



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 43
HCA/2026/00017/XC**

Lord Justice Clerk
Lady Wise
Lord Ericht

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

WX

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: Culross; John Pryde & Co. (for Keegan Smith, Solicitors, Livingston)
Respondent: A Stalker AD; the Crown Agent**

7 October 2026

Introduction

[1] The appellant challenges his conviction on five charges against four complainers following a trial at the High Court in Livingston for which he was made subject to an extended sentence of 17 years with a 12-year custodial term on 24 December 2025. In the two grounds of appeal on which leave to appeal was granted, he contends that the judge misdirected the jury occasioning a miscarriage of justice.

The indictment

[2] There were originally seven charges but charges 2 and 4 were withdrawn. The jury convicted the appellant unanimously on four of the charges that remained, and by majority on charge 6. The charges related to sexual and other offending against four complainers between 2011 and 2022 in West Lothian. There was also notice in a docket that evidence would be adduced of sexual offending against the first complainer BB in England between 2006 and 2009 when she was 9-12 years old and other evidence of certain offending in England against the second complainer CC between 2009 and 2011.

[3] The appellant was convicted of the following charges:

“(001) on various occasions between 1 January 2011 and 18 May 2011, both dates inclusive, at [address 1 in West Lothian] you ... did sexually assault [BB then aged 13] your half-sister, ... and did touch her breasts, remove her clothing, masturbate your penis in her presence, sexually penetrate her vagina with your fingers, cause her to watch pornography, penetrate her vagina with your penis and you did thus rape her: CONTRARY to Sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009;

(003) on 28 March 2011 at [address 2 in West Lothian] you ... did assault [CC] your partner, ... and did punch her on the leg, to her injury;

(005) on various occasions between 1 January 2012 and 12 June 2022, both dates inclusive, at [address 2] and elsewhere you ... did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did call [DD], your partner, ... derogatory names, shout at her, behave aggressively towards her, seize her by the throat, punch walls, kick kitchen cabinets, throw her dog against the wall, and push her: CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;

(006) on an occasion between 1 January 2017 and 30 November 2021, both dates inclusive, at [address 2] you ... having penetrated the anus of [DD], your partner... with your penis with her consent did continue to penetrate her anus with your penis after her consent had been withdrawn and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009; and

(007) on various occasions between 1 November 2021 and 11 June 2022, both dates inclusive, at [address 2] you ... being a male person did have sexual intercourse with a person related to you in a degree specified by column 1 of the table contained in the aftermentioned section, namely [EE], your half-sister...CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 1(1).”

The evidence

BB docket evidence

[4] The appellant is six years older than BB, his half-sister by the same mother. BB described a chaotic childhood in England in which she was the only girl in a large sibling group. From age 7, she lived with her maternal grandmother. Whilst the appellant lived with their mother, he would regularly visit her home. BB would join in playing football and “rough and tumble” with the appellant and her older brothers.

[5] When BB was 9, the appellant came into her bedroom and locked the door from the inside and pushed her onto the bed. She thought he was going to play fight, but he pulled down her trousers and underwear. He said that what was happening “was normal, just remember in the future we are half-siblings”. He then told her to relax as he put his penis in her vagina. She asked him to stop, but he responded by putting his hand over her mouth, told her to be quiet and reassured her, “it does feel like that for the first time, but it is normal ... you have to be quiet ... it is normal.” Eventually he withdrew and ejaculated and told her, “it is our little secret and you can’t say to no-one, we are only half-siblings and it is fine, it is normal”. She felt very confused but listened to what he said and did not tell anyone what had happened.

[6] She described a second incident in which he forcefully penetrated her mouth with his penis before raping her.

[7] On a third occasion, she had gone to stay at her mother’s house. The appellant stood on a snail she kept as a pet. She was upset and his response was to ask if he could put his penis in her mouth. She said no but he did it anyway. He asked if he could penetrate her vagina and when she protested he put a pillow over face, restricting her breathing. He said “this is what happens when you say no to me” as he penetrated her.

[8] The appellant always sought to reassure the complainer that their sexual relationship was normal but also instructed her not to tell anyone, “because they will never believe you”. As well as penetrative penile sexual acts at various addresses in the same town in England the appellant made the complainer masturbate his penis and he digitally penetrated her vagina. On one occasion he exerted his physical presence and kicked her, causing a big bruise on her thigh, because she had said no to him.

BB’s evidence on charge 1

[9] Following her mother’s relocation to Scotland, BB moved here in 2009 with her grandmother to get away from the appellant who, by now, was in a relationship with CC. The appellant moved to Scotland in late 2010 with CC following the birth of his son to be close to his family. The appellant sexually assaulted BB on three occasions in West Lothian.

[10] The first incident arose when BB was experiencing sore breasts during her period. She sought out CC but was told she was sleeping. The appellant asked what she had wanted to speak about and, when she explained, he said he would take a look. She felt uncomfortable having her brother examine her breasts. He removed her vest top and was checking her whole chest area with his fingers. He asked her to undo her bra and when she refused, he sat back on a chair and started to masturbate, before asking to have sex with her. The complainer said no and he responded, “it is okay, you are older, it is normal.” He then leaned in to kiss her and pulled down her trousers, pushed her onto the edge of the sofa, knelt in front of her and thrust his penis into her vagina. A short time later he withdrew and ejaculated into his hands.

[11] The second incident occurred when the appellant climbed through her bedroom window as BB was using her computer. He intervened and showed her incest pornography,

whilst explaining it was incest because those shown were full-siblings and that “what we are doing is normal, because we are only half-siblings. It is okay”. He then asked her if she wanted to have sex with him. When she said no, he put her on the bed, pulled down her trousers and penetrated her vagina with his penis. Examination of the complainer’s computer disclosed two searches for “free incest porn for brother and sister” and thereafter a visit to three areas of a website containing “incest pornography” on 27 April 2011 between 2154 and 2200 hours.

[12] The complainer was having sex education at school. She described learning one thing there, but the appellant was telling her another. This left her very confused and she felt “disgusting”.

[13] The third incident occurred in BB’s mother’s bedroom. The appellant messaged saying that he needed to talk to her. When she went through, he grabbed her and pulled her onto their mother’s bed. She told him she did not want to do this anymore. He replied, “just one more time” and she just let him “get on with it” as he vaginally penetrated her with his penis.

[14] When BB revealed in March 2011 what had been going on, her mother and grandmother sided with the appellant, and nothing was done about her disclosures at that stage.

Other evidence

[15] CC had been the appellant’s partner between 2009 and 2011. She spoke to various incidents of domestic and sexual violence narrated in the docket, including an occasion when he had sex with her while she was asleep and another when he forced himself on her while she was recovering from receiving stitches during labour. Their relationship came to

an end following the conduct in charge 3 when the appellant punched CC on the knee, causing a bruise.

[16] DD spoke to being in a relationship with the appellant between November 2011 and June 2022. She explained that she was subjected to the abusive conduct and sexual violence by the appellant throughout their relationship featuring in charges 5 and 6. DD also spoke to the conduct libelled in charge 7, a charge of incest. She confirmed that she had witnessed the appellant and EE, the appellant's paternal half-sister, have sexual intercourse on multiple occasions. EE had a troubled history and required a lot of support. She suffered with night terrors. DD described the situation as complicated. Near the end of her relationship with the appellant there was an established arrangement where he would spend some nights in DD's bed and other nights with EE. EE did not give evidence.

[17] BB's mother testified about the complainer's emotional condition when she told her, at a time within the scope of the period libelled in charge 1, what the appellant had been doing. She explained that she had been in an impossible position, given the situation between two of her children.

[18] In due course, the appellant gave evidence denying the occurrence of the conduct libelled. His relationship with BB was that of normal siblings. He accepted that his relationship with CC was volatile but denied her sexual allegations. He denied physically and sexually abusing DD. They had an adventurous but consensual sex life. He did not have a sexual relationship with EE.

Pre-speeches discussion

[19] The judge considered that BB's evidence on charge 1 could be corroborated by evidence of distress spoken to by her mother and by what BB had told her, by the

appellant's computer searches when the second rape in Scotland occurred and that there was mutual corroboration from charge 7. There was no mention of grooming. There were separate routes to verdict on the other charges.

Speeches and jury directions

Crown

[20] The Advocate Depute invited the jury to find that the appellant exercised his power as an older half-brother to repeatedly sexually abuse his younger half-sister BB "who did not possess the tools to deal with the situation he had put her in". A picture had emerged from the evidence of a man who had a proclivity for sexual violence with an interest in incest. The appellant had sought to characterise his conduct as normal behaviour between half-siblings, at times bolstering the proposition *via* online resources about incestuous sex. The jury could find mutual corroboration from each of the complainers' accounts where they had each spoken to violent and sexual offending similar in time, character and circumstance such as to form a course of conduct systematically pursued. A prominent theme from the evidence was the appellant's abuse of his position of power, particularly in relation to his half-sisters, BB and EE and his pregnant partner, CC who spoke of sexual offending in England under the docket. Much of the offending spoken of carried the prospect of humiliation for the victim. As we shall explain, he also identified certain characteristics of the offending against BB that could be regarded as grooming, albeit he did not use that word in addressing the jury.

Defence

[21] Counsel highlighted various adminicles of evidence given by the appellant that supported both the candour of his evidence and his innocence. She challenged the reliability of BB's account and invited the jury to find that BB's delayed disclosure gave rise to a reasonable doubt as to her credibility. Counsel observed that BB was close to her grandmother but did not disclose to her what was happening.

[22] The evidence of CC and DD was unsatisfactory since they could not remember important details of the incidents they spoke to. Text messages adduced between the appellant and EE did not fit with the Crown case on charge 7. The appellant's DNA found in EE's underwear and relied on by the Crown in support of charge 7, had an innocent explanation.

[23] At page 11 of the transcript of the defence speech, counsel founded on admissible hearsay adduced from the parties' grandmother that so far as she was aware, she had always been in the house in England where BB had described certain sexual behaviours by the appellant but had seen and heard nothing to cause her concern. She had never walked into a room to find the appellant acting inappropriately with BB.

[24] Counsel referred to other witness testimony that might contradict aspects of BB's evidence about being abused by the appellant in England when she was young. Counsel also referred to CC's evidence that she had seen nothing other than normal brother and sister interactions between the appellant and BB.

[25] At several points, counsel highlighted that there was no supporting evidence for various adminicles of BB's testimony. For example, she submitted (defence speech transcript page 13) that:

“[BB] talked about people walking in on things happening: her stepdad, her brother [FF], her grandmother. Yet there is no one at all to give any evidence to say that they

were aware of that or saw that, and you heard [what] her gran stated in her statement that was read to you that that was not something that happened.

[BB] says when her stepfather walked in, they were putting their clothes back on. It would be quite something for a parent to walk in on, but you've no evidence at all from anyone that that was correct, other than [BB] herself".

[26] It may be that the judge did not take in precisely what was said at this point as she wrote at para [79] of her report that after counsel's submission to the jury about there being no evidence about people walking in coming from anyone other than BB, counsel posed a question "Is that not evidence that you might have expected to hear?" The transcript confirms that the point was not put in this way. The judge must be referring to the passages quoted at para [25] above.

Jury directions

[27] The judge gave standard directions on the jury's function and what required to be proved by evidence. Under reference to what defence counsel had submitted to the jury about there being a lack of evidence supporting the complainer BB, she explained:

"And despite perhaps what you were asked to do this morning in assessing the evidence I remind you that you mustn't speculate or guess about anything that has not been led in evidence in the trial. [Defence counsel] made references to witnesses that she said you might have expected to hear from.

Well, put simply, there are hundred and one different reasons why a particular witness might not be called or might not be able to be called or a piece of evidence that's not made available to you.

And it's not for you to try and fill in those gaps and speculate as to why not, that's an unfair question that was asked. So, where no evidence is led don't ask yourself why that should be so. The point I'm simply making is this, members of the jury, concern, don't concern yourselves with what you don't know, focus only on that which you do. You must reach your verdicts based only on the evidence that you have heard and, of course, what reasonable inferences you can draw from it... Speculation is simply guesswork trying to fill in where there's a gap in the reasoning between the facts and your conclusions."

[28] On consent, the judge directed:

“In respect of charge 1 and all of the experiences of [BB] in respect of all three of the offences ... the Crown say that she was exploited or being groomed by the accused and that she didn't freely agree to any of his sexual attentions in those circumstances so let me explain what our courts have learned from our experience about exploitation and grooming and the circumstances in which that can arise.

Typically, the perpetrator will take advantage of a power imbalance in order to control and manipulate the child. Perpetrators may engage in a course of conduct to distort the child's perception and be able to continue their abuse. The child may not realise that they're being exploited or groomed and they might not even resist or protest.

So, when you're considering free agreement in respect of charge 1 you'll need to consider the relationship between the complainer and the accused, how it developed and the degrees of influence that the accused might have had over her.

Consider all of the circumstances, so matters including how did the relationship develop, how old or mature was the accused in comparison to the complainer, what was the age difference between them, what was the levels, level of understanding and knowledge of the position that they were in and the significance of what they were being asked to do.

Was there a pattern of behaviour by the accused to obtain trust which escalated into a misuse of that trust and did the accused use manipulation to continue his abuse. You can take any or all of those matters into account when deciding if there was free agreement by the complainer.” [Emphasis added]

[29] The judge set out the various routes to verdict on the different charges, each of which could stand alone but the jury also had options to find mutual corroboration. On charge 1, she identified a free-standing case with BB's mother speaking to BB's distressed state and her recent statements that the appellant had been touching her as potential sources of corroboration, along with the computer evidence relating to the second incident of rape in Scotland. She also identified the evidence of DD speaking both to charge 7 involving EE and to her own charge 6, and docket evidence from CC, as potential sources of mutual corroboration.

Grounds of appeal

[30] Of the four grounds contained within the Note of Appeal, only grounds 1 and 4 were granted leave.

[31] Ground 1 - the judge unfairly characterised counsel's jury submission that there was a lack of supporting evidence for the testimony of the complainer BB as inviting speculation. The criticism levelled at counsel by the trial judge was unnecessary and unfair since it bolstered the Crown case.

[32] Ground 4 - in giving directions about grooming, the trial judge introduced an issue that did not arise on the evidence and to which no reference had been made. The prosecutor had not characterised the appellant's actions as "grooming" and the judge's reference to the term unfairly prejudiced the jury against him.

Submissions

Appellant

Ground of appeal 1

[33] The purpose of defence counsel's address was to highlight the lack of supportive evidence for BB's account that family members knew of the abuse she had suffered at the hands of the appellant.

[34] The trial judge had misconstrued defence counsel's intention to highlight gaps in the Crown case as an invitation to speculate. In her corrective directions the trial judge had fallen into error by, herself, inviting the jury to speculate on the reasons why evidence was missing in the case. The trial judge offered explanations why the evidence might not have been available. Properly construed, that was an invitation to overlook the Crown's burden of proof and to fill in the gaps that existed. The direction undermined defence counsel's

submission that significant care ought to be taken when accepting BB's testimony. That was particularly so when the credibility of BB was central to the Crown case.

[35] By directing the jury that there may be good reasons why evidence was not available to support BB's account the trial judge invited the jury to take a more positive view of the Crown case and to disregard the concerns of the defence. It amounted to commenting upon the evidence in a way which was inappropriate: *Crowe v HM Advocate* 1990 JC 112. There had been a miscarriage of justice since it had the effect of undermining the defence challenge to the credibility and reliability of an essential Crown witness.

Ground of appeal 4

[36] The trial judge had introduced the concept of grooming at her own instance. The Crown case was not founded on such a characterisation of the conduct and the Advocate Depute did not submit that the jury should consider the evidence demonstrative of grooming. The direction was inappropriate and may have given the jury an unwarranted impression of the evidence before them. While it was accepted that some of the conduct spoken to in evidence by the complainers had hallmarks of grooming, that was not how the Crown had presented its case.

[37] The direction was especially prejudicial since the trial judge had not indicated to counsel her intention to raise the issue of grooming in her pre-charge discussion. There was no warning that the judge was going to raise the issue with the jury and there was no opportunity for the defence to respond. That was manifestly unfair and prejudicial to the defence: *Hogg v HM Advocate* [2023] HCJAC 37, 2024 JC 54 at [23].

[38] The defence to charge 1 was denial of the conduct rather than consent. The directions given were only relevant where the Crown case was that apparent consent had

been procured by exploitation, breach of trust and power imbalance such that there was no free agreement. That was not, on the evidence, the Crown case. The directions given by the trial judge served to obscure the issues before the jury.

[39] The cumulative effect of these misdirections denied the appellant a fair trial. It followed that there had been a miscarriage of justice.

Respondent

Ground of appeal 1

[40] What was said by defence counsel in her address to the jury was reasonably capable of inviting the jury to speculate. There was sufficient evidence to convict the appellant of charge 1 as a matter of law. Defence counsel had challenged the credibility of BB's testimony where there was no support for her account on matters where such support would have been expected. The trial judge's direction did not detract from or undermine that. The direction mirrored the suggested direction in the Jury Manual that juries are to be reminded not to speculate or guess.

[41] The judge's direction had to be considered in the context of the charge, evidence and speeches as a whole: *Sim v HM Advocate* [2016] HCJAC 48, 2016 JC 174. The judge repeatedly directed the jury that it was for them to decide what had been proved and what had not. She reminded the jury of the defence position, particularly on the credibility of the complainers. The judge was entitled to remind the jury that their verdict must be based on the evidence and not on speculation.

Ground of appeal 4

[42] “Grooming” was not a term of art. It was a convenient shorthand to refer to offending which involved the use of cynical and manipulative behaviour designed to achieve a sexual objective: *HM Advocate v LM* [2025] HCJAC 3, 2025 JC 287. The common features of grooming included the exploitation of vulnerabilities arising from a complainer’s age, stage of development and sexual inexperience, emotional manipulation, secrecy and breaches of trust: *LM* at [34]. While the Advocate Depute did not use the term “grooming”, he did make repeated reference to the cynical and manipulative nature of the appellant’s behaviour designed to achieve his sexual objectives.

[43] It was open to the trial judge to tailor her directions to reflect the live issues before the jury: *Cowan v HM Advocate* [2024] HCJAC 35, 2025 JC 25 at [15]. While it was correct that the trial judge had not mentioned grooming in her pre-charge discussion, it could not be said that reference to grooming was an alternative approach to that adopted by the parties. It was inherently part of the Crown case that the evidence given by BB was consistent with the characteristics associated with grooming. Defence counsel had the opportunity to address that in her jury speech.

[44] Even if the court found that there was a misdirection, there was no miscarriage of justice. In making that assessment, if it arose, the court must take an overall view of the circumstances: *Brodie v HM Advocate* [2012] HCJAC 147, 2013 JC 142; *TH v HM Advocate* [2025] HCJAC 46, 2026 JC 58. When viewed as a whole, any misdirection did not go to the whole tenor of the charge. The appellant’s position was clear to the jury.

Decision

Speculation

[45] The laws of evidence and procedure are designed to regulate proceedings and ensure that criminal trials are fair for the accused, complainers and the community whose interest lies in the innocent being acquitted and the guilty being convicted. The public also have an interest in the punishment and rehabilitation of offenders, in being protected from them where appropriate, and in both individual and general deterrence.

[46] Certain fundamental principles underpin criminal justice in Scotland. An accused person is presumed to be innocent until proven guilty and the burden of proving guilt lies only on the prosecution. The prosecution must establish its case by evidence. It must satisfy the court of the accused's guilt on a charge beyond reasonable doubt. For serious crimes, the evidence is heard by the 15 members of the public serving on a jury. Jurors must apply the rules of evidence and procedure explained to them by the trial judge.

[47] One rule is of such fundamental importance that it is not only explained by the judge at the start and end of each trial but, having heard the charges read, each juror must either swear or affirm to reach "a true verdict according to the evidence".

[48] A professional judge presiding alone in criminal or civil proceedings will have been trained in the rules of evidence and will understand how to apply them. In contrast, where proceedings take place before a lay jury, it is particularly important that it is explicitly clarified that jurors should not speculate in reaching their verdicts. The Jury Manual contains suggested remarks for introducing trial procedure to the jury that include the judge stating six times that the jury must reach their verdict only on the evidence in court.

[49] This stage is followed by the judge providing formal directions both orally and in writing explaining that inferences must be reasonable and supported by evidence and: “You cannot indulge in speculation or guesswork.”

[50] The Jury Manual contains a specimen introduction to charging the jury as the second appendix, “Possible form of introductory general direction,” including the following direction:

“It’s very important you should reach your verdict on the basis of the evidence and reasonable inferences from that. Don’t speculate or guess.”

[51] This is so well known as to be trite, but authoritative vouching is found in the Opinion of the court delivered by the Lord Justice General (Carloway) in *HM Advocate v Moynihan* [2018] HCJAC 43, 2019 SCCR 61 [15] where, having explained that a docket is essentially to be regarded as notice so far as a jury is concerned, he added:

“...Any danger of speculation about the reason for the matter appearing in the docket, whatever that reason might be, would be guarded against by giving standard directions that jurors must not indulge in speculation, supplemented by any additional directions which the trial judge might think necessary. There are many circumstances in which a Trial Judge feels it necessary to warn the jury strongly against speculation of any kind.”

[52] In Scotland, there must be evidence from more than one source to prove that a crime charged was committed and that the person accused committed it. Any fact can be proved by a single witness, but proof of the case requires there to be more than one witness:

Lord Advocate’s Reference No 1 of 2023 [2023] HCJAC 40, 2024 JC 140; *HM Advocate v PK (Lord Advocate’s Reference No 1 of 2025)* [2026] HCJAC 42.

[53] The Crown bears the burden of proof and must present evidence from more than one source. That is all that the law requires. It is then for the jury, applying directions on the law from the trial judge, to determine whether they are satisfied on the evidence adduced,

and in light of submissions made as to its quality and effect by both prosecution and defence, that guilt on a charge has been proved beyond reasonable doubt.

[54] There is no obligation on the prosecution to adduce every possible witness to an event or to prove a fact. Calling unnecessary witnesses prolongs trials, increasing the burden on the jury, costs and more generally undermines the administration of justice by delaying the start of another trial. Professional judgement is required as to what will prove persuasive for the jury. That judgement may or may not prove sound in the eyes of the jury. Defence lawyers are fully entitled to challenge the quality and effect of the evidence led by the prosecution and prosecutors are fully entitled to challenge the quality and effect of any evidence adduced by the defence.

[55] Neither defence nor prosecution is entitled to invite jurors to speculate about evidence not heard.

[56] If a judge considers that a party is inviting a jury to speculate on a matter not found in the evidence, or has made submissions that may prompt speculation, a corrective direction is generally required. The form of that direction is a matter for the judgement and discretion of the judge according to the circumstances in which the judge apprehends that there is a risk of jurors speculating.

[57] It would be perfectly acceptable for a judge to remind the jury that they must proceed only on the evidence and that they should not speculate about matters not adduced in evidence or about evidence which might have been, but was not, led in the trial. A judge might then observe that it is for the Crown to seek to prove its case as it sees fit and for the jury to determine if the evidence led satisfies the jury of the accused's guilt on a charge, or charges, beyond reasonable doubt.

[58] Generally, if a defence lawyer criticises, or comments on, the Crown not calling a witness, the judge ought to direct the jury that they must reach their verdict only on the evidence and should not speculate on what some other witness might have said. Such a direction might reasonably be accompanied by a reminder that the onus of proof lies on the prosecution. A judge could properly, and reasonably, go on to say that whilst there is no onus of proof on any accused person, it was open to the accused to call any witness referred to in a defence speech if the defence wished to do so. The judge should add a clear direction to the effect that since the defence did not do so, it would be wrong for the jury to speculate on what any uncalled witness might have said. Finally, the judge should remind the jury that they must reach their verdict only on the evidence led before them.

[59] Generally, if the prosecutor criticises, or comments on, the defence not calling a witness, the judge should remind the jury that there is no onus of proof on the accused and, where appropriate, that the requirement for corroboration does not apply to the defence. It would also be appropriate to direct the jury that they must reach their verdict only on the evidence and should not speculate on what some other witness might have said.

[60] All of this will be unnecessary where no such submission is made about the absence of a potential witness.

[61] Turning to the circumstances of the present case, we note that it was not the subject matter of the charge featuring BB that attracted comment from defence counsel. It was BB's account of criminal conduct occurring in England, adduced under the docket, that invited the directions giving rise to the first ground of appeal.

[62] Counsel then legitimately referred to witness evidence and hearsay from BB's grandmother (who was hostile to the complainer following her revealing what the appellant had done, telling the police that on BB making her accusations known she had told BB "as

far as I am aware you don't exist" before walking out on BB) refuting a part of BB's account of an event in England occurring in a bedroom with a lock on the door. There was evidence to the effect that there were no locks on bedroom doors and counsel was perfectly entitled to make this point. She made several other legitimate submissions on the evidence as we have summarised them at paras [22] to [24] above.

[63] It was counsel's submissions on page 13 of the transcript of her speech, set out at para [25] above, that prompted the directions complained of in this ground of appeal. We consider that in making these submissions counsel created a risk of the jury speculating as to what other witnesses may have said. For example, they may have caused the jury to understand that they were being invited to consider that such potential witnesses would contradict the complainer's evidence. The jury had no basis to reach such a conclusion. Whilst we accept counsel's assurance that that was not her intention, her submission had the potential to prompt such speculation. Accordingly, it was appropriate for the judge to seek to address the risk of speculation. We have set out in paras [57] and [58] above how we consider this might have been done, but we are not persuaded that the judge misdirected the jury. The judge's purpose was to warn the jury against speculation and she did so.

[64] We have quoted the judge's directions at para [27] above. The first and third parts as we set them out are entirely appropriate directions to the effect that the jury should not speculate about evidence not led. This would not have been necessary but for counsel's submission to the jury about witnesses from whom they had not heard

[65] The judge erred in thinking that counsel had posed a question, but she did not err in apprehending that the submission carried a risk of prompting speculation about evidence not led. Whilst we consider that it was unnecessary for the judge to explain that there could be many reasons for a witness to be called and recommend directions to address the

situation she faced along the lines of our proposals at paras [57] and [58] above, we do not consider that this was a misdirection. Even if what the judge said had constituted a misdirection, it was immediately cured by the clear, emphatic and correct direction in the third part of the passage quoted at [27] above.

[66] We find no support for this ground of appeal in *Crowe*. A conviction for reckless driving was quashed where the sheriff failed to define the crime correctly. That is the *ratio* (the binding part of the decision) of *Crowe*. The court went on to observe that the sheriff had made adverse comments on defence evidence and should not have imposed his own views on the jury. The observation was plainly sound but that is not what occurred in the appellant's case. Defence counsel's submissions carried a risk of the jury speculating on evidence not led and the judge gave corrective directions.

[67] Accordingly, in the context of the defence speech, and viewing all the directions on speculation against the background of the whole charge, there was no misdirection.

Grooming

[68] Despite having asserted the contrary in her written submissions, counsel properly accepted in the appeal hearing that the directions the judge gave on grooming were modelled on those contained in the Jury Manual at the time of the trial.

[69] The fullest treatment of grooming by this court is found in *HM Advocate v LM* [2025] HCJAC 3, 2025 JC 287 where the court examined relevant caselaw from both Scotland and England. In delivering the Opinion of the court the Lord Justice Clerk (Dorrian) having examined that caselaw explained, generally, at [35] and [36], that grooming could affect the perceptions of the person groomed and that a jury may conclude that the free agreement required for true consent was not present where vulnerabilities of a victim were taken

advantage of. At [34] her Ladyship identified in some detail common features or hallmarks of grooming as including, in essence:

- i) the complainer being in a vulnerable position;
- ii) offending occurring as a course of conduct;
- iii) escalation in its nature that may involve misusing a bond of trust;
- iv) manipulation techniques are used to distort the victim's perception and encourage them to engage in criminal activity;
- v) almost invariably there is an element of secrecy employed and enforced by the perpetrator;
- vi) behaviour is often planned and systematic and may involve a lengthy process; and
- vii) there will often be a breach of trust by someone in a position of authority or responsibility towards a child, one example being a relative.

[70] Aspects or analogies of all seven features could be found at least to some extent in BB's description of events, and the trial Advocate Depute referred to several of them in his speech, notably those in (i), (iii), (iv), and (vii).

[71] Accordingly, the basis of this ground of appeal is without foundation, but even if what was averred in the Note of Appeal and written submissions was correct, it would not demonstrate a misdirection, far less a miscarriage of justice.

[72] The fundamental problem in *Hogg* [2023] HCJAC 37, 2024 JC 54, was that the judge introduced a route to verdict based on distress that was not available as a matter of law for two reasons. First, the evidence about distress was so vague it was not open to the jury to conclude that observed distress related to the first instance of the sexual offence in question and, secondly, according to the law as then understood, distress could not corroborate the fact of penetration on the second instance. The other problem arose where the judge had, before speeches, in discussing routes to verdict, given parties to understand that the only route to verdict he would direct upon was mutual corroboration. After speeches, and without inviting further submissions, the judge directed the jury erroneously on a route to verdict that was not available given the state of the evidence and the understanding of the

law at the time of the trial. Prior to the seven-judge Full Bench decision in *Lord Advocate's Reference No 1 of 2023*, it was understood that each component of an offence needed separate corroboration.

[73] The position is materially different in this case. There was a discussion between parties and the judge before speeches and no reference was made to grooming. What then happened is that, without using the word grooming, the Advocate Depute addressed the jury on features of grooming apt to support the absence of BB's consent (meaning free agreement) on charge 1. This is understandable given BB's account of each of the three rapes when, after her initial expression of disinclination, she may have appeared to the jury to have acquiesced. Accordingly, when defence counsel was addressing the jury, she had heard the Crown introduce the issue of behaviour tantamount to grooming and was able, if she chose, to address it. The situation is far removed from what occurred in *Hogg*.

[74] Further, it is important to note that in *Hogg*, the Lord Justice Clerk (Dorrian) confirmed at [21] that:

"It is beyond doubt that it is the responsibility of the trial judge to formulate the appropriate legal directions to give a jury, including those in relation to corroboration, and to direct the jury on all reasonably available sources of corroboration, whether or not these are referred to or relied upon by the Advocate Depute or defence counsel..."

Her Ladyship added that this is so, even if it was too late to seek the views of parties.

[75] A judge is not constrained when directing the jury to echoing only routes to verdict identified in a prosecution speech. In *Fraser v HM Advocate* [2008] HCJAC 26, 2008 SCCR 407, the Lord Justice Clerk (Gill) at [175] explained that a trial judge should: "direct the jury on the sufficiency of evidence according to his own judgment of the evidence".

[76] That view was endorsed by Lord Reed delivering the Opinion of the court in *Quinn v HM Advocate* [2010] HCJAC 124 where the Crown had presented its case on the basis of

eyewitness identifications and the judge identified the only route to verdict as one based on circumstantial evidence, primarily DNA findings, and directed the jury accordingly. Lord Reed explained at [11], that:

“...It is the responsibility of the trial judge to direct the jury on the way that the law applies to any reasonable view of the facts discussed by the evidence, so that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take...”

At [12] he added that the judge was not, in the circumstances of the case, required as a matter of fairness to warn the appellant’s solicitor, in advance of his addressing the jury, that he intended to direct the jury on sufficiency in the manner that he did.

[77] In *Garland v HM Advocate* [2020] HCJAC 46, 2021 JC 118 the Lord Justice General (Carloway) confirmed at [20] in the context of corroboration that it was not sufficient for the trial judge when directing the jury to recreate what he understood the Crown to have said about it:

“He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant’s testimony, which might constitute corroboration.”

His Lordship chaired the court in *Cowan* where Lord Matthews, in delivering its Opinion explained, at [15], in a case where the Crown had identified only one route to verdict:

“It was open to the jury, despite the Crown’s approach, to infer from all of [the complainer’s] evidence that she was not consenting, even if they were not satisfied that she was asleep or unconscious. The jury should have been given directions in that regard as well as directions about her capacity or incapacity to consent. It was an obvious and fair route to verdict, of which the jury were deprived.”

A similar obligation on trial judges was explained by a different court (Lord Justice Clerk (Dorrian), Lord Matthews and Lady Wise) in *AX v HM Advocate* [2024] HCJAC 12, 2024 JC 273 at [35] and [38] where the sheriff had failed to set out a route to verdict apt to identify the appellant as the perpetrator of certain offences.

[78] The cases demonstrate that whilst judges would be well-advised to avoid repeating what occurred in *Hogg*, they should not be inhibited from giving appropriate directions in charging the jury where they consider it in the interests of justice to do so or appropriate for reasons of fairness. Lord Reed's statement in his Opinion in *Quinn*, quoted at para [76] above, is an important one and illustrates that it is inherent in an adversarial system with trial by jury that a judge may sometimes need to provide the jury with directions on matters not addressed by parties. The same principle was recognised by the Lord Justice Clerk (Dorrian) in *Hogg* at [21].

[79] The Crown required to satisfy the jury that the conduct in charge 1 occurred and that the complainer did not consent, meaning freely agree, to it. The appellant's denial that the conduct occurred did not alleviate the need for the Crown to prove the absence of consent, (meaning free agreement). It is perfectly clear from the directions given, see para [28] above and particularly the passages underlined, that the judge correctly considered that the jury would need to consider the question of the absence of free agreement carefully in light of BB's account. The judge required to identify all obvious routes to verdict and any others reasonably open to the jury on the evidence adduced. Accordingly, she did not misdirect the jury or err in any respect in referring to grooming. It arose for consideration from BB's evidence in the context of the absence of free agreement and was addressed in the Crown speech.

[80] It would have been appropriate to give these directions even if the Advocate Depute had not addressed grooming in his speech.

[81] There being no merit in either of the grounds, the appeal is refused.