] had previously made a statement which conflicted with his evidence. His evidence is what he told us in court on oath/affirmation. What use may you make of that previous statement?

You may take into account the fact that he did make such a statement when you consider whether he is believable as a witness. However the statement itself is not evidence of the truth of its contents, except for those parts of it which he has told you are true.

[It is suggested (admitted) that the previous statement made by X is inconsistent with his/her evidence in this court in that …]

In examining suggested inconsistencies, you will wish to decide, first, whether there is in fact and in true context, an inconsistency; and if you decide that there is one, you will wish to decide whether it is material and relevant or, on the other hand insignificant or irrelevant. If there is an inconsistency, it might lead you to conclude that the witness is generally not to be relied upon; alternatively, that a part only of his evidence is inaccurate; or you may accept the reason he has provided for the inconsistency and consider him to be reliable as a witness.

Notes: (1) Where the inconsistency is neither serious nor central to the case, it is normally sufficient to do no more than draw attention to it.

(2) Explain what is and what is not evidence of the truth and the relevance of the previous inconsistent statement to the credibility of the witness.

(3) If there are several witnesses concerned, give the general directions first before you deal with the first of them and then refer briefly to that direction when you deal with each of the others.

(4) See also **Direction No. 26**, "Hostile Witness" and **Direction No. 25** "Cross-Examination on a Previous Occasion".

Archbold Hong Kong (2009) 8-128 et seq.
Archbold (2009) 8-125 et seq.
Bruce and McCoy, Criminal Evidence; X- 80 to 951.
Blackstone (2008) F 7-28 et seq. [Note: The 2009 edition addresses a new and different statutory provision**].**

28. VISUAL IDENTIFICATION

This is a trial where the case against the defendant depends [wholly] or [to a large extent] on the correctness of one or more identifications of him which the defence alleges to be mistaken. To avoid the risk of any injustice in this case, such as has happened in some cases in the past I must therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. A witness who is convinced in his/her own mind may, as a result, be a convincing witness, but may nevertheless be mistaken. The same may apply to a number of witnesses. [Add if appropriate: mistakes can also be made in the recognition of someone known to a witness, even of a close friend or relative.]

You should therefore examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says was the defendant under observation? At what distance? In what light? Did anything interfere with the observation? [And, where appropriate]

Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? How long was it between the original observation and the identification to the police? Is there any marked difference between the description given by the witness to the police when he was first seen by them and the appearance of the defendant?

[Add if appropriate]

I must remind you of the following specific weaknesses which appeared in the identification evidence ...

See *R v Turnbull* [1976] 63 Cr App R 132

Notes:

1. The importance of the rules laid down in *R v Turnbull* was emphasised by Lord Lane CJ in *R v Clifton* [1986] Crim LR 399. The basic principle is the special need for caution when the issue turns on evidence of visual identification. The summing-up in such cases must not only contain a warning but expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case. *Turnbull* is intended, primarily, to deal with the "ghastly risk" in cases of fleeting encounters; see Lord Widgery CJ in *R v Oakwell* [1978] 1 All ER 1223 and also *R v Pattinson and Exley* [1996] 1 Cr App R 51. The rule is equally applicable to police witnesses: *R v Reid* [1989] 3 WLR 771, PC; as Cr App R 121. The judge should raise with counsel, prior to their closing speeches and the summing up, the issue of what evidence they seek to rely on as undermining or supporting the identification evidence so that the judge can indicate to counsel his view as to whether and not that evidence is capable of having that effect: *R v Stanton* [2004] EWCA Crim 490. In his summing up, the judge should identify for the jury's careful weighing exercise matters that **he** considers material to the issue and not merely refer to points raised by counsel: *R v Elliott* [1997] EWCA Crim 3419.

2. Where the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. See *R v Fergus (Ivan)* 98 Cr App R 313, CA. The identification evidence can be poor, even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. Where, however, the quality is such that the jury can safely be left to assess its value, even though there is no other evidence to support it, the trial judge is entitled (if so minded) to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken. *R v Weeder* [1980] 71 Cr App R 228 and *R v Breslin* [1985] 80 Cr App R 226. The judge should identify the evidence he regards as capable of supporting the evidence of identification.

3. In *R v Etienne* (1990) The Times, 16 February, the court was not at all sure that previous sightings of the suspect could render the identification more reliable if the identification was, on any view, an identification amounting to no more than a fleeting glimpse recognition. The court was left with a lurking doubt as to the safety of the conviction.

4. Such a direction is not required in every case, eg where the identification is not challenged or where it is not regarded by the judge as requiring supportive evidence. See *R v Penman* [1986] 82 Cr App R 44. Neither is such a direction required when the identification is by description rather than by facial features (see *R v Doldur* [2000] Crim L R 178 and *R v Gayle* [1999] 2 Cr App R 131. See also *R v Byrne* [1999] EWCA Crim 120.

5. For hot pursuit situations, see *R v Wong Wing-yip* Cr App 512/90.

6. Where identification involves recognition, remind the jury that mistakes in recognition, even of close friends and relatives are sometimes made. As to the cumulative effect of a number of identifying witnesses, see *R v Barnes* [1995] 2 Cr App R 491.

7. Care should be taken in directing about support to be derived from the jury's rejection of an alibi. There may be many reasons for putting forward a false alibi. Alibi witnesses may be genuinely mistaken as to dates etc. Only if satisfied that the sole reason for the fabrication was to deceive them, may the jury find support for poor identification evidence. The mere fact that the defendant has lied about his whereabouts does not of itself prove that he was where the identifying witness said he was. Lies may however, in limited circumstances, provide support for identification evidence. See *R v Goodway* 98 Cr App R 11 and *HKSAR v Mo Shiu Shing* [1999] 1 HKC 43; and **Direction 42**.

8. *R v Galbraith* [1981] 73 Cr App R 124 was not intended to affect in any way the *Turnbull* guidelines as to the withdrawal of a case dependent upon poor identifying evidence.

9. For the relationship between the *Turnbull* directions and the now discretionary directions on supporting evidence in sexual cases where identification is in issue,

see the important case of *R v Chance* [1988] 87 Cr App R 398 and *R v Barnes* [1995] 2 Cr App R 491.

10. As to identification of a defendant by comparison with a film or photograph from the scene of the crime, see the summary of the circumstances in which such evidence may be admitted in the judgment of the Court of Appeal in *AG's Reference* (No. 2 of 2002) 2003 1 Cr App R 21 p.321.

Archbold Hong Kong (2009) 14-1 et seq.
Archbold (2009) 14-1 et seq.
Blackstone (2009) F 18.2.
Bruce and McCoy, Criminal Evidence; XI-2 to 352.

28A. Identification by Voice

In an appropriate case where identification by voice is in issue the trial judge should direct the jury by the careful application of a suitably adapted 'Turnbull' direction: see *R v Hersey* [1998]Crim LR 281, [1998] EWCA Crim 1094, 27 November 1998; *R v Gummerson and Steadman* [1999] Crim LR 680, [1998] EWCA Crim 3106, 1 December 1997. See also 'Sounds Familiar' by David Omerod [2001] Crim L R 595, in particular p.619.

In *R v Roberts* [2000] Crim LR 183, the Court of Appeal of England and Wales referred to academic research indicating that voice identification was more difficult than visual identification, and concluded that the warning given to jurors should be even more stringent than that given in relation to visual identification ;see also *HKSAR v Lai Wai Cheung* [1998] 1 HKLR 665 and *R v Cheung Hay Din* [1991] 1 HKC 250.

It is clear from the authorities that it is not necessary to hold a voice identification procedure to render admissible evidence of identification by voice.

As to the use of auditory and acoustic expert evidence, see *R v Doherty* [2001] 1 Cr App R 5. and [2003] Crim L R 183(Court of Appeal of Northern Ireland).

Archbold Hong Kong (2009) 14-46 et seq.
Archbold (2009) 14-52.
Bruce & McCoy, Criminal Evidence; XI-404 to 542.
Blackstone (2009) F-18.30.

28B. IDENTIFICATION BY DNA

1. In the judgment of the Court of Appeal of England and Wales in *R v Doheny* [1997] 1 Cr App R 365 Phillips LJ suggested the following be addressed in the summing up on the aspect of DNA evidence :

> *"The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case.*
>
> *'Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only 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.'"*

Note:

The guidance of Phillips LJ was approved in the Advice of the Privy Council in *Pringle v R [Jamaica]* [2003] UKPC 9.

In Hong Kong, in the context of evidence of a random match probability of say 1: 33.5 billion it might be appropriate to direct the jury in the following manner:

"What that means is that the probability of finding another person with the same DNA type from the local Chinese population who is neither the sample donor or anyone related to him is one in 33.5 billion."

Archbold Hong Kong (2009) 14-48.
Archbold (2009) 14-58.

Bruce & McCoy, Criminal Evidence; I –254.
Blackstone (2009) F18.32.

29. DELAY

1. The following direction is framed to include all the directions that may be necessary where the count(s) relate to events which occurred years earlier or where for any reason there is concern about the delay But, as the notes below emphasise, directions about delay, if they are appropriate in the case at all, must be tailored to the case.

We are now concerned with events which are said to have taken place a long time ago. You must appreciate that because of this there may be a danger of real prejudice to a defendant. This possibility must be in your mind when you decide whether the prosecution has made you sure of the defendant's guilt.

1. *(Where appropriate:)* You are entitled to consider why these matters did not come to light sooner. Is that a reflection on the reliability of the complaint? Or does it arise from the conduct of the defendant? You have been given an explanation for this, which is […]
2. You should make allowances for the fact that with the passage of time memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred [many years ago]. Sometimes the passage of time may even play tricks on memories.
3. You should also make allowances for the fact that from the defendant's point of view, the longer the time since an alleged incident, the more difficult it may be for him to address. [For example, has the passage of time deprived him of the opportunity to put forward an alibi and evidence in support of that alibi]. You only have to imagine what it would be like to have to answer questions about events which are said to have taken place […] years ago to appreciate the problems which may be caused by delay. Even if you believe that the delay in this case is understandable, if you decide that because of this the defendant has been placed at a real disadvantage in putting forward his case, take that into account in his favour when deciding if the prosecution has made you sure of his guilt.
4. *(Where appropriate in the case of a defendant of good character i.e. either here, or when giving the second limb of the good character direction, add:)* Having regard to what you know about this defendant and in particular the […] years since the date of the alleged offence [and *(if it be the case)* that no similar allegation has been made against him] you may think he is entitled to ask you to give considerably more than usual weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

Notes

1. The direction takes into account the observations of the Court of Appeal (Criminal Division) in *R v Percival* (1998) EWCA Crim 2012 (19 June 1998). However, in a number of cases before and after *Percival* the Court of Appeal has emphasised that whether a direction about delay is required at all and, if so, what form it should take will depend on the circumstances of the case, including the length of the delay and the cogency of the evidence. (See eg *R v E* (1995) The Times, 6 July; *R v W* [1999] 2 Cr App R 201; and *R v M* [2000] 1 Cr App R 49.) In the last of the cases, at p 57, Rose LJ said:

> *" It is apparent that the judgment in Percival was directed to the summing-up in that particular case. We find in the judgment no attempt by the Court to lay down principles of general application in relation to how judges should sum up in cases of delay and we accordingly would wish to discourage the attempts being made, with apparently increasing frequency, in applications and appeals to this Court to rely on Percival as affording some sort of blueprint for summings-up in cases of delay. It affords no such blueprint. Indeed in this area, as in so many others, prescription by this Court as to the precise terms of a summing-up is best avoided. Trial judges should tailor their directions to the circumstances of the particular case. In a case where there have been many years of delay between the alleged offences and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard or proof can be left to the good sense of trial judges with appropriate help and guidance from the Judicial Studies Board."*

Also, see *R v Holgate* [1996] 3 HKC 315 at 321 E-G.

2. Where there is a delay between the crime and the witness identifying the defendant, see **Direction 28**, Identification.
3. Where a significant difficulty to the defence or some aspect of prejudice occasioned by the delay has been aired on behalf of the defence, or is perceived by the judge (e.g. the defendant can no longer remember where he was at a time or date so long after the event) it is incumbent on the judge to emphasise the way in which prejudice may have arisen [see *R v Henry* [1998] 2 Cr. App. R. 161 at 168F].
4. See *R v Doody* EWCA Crim 2394 (24 October 2008) [paragraphs 9 and 11] a decision of the Court of Appeal of England and Wales for general guidance as to the ambit of an appropriate direction in circumstances of a delayed complaint where the issues of shame, guilt and trauma in the complaint arise on the evidence.

Archbold (2009) 4-71(a).
Bruce, Criminal Procedure; VI -753.1.
Blackstone (2009) D 3.61.

30. SEXUAL OFFENCE: RECENT COMPLAINT AND DISTRESS

Recent complaint

In *R v Islam,* [1998] 1Cr App R 22 and *R v NK* [1999] Crim. LR 980 the Court of Appeal in England stated the need to direct the jury on the evidential significance of a complaint in a sexual case. It was emphasized by the Privy Council in *White v The Queen* [1999] 1 AC 210 and [1999] 1 Cr App R 153 that it was necessary that the terms of the complaint be proved by the person to whom it was made.

> You have heard evidence that shortly after this alleged incident X made a complaint to Y [her mother, a passer-by, the police, etc]. This is not evidence as to what actually happened between X and the defendant. Y was not present, and did not see what happened between them.
>
> It is evidence which you are entitled to consider, because it may help you to decide whether or not X has told you the truth. [The prosecution say that her complaint is consistent with her account, and therefore she is more likely to be truthful. On the other hand the defence say...] It is for you to decide whether the evidence of this complaint helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between X and the defendant, and it therefore cannot of itself prove that the complaint is true.

Notes:

1. Evidence of recent complaint is admissible only as evidence of the consistency of the complainant's conduct, not for the purpose of negativing consent.

   In *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526 at 537 H to 538 B, paragraph 21, Li CJ noted that the general rule at common law was that a witness could not be asked in evidence-in-chief whether he had formerly made a statement consistent with his present testimony. He went on to say:

   > *"A well known common law exception to this rule is evidence of recent complaint in a sexual case. If a complaint was made at the first reasonable opportunity after the offence, the evidence of the person to whom it was made of the fact that it was made and as to its terms are admissible. But such evidence of recent complaint is admissible not as evidence of the facts complained of but only as evidence of the consistency of the complaint's conduct with his or her testimony. In short, such evidence is only relevant to the credibility of the complainant and would serve to buttress it. See White v The Queen [1999] 1 AC 210 at 215F-H, Archbold Hong Kong (2004) para 8-102, Archbold (2004) para 8-103. In cases where consent has been in issue, there are statements which can be read as suggesting that evidence of recent complaint is also admissible for the purpose of negativing consent. But it should be regarded as settled that this does not afford a second and independent ground of admissibility. Where consent is an issue, evidence of recent complaint is admitted not*

> *as evidence of whether there was consent. Its purpose is merely to show consistency in the complainant's evidence which would include any evidence as to lack of consent. See Kilby v The Queen (1972-3) 129 CLR 460 at 469."*

2. The admissibility of a complaint depends upon proof of the fact of the complaint by other evidence. *(see R v Wright & Ormerod* (1990) 90 Cr App R 91*)*

> *" If the terms of the complaint are not ostensibly consistent with the terms of the testimony, the introduction of the complaint has no legitimate purpose within the context of the trial" (see Wright p. 96)*

3. As noted, a complaint might be proved to show consistency. For that purpose, it was necessary not only that the complainant should testify to the making of the complaint, but also that its terms should be proved by the person to whom it was made. If the recipient of the complaint does not give evidence, the complainant's evidence that she made a complaint cannot assist in proving her consistency. However, a witness might testify to an earlier consistent statement to rebut an imputation that her evidence was a recent invention. *(see White v The Queen* [1999] 1 AC 210*).*

4. A similar direction should be given if, by whatever route, there is before the jury a previous account by a complainant of a sexual offence which, although technically not a recent complaint, is one which the jury is likely to take into account : *R v Croad* [2001] EWCA Crim. 644 (C.A. 21 March 2001).

   If the complaint is one to the emergency services it may have been recorded, and the recording itself may constitute 'primary evidence' of the complainant's condition.

Distress

For guidance on how to deal with the **distressed condition** of an alleged victim of a sexual offence see the judgment of Li CJ in *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526 at 542 I- 543D, paragraph 41:

> ***"Directions by the judge***

The judge should direct the jury on the proper approach to be taken in considering evidence of the complainant's distressed condition. In summary, the essentials of the proper approach are as follows:

> *(a) The jury must be satisfied beyond reasonable doubt (i) that the complainant's distressed condition was genuine and (ii) that there was a causal connection between the distressed condition and the sexual offence. In other words, they must be satisfied that (i) the distressed condition was not feigned and (ii) was only referable to the alleged sexual offence and not*

to any other cause. In deciding on those matters, they must take into account all relevant circumstances.

(b) Where the jury is so satisfied, they could give such weight to the evidence of distress as is appropriate. Weight is entirely a matter for them.

(c) Where the jury is not so satisfied, they should disregard the evidence of distress.

(d) Where fantasy has been properly raised as an issue, the jury must not use evidence of distress to rebut fantasy. If they believe that fantasy is a possibility, they cannot be satisfied of the required causal connection.

A judge sitting alone should approach the matter similarly."

Archbold Hong Kong (2009) 8 – 102.

Bruce & McCoy Criminal Evidence; X-104 et seq.

Note:

The law in England and Wales is now subject to the provisions of the Criminal Justice Act, 2003

Archbold (2009) 8-103.

Blackstone (2009) F 6.20.

31. STATEMENT TO POLICE BY CO-DEFENDANT, Not Evidence Against Defendant

Where maker of statement has not given evidence.

> The statement which B [or any other person] made [to the police] in A's absence implicating A is not and cannot be evidence against A. A was not present and had no opportunity to contradict it. You must therefore disregard it when you consider the case against A.

Where maker of statement has given evidence.

> The statement which B made [to the police] in A's absence cannot by itself be evidence against A, for he was not present and had no opportunity to contradict it. However, B has now given evidence in court [adopting that statement] implicating A. This evidence has been given in A's presence, and A has had the opportunity to challenge and contradict it. Therefore, it is evidence in the case generally, which you are entitled to consider.

Notes :

1 Where there is more than one defendant and each has made a written statement, tell the jury when considering the evidence against each defendant, to consider only the statement made by that defendant.

2 Where an out-of-court statement or confession of one defendant incriminates one or more co-defendants, it will often be sensible to advise the jury to consider the case of the defendant who was alleged to have made that statement after considering the case of the co-defendants *R v Hickey and Robinson* (1997) 8 Archbold News 3; Archbold 2009; 4-405.

3. Even if A and B are together when co-defendant B makes a statement implicating A, the statement may only be taken into account as evidence against A if A says or does something which constitutes a positive acceptance or acknowledgement of the truth of these statement in so far as it affects A. The fact that A remains silence when confronted with that statement cannot be an acceptance by him of the truth of B's statement.

4. Of course, if the defendant has given evidence in favour of defendant A the jury is entitled to have regard to it, and must be so directed. If he has given evidence against A it is necessary to have regard to **Direction 41** - 'Defendant's Evidence – Effect on other Defendants'.

31A. STATEMENT TO POLICE BY CO-DEFENDANT
May Be Evidence To Be considered <u>In Favour</u> Of Defendant.

In *HKSAR v Lee Kwan Kong* CACC 198/2004 (unreported) the Court of Appeal quashed an appellant's conviction for the offence of murder in circumstances in which the trial judge had not directed the jury that they could have regard to references in out-of-court statements made to the police and adduced in evidence at the joint trial by two co-accused exculpatory of the appellant's conduct. In so doing, the court cited with approval the decision of the House of Lords in *R v Myers* [1997] 3 WLR 552. In the judgment of the court, delivered by Stuart-Moore VP, the issue was addressed thus : (paragraph 62)

"In the present case, of course, unlike the position in Myers, D1 and D3's respective confessions had been admitted in evidence and, for the purposes of advancing her defence that her guilt extended only as far as the assault she was prepared to admit, D2 was entitled to rely upon D1 and D3's confessions to show that, in fact, after she had gone to sleep, they had carried out a prolonged and serious attack upon the deceased. Indeed, without their accounts, there would have been nothing before the jury to suggest that D2 had not been involved in assaulting the deceased right up to the end, such as might have been the case if she had been arrested and tried on her own, without having the advantage of the confessions made by D1 and D3 which provided the full picture of what had happened. As Lord Slynn said (at page 563) in Myers:

> *"A confession may be relevant as to credibility or as to the facts in issue and it does not cease to be admissible because it does so. Indeed, as long as it is relevant to establish his defence or to undermine the prosecution case against him a defendant should in my view be allowed to cross-examine a co-defendant as to his confession which goes to the facts in issue rather than only to the credibility of the maker of the statement. He should not less be allowed to cross-examine the person to whom a statement is made as to the terms of the confession even though, since the defendant has not given evidence, the question of credibility has not arisen."*

In the instant case, D2 merely had to rely on what had been said by D1 and D3 to establish the fact that hours after she had gone to her room to sleep, D1 and D3 had launched a fresh attack on the deceased.

It follows, therefore, that while the judge had rightly directed the jury that each of the confessions made by the applicants was evidence against only the maker of the confession, the judge ought at the same time to have indicated that they could take favourably into account in D2's case what had been said by D1 and D3 about their resumption of the assault upon the deceased long after D2 had left the scene."

Archbold (2009) 15-387.
Archbold Hong Kong (2009) 15-114 to 115A et seq.
Blacksone (2009) F 17.19.

32. EXPERT EVIDENCE

In this case you have heard the evidence of X, who has been called as an expert on behalf of the prosecution/defendant. Expert evidence is permitted in a criminal trial to provide you with scientific [or e.g. accountancy] information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely [...].

[In a case where e.g. handwriting (see Note 1, below) is in issue or there might otherwise be a danger of the jury coming to its own 'scientific' conclusions, add: With regard to this particular aspect of the evidence you are not experts; and it would be quite wrong for you as jurors to attempt to [compare specimens of handwriting/perform any tests/experiments of your own] and to come to any conclusions on the basis of your own observations. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.]

A witness called as an expert is entitled to express an opinion in respect of [his findings or the matters which are put to him]; and you are entitled and would no doubt wish to have regard to this evidence and to the opinion/s expressed by the expert/s when coming to your own conclusions about this aspect of the case.

You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert/s, you do not have to act upon it. [Indeed, you do not have to accept even the unchallenged evidence of an expert.] *(In a case where two or more experts have given conflicting evidence:)* It is for you to decide whose evidence, and whose opinions you accept, if any. You should remember that this evidence relates only to part of the case, and that whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

Notes:

1. In relation to a matter such as handwriting, it is desirable to give the jury (in addition to any directions in the summing up) an early direction when the matter arises in evidence that they should not embark upon a comparison exercise on their own. They may, e.g. be told, if the issue is likely to be of importance, that they must decide it on the evidence only (which may legitimately take the form of agreed facts, the evidence of the maker or alleged maker of the document, the evidence of a person proved to be familiar with the maker's handwriting, expert evidence and circumstantial evidence); but they must not decide it on the basis of any comparison carried out privately by them.

2 See *R v Stockwell* 97 Cr App R 266; *R v Fitzpatrick* [1999] Crim LR 832; *R v O'Brien* and others [2000] EWCA Crim. 3 (C.A. 25 January 2000) followed in *R v Smith* [2003] EWCA Crim. 927 (in relation to confessions); *R v Buckley* [1999] EWCA Crim.1191 (C.A. 30 April 1999) (in relation to fingerprints); and *R v*

Dallagher [2003] 1 Cr App R 195 (in relation to ear-prints, and the test of admissibility of expert evidence in a novel area).

3. In respect of psychiatric reports containing potentially inadmissible material regard should be had to :

   (1) section 65DA of the Criminal Procedure Ordinance, which requires service of expert reports before the trial, a matter which should be raised at the Pre-Trial Review;

   (2) the need to scrutinise the reports before trial to ascertain whether or not the intended evidence is admissible; and if doubt arises the need to raise the issue with counsel at an early stage;

   (3) the distinction to be drawn between the factual basis for the expert's opinion and the opinion itself. Where the factual basis is an account of events given to the psychiatrist by the patient, it is for the jury and not the psychiatrist to say whether that factual basis is or may be true; a point which may have to be drawn to the attention of the jury in the summing up.

4. For the proper ambit of an expert's report, see *R v Harris and others* [2006] 1 Cr App R 5 and *R v B (T.)* [2006] 2 Cr App R 3.

5. 'The Code of Practice for Expert Witnesses Engaged by the Prosecution Authority [of Hong Kong]' –see Archbold Hong Kong (2009) Appendix Three.

Archbold Hong Kong (2009) 10-36 et seq.
Archbold (2009) 10-64 et seq.
Blackstone (2009) F10.3 et seq.
Bruce & McCoy, Criminal Evidence; VI-304 to 653.

33. DISHONESTY AND THE 'GHOSH' DIRECTION

Normally it is not necessary to attempt to define dishonesty as an ingredient of an offence. It will suffice simply to tell the jury that the word bears its ordinary meaning, which will be well known and understood by all of them.

However, there are exceptional cases in which the defendant may e.g. claim that his alleged conduct even if proved or admitted was not considered by him to be dishonest. In such cases a direction in accordance with the judgment of Lord Lane CJ in *R v Ghosh* 75 Cr App R 154 should be given. It is wise to use the exact words, see *R v Hyam* 1997 EWCA Crim 161 (23 January 1997).

It is always desirable to canvass the need for such a direction with counsel prior to speeches.

For examples of cases in which such a direction was held to be appropriate and inappropriate, see respectively *R v Wood* [1999] Crim LR 564 and *R v Wood* [2002] EWCA Crim 832.

Ghosh direction

The prosecution must make you sure that the defendant was acting dishonestly. In this case you must decide two questions:

1. Was what the defendant did [or *(in the case of a conspiracy)* agreed to do] dishonest by the ordinary standards of reasonable and honest people?.

   In this regard, you the jury must form your own judgment of what those standards are.

2. Must the defendant himself have realised that what he was doing [or *(in the case of a conspiracy)* agreed to do] would be regarded as dishonest by those standards?.

   In deciding this you must consider the defendant's own state of mind at the time [of these events].

If, after taking into account all of the evidence, you are sure that the answers to both of these questions are YES, the element of dishonesty is proved. If you are not sure of that, the element of dishonesty is not proved [and the defendant is 'Not Guilty' of the offence].

Archbold Hong Kong (2009) 22-20.
Archbold (2009) 21-2b.
Blackstone (2009) B 4.37.

34. SECTION 65 STATEMENTS

In relation to facts admitted under section 65C *Criminal Procedure Ordinance* :

> The evidence includes the statement of admitted facts, which was read to you. You must treat the facts which are thus admitted as facts which are conclusively proved in this case.

In relation to section 65B statements :

> The written statement of [Mr X] was read to you. It constitutes evidence in this case just as if Mr X had appeared in person before you, and given direct oral evidence of the matters in that statement. The matters in the statement should be considered by you along with all the other evidence. You are not bound to accept what is said in the statement. [On the other hand, since there has been no evidence to contradict the statement, you might feel that you are able to accept what it says.]

Archbold Hong Kong (2009) 10-7and 8; 10-20 and 21.
Bruce & McCoy, Criminal Evidence; II-201 to 303.

35. HEARSAY EVIDENCE ADMITTED UNDER SECTIONS 70, 73 AND 77F OF THE EVIDENCE ORDINANCE

Where the hearsay evidence is not admitted as agreed evidence or is the subject of challenge:

The general rule in the courts is that unless evidence is agreed it has to be given orally from the witness box. Then, you have the opportunity to see the witness for yourselves and judge the evidence accordingly. However, there are certain circumstances where a witness is unavailable and the evidence is given in other ways, for example by reading out his earlier deposition. In this case you have heard evidence from X [by the reading of X's deposition]. That is evidence in the case which you can consider and to which it is for you to decide what weight, if any, to attach, but as X did not come to court that evidence has certain limitations which I must draw to your attention.

1. You have not had the opportunity of seeing and hearing X in the witness box, and sometimes when you do see and hear a witness you get a much clearer idea of whether his evidence is honest and accurate.

[AND where appropriate]:

2. X's 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.

[*Refer to matters, by way of illustration, that might have been put in cross-examination in the particular case and any particular matters canvassed during the trial which might further affect the jury's view of X's evidence]*

* Under section 70 and section 77F there may have been cross-examination before a magistrate or other person, in which case identify the areas of such cross-examination but, if evidence relevant to that testimony came to light subsequent to the cross-examination identify those areas and indicate the sort of matters that might have been put in cross-examination in addition.

Note: It may be appropriate to tailor the above direction to other circumstances in which hearsay evidence is admitted eg dying declarations etc.

Archbold Hong Kong (2009) 9-45 and 11-15.
Bruce & McCoy, Criminal Evidence; VI 4- 52.

36. Drugs - Money Found In Possession Of Defendant / Evidence Of Extravagant Lifestyle, etc.

The prosecution has called evidence that the defendant [eg was found to be in possession of $..] (and/or to the effect that he) [was living to a standard which they suggest was much higher than that which might be expected of a man of his means].

That evidence, if you accept it, does not by itself prove anything against the defendant. However, if you are sure that:

(a) the defendant was indeed [in possession of this money and/or living to a standard much higher than might be expected in all the circumstances of the case];

(b) the defendant's explanation for the [money][standard of living] is untrue; and

(c) the [money][standard of living] can only be explained by continuing unlawful trafficking in drugs as opposed to unlawfully trafficking in drugs in the past,

you may, if you think fit, take that evidence into account when deciding whether the defendant was unlawfully trafficking in drugs as alleged in the indictment.

Notes :

1. See *R v Gordon* [1995] 2 Cr App R 61, *R v Diane Morris* [1995] 2 Cr App R 69, *R v Grant* [1996] 1 Cr App R 73 and *R v Malik* [2000] 2 Cr App R 8. Re 'lifestyle', see *R v Scott* [1996] Crim LR 652.

2. In *R v Guney* [1998] 2 Crim App R 242, the Court of Appeal held that it is for the trial judge to determine whether cash and lifestyle may be relevant and admissible to any issue in the case. The court decided that in limited circumstances this kind of evidence might also be relevant to the issue of possession only. The admissibility of such evidence depends on the particular circumstances of the case, and the issues raised (for example, the defendant was not 'knowingly' in possession). Such evidence is more likely to be relevant where the issue is unlawful trafficking by possession for the purposes of unlawful trafficking. See also *R v Griffiths* [1998] Crim LR 567, CA.

3. A similar direction should be given where the issue is possession of dangerous drugs for the purpose of unlawful trafficking and documents containing references to money transactions allegedly relating to transactions involving dangerous drugs are admitted in evidence. See *R v Lovelock* [1997] EWCA Crim.1123, 1997 Crim LR 821, and *R v Chubb* [1998] EWCA Crim. 638 (20 February 1998).

Archbold Hong Kong (2009) 29-48 et seq.
Archbold (2009) 27-71 et seq.
Blackstone (2009) F 1.13.
Bruce & McCoy, Criminal Evidence; I- 1 to 102.

IV. THE DEFENDANT

37. DEFENDANT'S CHARACTER — GOOD

Guidance as to the ambit of the discretion in the judge — to give a credibility and a propensity direction whenever a defendant has testified or made pre-trial answers or statements — is given in the decision of the Court of Final Appeal in *Tang Siu Man v HKSAR No. 2* [1998] HKCFAR 107.

The Court commented that given the wide range of circumstances in which good character (in all its suggested manifestations) might come into play, 'any set rule of practice apt to cover all cases must necessarily be suspect.' Where there is evidence of good character it will not always be necessary to give both limbs of the *Vye* direction; and the mere absence of any previous convictions does not of itself necessarily drive a judge to give a good character direction. The conclusions of the CFA were as follows, (at 133B-134 A) :

> "*1. There is no need in this jurisdiction to impose the Vye and Aziz regime on trial judges. The regime has not been demonstrated to work well in other jurisdictions. At the extremity, those rules of practice require trial judges to give directions testing the limits of common sense, and then to add qualifications in an attempt to return to the confines of common sense. Whatever the imperatives making that regime desirable in England, none has been demonstrated here.*
>
> *2. Where positive evidence of good character has been adduced and nothing discreditable concerning the defendant has emerged, a summing-up which fails to give a full Vye direction — and if needs be something more — might well render the summing-up unbalanced and unfair.*
>
> *3. As a matter of humanity and indulgence — expressing the traditional inclination of the common law in favour of the defendant in criminal trials, springing from "the time when the law was according to the common estimation of mankind severer than it should have been" per Cockburn CJ in Rowton (1865) 19 Cox CC 25 at 30 — trial judges have often in practice given both limbs of the good character direction on mere absence of previous convictions. They will doubtless continue to do so in the future. Sometimes one limb of the direction is enough : for example, where in essence the central issue is credibility and an inclination on the part of the jury to believe the defendant means in effect he is entitled to an acquittal : to fail to give the "credibility" direction in such circumstances may well render the summing-up unbalanced and unfair : to give the "propensity" limb may be a surplusage.*
>
> *4. "Absence of previous convictions" is a concept indulgently construed by trial judges. One or two minor offences, not related to the*

charges in question, may be overlooked. A string of offences, even though unrelated, will begin to strain against common sense in the context of "good character". The judge's margin of assessment is wide in this area.

5. Where a person with a clear record is before the court, but in the course of the trial, discreditable matters concerning him (or her) are revealed, the judge again has a wide margin of assessment. Dishonest conduct, to borrow an example from Thomas J's judgment in Falealili [1996] 3NZLR 664, may be very relevant to credibility, but irrelevant to propensity towards sexual offences. To simply give the "propensity" direction alone may be appropriate — or none at all.

6. At the end of the day, the summing-up will be looked at by the appellate courts to see if it is fair and balanced. That is the ultimate test."

Wherever there is any doubt as to whether both limbs of the character direction apply, or wherever it is thought that it may be necessary in the particular circumstances to modify a 'character direction', it is desirable to canvass the proposed direction with counsel before their closing speeches.

In *R v Durbin* [1995] 2 Cr App R 84, 91, the court laid down guidelines for cases in which it might be appropriate to give a modified direction. The court stressed the importance of the principle that 'The jury should not be directed to approach the case on a basis which ... is artificial or untrue.' Generally, however, this direction should not be watered down.

The specimen directions provided below are therefore to be regarded as samples to be adapted, or cut, or shaped, according to the particular case.

> You have heard that the defendant is a man/young man of good character [not just in the sense that he has no convictions recorded against him, but witnesses have spoken of his positive qualities]. Of course, good character cannot by itself provide a defence to a criminal charge, but it is evidence which you should take into account **in his favour** in the following way/s:

Credibility

*If a defendant does not give evidence **and** he has not made any statement to the police, or other authority or person which is admitted in evidence, ignore 1 below.*

> *1. (If a defendant has given evidence)* In the first place, the defendant has given evidence, and as with any man of good character his good character supports his credibility. This means it is a factor which you should take into account when deciding whether you believe his evidence.
>
> *(If a defendant has not given evidence, but has eg made a statement to the police or*

has answered questions in an interview). In the first place, although the defendant has chosen not to give evidence before you, he did, as you know give [an explanation to the police]. In considering [that explanation] and what weight you should give it, you should bear in mind that it was made by a person of good character, and take that into account when deciding whether you can believe it.

The direction as to **propensity** may be given whether or not the defendant has testified and whether or not he has made out-of-court statements adduced in evidence.

Propensity

2. In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now.

I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, […] and […]. (*Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character, and at this stage the benefit of this to a defendant whose good character justifies it may be pointed out to the jury, with words such as:* Having regard to what you know about this defendant 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) 'Character, bad or good, is not simply a matter of the presence or absence of previous convictions, nor is it the same as reputation, though the one may be evidence of the other.' (*Durbin, supra,* at page 92)

(2) Do not detract or qualify from the direction, for example by commenting that initially everyone has a good character. (See *Berrada* (1990) 91 Cr App R 131; *Cohen* (1990) 91 Cr App R 125)

(3) Where the defendant has called character witnesses, the jury should be reminded of their evidence and of the way it relates to credibility.

(4) "*A defendant who is of good character is entitled* to have the judge direct the jury as to its relevance even if he is jointly tried with a defendant of bad character. … The judge will have to decide what if anything to say about the character of the defendant who is not of good character. He might think it best to grasp the nettle and tell the jury that they have to try the case on the evidence; there having been no evidence about the character of the particular defendant, they must not speculate and must not take the absence of any information as to*

his character as any evidence against him. On the other hand a judge might think it best to say nothing about the absence of evidence as to character of the co-defendant]." "Where the co-defendant's bad character is in evidence, a full direction on its significance must be given *R v Cain 99* Cr App R 208" Archbold (2009) 4-407.

(* 'Entitled' must be read subject to the decision in *Tang Siu Man.* But the point is that where the judge does give a direction as to the relevance of good character in relation to one defendant he must decide how he is to deal with the contrast between that fact, on the one hand, and, on the other, silence about the character of another defendant.)

(5) As for the position of a defendant who has pleaded guilty to another offence upon the same indictment and his entitlement nonetheless to a character direction, see *Teasdale* (1994) 99 Cr App R 80.

(6) Where an accused is of mature years and is of unblemished character and /or where positive evidence of his good character has been adduced (beyond the fact of a record clear of any material blemish) attention should be drawn to the combined impact of maturity and good character. On the other hand, where the defendant with a good character is young, a good character direction should not be diluted or rendered nugatory by reference to his mere youth or to the fact (if it is a fact) that no character witnesses have been called.

(7) A good character direction should be given in the form of an affirmative statement rather than a rhetorical question (*R v Lloyd* [2002] Cr App R 355) and should not be qualified by suggesting that its significance in relation to propensity is less when the offence is spontaneous (*R v Fitton* [2001] EWCA Crim 215).

Archbold Hong Kong (2009) 4-228 et seq.
Archbold (2009) 4-406 to 409.
Blackstone (2009) F13.1 et seq.
Bruce & McCoy, Criminal Evidence; I –652 to 675.

38. DEFENDANT'S CHARACTER — BAD

(Where not introduced as evidence of propensity)

You have heard that the defendant has previous convictions [for ....]. This has been given in evidence because he [has attacked the character of a prosecution witness and it is right that in those circumstances you should know the character of the person making that attack] [has claimed to be of good character] [has given evidence against a co-defendant, who has cross-examined him on his character].

What is the relevance of the defendant's convictions in this case? The only reason why you have heard about his previous convictions is that knowledge of the character of the defendant [who has made this attack] may assist you to judge the truthfulness of his evidence when you come to consider this matter.

You must not assume that the defendant is guilty or that he is not telling the truth because he has previous convictions. His convictions are not relevant at all to the likelihood of his having committed the offence. They are relevant only as to whether you can believe him. You do not have to allow these convictions to affect your judgment. It is for you to decide the extent to which, if at all, his previous convictions help you about that.

Add as appropriate :

[The defendant tells you that although he has convictions, he has always pleaded guilty on his previous appearances before the court. This is a matter which you may take into account when deciding what impact his convictions have upon his truthfulness].

[The defendant has admitted that he has on ... occasion[s] pleaded not guilty but has been found guilty by a jury after having given evidence on oath in that case. You are entitled to consider this when deciding whether you can believe him but you must not assume that merely because he has not been believed on a previous occasion he is not telling you the truth on this occasion].

Where there is evidence of previous convictions but where the defendant might pray in aid the absence of convictions of a particular type, the following is a sample direction for adaptation as appropriate :

You have heard that the defendant has been a drug addict and that he has been in prison for drug offences. [Normally, a jury does not hear .. etc ..] In this case, you had to hear about his addiction and his drug offences because it was all part of the history of his relationship with the deceased, and the argument between them was about payment for drugs. But the mere fact that he was an addict and has been in prison for drug offences does not mean that he is not telling you the truth about what happened on the occasions with which you are concerned. He is not

on trial before you for being a drug addict or for having been in prison at some stage in the past; and the fact that he has these convictions does not help you in the slightest to decide whether or not he is guilty of murdering Mr. Z. Indeed, he is aged 40 years and he has never been in trouble for any offences of violence, which may mean that he is less likely to commit such an offence as is now suggested against him than otherwise might be the case.

Note: See *R v Prince* [1990] Crim LR 49, CA and the principles set out in *R v Burke* 82 Cr App R 156, *R v McLeod* (1994) The Times, 14 April, *R v Carter* (1996) The Times, 14 November and *R v Miller* [1997] 2 Cr App R 178. But, also see **Direction 41** and the reference in the notes to the judgment of the Court of Appeal of England and Wales in *R v Randall*, a 'cut throat' defence in a murder trial in which a co-accused was held entitled to a direction in respect of propensity as well as credibility arising from evidence led of the other defendant's convictions for offences of violence.

Archbold Hong Kong (2009) 4-232.
Bruce & McCoy, Criminal Evidence; X-1405.

Note: In England and Wales the law is subject now to the provisions of the Criminal Justice Act, 2003.
Archbold (2009) 13-101.

39. DEFENDANT'S CONFESSION

There have been produced records of certain interviews which the police say they conducted with the defendant. The prosecution assert that [although you should not accept everything said by the defendant to the police as accurate] nonetheless the interviews contain admissions by the defendant that (*state the essence of the admissions*) and the prosecution further contend that those admissions are true.

The defendant's case is that [he made none of those admissions and that they were fabricated by the police {but that to the extent that he is said to have adopted the admissions by appending his signature to those documents he was forced to do so; that the signatures are therefore worthless; and that the admissions are untrue}] [although he made the confession it is not true].

In deciding whether you can safely reply upon the admissions, you must decide two issues :

1. Did the defendant in fact make the admissions? If you are not sure that he did, you must ignore them. If however you are sure he did, then :
2. Are you sure that the admissions are true? In addressing that issue (whether the admissions / answers were true) decide whether they were, or may have been, made or given as a result of [oppression] [something said or done which was likely to render them unreliable]. If you conclude that the admissions / answers were or may have been obtained by (*identifying the person or persons in authority*) as a result of [oppression] [something said or done which was likely to render them unreliable] then you must disregard the admissions / answers.

In this case, the defendant alleges that (*summarise the allegation*). If you conclude that that allegation is or may be correct and that the admissions / answers were or may have been obtained as a result of that conduct, then you must disregard the admissions / answers.

If, however, you are sure that the defendant made the admissions and that they were not obtained in that way, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason, you are not sure that the admissions are true, you must disregard them. If on the other hand, you are sure that they are true, you may rely on them. (*Remind the jury of any specific weaknesses in the confession evidence which may reflect on its reliability.*)

Note : The last two paragraphs of this direction depart from the previous directions which advised the jury that a finding of oppressive circumstances led, not necessarily to rejection of the confession, but to an assessment of weight. That reflected the law in *Chan Wei Keung v The Queen* [1967] 2 AC 160 which enabled the jury to rely on a confession even if it was or may have been made as a result of oppression or other improper circumstances, so long as the jury were sure it was made and that it was true. Strictly speaking, that remains the law in Hong Kong but that approach has now been

disapproved by the Privy Council in *Wizard v the Queen* [2007] UKPC 47 which endorses *R v Mushtaq* [2005] UKHL 25; [2005] 1 WLR 1513 as being declaratory of the common law. *Chan Wei Keung* pre-dated the Hong Kong Bill of Rights Ordinance and the Basic Law and the consequential constitutional protection of the right against self-incrimination. It is this right that forms the core of the decisions in *Mushtaq* and *Wizard*. It therefore seems to those drafting these directions that a direction along the new suggested line is much the safer course.

Mental Handicap

Where a confession has been made by someone who is mentally handicapped, it is incumbent on a judge in the summing up to render a full statement of the accused's case against the confession being accepted as true and accurate and to adopt the standard direction. In those circumstances, add with such modifications as are appropriate :

> In this case you should approach the evidence of the defendant's confession with special caution before convicting him on it. I say this for three reasons. First, because the case against him depends wholly/substantially on that confession. Second, because he is a mentally handicapped person. Third, because no independent person was present when he made it – that is, someone other than the police officer(s).

Archbold Hong Kong (2009) 15-61 and 15-91.

40. DEFENDANT'S MIXED STATEMENT

The direction applies where the defendant has **not** given evidence.

The direction then to be given (below) is that suggested in *R v Sharp* [1988] 1 WLR 7 and approved of in the judgment of the CFA in *Li Defan v HKSAR* (2002) 5 HKCFAR 320 at 334 §29. It is not intended to apply where the defendant gives evidence, in which event the real question is what weight is to be given to the evidence which the defendant gives : see *R v Vu Trong–minh* [1995] 1 HKCLR 24; and *R v Cheung Hon Kwong* Cr App No. 503 of 1989 (unreported).

"Where the Sharp direction is given, it is not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than the evidence of the facts they state" *(R v Duncan* (1981) 73 Cr App R 359). See also *R v Aziz* [1996] 1 AC 41.

> The defendant's statement to the police contains both incriminating parts and [excuses] [explanations]. You must consider the whole of the statement in deciding where the truth lies. You may feel that the incriminating parts are likely to be true – for why else would he have made them? You may feel that there is less weight to be attached to his [excuses] [explanations], for they were not made on oath, have not been repeated on oath, and have not been tested by cross examination.

Where there is an issue whether the statement was made or whether, if made, it was made freely, see **Direction 39**.

See *R v Garrod* [1997] Crim LR 445 and [1996] EWCA Crim 1149 for guidance as to which statements are to be regarded as 'mixed'.

"We would hold that where the statement contains an admission of fact which are [sic] significant to any issue in the case, meaning those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt, then the statement must be regarded as 'mixed' for the purpose of this rule".

Also, *Western v DPP* [1997] 1 Cr App R 474.

Also, see the judgment of the Court of Appeal in *HKSAR v Yuen Man Tung* (unreported CACC 442 /2003, at paragraph 18).

Note : The statutory definition of 'confession' in PACE has no statutory equivalent in Hong Kong.

Archbold Hong Kong (2009) 15-107 et seq.
Archbold (2009) 15 – 400 et seq.
Blackstone (2009) F17.61
Bruce & McCoy, Criminal Evidence; V-1203 et seq.

41. DEFENDANT'S EVIDENCE — EFFECT ON OTHER DEFENDANTS

(Where a defendant gives evidence in his own defence which damages a co-defendant's case or tends to implicate a co-defendant in the commission of the offence(s) for which he is being tried.)

In *Law Chung Ki and another v HKSAR* [2005] 8 HKCFAR 701 the Court of Final Appeal addressed the issue of the appropriate direction to give in a 'cut-throat' defence case and, at paragraph 18 page 710 J-711 D, suggested the following direction :

> When an accused enters the witness-box it is usually for the purpose of giving an account simply to the effect that he is innocent. In other words, it is for the purpose of giving an account exculpatory of himself. Sometimes, however, an accused's account is not confined to saying things in his own favour. And it includes saying things against another or other accused. He may say that they are guilty or, short of that, he may say something that at least undermines their position in some way. So it can happen that an accused gives an account that is exculpatory of himself and, at the same time, inculpatory of another or other accused.
>
> There are cases in which two or more [defendants] enter the witness-box, and each gives an account that is exculpatory of himself and, at the same time, inculpatory of another or other accused. Lawyers commonly refer to such accounts as 'cut-throat' defences. *[Describe the nub of the nature of the self- exculpatory accounts of the two or more defendants together with their evidence against their respective co-accused.]* What a jury must always bear in mind about evidence given in support of a 'cut-throat' defence is this. If the evidence given in support of a 'cut-throat' defence leaves [you] [not sure] as to the guilt of the [defendant] who gave such evidence in his own favour then he must be acquitted. But such evidence cannot adversely affect any [defendant] against whom it is given unless [you are sure] that it is true. All of this is simply a part of the law that [unless you are sure of a defendant's] guilt, then he must be acquitted.

The Court went on to note that the suggested direction did not contain a direction in respect of ' self-interest', which formed part of the former specimen direction. Of that, the Court said at paragraphs 21 and 22 at pages 712 I-712B :

"Our view is that, at least in general, the judge should not take the initiative of giving the jury a self interest warning. Of course it may happen that what defence counsel have suggested in cross-examination and/or urged in speech may drive the judge to feel that he should say something about self-interest. Or the judge may feel driven to do that by a question sent to him by the jury. If the judge feels driven to say something about self-interest, he might do so along the following lines:

Each [defendant] is presumed innocent unless and until [his guilt is proven so that you are sure of it]. So the thought that he may have been more interested in getting himself acquitted than in telling the truth should not form any part of your thinking when deciding whether to acquit or convict him. It is, however, something which you may take into account when deciding whether you feel sure that what he says against a co-[defendant] is true. All of this, too, is simply a part of the law that [unless you are sure of a defendant's] guilt, then he must be acquitted.

Notes:

1. Even where it is obvious that the co-defendant is an accomplice there is no rule of practice and certainly none of law which obliges a judge to give the jury the warning about 'corroboration' which is often given when an accomplice gives evidence for the prosecution. Such a warning may nevertheless be given at the discretion of the judge if he thinks it should be, having regard to the nature and severity of the attack made upon a co-defendant. It is not expected that the need for this precaution will arise on more than rare occasions. See *R v Knowlden and Knowlden* (1983*)* 77 Cr App R 94. Also, see Corroboration **Direction 23**.

2. In *R v Randall* [2004] 1 Cr App R 26 p.375 Lord Steyn said of the facts arising in the case, a 'cut-throat' defence in a murder case in which evidence was led of the convictions of offences of violence in respect of a co-accused, that the appellant was entitled to a direction that the evidence went not only to credibility but also to the likelihood that the co-accused was the one who attacked the deceased and that it tended to show that the version put forward by the appellant was more probable than that put forward by the co-accused.

   > *"35. … where evidence of propensity of a co-accused is relevant to a fact in issue between the Crown and the other accused it is not necessary for a trial judge to direct the jury to ignore that evidence in considering the case against the co-accused. Justice does not require that such a direction be given. Moreover, such a direction would needlessly perplex juries."*

3. The 'cut-throat' direction, though couched in terms of defendants giving evidence against each other, would seem also to apply in principle to circumstances where one or more defendants give evidence and others do not, and their evidence tends to undermine the cases of, or support the prosecution case against, those who did not give evidence.

Archbold Hong Kong (2009) 4-221 et seq.
Archbold (2009) 4-404n et seq; 8-164.
Blackstone (2009) F12.34 et seq.
Bruce & McCoy, Criminal Evidence; VIII- 252.

42. DEFENDANT'S LIES (outside court or in the course of the trial)

In *Yuen Kwai Choi* [2003] 6 HKCFAR 113, re-affirmed in *Jim Fai v HKSAR* (2006) 9 HKCFAR 85, the CFA confirmed the observation of the English Court of Appeal in *R v Burge and Pegg* [1996] 1 Cr App R 163 that in cases where a defendant had given evidence a *Lucas* lie direction is not always necessary and, if given where not necessary, merely adds complexity and will do more harm than good.

In the judgment of the CFA Chan PJ noted (p.128 para.37) :

> *37. In the great majority of cases where the prosecution contend that an accused is telling lies in the witness box, a direction on lies is inappropriate.* R v Barnett *[2002] 2 Cr App R 168, 173. In cases where the rejection of any explanation given by an accused almost necessarily leaves the jury with no choice but to convict as a matter of logic, or where the jury are asked to decide on the truth of what an accused said on a central issue in the case, the usual direction on the burden and standard of proof would normally be sufficient. See* R v Dehar *[1969] NZLR 763 at p.765;* R v Man Bing Chou *[1993] 2 HKCLR 71;* R v Liacopoulos and others*, (unrep., 31 August 1994), referred to in* R v Burge and Pegg *[1996] 1 Cr App R 163 at pp.172 to 173. …"*

Of the circumstances in which a direction on lies is necessary he said, (para.38) :

> *"38. Where there is a risk that the jury may regard lies told by an accused as probative of his guilt, as in the case where the prosecution address the jury on the basis that the accused has lied in what he said and that the lie is supportive of the prosecution's case (e.g. in* R v Mok Lun*, (unrep., Crim App No 502 of 1993;* R v Ho Che Chung *[1994] 2 HKC 148;* R v Wai Wing Sang and another *[1992] 2 HKCLR 23), or where there is a danger that the jury may in any way misuse the lie, it is necessary to give a direction on lies. See* R v Richens *[1993] 4 All ER 877 at p.886 and the second paragraph of the conclusions in* HKSAR v Mo Shiu Shing *[1999] 2 HKLRD 155 at p.168. …"*

In considering whether or not to give such a direction and its ambit the judge should consult counsel.

Of the contents of the direction Chan PJ said (para.39) :

> *"39. Where a direction on lies is required, the jury must be directed that a lie in itself can never prove guilt and that they cannot use the lie to strengthen or establish the prosecution's case unless they are satisfied that the lie was told because: 'he*

> *was unable to account innocently for the evidence that has been given against him.'* (Edwards v R *(1993) 178 CLR 193 at p.199); or 'there is no innocent motive for the lie.'* (R v Goodway *(1994) 98 Cr App R 11 at p.15). The jury should also be reminded that there may be innocent reasons for the lie other than consciousness of guilt* (HKSAR v Mo Shiu Shing *[1999] 2 HKLRD 155 at p.168H). The terms of the direction must, however, ultimately depend on the circumstances of each case. In deciding what language to adopt, a trial judge should consider the use to which the lie in question is intended to be put or may be put, and the possible effect it may have on the accused's case, always bearing in mind that the purpose of such a direction is to avoid possible misuse of lies by the jury. Reference can be made to the specimen directions approved by the Court of Appeal in* HKSAR v Mo Shiu Shing *[1999] 2 HKLRD 155 at p.169."*

The following is the basic **Lucas** direction to be given only when the need arises : [see Note 1]

It is alleged (admitted) that the defendant lied to the police (or X) in saying (that ….) and you are entitled to consider whether this supports the case brought against him by the prosecution. In this regard you should consider two questions:

1. You must decide whether the defendant did in fact tell (these) lies. If you are not sure he did, ignore the matter altogether. If you are sure, then next consider:
2. Why did the defendant lie? The mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, and they may possibly be 'innocent' ones in the sense that they do not give any indication of guilt, for example lies to bolster a true defence, to protect somebody else, to conceal some disgraceful conduct (other than) (short of) the commission of the offence, or out of panic or confusion.

If you think that there is, or may be, an innocent explanation for his lies then you should take no notice of them. It is only if you are sure that he did not lie for an 'innocent' reason that his lies can be regarded by you as evidence which supports the prosecution's case.

Note:

1. The 'abbreviated direction' contained in the previous Specimen Directions has been removed in light of the judgment of the Court of Appeal in *HKSAR and Huang Song Fu* (unreported) CACC141/2005. In the judgment of the Court of Appeal, Stuart-Moore VP said:

> *"24. The court in HKSAR v Mo Shiu-shing (at page 168 F-H) had, as we have said, also left open an abbreviated direction,*

falling short of the full direction set out in the previous paragraph in that it did not include words to the effect that if the jury were sure that the defendant had not lied for an innocent reason, his lies could be regarded by them as evidence which supported the prosecution case. We have concluded in the light of the submissions made in this case that whenever directing juries on lies, judges should in future give the full direction (set out in paragraph 23 above). To this extent, therefore, the judgment in Mo Shiu-shing's case must be modified and although an omission to direct the jury on lies in full will by no means necessarily be fatal to a summing up, the full direction should ensure that there can be no suggestion that the proper approach has not been taken by a jury when they are considering how to regard a lie that has not been given for an innocent reason.

25. Finally, having regard to this modification, we need to deal with one further passage in Mo Shiu-shing which (at page 169 F-H) reads:

> *"We emphasise again what Mortimer JA said in R v Ng Chi Wai & Another (unrep., Crim App No 346 of 1996, [1997] HKLY 223). The circumstances in which a direction (should be given) that a lie may support the prosecution's case will be rare but may be appropriate where: (1) a defendant has relied upon an alibi; and (2) the judge concludes that it is necessary or desirable for the jury to look for support for some piece of evidence, and that support includes a material lie upon which the prosecution properly relies because it has been proved or admitted.*
>
> *Lastly on this topic, if the lie is being used as corroborative evidence in the strict sense (eg in a trial of a sexual offence) it must, of course, be evidence that comes from a source which is independent of the evidence it is being used to corroborate." (Emphasis added)*

26. It follows from the conclusions we have already expressed and from Chan PJ's judgment in Yuen Kwai-choi v HKSAR that as there will only be one standard direction on lies and that it is for the judge to decide after consultation with counsel when such a direction needs to be given, the "rare" direction to be used in cases where an alibi has been called or where a lie is used in an independent corroborative sense will now be one and the same direction as in all other cases where a 'lies' direction is considered to be appropriate."

In FAMC No. 7 of 2007 the Appellate Committee of the Court of Final Appeal refused leave to appeal.

2. In *R v Burge and Pegg* [1996] 1 Cr App R 163 the court identified the following four main circumstances in which it would be appropriate to give a *Lucas* direction:

'(1) Where the defence relies on an alibi (see also *R v Harron* [1996] 2 Cr App R 457 and *R v Lesley* [1996] 1 Cr App R 39).

(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 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 has not adopted the approach (in 3. above) the judge reasonably envisages that there is a real danger that the *jury may do so*.'

3. See also *R v Goodway* 98 Cr App R 11; *R v Bey* 98 Cr App R 158, and *R v Keeton* [1995] 2 Cr App R 241 and *R v Taylor* [1998] Crim LR 822. Thus if a 'Lucas' direction is called for in a murder case in which the defendant admits the killing but raises the defence of provocation, the jury must be directed that they may take the defendant's lies into account only if they are sure that when telling lies he was concerned to avoid responsibility for murder rather than for a less culpable form of homicide such as a provoked killing : see *R v Richens* 98 Cr App R 43.

4. The phrase 'the motive for the lie must be a realization of guilt and a fear of the truth' which appears in *Lucas*, should **not** be used; nor should any phrase to the same effect (e.g. 'through a consciousness of guilt;' or 'you have first to be satisfied that the only reason he lied was because he knew he was guilty') Such an approach puts the cart before the horse. Rather, the phrase to be used is "no innocent motive for the lie". [See *Mo Shui-shing*, where the Court of Appeal also warned against the use of such phrases when directing juries about the significance of flight by a defendant.]

5. For examples of circumstances where no *Lucas* direction was called for see *R v Middleton* [2001] Crim LR 251 (inappropriate in that case for lies the jury might conclude that the accused had told in evidence); *HKSAR v Chan Boon Ning* CACC571/2001 (unreported) C.A. (the mere assertion by counsel for the prosecution that a defendant has lied is far from the automatic trigger for a lies direction); and *R v Barnett* [2002] 2 Cr App R 167 (a handling case where the accused had given different accounts for his possession of the stolen property).

6. For an example of the need to give a direction that if lies told by the applicant were established they were not to be treated as evidence of guilt see *HKSAR v Sham Kit Yi* (unreported CACC 128/2003) C.A.

Archbold Hong Kong (2009) 4-207 et seq.
Archbold (2009) 4-402.
Blackstone (2009) F1.18.
Bruce and McCoy, Criminal Evidence; I 105-252.

43. DEFENDANT'S FLIGHT (after crime or on bail)

The position where a defendant absconds is analogous to lies. See *HKSAR v Mo Shiu-shing* (1999) 1 HKC 43 at page 60.

It is alleged (admitted) that the defendant deliberately (ran away) (disappeared) after (the crime) (he had been bailed). You are entitled to consider whether this supports the case brought against him by the prosecution. You will need to consider:

(1) whether it has been established that the defendant did (run away) (disappear) after (the offence was committed) (he was bailed).

If you are sure he did, then next consider:

(2) Why did he (run away)? The mere fact that a defendant acts in this way is not in itself evidence of guilt. There are many innocent reasons why a person may do so. [Provide examples, if appropriate] (The defendant has said his reasons for .....)

If you think his explanation is or may be true, then you should take no notice of the fact that he chose to (run away). It is only if you are sure that he did not (run away) for an 'innocent' reason that his actions (in running away) can be regarded as evidence which supports the prosecution's case.

Note: In order for flight to be capable of providing support for the prosecution's case, there must be some evidence to establish a connection between the defendant's conduct (his flight) and the offence in question. See *Mo Shiu-shing* [1999] 1 HKC 43 at p.60.

44. DEFENDANT WHO HAS NOT GIVEN EVIDENCE

The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict or explain the evidence put before you by the prosecution. [However, you still have to decide whether, on the prosecution's evidence, you are sure of the defendant's guilt.]

Notes:

(1) In *HKSAR v Li Defan* [2002] 5 HKCFAR 320 the CFA approved the above direction in terms. See Lord Hoffmann NPJ (para.29 p.333) :

> *"… in most cases in which the accused does not give evidence it is undesirable that the judge should give the jury more than the Judicial Studies Board direction."*

(2) Of the power of a judge to make stronger comment on the failure to give evidence Lord Hoffmann said (para.29) :

> *"… There is unquestionably power in an appropriate case to comment that the jury may — but need not — consider that the prosecution case on a particular issue relevant to guilt is strengthened by the absence of the accused from the witness box. But the cases in which such comment is permissible and, even if permissible, necessary, will be exceptional. Although it is impossible to generalize and every case must depend upon its own facts, the kind of case in which the judge may feel that the jury needs additional comment is that in which the criteria stated in R v Martinez-Tobon [1994] 1 WLR 388 are satisfied and, in addition, the defence is relying by way of answer upon some extra-judicial statement proved by the prosecution which the accused has not supported in evidence. …"*

(3) As an example of such circumstances Lord Hoffmann cited a passage from the judgment of Lord Lane LCJ in *R v Duncan* [1981] 73 Cr App Rep 359 at 365 in the context of the direction of weight to be given to the exculpatory parts of a 'mixed' statement, noting that the comment should identify the issue to which the accused's election may be relevant :

> *"… Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."*

Also, he noted with approval that the Court of Appeal had held that the trial judge in *HKSAR v Launder* had been entitled to make adverse comments on the accused's failure to give evidence. [see para.15, p.329B-H].

(4) The criteria identified by Lord Taylor LCJ in *R v Martinez-Tobon* [1994] 1 WLR 388 are :

> *"(3) Provided those essentials are complied with the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which (a) are at variance with the prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant.*
>
> *(4) The nature and strength of such comment must be a matter for the discretion of the judge and will depend upon the circumstances of the individual case. However, it must not be such as to contradict or nullify the essentials of the conventional direction."*

5. Where the defence of diminished responsibility is raised and the defendant does not give evidence see Archbold 2009, 19-75, and *R v Bathurst* [1968] 2 QB 99

6. As for the case where the prosecution has commented on the defendant's failure to give evidence in breach of the prohibition on such comment of s.54(1)(b) of Cap.221 see Archbold Hong Kong 2009, 4-180; Bruce & McCoy I-1001 Where such a comment is made, it is incumbent on the judge to correct the error in his summing up and to make plain the correct position. See also *R v Naudeer* [1984] 2 All ER 1036.

   Note : In England and Wales the former prohibition on the making of comments by the prosecution on the failure of the defendant to give evidence has been abolished [Archbold 2009, 4-362].

7. Where counsel put forward material factual allegations to witnesses in cross examination, or in a closing address, for which there is no evidential foundation, the jury should be reminded in the course of the summing up that they are enjoined to consider their verdict 'according to the evidence,' that mere suggestions by counsel in the course of questioning are not evidence and that the speeches of counsel do not constitute evidence, and [unless of course the suggestions have been accepted by a witness or by admission on the other side] that there has been no evidence to the effect suggested. For example, where the defendant has, through counsel, made serious allegations against prosecution witnesses, the suggested direction may be supplemented by the comment that counsel's allegations are unsupported by evidence. It should, however, remain a neutral direction.

Archbold Hong Kong (2009) 4-205.
Bruce & McCoy, Criminal Evidence; III-202.

44A. DEFENDANT WHO HAS GIVEN AND / OR CALLED EVIDENCE

The defendant has chosen to give evidence [and to call witnesses]. The defendant was not obliged to give evidence. He was not obliged to call any witnesses. He does not have to prove his innocence. He does not have to prove anything.

However, he has chosen to give evidence [and to call witnesses on his behalf]. You must take what he [and his witnesses] has / have said into account when considering the issues of fact which you have to determine.

It is for you to decide whether you believe the evidence of the defendant [and /or his witnesses] or whether it may be true. I have previously told you that if the account given by the defendant / put forward by the defence is or may be true, then the defendant must [Note 1] be acquitted.

But even if you entirely reject the account given by the defendant / put forward by the defence, that would not relieve the prosecution of its burden of making you sure by evidence of the defendant's guilt [in respect of each charge which you have to consider]. [Note 2]

Note:

1. This will require qualification where there is an objective element that may result in a conviction despite the truth or possible truth of the defence account; as, for example, where provocation is in issue.

2. *R v Liberato* (1985) 159 CLR 507 at 515, cited with approval by the CFA in *Lee Fuk Hing v HKSAR* (2004) 7 HKCFAR 600 at paragraphs 28 and 29, page 612 I-613 G and in *Jim Fai v HKSAR* (2006) 9 HKCFAR 85 at paragraphs 16 and 17, page 93 C-I.

Archbold Hong Kong (2009) 4-190B.

45. DEFENDANT'S RIGHT TO SILENCE

> Any person suspected of a criminal offence or charged with one is entitled to say nothing when asked questions about it. You must not hold his [silence][refusal to answer questions] against him. The exercise of the right to silence cannot amount to an admission of any kind nor can it be taken to reflect a guilty conscience.

Note:

1. This direction should always be given where a defendant has exercised his right to silence.

2. As to the impropriety of making comments on the fact that a defendant was silent when charged or questioned, see *HKSAR v Lee Fuk Hing* (2004) 7 HKCFAR 600 and the CFA's consideration of the judgment of the High Court of Australia in *R v Petty and Maiden* (1991) 173 CLR; (1991) 55A Crim R 322

> *"35. We agree with the reasoning of the majority in Petty and Maiden. We recognize that it is a matter of ordinary experience that a failure to put forward an innocent explanation when given an opportunity to do so may support an inference that any later explanation is false but as to the nice distinction drawn in Littleboy and later Ryan there is doubt as to whether there is a real distinction between using silence to infer guilt and using it to attack the weight of an account given at trial but not earlier. Even if there is such a distinction, it is one which would be difficult for a jury to understand or apply. There is a right to silence. And in consequence of this right, suspected persons in Hong Kong should be – and routinely are – given a caution informing them in unqualified terms that they need not speak. In the whole of these circumstances, it is inappropriate in Hong Kong to use a person's silence against him in any way.*
>
> *36. A person's right against self-incrimination (his right of silence) would otherwise become a possible source of entrapment. It is unfair for a person to have the right to remain silent, and usually to have been reminded of this right through the caution, and then for his silence to be put against him at trial. There are comments in some of the authorities to which we have referred which suggest that in some circumstances a trial judge may fairly inform the jury that an explanation has been made for the first time at trial provided that the judge also makes it clear that an accused has the right to remain silent and make no explanation in answer to police questions. With respect such a direction is also objectionable. It gives rise to an adverse inference against the accused."*

Note:

1. When referring to UK texts, please note that the 'right to comment' provisions of the Criminal Justice and Public Order Act 1994 is not reflected in Hong Kong legislation.

2. As to the ambit of the right of silence, see *HKSAR v Lam Sze Nga* (2007) 9 HKCFAR 190.

Archbold Hong Kong (2009) 4-204 and 15-65.

Bruce & McCoy, Criminal Evidence; V- 54 to 150.

V DEFENCES

46. ALIBI

> The defence is one of alibi. The defendant says that he was not at the scene of the crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi.
>
> Even if you conclude that the alibi was false, that does not by itself entitle you to convict the defendant. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.

Notes:

1. As to false alibis in identification cases, see **Direction 28.2** note 7.

2. Be sure to spell out, as in this direction, that the prosecution must disprove the alibi. Do this, even in a short summing up, in addition to the general direction on the burden of proof: see *R v Anderson* [1991] Crim LR 361, CA and *R v Baillie* [1995] 2 Cr App R 31. In *R v Lesley* [1996] 1 Cr App R 39 the Court of Appeal quashed a conviction when the standard JSB direction (above) had not been given. See also *R v Harron* [1996] 2 Cr App R 457 and *R v Khan* CA, unreported (95/3635/Y5).

3. In *R v Askins* CA, unreported (95/7300/Z5), a conviction was quashed as a result of a failure to give the warning in paragraph 2 of the direction.

4. Where an alibi is advanced it may also be necessary to give **Direction 42**.

5. See Criminal Procedure Ordinance (Cap 221) section 65D.

Archbold Hong Kong (2009) 4-153. and 14-31.
Archbold (2009) 4-316 and 14-22c.
Blackstone (2009) D16.14-D16.16 and F3.34.
Bruce & McCoy Criminal Evidence; X-1704 to 1801.

47. AUTOMATISM

This direction applies only to non-insane automatism. Insane automatism is governed by the *McNaghten* Rules (1843) 10 C1&F 200. In *R v Burgess* (1991) 93 Cr.App.R. 41 at 43 Lord Lane CJ said:

> *"Where the defence of automatism is raised by a defendant two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say a case which falls within the McNaghten Rules, or one of non-insane automatism."*

If, because of [the concussion] [the anaesthesia] the defendant's state of mind was such that, at the time of the [act in question], his ability to exercise voluntary control was totally destroyed, he is not guilty of the offence. The defence has raised this issue for you to consider, but it is not for the defendant to prove that that was his condition; it is for the prosecution to make you sure that it was not.

Notes:

1. 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, e.g. concussion from a blow, therapeutic anaesthesia but not self-induced by consumption of alcohol/or drugs (see below and the commentary to **Direction 14**). *R v Sullivan* [1983] 2 All ER 673: 77 Cr App R 176; and *Attorney General's Reference (No. 2 of 1992)* where Lord Taylor said:

> " We were referred to a number of decisions drawing a distinction between insane automatism and non-insane automatism: *Reg v Quick* [1973] Q.B. 910; *Reg v Sullivan* [1984] A.C. 156; *Reg v Hennessy* [1989] 1 W.L.R. 287 and *Reg v Burgess* [1991] 2 Q.B. 92.
>
> The effect of those decisions is that if the defence of automatism is said to arise from internal causes so as to bring the defendant within the *McNaghten* Rules (see *McNaghten's Case* (1843) 10 Cl. & F. 200), then if it succeeds the verdict should be one of not guilty by reason of insanity. An epileptic seizure, in *Reg v Sullivan* [1984] A.C. 156, a stress disorder, prone to recur and lacking the features of novelty or accident, in *Reg v Hennessy* [1989] 1 W.L.R. 287, and sleep-walking, in *Reg v Burgess* [1991] 2 Q.B. 92, were all regarded as internal causes. If, however, automatism is said to arise from an

external cause, for example a stone hitting the driver on the head, then a successful defendant is entitled to be acquitted."

2. The evidential burden (i.e. the burden of adducing evidence fit for consideration by the jury) is on the defence and it is for the judge to decide whether to leave it to the jury. The judge may also have 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). As to the laying of an adequate evidential foundation see *R v Mohammad Hussain* [1993] 1 HKCLR 1.

3. See *Attorney-General's Reference (No 2 of 1992)* [1993] 97 Cr App R 429 where the Lord Chief Justice of England said, at page 434, '… 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.' In this case the court decided that reduced or imperfect awareness, even though described by an expert as 'driving without awareness', is incapable of founding a defence of automatism.

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. *R v Isitt* [1977] 67 Cr App R 44*;* Archbold (2009) 17–95.

6. Automatism due to self-induced intoxication by alcohol and/or dangerous drugs:

   (i) is not a defence to offences of basic intent, since the conduct of the defendant in getting drunk was reckless and recklessness constituted the necessary mens reas;

   (ii) may be raised where the offence is one of specific intent.

7. Automatism not due to alcohol, but caused by the defendant's action or inaction in relation to medicinal drugs (e.g. failure by a diabetic to eat properly after insulin) may be a defence to offences of basic intent unless the prosecution proves that the defendant's conduct was reckless. For example, in assault cases the prosecution must prove that the defendant realised that his failure was likely to make him aggressive, unpredictable or uncontrolled. *R v Bailey* [1983] 2 All ER 503; 77 Cr App R 76, at page 80: see Archbold (2009) 17-90.

Archbold Hong Kong (2009) 16-4, 20-7, 34-18, 16-83.
Archbold (2009) 17-5, 17-84 et seq.
Blackstone (2009) A3.7 et seq.
Bruce & McCoy Criminal Evidence ; III-52.

48. SELF DEFENCE

The following direction is intended to cover a number of likely situations and therefore it is NOT expected that it would be given in its entirety. The heart of the direction is printed in bold type, and where directions on self defence are required it will always be necessary to direct the jury that they should apply these principles (in whatever language is thought appropriate). The remainder of the directions are there merely as a guide, from which to pick and choose and adapt to the particular circumstances of the case.

Normally, where one person uses deliberate violence towards another and injures/kills him, he acts **unlawfully**. However, it is both good law and good sense that a person who is attacked or believes that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the situation his use of force is not unlawful - he is acting in **lawful** self defence, and is entitled to be found 'Not Guilty'.

As it is the prosecution's duty to prove the case against the defendant, it is for the prosecution to make you sure that he was not acting in lawful self defence. The defendant does not have to prove that he was.

What does acting in lawful self defence mean? The law is that a person only acts in lawful self defence if in all the circumstances he honestly believes it is necessary for him to defend himself [or e.g. a member of his family] and the amount of force which he uses in doing so is reasonable. So there are two main questions for you to answer:

1. **Did the defendant honestly believe or may he have honestly believed that it was necessary to defend himself?**

   (*Where appropriate:* A person who is in reality the aggressor or who injures another as an act of revenge or retaliation acts unlawfully, for it is not necessary for him to use force at all. [Also there are circumstances in which a man may be attacked or threatened with attack, but it is not necessary for him to fend off his attacker with force because he could, for example, very easily get away from him, or he is a much stronger person than his attacker and could quite easily deal with the situation without resorting to violence].

   If the prosecution has made you sure that the defendant did not [e.g. strike X] in the honest belief that it was necessary to defend himself, then self defence simply does not arise in this case [and he is 'Guilty']. But if you decide that he was or may have been acting in that belief, then you must go on to answer the second question:

2. **Taking the circumstances as the defendant honestly believed them to be, was the amount of force which he used reasonable?**

   The law is that force used in self defence is unreasonable and unlawful if it is out of proportion to the nature of the attack, or if it is in excess of what is really required of the defendant to defend himself. (*Where appropriate:*) And so, for example, if the defendant began by defending

himself, but then totally over-reacted, turning an act of self defence into a punitive attack, and caused [injury/death] in the course of that attack that would not be lawful.

It is for you, the jury, to decide whether the force used by this defendant was reasonable. Here consider all the circumstances. *[These may include e.g.: What was the nature of the attack upon him? Was a weapon used by the attacker? If so, what kind of weapon was it, and how was it used? Was the attacker on his own, or was the defendant being attacked, or in fear of, a concerted attack by two or more persons?]* In deciding this question use your common sense, experience, knowledge of human nature and, of course, your assessment of what actually happened at the time of this incident.

In deciding this, judge what the defendant did against the background of what he honestly believed the danger to be. *[e.g. Accordingly, if he honestly believed that he was being attacked with a knife, his actions are to be judged in that light, even if you find as a fact that he was not being attacked with a knife.]* **You should also bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. The more serious the attack [or threatened attack] upon him the more difficult his situation will be. If, in your judgment the defendant believed or may have honestly believed that he had to defend himself [against …] and he did no more than what he honestly and instinctively thought was necessary to do so, that would be very strong evidence that the amount of force used by him was reasonable.**

And so, bearing in mind what I have said, are you sure that the force used by the defendant was unreasonable? If it was unreasonable he cannot have been acting in lawful self defence [and he is 'Guilty'], but if the force used was or may have been reasonable, then he is 'Not Guilty'.

Notes:

1. This direction may need further adapting depending upon the facts of the case and will need to be adapted if the case involves the defence of another person (as to which see e.g. *R v Duffy* 50 Cr App R 68; R *v Chisam 47* Cr App R 130). As to defence of property see Archbold (2009) 19-187.

2. Whether the plea is self defence or defence of another, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view a reasonable mistake or not: see *R v Williams* [1984] 78 Cr App R 276; *R v Beckford* [1987] 85 Cr App 378 and *R v Oatridge* [1991] 94 Cr App R 367. In the latter case the court emphasised that in cases where a defendant was not under actual or threatened attack, but honestly believed that he was, then the jury should be directed to consider whether the degree of force used by the defendant was commensurate with the degree of risk which he believed to be

created by the attack under which he believed himself to be. See also *R v Man Wai-keung* [1992] 1 HKCLR 89.

3. Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive. It is simply a factor to be taken into account in deciding whether it was necessary for the defendant to use force and whether the force used was reasonable. It is not necessary that the defendant should demonstrate by his actions that he does not want to fight: see *R v Bird* [1985] 81 Cr App R 110. Where necessary, an appropriate direction should be given.

4. As to whether a defendant is entitled to rely, in a defence of self-defence, upon a mistake of fact induced by voluntary intoxication see Archbold (2009) 17-16 and Blackstone (2009) A3.37.

5. As to use of excessive force see *R v Clegg* [1995] 2 WLR 80, HL.

6. Whether or not the amount of force used was reasonable is a purely objective question: see *DPP v Armstrong-Braun* [1999] Crim LR 416, *R v Martin* (2002) 1 Cr App R 27 para 7.

7. For the availability of self-defence where the defendant sought or initiated the confrontation see *R v Balogan* [1999] All ER (D) 916.; *Burns v HM Advocate* [1995] SLT 1090; *R v Howard* (2003) 20 CRNZ 319; and *R v Rashford* [2005] EWCA Crim 3377.

Archbold Hong Kong (2009) 20-44 et seq.
Archbold (2009) 19-41 et seq.
Blackstone (2009) A3.31 to A3.38.

49. DURESS BY THREATS OR CIRCUMSTANCES

a) Both forms of the defence arise out of the exertion of force on D to commit the crime concerned— by human threats in the former (*R v Hasan* [2005] 2 Cr App R 22 (314); reported as *R v Z* in [2005] 2 AC 467), and by extraneous circumstances in the latter form (*R v Martin* (1989) 88 Cr App R 343). (There is a debate — which we do not attempt to join — as to whether 'duress of circumstances' is a form of, or is to be equated with, necessity. See, e.g. the commentary to *R v Quayle and Ors* [2006] Crim L R at p151.)

b) Although both forms of the defence share some characteristics, there are two limitations which apply only to duress by threats. Briefly, these arise when D : (i) failed to escape from the threats when he could and should have done so; and/or (ii) put himself in a position in which he was likely to be subjected to threats.

c) In a case of duress by threats in which neither of these limitations is in issue, or in a case of duress of circumstances, only paras 1 to 5(a) of the following direction are relevant. In a case of duress by threats in which either or both of these limitations is in issue, the relevant paras are 1 to 4, 5(b), 6 and/or 7.

d) This direction has been re-written in the light of *R v Hasan (supra)* and *R v Safi and Ors*. [2004] 1 Cr App R 14 (157). The direction does not seek to encompass recent case law rejecting a defence of necessity, e.g., in relation to drug offences — *R v Quayle and Ors* [2005] 2 Cr App R 34 (527).

1. D says that he was acting under duress. He says that he was driven to do what he did by [threats, namely…][the circumstances in which he found himself, namely…]
2. Duress of this kind may be a defence to a criminal charge. Because it is for the prosecution to prove D's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for D to prove that it does apply.
3. First, you must ask whether D was driven (*see Note 1*) to act as he did because he genuinely and reasonably (*see Note 2*) believed that if he did not do so [he][a member of his immediate family] [a person for whose safety he would reasonably regard himself as responsible] (*see Note 3*) would be killed or seriously injured either immediately or almost immediately. If you are sure that this was not the case the defence of duress does not apply [and D is guilty].
4. However, if you think that this was or may have been the case you must next consider whether a reasonable person, in D's situation and believing what D did, would have been driven to do what D did. By 'a reasonable person' I mean a sober person of reasonable firmness and of D's age and sex (*here refer to any other relevant characteristics — see Note 4*). The reactions of a reasonable person may or may not be the same as those of D himself. If you are sure that a reasonable person would not have been driven to do what D

did, the defence of duress does not arise [and D is guilty].

5. ***Either***

   a) However, if you think that a reasonable person would or might have been driven to do what D did, the defence of duress does apply, and you must find D not guilty.

   Or

   b) However, if you think that a reasonable person would or might have been driven to do what D did, you will have to consider [one] [two] further question[s].

6. The [final] [next] question is this : did D fail to take an opportunity to *escape* from the threats without injury to [himself] [the person threatened] by (*here refer to any escape route canvassed during the trial, e.g., going to the police*), which a reasonable person in D's situation would have taken but which D did not take. If you are sure that he had such an opportunity, the defence of duress does not apply [and D is guilty]. However, if you are not sure of this [(*if this is the only limitation relied upon by the prosecution*) the defence of duress does apply and you must find D not guilty][(*or, if the prosecution rely upon both limitations*) there is a final question for you]

7. Did D voluntarily put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence (*see Note 5*)? The prosecution say that he did, by [joining a criminal group the members of which might make such threats][getting involved with crime and thus with other criminals who might make such threats if he let them down or came to owe them money]. But it is for you to decide. If you are sure that D did voluntarily put himself in such a position, the defence of duress does not apply [and D is guilty]. However, if you are not sure that he did so, the defence of duress does apply and you must find D not guilty.

Notes

1. The fact that D's will to resist had been affected by his **voluntary** consumption of drink and/or drugs is irrelevant.

2. See *R v Hasan*, para 23.

3. See *R v Hasan*, para 21(3).

4. See *R v Bowen* [1996] 2 Cr App R 157; also *R v Rogers* [1999] 9 Archbold News 1 and *R v Moseley* [1999] 7 Archbold News 2; *R v Sewell* [2004] EWCA Crim 2322.

5. See *R v Hasan*, paras 37 & 39, disapproving *R v Baker* [1999] 2 Cr App R 335. It is **not** necessary that D foresaw or ought reasonably to have foreseen that he might be the subject of compulsion **to commit any particular type of criminal offence, or indeed any criminal offence at all.**

6. For the circumstances in which it is permissible to withdraw the defence of duress from the jury, see *R v Harmer* [2002] Crim L R 401 and *R v Bianco* [2002] 1 Archbold News 2.

Archbold Hong Kong (2009) 16-87 et seq.
Archbold (2009) 17-119 et seq.
Blackstone (2009) A3.21 et seq.
Smith & Hogan "Criminal Law" 12th Ed. pp 325 - 345.

50. DIMINISHED RESPONSIBILITY (MURDER)

It is impossible to devise a specimen direction suitable for all cases, but the following is an indication of the type of direction which could be given. It must, of course, be carefully adapted to meet the circumstances of the particular case. It is entirely for the judge to decide whether the court should direct the jury that if they convict of manslaughter they should return a verdict on a particular basis e.g. here: Guilty of manslaughter by reason of diminished responsibility. In R v Cawthorne (1996) 2 *Cr App R (S) 445 at pages 450-451 the CA referred to the 'grave dangers' of doing so in many cases (examples of which were given) and continued 'In other cases, for example where provocation is raised and a defence of diminished responsibility is also put forward, the judge may regard it as essential to know the basis of the verdict.': See also* R v Jones *(1999) EWCA (Crim) 296 and introduction to* ***Direction 51***.

Providing that the prosecution has proved all the elements of the offence of murder, you must convict the defendant of that offence, unless you find that at the time of the offence he was suffering from an abnormality of mind which in law substantially impaired his mental responsibility for the killing. If he was, his responsibility is diminished and that will reduce the offence from one of **murder** to one of **manslaughter**.

The law is that it is for the defendant to prove that his responsibility is diminished. He does not have to make you sure of that, but he does have to satisfy you of it on the balance of probabilities, i.e. he must prove by evidence that it is more likely than not that when he killed X his mental responsibility for his actions was substantially impaired.

There are three elements which the defence must prove before this defence can be established. They must all be present:

1. At the time of the killing the defendant suffered from an **abnormality of mind**.

   The word **mind** includes perception, understanding, judgment 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.

2. 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**.

As to these first two elements, although the medical evidence which you have heard is important, you must consider not only the evidence of the doctors, but also the evidence relating to the killing and the circumstances in which it occurred. Consider the behaviour of the defendant both before and after that event and take into account his medical history.

3. The abnormality of mind must have **substantially impaired** the defendant's mental responsibility for what he did [i.e. his acts or omissions which caused death].

   Substantially impaired means just that. You must conclude that his abnormality of mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it, but he must show that it was more than merely a trivial one [which did not make any real/appreciable difference to his ability to control himself].

You should approach all of these questions in a broad, common sense way. If the defence has failed to prove any one or more of these elements, providing that the prosecution has proven the ingredients of murder to which I have referred, 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 defendant killed X your verdict must be **Not guilty of murder but guilty of manslaughter [on the grounds of diminished responsibility**].

Notes:

1. 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 defendant himself, the truth of which are not admitted by the prosecution. Evidence by a doctor of statements made to him by the defendant about the defendant's acts and feelings is hearsay evidence and inadmissible to establish the truth of the contents of those statements. Where appropriate, the jury should be so directed. Where such hearsay statements are given and are not supported by direct evidence, see *R v Bradshaw* (1986) 82 Cr App R 79; and Archbold (2009) 19-77. See also Note to **Direction 32**: Expert Evidence.

2. It is for the court to determine whether there exists an evidential basis for the defence. See **Direction 54** for the duty to leave defences raised by the evidence although not relied upon by the defence.

   The defence is concerned with abnormal underlying causes peculiar to an individual and not with the reaction of a normal man to an abnormal situation and the defence should not be confused with that of provocation: *HKSAR v Leung Wai-chung* [1999] 2 HKC 471. See also *Luc Thiet Thuan v R* [1997] AC 131; and *HKSAR v Kong Kwong San* (1998) Cr App No 135 for the converse consideration, namely, that mental infirmity which might ground a defence of diminished responsibility will not normally be a 'characteristic' for the purposes of a provocation direction.

3. It is best to omit references to 'insanity' in a direction on diminished responsibility.

4. The defence is available where the defendant relies on abnormality of the mind brought about by long term drug abuse or alcoholism see *R - v - Tandy* 87 Cr App R 45; *HKSAR v Liu Chuen Yip* (2006) 4 HKLR 595. The defence is available where the defendant relies on abnormality of the mind brought about by long term drug abuse or alcoholism see *R v Tandy* 87 Cr App R 45; *HKSAR v Liu Chuen Yip* (2006) 4 HKLR 595. It is to be noted that in *R v*

Wood [2008] 3 All ER 898 the Court of Appeal of England and Wales did not follow *R v Tandy* in the following respect: (see paragraph 41)

> " The sharp effect of the distinction drawn in Tandy between cases where brain damage has occurred as a result of alcohol dependency syndrome and those where it has not, is no longer appropriate. Naturally, where brain damage has occurred the jury may be more likely to conclude that the defendant suffers from an abnormality of mind induced by disease or illness, but whether it has occurred or not, logically consistent with Dietschmann, the same question (i.e. whether it has been established that the defendant's syndrome is of such an extent and nature that it constitutes an abnormality of mind induced by disease or illness) arises for decision."

5. In *R v Dietschmann* (2003) 1 A.C. 1209, the House of Lords considered the question "… what direction ought to be given to a jury as to the approach to be taken to self-induced intoxication which was present at the material time in conjunction with an abnormality of mind which falls within section 2(1) of the 1957 Act." The House assumed that there was no evidence capable of establishing alcohol dependence syndrome as being an abnormality of mind within the section. Having reviewed the earlier authorities, Lord Hutton said that "… without attempting to lay down a precise form of words, as the judge's directions were bound to depend to some extent on the facts of the case before him, the jury should be directed on the following lines:

> 'Assuming that the defence have established that the defendant was suffering from mental abnormality as described in section 2, 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 defendant 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 responsibility arising from that abnormality.
>
> But you may take the view that both the defendant's 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 defendant 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.'"

Archbold Hong Kong (2009) 20-78.
Archbold (2009) 19-66 et seq.
Blackstone (2009) B1.15 et seq.

51. PROVOCATION (MURDER)

1. There can only be an issue of provocation to be considered by the jury if the judge is of the opinion that there was some **evidence** of a specific act or words as provocation resulting in a loss of self-control. If there is such evidence, from whatever source it emerges and whether or not it was relied upon by the defendant at trial, the issue has to be left to the jury. If there is no such evidence but merely a speculative possibility, there is then no triable issue of provocation. See *R v Acott* [1997] 2 Cr App R 94; *Zeng Liang Xin v HKSAR* [1997] 1 HKLRD 1204; and generally, *HKSAR v Lam Wai Sho* CACC 283 of 2006, *R v* Coutts [2007] 1 Cr App R 4, *R v Foster* [2008] 2 All ER 597 and Ho *Hoi Shing v HKSAR* [2008] HKC 57.

2. It is always desirable that the question of provocation should be canvassed with counsel before closing speeches. Prosecution counsel and (though less clearly) defence counsel (see *R v Cocks*, 63 Cr App R 79 at 82 and *R v Leung Chi Yuen* (1989) 2 HKC 24) have a duty to direct the judge's attention, before he sums up, to any evidence on which it appears to them that the jury could find provocation: see also *R v Cox* 2 Cr App R 513 at 518 and *R v Cody* (2000) 3 HKLRD 573 at 584. Even if it has clearly been an issue in the case it is suggested that the issue nonetheless be canvassed so that counsel be given the opportunity to address the judge in respect of relevant 'Camplin' characteristics: see *DPP v Camplin* and the commentary to *R v Cox* [1995] Crim LR 741. See also Archbold Hong Kong (2009) 4-144.

3. A direction upon provocation is pre-eminently one which must be custom-built to cater for the particular circumstances of the case.

4. Where there is more than one possible basis for a verdict of guilty of manslaughter it is desirable for a judge to invite the jury to indicate the basis upon which they return the verdict, the purpose of which exercise is to help the judge in relation to sentence. When summing up the judge might provide to the jury written questions which might identify the different possible verdicts not only as between murder and manslaughter, but also as to the reasons for the verdict of manslaughter, if such a verdict was to be returned. Alternatively, after a manslaughter verdict is returned the judge might ask the jury what was the basis of the verdict, but if he is to take this route, he must warn the jury in the course of the summing up of his intention to ask the question : see *R v Jones (Douglas)* (1999) EWCA (Crim) 296 and *HKSAR v Lam Wai Shu and Another*, CACC283/2006 at paras. 18-25. Perhaps a preferable course is to include the enquiry as the final question in the verdict "pro forma": see **Direction 55**, question 7. The matter is within the judge's discretion. What the judge should never do is engage upon any discussion with the jury about the factual basis for their decision.

1. If you are sure that the defendant unlawfully killed X intending to kill X or to cause X really serious injury, the defendant is guilty of murder unless you conclude that this was or may have been a case of provocation (*Subject to any question of diminished responsibility*). Provocation is not a complete defence, leading to a verdict of 'Not guilty'. It is a partial defence, reducing what would otherwise be murder to the lesser offence of manslaughter. Because the prosecution must prove the defendant's guilt, it is for the prosecution to make you sure that this was not a case of provocation, and not for the defendant to establish that it was.
2. Provocation has a special legal meaning, and you must consider it in the following way.
3. First, you must ask yourselves whether the defendant was provoked in the legal sense at all. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been [said and/or done] by [X and/or [an] other person/s [*ADD, if appropriate*] rather than just by his own bad temper. *(Here, identify the things allegedly said and/or done to constitute the provocation – including where appropriate cumulative provocation * and, unless it is obvious, the evidence pointing to a loss of self-control.)*
4. If you are sure that the defendant was not provoked in that sense, the defence of provocation does not arise, and [subject to the question of diminished responsibility which I will address later] the defendant is guilty of murder.
5. But, if you conclude that the defendant was or might have been provoked, in the sense which I have explained, you must ask yourself this question:

   Was or may that conduct had been such as to cause an ordinary and sober person of the defendant's age and sex [and other special characteristics] to do as he did?

   An ordinary person is simply a person who has the powers of self-control to be expected of an ordinary, sober person who is of the defendant's age and sex [and other special characteristics**].

   [ADD, if appropriate: What is to be expected of an ordinary person? The law expects people to exercise control over their emotions. If, for example, a person has an unusually volatile, excitable or violent nature (or is intoxicated) he cannot rely on that as an excuse. So, the ordinary person in this context is a person who is not exceptionally excitable or given to violence, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.

   ADD, if appropriate: If you think that the conduct would have been more provoking to a person who, like the defendant, was a [insert as appropriate: a drug addict / homosexual / illegitimate / sexually impotent / physically deformed] then you must ask yourself whether an ordinary person with that [characteristic/affliction/personal history] might have been provoked to do as he did.]**
6. Therefore, when considering this question you must 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 your are sure that what was done and/or said would not have caused an ordinary, sober person of the defendants aged 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 defendant'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'.

****** See the judgment of Chan PJ in the CFA in *Ho Hoi Shing v HKSAR* [2008] HKC 57, including para 33 where he says:

> *"The second aspect of this defence (that is, was the provocation enough to make a reasonable man do as he did) was further explained by Lord Nicholls of Birkenhead when delivering the majority judgment (majority of 6 to 3) in* Attorney General for Jersey v Holley *[2005] 2 AC 580. In paragraph 6 of his judgment, Lord Nicholls, adopting the comments made by Lord Hobhouse of Woodborough in a dissenting judgment in* R v Smith (Morgan) *[2001] 1 AC 146 at p.185F, said that there are two elements in this aspect: first, the assessment of the gravity of the provocation; and second, the assessment of how a person with ordinary power of self-control would react to provocation of that gravity. The first element involves a consideration of everything both done and said as required by s.4 of the Ordinance, and the second element involves a consideration of the accused's conduct and whether a person with ordinary power of self-control would have reacted in a similar way. The accused's characteristics that a reasonable person, i.e. a person with ordinary self-control may be taken to share, are not such characteristics as are inconsistent with reasonableness. The accused's characteristics that the person with ordinary self-control may be taken to share are those which a reasonable person may have, e.g. having some physical impediment or deformity or something in one's background that a person might be sensitive about, such as illegitimacy. If the provocation was directed to that sort of thing, the reasonable person may be taken to have had such characteristics."*

Where the issue of revenge rather than sudden response arises:

> Provocation only applies in the case of a sudden and temporary loss of self-control of such a kind as makes a person for the moment not the master of his mind. So a defendant who plans an attack in revenge for provocative conduct does not act under provocation as I have defined it, because in such circumstances he has not suffered a sudden temporary loss of self-control.

* *Where a 'last straw' contention is raised [see Note 5]:*

> Although provocation which reduces murder to manslaughter applies only if the act of the defendant is committed suddenly upon a provoking event, that does not require you to ignore past behaviour by the deceased, since an incident which is trivial when examined in isolation might nonetheless be one which might cause a reasonable man to react explosively in the context of provocation over an extended period.

Notes:

1. The relevant conduct need not be that of the deceased: *R v Davies* [1975] 65 Cr App R 253. As to 'self-induced' provocation see Archbold Hong Kong (2009) 20-68.

2. As to the causal chain connecting the alleged provocation, the loss of self-control and the act resulting in death see *R v Ibrams and Gregory* [1981] 74 Cr App R 154; *R v Davies* (above)*; R v Whitfield* [1976] 63 Cr App R 39.

3. There may be a need in a particular case to refer to the defendant's **personal history** (or to an aspect of it) and/or the circumstances in which a defendant was placed at the relevant time, which history or circumstances the jury might think could have affected the gravity of the provocation upon an ordinary person of the defendant's age and sex. See *DPP v Camplin* (above). In *R v Morhall* [1996] 1 AC 90; [1995] 2 Cr App R 502, the House of Lords held that any unusual characteristics should be taken into account for the 'reasonable person' test (under section 4 of the Ordinance) **in so far as they affected the gravity of the provocation in question**. It is particularly important that the judge, before final speeches are made, should discuss with counsel how he proposes to direct the jury so that counsel may be invited to comment on any further characteristics they consider should be included in the direction.

4. The Privy Council in *Luc Thiet Thuan v R* [1997] 1 AC 133 held that in a case where the defendant suffered from brain damage and was prone to respond to minor provocation by losing self-control and reacting violently, that the defendant's impaired mental condition could not be incorporated into the characteristics of a notional "reasonable man" for the purposes of the test under section 4 of the Homicide Ordinance.

The judgment doubted the correctness of English Court of Appeal cases which suggested that **all** the characteristics of the defendant including the defendant's mental infirmities should be attributed to the notional "reasonable man" (see *R v Newell* (1980) 71 Cr App R 331 which was subsequently approved in *R v Campbell* (1997) 1 Cr App R 199 and *R v Morgan Smith* (1999) 1 Cr App R 256). The Privy Council in A-G for *Jersey v Holley* (2005) 2 Cr App R 36 (485) and [2005] 2 AC 580, affirmed in *Ho Hui Shing* (applied in *R v James* & *R v Karimi* (2006) 1 Cr App R 29 (440) said the majority judgment in *Morgan Smith* was wrong and approved the approach in *Luc Thiet Thuan* and *DPP v Camplin* [1978] A.C. 705 and (1978) 67 Cr App R 14 (HL). See para 22 of *Holley per* Nicholls LJ which suggests the "reasonable man" is an ordinary person of the age and sex of the defendant though without any other special characteristics. But see also the judgment of Lord Diplock in *DPP v Camplin* [1978] 67 Cr App R 14 at 21: "… the reasonable man referred to … 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 (the jury) think would affect the gravity of the provocation to him."

So, as opposed to characteristics which affect the defendant's self-control, the "reasonable man" can and should be notionally clothed with such characteristics of the defendant which have a bearing on the gravity of the provocation **as perceived by him** (see also *R v Cox* (1995) Crim LR 741).

The Court of Appeal in Hong Kong has followed *Luc Thiet Thuan (supra) in HKSAR v Kong Kwong-san* CACC 135/1998 and in that case leave to appeal on the point was refused by the Appeal Committee of the Court of Final Appeal (see also *Kong Kwong-san v HKSAR* (FAMC 4/1999) and reference to that in *HKSAR v Mok Tsan Ping & Ors* [2001] 2 HKLRD 325. See also *HKSAR v Wong Hing Pui* CACC 189/2001).

5. Provocation is not ruled out as a matter of law either because the provocative conduct has extended over a long period of time or because there has been a delayed or 'slow burn' reaction. Thus, the jury can consider alleged provocative conduct giving rise to loss of control in the light of the deceased's conduct leading up to the killing. This may involve a period of minutes or a period of years: *R v Ahluwalia* 96 Cr App R 133, though see also *R v Vu Van Thang* (1991) 2 HKC 90. It is the loss of control which must be 'sudden', which does not mean 'immediate'; see *R v Thornton* [1996] Cr App R 108. There may be evidence to go to the jury that the temporary loss of control continued through a series of deliberate acts: *R v Baille* [1995] 2 Cr App R 31. Note too the suggestion in *Thornton*, at page 116 that Battered Woman Syndrome might also affect a defendant's personality so as to constitute a significant characteristic.

6. The issue of provocation must be left to the jury (providing there is evidence of it which is fit for them to consider) regardless of whether the defendant actually claims that he was provoked and regardless of the wishes of defence counsel : see *R v Coutts* (2007) 1 Cr App R 4(60). Determining whether the evidence is

such as to warrant a direction upon provocation is not always easy: see *R v Cambridge* [1994] 99 Cr App R 142 and *R v Stewart* [1996] 1 Cr App R 229; but a defence of provocation may never be withdrawn on the ground that no reasonable jury could possibly find that a reasonable man would have been provoked to do as the defendant did : see *R v Gilbert* 66 Cr App R 237.

Archbold Hong Kong (2009) 20-55 to 20-77.
Archbold (2009) 19-50 to 19-65.
Blackstone (2009) B1.22 to B1.30.

52. INTOXICATION – SELF-INDUCED OR VOLUNTARY

Offences requiring a specific intent

Refer to the specific intent and continue:

> You must not convict unless you are sure that the defendant, when he did the act, intended [X]. In deciding whether he intended [X] you must take into account the evidence that he was [drunk][affected by drugs]. If you think that, because he was so [drunk][affected by drugs], he did not intend or may not have intended [X], then you must acquit him. But if you are sure that, despite his [drunkenness] [the effect of the drugs], he intended [X] then this part of the case is proved against him. A [drunken] [drugged] intent is still an intent. [What is more it is not a defence for the defendant to say that he would not have behaved in this way had he not been [drunk/affected by drugs.]] (see Notes 2 & 3).

Offences not requiring specific intent

Offences requiring 'malice' (e.g. sections 19 and 22 Offences Against the Person Ordinance, Cap. 212 upon which the following direction is based) and offences of basic intent, e.g. criminal damage and rape.

> You must be sure that the defendant, when he did the act, either:
>
> 1. Realised that it might cause some injury [not necessarily serious injury or wounding] to some person **or**
> 2. Would have realised that his act might cause such injury had he not been [drinking] [taking drugs].
>
> It is not a defence for the defendant to say that he would not have behaved in this way had he not been [drunk] [affected by drugs] or that he failed to foresee the consequences of his act because he was [drunk] [affected by drugs].

Notes:

1. For a brief summary of the law of the relevance of drink/drugs to crimes of specific and basic intent, when (a) voluntarily (b) involuntarily consumed, see **Direction 14** above.

2. For guidance on what to do in a specific intent case when the defendant says that he had consumed a lot of alcohol but knew what he was doing, see *R v Groark* (1999) EWCA (Crim) 207; [1999] Crim LR 669.

3. In *R v McKnight* [2000] All ER (D) 764, it was said that this direction need not be given in every specific intent case in which alcohol played a part. It need only be

given where the evidence, taken at its highest, justified the conclusion that the defendant might not have been able to form the necessary intention because of drink. See also *R v Alden and Jones* [2001] 5 Archbold News 3.

4. Self-induced intoxication by drink or drugs is no defence, except potentially to offences requiring a specific intent. Note *R v Allen* [1988] Crim LR 698, CA, where the defendant knew that he was drinking alcohol, the drinking of it did not become involuntary merely because he did not know or may not have known the precise nature or strength of the alcohol. See also *DPP v Majewski* [1977] A.C. 443 HL.

5. For self-induced intoxication and the defence of honest belief within section 64 of the *Crimes Ordinance, Cap. 200*, see *Jaggard v Dickinson* 72 Cr App R 33, Archbold (2009) 23-48. For mistake of fact induced by voluntary intoxication see Archbold Hong Kong (2009) 20-193.

6. Concerning drugs see *R v Bailey* [1983] 77 Cr App R 76, *R v Hardie* [1985] 80 Cr App R 157, Archbold (2009) 17-90. Where the prosecution case is that the defendant was reckless: See *Archbold* (2009) 17-105.

7. The onus of proof of intent in cases requiring specific intent still rests on the prosecution when the issue of intoxication arises: see *Bruce & McCoy* III [53]; *R v Kimley* [1994] Crim LR 944, and *R v Ip Chong Fun* [1996] 1 HKC 597 at pages 602, 603 (Caution - headnote (2) of the report of *Ip Chong Fun* appears to be inaccurate).

Archbold Hong Kong (2009) 16-72 et seq.
Archbold (2009) 17-105 et seq.
Blackstone (2009) A3.8 to A3.12.

53. SEXUAL OFFENCES - CONSENT, "DOMESTIC CIRCUMSTANCES"

In the case of *R v Mohammad Zafar* 18th June 1993 (92/2762/W2) the English Court of Appeal remarked that the following passage from the summing-up of Pill J '*… deserves to stand as a model for summing-up in a case of this nature*'. (Rape. Parties had been living together. Issue-consent; but the following directions could also be usefully adapted to cases of indecent assault etc.).

The Learned Judge commenced his summing-up with the words:

> '*Members of the jury, the defendant and X had a long standing relationship, they lived together in Cardiff, they had two children and they had many acts of sexual intercourse.*'

Later, he went on to say:

> *'It is a relevant fact (you may think) that they lived together (the defendant and Miss X) in a long standing relationship, relevant that is to the charge. When sexual intercourse occurs between a man and a woman your approach to the questions of consent which arise may well be different in a situation where the parties live together and have lived together for a long time from a situation where, for example, they have just met. The questions on the law of rape are the same in each case; but the answers will be given in the light of all the circumstances and all the evidence, including the fact that they have had a long standing relationship …'*
>
> *'In law a husband or a long-term or a short-term partner for that matter … can be convicted of rape of his partner if the constituents of the offence are proved notwithstanding his relationship with the victim …'*
>
> *'In considering whether it is proved that the complainant Miss X did not consent, bear in mind when considering the evidence the relationship between them. When people enter into long-term relationships either within or outside marriage they usually contemplate regular sexual relations. In most partnerships, even not entirely happy ones, there is often give and take between the partners on sexual as on other matters. A female partner may not particularly want sexual intercourse on a particular occasion but because it is her husband or her partner who is asking for it she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner, is still a consent.'*
>
> *'However, a woman is entitled to say 'no' and to refuse to consent even to her husband or long-term partner. There is a dividing line between a real consent on the one hand and a lack of consent or mere submission on the other. It is for you to decide whether the absence of consent is proved in this case applying your combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case.'*

54. DEFENCE AVAILABLE BUT NOT RAISED

Where there is evidence from which a jury could reasonably infer that a defence might be available which has not been relied upon by the defendant or his counsel it must be put before the jury. Sometimes a defence may not have been put by inadvertence; sometimes it may not have been put for tactical reasons, for instance that it would be inconsistent with, or weaken the force of, some other defence specifically and primarily relied upon. But there is no duty to leave to the jury defences which have not been put and which are fanciful or speculative (as to which see in particular *R v Coutts* (2007) 1 Cr App R 6 (60) and see Note 6 to Direction 51, *R v Acott* [1997] 1 WLR 306 and *Zeng Liang Xin* [1997] HKLRD 1204). See also *HKSAR v Ho Hoi Shing* FACC 1 of 2008; *HKSAR v Lau Chi-ming* FAMC 31 of 2005 and *R v Foster* [2008] 2 All ER 597. See, generally, *R v Critchley* [1982] Crim LR 524 and *R v Bonnick* [1978] 66 Cr App R 266. Particular care should be taken to ensure that where appropriate, Self Defence (**Direction 48**), Duress (**Direction 49**) and Provocation - Murder (**Direction 51**) are left to the jury.

Note:

See *R v Conway [1989] 88* Cr App R 159 CA and *Coutts* (*supra*), in which, on the facts, it was held in both cases that the judge was obliged to put a defence (duress and provocation respectively) to the jury, despite the defendant's counsel's submissions to the contrary. See also generally the comment by Winn LJ in *R v Kachikwu* 52 Cr App R 538 at 543. See also *R v Watson* (1992) Crim LR 434. For an example of a case where the evidence of a potential defence was so tenuous as to not require the defence to be left with the jury see *R v Elliott* (2000) Crim LR 51CA. See also: *Von Starck v The Queen* (2000) 1 WLR 1270 PC.

Archbold Hong Kong (2009) 4-191.
Archbold (2009) 4-379 and 19-53.
Blackstone (2009) D17-34.
Bruce & McCoy III [5]-[50].

VI VERDICT / JURY MANAGEMENT

55. CONCLUDING DIRECTIONS

1. Each of you has taken an oath or affirmation to return a true verdict according to the evidence. This is a responsibility you must fulfil. Each of you takes into the jury box your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening and giving due consideration to the views of others. There must necessarily be discussion and debate, as a result of which an individual may be persuaded to accept a view which he or she did not previously hold. But, of course, you must at all times stay true to your oath or affirmation to give a true verdict according to the evidence. [See Note 1]

2. You should strive to reach a unanimous verdict, that is, a verdict upon which you are all agreed; whether guilty or not guilty. If however you are unable to do so, then I am entitled in law to accept from you a verdict upon which at least five of you are agreed, in other words, a verdict of six-one, or five-two. A verdict of four-three either way does not constitute a verdict, and should that position arise inform the court by a written note of the fact of that split, but not the numbers in favour of and against a particular verdict, and I shall direct you further. [See Note 2]

3. On your return to court, your foreman will be asked a series of questions in order to bring out your verdict(s) in a manner designed to avoid any mistakes or misunderstandings. The clerk will now hand to each of you for your assistance a sheet of paper upon which the questions have been typed, and it may help if before you return to court you note against those questions the answers which have been agreed between you and which will be given by the foreman on your behalf. Please bring the papers back to court with you and if any mistake arises when the answers are given orally by your foreman, you should immediately draw it to my attention. (See 55.4 for Questions to assist the return of a verdict/s.)

4. When you retire you will be taken by the jury usher to your deliberating room. If after your retirement you require assistance upon a matter of law, or wish to be reminded of some evidence, your foreman should write your question or request on paper and hand that paper to the usher. I shall need to recall counsel and discuss the issue raised with them in open court. You will then be called back to court for me to deal with the matter. So, there may be a little delay before you are brought back and your question or request is addressed.

5. The jury usher will at all times be outside you room. Please do not, on any account, discuss with her any aspect of the case or procedure nor ask her any questions unless it be to ask her to deliver an exhibit to you or to deliver a written question to me.

6. Refreshments and lunch will be brought to you, and it would be irregular for you to split up or go out for lunch or for any other purpose. Nor may you telephone from the jury room. Please leave mobile telephones with the jury usher and do not take them into the jury room with you.

7. When you retire, take with you the notes which you have been making as well as [the album of photographs/records of interview *(and such other exhibits as the jury have before them and will obviously wish to take along)*]. Other exhibits such as ... are available for you if you wish to see them, and if you do, please ask for their delivery to your room.*

* It is not appropriate for drug exhibits to be delivered to the jury room and the jury should so be informed. If they wish to examine them, then the court should reconvene for them to do so. If any exhibits have blood, the jury should be given plastic gloves and be advised to wear them when examining them.

'4:3 Split'

If the jury respond to the direction above by indicating that they are split 4:3 on a count or counts and if, in the circumstances of the particular case, it is appropriate, the jury might be invited to discuss the matter further :

" I am going to ask you to give further consideration to your verdict/s on count/s [..] and I repeat the direction I gave earlier. Each of you has taken an oath or affirmation to return a true verdict according to the evidence. This is a responsibility you must fulfil. Each of you takes into the jury box your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening and giving due consideration to the views of others. There must necessarily be discussion and debate, as a result of which an individual may be persuaded to accept a view which he or she did not previously hold. But of course you must at all times stay true to your oath or affirmation to give a true verdict according to the evidence. However, if after full discussion you cannot reach agreement, you must say so".

Notes :

1. The direction at paragraph 1 above is taken from the judgment of Li CJ, with whom all the other judges agreed, in *Tam King Hon v HKSAR* (2006) 9 HKCFAR 206 at 216, para 29. . Of the desirability of giving such a direction Li CJ said (at page 217, para 30) :

> *" Whatever may be the position in relation to the giving of the specimen directions in full, judges may well consider that it would usually be of assistance to the jury to direct them as part of the summing up on how they should go about deliberating as a jury. It should be borne in mind that jurors are often serving for the first time and such directions may be helpful to them."*

2. There has been a significant number of cases in which judges have told the jury, either expressly or by clear implication, that a four-three result is not acceptable.

It is one thing to tell a jury that such a split cannot constitute a verdict, quite another to give the impression that a split is not open to them. Not only is that wrong in law but it is likely to create improper pressure. It is therefore vital that both in the original summing-up and in the event of a need to give a further relevant direction, it be made clear that they are not precluded ultimately from reaching a 4-3 position. Therefore, the relevant parts of these directions should not be omitted. See also *Chan Kar Leung v HKSAR* [2006] 9 HKCFAR 827, *Pun Luen Pan v HKSAR* [2008] 2 HKLRD 404 and *Lam Chi Kwong v HKSAR* FACC 2/2008.

3. The second direction has been drafted mindful of the observations made by Li CJ in the remaining part of paragraph 30 :

> *"… where such a direction has been given, if the jury subsequently asks questions on the same subject matter, that is, the jury's decision making process, it would be prudent for a judge to repeat or stay as close to the directions previously given where possible. If in response to such questions, a judge then uses different terms to convey the same meaning, depending on the circumstances, the risk of confusion or misunderstanding may arise."*

Questions to assist the return of a verdict/s.

Suitable questions are set out below. There should be a separate sheet for each count and each defendant. Questions 4 to 6 inclusive will not be appropriate unless you have indicated to the jury that there is a possible alternative offence to consider.

1. On count…….. against……. have you reached a verdict?

   If "No" the judge will deal with the matter.

   If "Yes" then:

2. Is the verdict one upon which you are all agreed ?

   If "Yes" go to Question 3.

   If "No" then:

2A. By what majority have you arrived at that verdict?

Then:

3. What is your verdict?

   [If "not guilty" and there is a possible alternative verdict:

4. Have you reached a verdict on the possible alternative offence of……

   If "No", the judge will deal with the matter.

   If "Yes" then:

5. Is the verdict one upon which you are all agreed?

   If "Yes" go to Question 6.

   If "No" then:

5A. By what majority have you arrived at the verdict?

Then:

6. What is your verdict?]

7. [*In a murder case when alternative bases for a manslaughter verdict have been left for the jury's consideration, add (as appropriate)*] On what basis do you find the defendant guilty of manslaughter :

(1) manslaughter by an unlawful and dangerous act or
(2) manslaughter by reason of provocation or
(3) manslaughter by reason of diminished responsibility?]

56. VERDICTS ON ALTERNATIVE COUNTS

1. Alternative counts fall into two categories:

   (i) genuine alternative charges -

   theft with the alternative offence of handling is the obvious example. The accused cannot be guilty of both offences.

   (ii) an alternative lesser charge-

   the greater usually, but not always, includes the lesser. For example, unlawful wounding is an alternative to a charge of wounding with intent.

2. The approach to taking a verdict from the jury varies between (i) and (ii) above.

   (i) *Genuine alternative charges.*

   It is possible to have a guilty verdict to one of the alternatives only. The jury should be <u>discharged</u> from giving a verdict on the alternative count once a verdict of guilty on the other is entered.

   The reason for proceeding in that way is to leave open to the Court of Appeal, in the event of a successful appeal in respect of the count on which a guilty verdict has been returned, the alternative of substituting a verdict of guilty in respect of the alternative count. That cannot be done if a verdict of 'not guilty' has been entered in respect of that alternative count.*

   There is a difficulty if the verdict is not guilty on the first charge and guilty on the second charge.

   This difficulty is avoided by asking the jury at the appropriate stage whether they find the accused guilty on either.

   For example:

   Q. "Do you find the accused guilty of either theft or handling?"

   A. "Yes."

   Q. "On which count do you find him guilty?"

   A. "Handling."

   The handling charge is then put in full (i.e.: "On count [the handling count] have you reached a verdict … etc.") and the verdict of guilty is taken. The jury is then discharged from bringing in a verdict on the first charge of theft.

   [If the judge is sitting alone, the procedure is simpler but the judge must discharge himself from bringing in a verdict on the alternative count if he finds the accused guilty of one of them.]

(ii) *Alternative lesser charges.*

The jury should be asked for verdicts in the order of the gravity of the offences. So, on a count of wounding with intent a verdict should be sought on that count first. If the verdict is guilty the jury should be discharged from bringing in any verdict on the lesser alternative charge. Of course, if the verdict is 'not guilty' of the count of wounding with intent then a verdict ought to be sought on the alternative count of unlawful wounding.

* See the statement of Mortimer J. A. in his judgment in the Court of Appeal in *R v Tsui Fung (No.1)* [1996] 2 HKC 77 at 86 H-87A:

> *" This court has frequently pointed out that when a verdict of guilty is recorded upon a count or charge and there is an alternative, the jury ought to be discharged from giving any verdict upon the alternative. Similarly, judges should excuse themselves from giving any verdict upon an alternative. The reason is that if the case goes on appeal and it is demonstrated that the applicant is not guilty of the count upon which he was convicted but is guilty of the alternative, an acquittal on the alternative prevents the Court of Appeal from substituting the proper verdict."*

Archbold Hong Kong (2009) 4-255.

58. OVERNIGHT RETIREMENT

It is the essence of the jury system that you should reach a verdict when you are together in your jury room, with the jury usher outside to ensure your complete privacy. It follows that now that you will be separating to retire for the night you should not discuss the case amongst yourselves. No discussion about the case should resume until you all return to your jury room tomorrow.

In the morning you will be provided with breakfast, and we will resume in this court at 9:30 a.m., at which point I will ask you to return to the jury room to continue your deliberations.

Of the time at which the jury ought to be invited to cease their deliberations see the observations of Bokhary PJ in *Chan Kar Leung and others v HKSAR* (2006) 9 HKCFAR 827 (at paragraph 15) :

> *"As to that, we endorse the broadly held view that jurors should generally cease deliberating by about 8 o'clock at night and then rest overnight before resuming their deliberations together after breakfast the following morning. That is the view on which trial judges should act."*

VII SPECIFIC OFFENCES

59. ARSON

Arson with intent to endanger life [Count 1]

(section 60(2)(b) Crimes Ordinance)

Before you may convict a defendant on Count [1], you must be sure of all the following matters :

1) that on [date] [property] was destroyed [or damaged] by fire;

2) that the defendant committed the act which destroyed [or damaged] that property by fire;

3) that the defendant did so without lawful excuse;

4) that at the time that he committed the act the defendant intended

   (a) to destroy [or damage] the property; and

   (b) he intended that the destruction of [or damage to] the property would endanger [the life or lives of insert name or names][a human life or lives].

The direction in respect of the alternative count [Count 2] of arson being reckless as to whether life will be endangered is set out on the next page.

If you are sure that the defendant is guilty on Count [1] *(arson with intent to endanger life)*, you will be discharged from returning a verdict on Count [2] *(arson being reckless as to whether life will be endangered).*

If, however, you are not sure that the defendant is guilty on Count [1] you should find him not guilty of that count and then go on to consider the case on Count [2].

Before you may convict the defendant on Count [2], you would have to be sure of all of the following matters :

1) that on [date] [property] was destroyed [or was damaged] by fire;

2) that the defendant committed the act which destroyed [or damaged] that property by fire;

3) that the defendant did so without lawful excuse;

4) that at the time he committed the act the defendant intended to destroy [or damage] the property, or was reckless as to whether the property would be destroyed [or damaged]; and

5) that at the time he committed the act the defendant was reckless as to whether [a human life or lives] [the life or lives of (insert name or names)] would be endangered by the destruction of [or damage to] property by fire.

The prosecution will have proved that the defendant was reckless as to whether the property would be destroyed [or damaged] if, having regard to all the evidence, you are sure:

(1) that he was aware of a risk [identify the evidence relevant to the issue] that property would be destroyed [or damaged]; and

(2) that in the circumstances known to him it was unreasonable to take that risk[identify the evidence relevant to these issues].

The prosecution will have proved that the defendant was reckless as to whether [the life or lives of (insert name or names)] [a human life or lives] would be endangered if, having regard to all the evidence, you are sure:

(1) that he was aware of a risk that the destruction or damage to the property would endanger [the life or lives of (insert name or names)] [a human life or lives] [at an appropriate stage identify the evidence relevant to the issue]; and

(2) that in the circumstances known to him it was unreasonable to take that risk [at an appropriate stage identify the evidence relevant to these issues].

However, if due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions he was not reckless.

So if you find that the defendant did not appreciate or foresee or may not have appreciated or foreseen the risk that property would be destroyed or the risk that the destruction or damage to the property would endanger a life or lives, then he is not guilty.

These directions have been re-drafted in light of the decision of the Court of Final Appeal in *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 approving the decision of the House of Lords in respect of the word "reckless" in *R v G* [2004] 1 AC 1034 and overruling *R v Chau Ming Cheong* [1983] HKC 68 and *R v Dung Shue Wah* [1983] 2 HKC 30.

> *" Henceforth juries should be directed in terms of the subjective interpretation of recklessness upheld in* R v G [2004] 1 AC 1034. *So juries should be instructed that, in order to convict for an offence under s.118(3)(a) of the Crimes Ordinance, it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions." Sir Anthony Mason, NPJ page 391 C-E, paragraph 44.*

(See also, *HKSAR v Tang Yuk Wah* CACC 132/2005-14 September 2005)

Note :

Where the prosecution rely on the alternatives of intention or recklessness as to whether life is endangered it must be reflected in a separate count : see *R v Hoof* 72 Cr App R 126 and *R v Hardie* 80 Cr App R 157.

Archbold (2009) 23-13 to 24.
Archbold Hong Kong (2009) 16-45 and 24-7, as amended in the 2nd Supplement.

60. BLACKMAIL

(Section 23 Theft Ordinance)

A person commits blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes an unwarranted demand with menaces.

Before you may convict the defendant, you would have to be sure of all of the following matters :

1) that he made a demand of [Mr X];

2) that when the demand was made, it was made with menaces;

3) that it was an unwarranted demand; and

4) that he made the demand with a view to gain for himself or another.

I do not need to define for you the word 'demand'. You are to give it its ordinary meaning. It is to be distinguished from a mere request. It can be constituted by speech or by conduct or by a combination of both. It can be explicit or implicit. It arises where the words used or the demeanour of the defendant and the surrounding circumstances are such that an ordinary reasonable man would understand that a demand was being made of him.

'Menace' is also an ordinary English word which needs no definition. If someone demands that you pay him money and states or clearly implies by words or action that if you do not, he will assault you or cause harm to your family or your property, he is reinforcing his demand, is he not, with menaces.

As for the requirement that the prosecution must prove that the demand with menaces was unwarranted, some threats, unpleasant to the person to whom the threat is addressed might nonetheless be warranted. For example, it is not blackmail for a creditor to threaten court proceedings in respect of a debt which is due. That is a warranted demand; not an unwarranted demand. So the law provides that if a person making the demand believes that he has reasonable grounds for making it, **and** he believes that the use of menaces is a proper means of reinforcing the demand then he is not guilty of the offence of blackmail. It would be for the prosecution to make you sure that he had no such belief.

Note:

See the comments of the Court of Appeal in *HKSAR v Chen Wei Li* CACC402/2004 to the effect that victims of blackmail cases should be identified, not by their names, but alphabetically unless they consent to their names being used.

Archbold Hong Kong (2009) 22-204 et seq.
Archbold (2009) 21-260 to 267.
Blackstone (2009) B5.38 et seq.

61. DANGEROUS DRUGS

Trafficking in a dangerous drug : see section 4(1)(a) of the Dangerous Drugs Ordinance.

"Trafficking"

> The defendant is charged with unlawful trafficking in a dangerous drug, namely [the drug]. Trafficking in a drug means supplying it to others, or selling it, or exporting it [etc.] or possessing it for such a purpose.

"Unlawful"

> Unless a person is authorised by law to traffic in a dangerous drug it is a crime to do so. Some people such as doctors and chemists are authorised by law to supply drugs to people, and although therefore they traffic in those drugs it is not unlawful for them to do so. The Dangerous Drugs Ordinance provides that [specify drug] is a dangerous drug. It is not suggested in this case that this defendant was authorised either to possess or traffic in that dangerous drug.

The following direction assumes the prosecution allege the defendant possessed dangerous drugs for the purpose of trafficking. It will need to be amended if the allegation is of actual trafficking (e.g. sale to another).

> In this case the prosecution allege the defendant possessed dangerous drugs for the purpose of trafficking in them. You may not convict the defendant unless you are sure the prosecution have proven [at the place and on the date alleged] that :
>
> 1. the defendant possessed dangerous drugs;
> 2. he knew they were dangerous drugs; and
> 3. he possessed them for the purpose of [supply to another/ export/sale].
>
> The prosecution must prove each of those matters so that you are sure.

"Possession"

> A person is in possession of an object if it is in his actual physical custody, e.g. in his hand or in his pocket, or is otherwise within his control e.g. kept in his desk or in his bedroom, and he knows it is there and has the intention to exercise custody or control over it.

The following specific points, or some of them may require mention and expansion :

Please note that you should not equate ownership with possession. In other words, one may possess an object even though one does not own it.

An object may be possessed by more than one person at the same time. If two or more people agree to keep a pool of articles or a particular product in one place and that any of them may go there to take or move some of the articles as and when they see fit, then all are in control of the product in the sense that I have described 'control', and all are in possession of it.

But a person's mere presence in the vicinity of an object is not of itself possession of it. If a person is invited for dinner to a friend's home, he is not in possession of the objects in that home simply because he is there and knows that the objects are there. The objects are not in his physical custody and he has neither the intention nor the authority to exercise control over them.

'Shut eye', or constructive, knowledge :

Where there is an issue about knowledge of the contents of a container, the jury must be told that suspicion does not suffice and that knowledge must be proved. In such cases, judges must be very careful not to suggest that, by itself, failure to take an opportunity to inspect is to be, or may be, equated with knowledge of the contents. In appropriate cases, it is a fact that may be taken into account and from which, with all the other circumstances, guilty knowledge may be inferred. In essence, guilty knowledge may be inferred where the custodian has evidently 'avoided getting confirmation which he neither wanted nor indeed needed' and where 'in common sense and in truth, he knew.' (See *Law Wai Choi* (1996) Criminal Appeal No. 279). Directions about means and opportunity to inspect are not to be imported into all drugs cases, but only where the issue so warrants (see *R v Cheung Kwok Kuen* CACC 51/1996). See also *Law Wai-choi,* FAMC 24/1998.

The Alternative Verdict : Simple Possession (A suggested direction for cases where the alternative arises. The alternative is often not applicable — e.g. where there is a large quantity in weight and value. Unless the alternative obviously applies, the issue is one which the judge should discuss with counsel before closing speeches.)

If you are sure that the defendant was in possession of a dangerous drug, but you are not sure that he had possession of it for the purpose of trafficking, you will find the defendant not guilty of trafficking in dangerous drugs, but guilty of the lesser charge of possession of dangerous drugs.

The law allows you to convict of this lesser offence if :

1. you acquit of the more serious offence; that is if you find him not guilty of trafficking, but

2. you are nevertheless sure that he was in possession of the dangerous drug.
3. and that he knew it was a dangerous drug

Note : The presumptions contained in section 47(1) and (2) of the Dangerous Drugs Ordinance now place only an evidential burden on the defendant rather than a persuasive burden : see *HKSAR v Hung Chan Wa and Another* (2006) 9 HKCFAR 614 at 648. There is no need for judges to trouble the jury with this issue.

Manufacture of a dangerous drug : see section 6(1)(a) of the Dangerous Drugs Ordinance.

"Manufacture"

Manufacturing a dangerous drug means any act connected with making, adulterating, purifying, mixing, separating or otherwise treating a dangerous drug.

The following direction will often suffice :

In this case, you may not convict the defendant of manufacturing a dangerous drug unless you are sure [that on or about (date) at (place)] :

1. he manufactured a substance;
2. the substance was a dangerous drug;
3. he knew the substance was a dangerous drug; and
4. he was not licensed, or authorised by law, to manufacture the dangerous drug.

62. KIDNAPPING

(Forcible Detention with intent to Procure a Ransom)

(section 42, Offences Against the Person Ordinance, Cap 212).

Before you may convict the defendant of this offence, you would have first to be sure of each of the following :

1. that the defendant detained Mr X. To detain a person is actively to prevent that person from leaving a place.
2. that the detention was effected by force; in other words, by violence or by threats of violence;
3. that such detention was against Mr X's will;
4. that the defendant knew that the detention was against Mr X's will; and
5. that the defendant intended at the time of the forcible detention to procure a ransom for Mr X's release. A ransom is the sum of money, or the price, for someone's release.

[It does not matter from whom or through what route it was intended to procure the ransom. Nor does the prosecution have to prove that the defendant intended to release Mr X once the ransom was secured, and it matters not whether the money was owing to the defendant or not. It suffices also if the demand is made to the victim himself, to obtain the money howsoever he may, rather than directly to a member of his family.]

(The common law offence of kidnap.)

In *R v D* [1984] AC 778 the House of Lords identified the ingredients of the common law offence of kidnap as being:

(i) the taking or carrying away of one person by another;
(ii) by force or fraud;
(iii) without the consent of the person so taken or carried away;
(iv) without lawful excuse; and
(v) so as to be deprived of his liberty.

It is to be noted that there is an absence of any reference as an ingredient to gain or reward. In the absence of any penalty having been specifically provided for in any Ordinance, section 101 I of the Criminal Procedure Ordinance, Cap. 221 provides that the maximum punishment is seven years imprisonment and a fine.

Archbold Hong Kong (2009) 20-370 et seq.
Archbold (2009) 19-333 et seq.
Blackstone (2009) B2.80 et seq.

63. MANSLAUGHTER — BY A DANGEROUS AND UNLAWFUL ACT

(BECAUSE INTENT TO KILL OR CAUSE REALLY SERIOUS BODILY HARM IS NOT PROVED)

A killing is manslaughter if it is the result of an unlawful act by a defendant where the unlawful act is one which all sober and reasonable people would inevitably realise must subject the victim to the risk of some harm — albeit not serious harm — whether the accused realised this or not.

The burden of establishing manslaughter on this basis is, [once again and as always], on the prosecution. You may not convict the defendant of manslaughter on this basis unless you are sure that:

1. the defendant committed an act which caused the victim's death;
2. the act was intentional;
3. the act was unlawful; and
4. the act was dangerous in the sense that it was one which all sober and reasonable people would realise must subject the victim to the risk of some harm.

Note:

In *Sze Kwan Lung and others v HKSAR* [2004] 7 HKCFAR 475 the CFA, on the particular facts of that case, declined to embark on the question of whether the result would differ if the issue was approached on the basis of the test identified by the High Court of Australia in *R v Wilson* 174 CLR 313, namely that the accused realized that the unlawful act exposed the victim to an appreciable risk of serious injury, rather than the direction set out at (4) taken from the judgment of the House of Lords in *R v Newbury* [1977] AC 500.

Archbold Hong Kong (2009) 20-103 et seq.
Archbold (2009) 19-99 et seq.
Blackstone (2009) B 1-36 et seq.

63A. MANSLAUGHTER BY GROSS NEGLIGENCE

Before you may convict the defendant of the offence of manslaughter by reason of gross negligence in respect of [count 1] on the indictment you must be satisfied so that you are sure of the following ingredients:

(1) that the defendant owed a duty of care to the victim ;

(2) that the defendant was in breach of that duty of care;

(3) that the breach of the duty of care caused the death of the victim; and

(4) that the breach of the duty of care constituted gross negligence, in that the circumstances were such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury, even serious injury, but of death* so that you, the jury, consider the defendants actions justify a criminal conviction.

It is for you to decide which facts you find proved: whether or not there was a duty of care owed by the defendant to the victim; whether or not there was a breach of that duty of care by the defendant; whether or not that breach caused the death of the victim and whether or not a breach of the duty of care owed by the defendant to the victim constituted gross negligence that justifies a criminal conviction

* See the judgments of the Court of Appeal of England and Wales in *R v Misra* [2005] 1 Cr App R 21 at paragraph 52, followed in *R v Yaqoob* 2005 EWCA Crim. 2169 at paragraphs 28 and 29). See also *R v Adomako* 99 Crim App R 362 and **Direction 15** above.

Archbold Hong Kong (2009) 20-113 et seq.
Archbold (2009) 19-108 et seq.
Blackstone (2009) B1.52 et seq.

64. MURDER

Murder is committed when a person unlawfully kills another and, at the time of doing so intends either to kill that other person or to cause that other person grievous bodily harm (really serious bodily harm).

The burden is throughout on the prosecution to prove each ingredient of the offence beyond reasonable doubt.

So, before you may convict the defendant of the murder of Ms [X] you would have to be sure of each of the following matters :-

1. that the defendant committed an act or acts which caused the deceased's death;

2. that the killing was unlawful; and

3. that at the time of the act or acts which caused Ms X's death the defendant either intended to kill her, or intended to cause Ms X grievous bodily harm — in other words, really serious bodily harm.

If you are not sure of any one of those ingredients, then the defendant is not guilty of murder.

If you are sure of all these ingredients, then (subject to the question of provocation/diminished responsibility which can, in the circumstances about which I will direct you in due course, reduce a finding of murder to one of manslaughter) the defendant is guilty of murder.

Archbold Hong Kong (2009) 20-4 et seq.
Archbold (2009) 19-1 et seq.
Blackstone (2009) B1.1 et seq.

65. RAPE

(Section 118, Crimes Ordinance, Cap 200)

A man commits rape if he has sexual intercourse with a woman who at the time does not consent to it and, if at the time he has sexual intercourse with her, either he knows that she does not consent to it, or is reckless as to whether she consents to it.

Sexual intercourse is penetration by a man's penis into a woman's vagina. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

Before you may convict the defendant, you have to be sure of each of the following matters :

1. that the defendant had sexual intercourse with Ms [X];

2. that at the time of that act of sexual intercourse, Ms [X] did not consent to it; and

3. that at the time of sexual intercourse, either the defendant knew that Ms [X] did not consent or was reckless as to whether she consented to sexual intercourse.

The defendant was reckless as to whether Ms [X] consented to sexual intercourse if you are sure that he knew that there was a risk that she was not consenting and carried on anyway [when in the circumstances known to him it was unreasonable to do so].

Add, where appropriate:

However, if due to his age or personal characteristics [give details] the defendant genuinely did not appreciate or foresee the risk that Ms [X] was not consenting to sexual intercourse he was not reckless.

See the Notes to **Direction 17.**

Where honest belief is a live issue :

If it is or may be the case that the defendant believed that she was consenting, then he cannot be guilty of rape. It is not for the defendant to prove that he believed that she was consenting; rather, it is for the prosecution to prove, so that you are sure, that he did not believe that she was consenting to sexual intercourse. And what if he held that belief but was mistaken? Well, if it is or may be the case that he held a genuine but mistaken belief that she was consenting, then you must acquit him. In deciding whether or not he believed or may have believed that she was consenting, you should have regard to the existence or absence of reasonable grounds for such a belief, and to all the surrounding circumstances. But the question must always be whether you are sure that he himself did not hold such a belief.

(See *R v Adkins* [2000] 2 All E.R. 185 for the limited circumstances in which such a direction may be required.)

Archbold Hong Kong (2009) 16-45 and **46, 21-7** [but **ignore 21-25** since it takes no cognizance of *Sin Kam Wah* and *R v G*].

Note:

The Sexual Offences Act 2003, which is now in effect in England and Wales, provides a different statutory definition of rape.