



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 31
HCA/2025/000460/XC**

Lord Justice General
Lord Matthews
Lady Carmichael

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

AA

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: W Culross, G Reid; Faculty Appeals Unit, Edinburgh for John Mathers & Co, Aberdeen
Respondent: J Keenan KC, AD; the Crown Agent**

4 August 2026

[1] This appeal against conviction was heard on 15 July 2026. We refused it on the same day and indicated that we would give our reasons in writing. This we now do.

Background

[2] The appellant was convicted after trial of a charge of attempting to murder a child born 15 April 2021 by shaking him, pinching his face or otherwise inflicting trauma to his

head by means to the prosecutor unknown, to his severe injury, permanent disfigurement and to the danger of his life.

[3] In due course, the trial judge imposed a sentence of imprisonment for 7 years, against which there is no appeal.

The evidence

[4] It is not necessary to go into this in great detail however, some discussion of it is required in order to put the appeal into context. Generally speaking, the case was a circumstantial one involving: (i) the exclusion, as assailants, of a number of people who cared for the child, (ii) certain comments made by the appellant about things which he claimed happened to the child while he was in his care, and (iii) expert medical evidence.

[5] On 29 April 2021 the child's mother, who was in the bedroom of her house, heard the child crying. The appellant had care of him at that time and told her that he had fallen off the sofa during a nappy change. The following call record notes were a matter of agreement:

“Dad states infant was on changing mat which had been placed on sofa, dad states he momentarily turned around to retrieve fresh nappy by which time baby was on the floor. Dad states child is ‘wiggly’ and also ‘rolls.’”

They took the child to the hospital that day and the triage report recorded that the appellant advised that the child “slide (*sic*) off changing mat off sofa.” The history and mechanism of injury is recorded as “baby on changing mat, baby wriggled, dad was sitting on floor, turned round and baby was still on changing mat on floor.” On examination, there was no sign of bruising or other injury, and the child roused appropriately and tolerated his feed. No concerns were noted and the child was discharged home with a minor head injury advice leaflet.

[6] On 1 June 2021 the mother was in the shower and the appellant again had care of the child. When she left the shower she noticed that the child had marks on his face the size of fingerprints. The appellant said that they might have been caused by an insect bite. The mother had him checked by a pharmacist. On the following day the mother took the child to see her GP for a 6 week review. Everything was found to be normal. The mother showed the doctor a photograph of the child with a bruise on his left cheek but the doctor could not see the bruise on the cheek in person.

[7] On 11 June 2021 the child had his first set of routine childhood immunisations. At some point the child started being ill including projectile vomiting. The mother asked the appellant and her own mother to deal with the child. On 19 June 2021 there was a call by the appellant to the out of hours GP. The child's mother could not recall if she was present during the call. She mentioned that as time went on the child was sick several times a day. He was quite lethargic, more asleep than he was awake and near the end was like a cardboard cutout. During the call it was reported by the appellant that the child was "stiff then floppy" and had been projectile vomiting after a feed. The child was examined by the out of hours GP on 20 June and advice was given regarding reflux.

[8] The child had a second set of routine immunisations on 9 July 2021.

[9] On 20 July, after returning from a visit to the appellant's parents during which they had commented on the size of the child's head, his mother took him to the GP. The GP thought the head was fine and the size was due to his being a child born by Caesarean section. He was given medication for reflux.

[10] A health visitor saw the child on 23 July 2021 and was concerned about the size of his head, which resulted in his being taken by ambulance to the Accident and Emergency department at Royal Aberdeen Children's Hospital. He was noted to be sleepy, not

interactive, with his head obviously enlarged and with a high pitched cry. He had a high heart rate and elevated blood pressure. There were no external injuries or bruises. He underwent initial CT scans of his head which showed widespread intracranial haemorrhage and fluid collections. There was no evidence of any soft tissue swelling or any superficial injury to the scalp and no skull fractures were identified.

[11] He was transferred to the Glasgow Royal Hospital for Children on 24 July 2021 for surgery on his head. He had a low blood count on arrival and required a blood transfusion before surgery. During surgery a shunt or drain was inserted in the left side of the head to allow the collections of blood and fluid to be removed from his skull. It was noted that his brain was under significant pressure due to the fluid which was present, which had caused the bones in his skull to separate.

[12] While in hospital further investigations were undertaken. There were no broken bones and the child was not suffering from any bleeding disorder which might explain the clinical and radiological findings. Tests for any metabolic conditions which might explain the clinical and radiological findings were negative. His eyes were normal.

[13] He was transferred back to hospital near his home on 5 August 2021 and remained there until discharged home on 12 August 2021. He was placed in kinship care.

[14] In late August the appellant disclosed to the child's mother that he had fallen carrying the child. He told the police in due course that that was on 1 June, the day when the child had bruises on his cheek. He gave a number of accounts of the fall which varied in some of their details.

[15] The appellant's position in evidence, broadly speaking, was one of denial of assaulting the child. He spoke of the incidents on 29 April and 1 June and attempted to explain what had happened. On 29 April he had been changing the child and put him on a

mat on the sofa. He turned round to get something and the child slid off the mat onto the floor. Perhaps he had not placed him properly on the sofa. He may have said previously that the child had wriggled. Slid would have been a better word than wriggled. The child went first then the mat followed him. He cried a bit but there was nothing concerning. He called NHS 24 and said that the child had a bump on his head which had gone down a bit. As indicated above the child was taken to hospital and there was no sign of injury. On 1 June the child's mother went for a shower and the child was unsettled. He picked him up and cuddled him. He was walking back and forth between the living room and the hall when he tripped and fell. The child hit the ground, having come out of his hold "for a split couple of seconds". He denied ever telling anyone that he had held the child up high, which contradicted other evidence. He fell because he had lost concentration. He had told the police that he had tripped over a carpet, but in evidence he said he could not remember. He did not think he had tripped over a cable and only said so because the mother's family were pressurising him to say more than he wanted to. There were a lot of threatening comments. On 19 June the child had been lethargic and he called the out of hours doctor. He had done nothing to bring about any symptoms. He spoke of being challenged by the mother in recorded telephone conversations. When he was asked whether he had changed the specifics all the time, his recorded reply was "When I was being threatened, yes". He explained that people kept wanting him to add to what he was saying and he did not like confrontation so he tried to calm the situation.

[16] In cross examination he agreed that he was alone with the child when the child sustained a head injury. He was also alone with him when he sustained a facial injury. He denied that he had repeatedly lied about the incident on 1 June but then he agreed he had lied to the child's mother that day. He said nothing about it to the doctors in July when the

child was taken to hospital. He lied to the police when they first asked him if he knew whether anything had happened to the child. He lied to the mother's family about how the child's face came to be bruised, at least initially. He also lied to his own parents about that. He was then forced to concede that he had in fact repeatedly lied about his knowledge of the incident on 1 June.

[17] Medical evidence was given by a number of practitioners. For present purposes it suffices to note that evidence was led from Mr Amedeo Calisto, a consultant paediatric neurosurgeon, Dr Fionnan Williams, a consultant neuroradiologist specialising in examining the brain scans of adults and children and Dr Marianne Forrester, a consultant paediatrician specialising in child abuse and child protection. Since her evidence is referred to in the Note of Appeal, it should be recorded that she has been a consultant paediatrician since 2010. She began her training in child protection in 2006. She focussed on child protection, beginning in 2001. She undertook experience across various parts of Scotland and kept up to date with various courses in forensic medicine, child sexual abuse, physical abuse, neglect and fabricated illness. She was the deputy chair of the Royal College of Paediatric Child Protection Committee in Scotland and organised national training for that. She dealt with cases involving suspected non-accidental injuries in children and on average saw one child a week for a physical abuse examination.

[18] The medical evidence was somewhat complex and detailed but ultimately was to the effect that the bleeding and fluids in and around the child's brain were caused by shaking, producing acceleration and sudden deceleration. Had there been any blow to the head it is likely that there would have been localised injury. However, the fact that there was bleeding and fluids to various parts of the skull and around it was indicative of shaking. It was on more than one occasion, given the differing ages of the fluids. Some of it was within

a window of between 7 to 10 days before a CT scan on 23 July 2021 and there had been similar trauma before that.

[19] Senior counsel explored with the doctors possible alternative causes, such as difficulties arising from the birth and reacting to immunisations. To a greater or lesser extent, the doctors considered these unlikely. According to Dr Forrester, the child could not have wriggled on 29 April given his stage of development, and the injury on his cheek, of which she saw a photograph, was consistent with pinching and unlikely to have been caused in a fall.

[20] In short, therefore, the evidence was that the child had sustained injuries on a number of occasions, most likely caused by shaking. The various witnesses who had care of the child denied causing any injury. The appellant claimed that the child had fallen from a couch, which would not have given rise to any injuries seen by the doctors. The alleged fall, about which he had told no one at the time (1 June 2021) and about which his accounts varied, was unlikely according to the doctors to have caused any of the injuries.

[21] This was a circumstantial case but nonetheless a compelling one.

The Note of Appeal

[22] This contains a number of grounds, not all of which attracted permission to be argued. In order, however, to put our later remarks in context it would be as well to set out briefly what they were.

[23] Ground 1 was to the effect that the conduct of the prosecutor prejudiced the appellant to the extent of preventing him from receiving a fair trial. This was compounded by propositions put to the appellant during his evidence which required to be corrected by

the trial judge. The inaccuracies were so considerable that they could not be cured by judicial direction, although the trial judge tried to do so. The issues were as follows:

- “(a) During the evidence of Dr Forrester, the Advocate Depute sought to elicit and began to elicit evidence about intercranial (*sic*) injuries and took evidence from the witness about that and about theories of baby shaking. The witness confirmed that the evidence she was being asked to give was out with her field of expertise, despite having given some evidence on the issue.
- (b) Further during the evidence of Dr Forrester, the Advocate Depute elicited evidence concerning changes in history and an inconsistency with development and developmental delay. The evidence that was taken by the Advocate Depute was out with the expertise of Dr Forrester. It was evidence that was not a recognised branch of knowledge.
- (c) The Advocate Depute sought to rely on the evidence about developmental delay in her address to the jury. This was inappropriate.
- (d) During cross examination of the appellant the Advocate Depute put to him that he did not express any fear or worry regarding the complainer.
- (e) It was wrongly put to the jury that they should ask themselves why the accused was lying.
- (f) It was wrong to submit to the jury that the appellant was the only one to give evidence about the presentation of the complainer on 19 June 2021.
- (g) It was wrong to submit to the jury that there were two routes to conviction. The route which was in error was based on the *Howden* principle.”

While the trial judge sought to correct these matters, it came too late. The Crown speech was on Friday 27 June 2025 and the corrections were only made on Monday 30 June 2025.

[24] The second ground of appeal was to the effect that despite telling the jury that he was not going to summarise the evidence, the trial judge did just that when it came to the medical evidence. His directions went beyond what was appropriate and necessary and, in effect, reinforced the Crown case by repeating significant parts of the evidence upon which the Crown relied.

[25] The sifting judge did not deal with the individual paragraphs or sub-paragraphs in the Note of Appeal. Instead, leave to appeal was granted in the following terms:

“This appeal against conviction is arguable in relation to those aspects of the evidence of Dr Forrester which fell outwith her expertise, how these aspects were addressed at the time, in the crown speech and in the charge (pp 28-29 of day 2 in particular), as well as the extent to which the charge addressed the evidence.”

This is somewhat obtuse, which would not have been the case had the individual elements of the Note of Appeal been considered and dealt with. It resulted in submissions which were not properly focussed and which went, to some extent, beyond the grant of leave. Counsel, to her credit, recognised this and restricted her submissions accordingly.

[26] In effect, leave to appeal was only granted in respect of ground 1(a), ground 1(b), ground 1(c) and ground 2 (a lack of balance in the charge). These grounds should have been specified in terms of section 107(7) of the Criminal Procedure (Scotland) Act 1995.

[27] Unfortunately, it was only during oral submissions that we were able to identify, with counsel’s help, the part of the Crown speech which was now criticised.

Submissions for the appellant

[28] The first expression of opinion which went beyond the expertise of Dr Forrester was in relation to the symptoms which might be shown by an infant after routine immunisations. At page 22 of the transcript of her evidence, she spoke of these symptoms. She was then asked how quickly she would expect to see symptoms coming on after a child had had their immunisations and replied, “Em, 24 hours. This is probably not my area of expertise, but I would say within the 24 hours...”

[29] At that point the trial judge intervened to say the following:

“Can I just say, Doctor, I’ll just stop you there. If you feel it’s not your area of expertise then please just say that to the advocate depute, because if it’s not your area

of expertise, then the advocate depute can't take evidence from you on it. All right? I'll pass you back to the advocate depute."

Thereafter, nothing more was said about immunisation symptoms and no reliance was placed on this matter by the Crown.

[30] However, it was argued that, while the jury were present during this exchange, they ought to have been directed at the time not to take the evidence into consideration.

[31] The second matter was during a discussion about head trauma. The witness had given evidence that when babies are dropped and sustain an intracranial bleed it was often one blood vessel which bled and there would be a collection of blood in that area. She was asked about the significance of bleeding being on both sides of the child's head and within the space between the two sides of the brain. Her opinion was that that was more commonly seen in abusive head trauma than accidental head trauma.

[32] The following exchange then took place:

"Q One of the injuries that we've heard details (*sic*) evidence about is the presence of damaged bridging veins towards the front of [the child's] head, at the top of [the child's] head. Is there, in your opinion, significance in that particular injury, these damaged veins?

A It's beyond my area of expertise I'm just going to say."

Counsel accepted that this meant that there was no evidence about damaged bridging veins coming from this witness.

[33] The third area of concern for counsel lay in the evidence from Dr Forrester at page 13 of the transcript, when she said the following:

"A history is extremely important in child protection. We have some evidence to say that when histories change over time, that that can alert us to the possibility of abuse. When the history is inconsistent with the child's developmental level, that can be an indicator. And when there's a delay in the history being told to us, that's often an indicator that something may not be right."

The trial judge in his report indicated that he thought that there was a conflation of roles, the witness being a paediatrician as well as someone who liaised with specialists and explained their findings to agencies involved in a child abuse investigation. The basis for this alleged conflation remains a mystery to us but counsel placed reliance on what the judge thought, as evidenced by his directions, which effectively told the jury to ignore this passage. Counsel accepted that this did not go beyond the expertise of the witness. The evidence itself was not problematic, but the reliance sought to be placed on it by the Crown was.

[34] Counsel accepted that in some respects the trial judge's directions were favourable to the appellant. We shall come onto these in due course.

[35] Nonetheless, the Crown ought not to have relied on these matters in the address to the jury. They were not matters which could point to guilt.

[36] There was no issue of developmental delay and counsel was not sure where that suggestion in the Note of Appeal came from. The issue was the delay in the appellant telling his partner and others what had happened.

[37] As far as the second ground of appeal is concerned, there was nothing inaccurate in the judge's summation of the medical evidence. However, the crucial parts of the Crown case were reinforced. The jury had been overloaded with technical detail: *Geddes v HM Advocate* 2015 JC 229, [2015] HCJAC 10.

Submissions for the Crown

[38] Dr Forrester did not give evidence which strayed beyond her expertise and even if she did there had been no miscarriage of justice. She had given an extensive account of her expertise and experience, in particular relating to the examination of children for physical abuse. She was able to draw upon her vast experience as a consultant paediatrician

specialising in forensic medicine, the relevant literature base and the pooled knowledge of a team of people with whom she worked. She was asked, without objection, about the typical symptoms expected in a child following routine immunisations, which was within her experience but outwith the experience of the jury. When she was asked about something outwith her area of expertise, namely the timing of any adverse symptoms after immunisation, she highlighted that immediately. The judge gave a clear instruction before the jury that she was to say so if anything was outwith her expertise and she followed that instruction in relation to the question of damaged bridging veins. She was able to give general evidence about intracranial injuries in the context of her expertise as a forensic paediatrician. Her evidence about changes in the history, delays in history and inconsistencies as between the history and the child's state of development were matters which were not beyond her expertise. They did not require any expertise at all and in effect were outwith the scope of the appeal. The witness merely outlined those matters to explain when an investigation might be called for.

[39] There was nothing wrong with the Crown relying on evidence about this. Some of the trial judge's directions about Dr Forrester's evidence were misconceived and favoured the appellant.

[40] There was no imbalance in the charge. The trial judge accurately set out the medical evidence. It was of the nature of things that most of the evidence referred to would be evidence led by the Crown but the judge also highlighted the evidence beneficial to the appellant.

[41] It was accepted that the admissibility of the evidence of an expert was a matter for the judge but that did not absolve parties from objecting to it, especially if it was evidence

that was anticipated. As it happens much of the medical evidence was unchallenged by the defence.

Analysis

[42] Despite the fact that this case generated a considerable amount of virtual paperwork, the issues, as can be seen from the submissions, are relatively straightforward.

[43] There is no dispute that expert evidence was required in this case and it is unnecessary to discuss the criteria for the admission of such evidence. For a recent example of such a discussion one might have regard to *Christie v HM Advocate* [2024] HCJAC 52, 2025 SCCR 365.

[44] Three points were made on behalf of the appellant. The first is that Dr Forrester gave evidence beyond her expertise in relation to the timing of symptoms following immunisations. We have set this out at paragraph [28]. The problem for the appellant is that the jury knew that the witness was going outwith her area of expertise and the trial judge made it clear that she should not do so. None of this was outwith the presence of the jury. The matter did not arise again, nothing having been made of it by the Crown.

[45] The second issue arose during the discussion about head trauma. As we have indicated, the witness was asked about the significance of bleeding being on both sides of the child's head and she gave evidence about that. When she was asked about the damaged bridging veins, she made it plain that that was beyond her area of expertise. In other words, she gave no evidence about this whatsoever. There was no suggestion that she was not in a position to give the evidence which preceded the question about bridging veins.

[46] The third issue was that which we dealt with at paragraph [33] above. That was to the effect that history was extremely important in child protection. There was nothing

wrong with the witness giving this evidence. It is not a matter of expertise but simply a matter of professional practice where she set out some of the factors which might trigger an investigation. She did not trespass into matters beyond her expertise in this regard.

[47] As far as the Crown is concerned, the advocate depute invited the jury to look at the various accounts given by the appellant as part of the complete picture disclosed in the evidence. He is said to have said nothing, or lied to his partner, to her parents and grandparents and to doctors, as well as the police. This was all said to be designed to fool everyone into believing that there was an honest and innocent explanation for the child's injuries. During her address, the advocate depute, having set out the appellant's accounts to various people, and their timing, said the following:

"You might remember in particular, members of the jury, that Dr Forrester told you about three specific red flags or indicators that she might look for when considering a history being given.

The first, a history which is inconsistent with the developmental level of the child, which she told you can be an indicator of abuse. Well, you might think you've heard a history like that in this case, members of the jury, it's a matter for you. The second, a delay in the history being provided by the care giver which she told you can also be an indicator of abuse. And the third, she told you, with (*sic*) a history which is not consistent with the medical findings which could be, again, an indicator of abuse.

Now, these are matters for you and you alone, members of the jury. But you might think you have evidence of all three of those particular indicators in this case."

The advocate depute was perfectly entitled to make this point. The fact that the appellant either delayed to give an account of what had happened when the child was in his care or did not tell the truth about it were matters to which the jury could have regard. They were pieces of circumstantial evidence which they were entitled to take into account. The same is true of the fact that his accounts, to a greater or lesser extent, were inconsistent with the child's stage of development: *Cf Bovill HM Advocate* [2003] SCCR 182.

[48] The trial judge gave the jury certain directions which were favourable to the appellant and which were incorrect. He discussed the evidence of statements made by the accused to the police, to the child's mother and to other members of her family as well as various messages and telephone calls. He went on to say the following:

"Now, can I just say to you, if you believe any of the accounts the accused gave that pointed to innocence, then, even if you don't believe it, it raises a reasonable doubt in your mind about the accused guilt, then you would be duty bound to acquit him."

So far so good. He then went on as follows:

"So, in terms of these statements made to both police and to others, let me be absolutely clear about something that arose from the advocate depute's speech. At one point the advocate depute in her speech invited you to ask yourself why the accused is lying. I'm sure she didn't mean to suggest this, members of the jury, but I'm sure the advocate depute didn't mean to suggest that you should conclude that the accused was lying and that was somehow evidence in support of the Crown case. But just to be absolutely clear about this, members of the jury, that's not the approach you should take.

Remember the directions I gave you at the outset. If you reject evidence for whatever reason, that does not mean the opposite is true. If you reject the evidence, what you do is you simply put it out of your minds as if it had never been given, and then you look to see what other evidence there is in the case."

In these directions the trial judge somewhat misses the point. Whilst it is true to say that if juries reject a piece of evidence they must put it out of their minds, the point the advocate depute was making was that the very fact of the appellant delaying in telling anyone about incidents involving the child and the fact that he lied about the circumstances of incidents involving the child, as he admitted, was itself a piece of circumstantial evidence: *Bovill* (*supra*).

[49] A similar misdirection in favour of the appellant was given in relation to the evidence of Dr Forrester. The trial judge said the following:

"But let me sound a word of caution here about the evidence of Dr Forrweste[r] [*sic*], members of the jury. You will recall the advocate depute began to ask more detailed questions about intracranial injuries, and she appeared to begin to answer those

questions and even commenting on theories of baby shaking. However, when she was asked about the details of the injuries, the bleeding injuries in the brain, she said that was outwith her field of expertise, and you'll remember her saying that.

Now, members of the jury, that means that she was in no position to offer an opinion on these matters, and her opinion in that regard is therefore inadmissible in law and should be disregarded."

That was an error. The only part of her evidence beyond her expertise in this regard related to the bridging veins and she gave no evidence about that.

[50] Furthermore, shortly after the passage referred to above the trial judge went on as follows:

"There was one other piece of evidence that Dr Forrester gave you that I have to direct you to disregard. You'll recall the advocate depute asked Dr Forrester about surrounding circumstances, and Dr Forrester said that where there has been a change in what she called histories, or where a history is inconsistent with development or there is a delay, that could be "an indicator that something might not be right". And she went on to talk about a jigsaw. The advocate depute reminded you about this passage of evidence in her speech, and seemed to place some reliance on this.

So, members of the jury, even with the very cautious and equivocal language that the witness used when saying that, that was not something Dr Forrester was able to offer opinion on. It's not a recognised branch of knowledge, it's not something she has expertise or demonstrated expertise in relation to, and it intrudes in your function as a jury, and you'll remember the directions, overall directions I gave you about experts at the start."

This was misconceived. The matter was well within the experience of Dr Forrester as a matter of fact, not as a matter of professional opinion. As we have indicated, she was merely recounting some of the factors which might give rise to an investigation. There was nothing wrong with her doing so and the jury should not have been told to disregard it. As it happens, as indicated above, the advocate depute correctly made it plain that the question was ultimately a matter for the jury.

[51] In short, no miscarriage of justice arose from the evidence of Dr Forrester or the manner in which that was treated by the Crown.

[52] It follows that there is no merit in grounds 1(a), (b) or (c) (which was not insisted in).

[53] The only ground remaining is ground 2 which complains about a lack of balance in the charge arising out of the manner in which the trial judge set out the medical evidence.

[54] Whether to engage in a summary of such evidence is a matter primarily for the discretion of a trial judge.

[55] In *Liehne v HM Advocate* 2011 SCCR 419, [2011] HCJAC 51 it was said to be a misdirection for the trial judge simply to leave technical evidence at large for the jury. Much the same result was reached in *Hainey v HM Advocate* 2014 JC 33, [2013] HCJAC 47.

[56] In *Geddes v HM Advocate* 2015 JC 229, [2015] HCJAC 10, at paragraph [97] the court said the following:

“Where there has been a trial of this duration, and where the parties have been content to explore the issues in such detail with each of the medical witnesses, a trial judge may feel that he/she requires to distil testimony which has been given over many days into some kind of manageable form, with a view to identifying the material issues for the jury’s benefit. However, it must be emphasised, as it was recently in *Younas v HM Advocate* 2014 SCCR 628, that even in cases where there is conflicting complex, technical testimony, there is generally no requirement to rehearse or summarise the evidence (LJC (Carloway) at para [55]). The obligation is to provide a framework or “route to verdict” which the jury can follow; the existence of which will render any verdict understandable (para [58]). At most, all that is needed, in such cases, is a ‘succinct, balanced review’ of the central factual matters for the jury’s determination. As will be seen, the mere fact that conflicting medical evidence has been given at some length does not mean that the jury have been presented with complex testimony of a technical nature (at paras [61] and [63]).

It is by now axiomatic that any discussion of evidence must be balanced. As was said in

Sim v HM Advocate 2016 JC 174, [2016] HCJAC 48, at para [32]:

[32] The grounds of appeal all relate to purported misdirections by the judge. Before examining each of these in more detail, it is worth repeating certain basic propositions applicable to this type of appeal. First, a judge’s directions must be looked at in the context of the oral tradition in which they are given as part of the trial process. The words should not be scrutinised in isolation or as if they were part of a conveyancing document or a provision in a penal statute (*Beck v HM Advocate*, LJC (Carloway), delivering the Opinion of the Court, at para [40]). Minor deviances

from standard *formulae* will not normally be regarded as productive of miscarriages of justice, if the directions on a particular topic are, when the charge is read as a whole, clear and correct (ibid). Secondly, where an allegation of imbalance is made, it is not sufficient, for the purposes of advancing a successful appeal, to say that a judge has failed to mention a particular point made (or perhaps one not made) by a party. The contention must be “a substantial one... going to the whole ‘tenor’ or ‘purport’ of the charge” (*Snowden v HM Advocate* 2014 SCCR 663, LJC (Carloway), delivering the Opinion of the Court, at para [51], citing *Scott v HM Advocate* 1946 JC 90; *Younas v HM Advocate* LJC (Carloway), delivering the Opinion of the Court, at para [54]). Thirdly, a charge is not to be scrutinised as if the jury had not heard the evidence and the speeches (*Keaney v HM Advocate*, Lady Smith, delivering the Opinion of the Court, at para [25], citing *Withers v HM Advocate* 1947 JC 109). Fourthly, it is primarily for the parties to address the jury on what parts of the evidence are, or are not, significant. The judge does not require to conduct an independent audit of the evidence in order to extract all the points which may favour one party or the other (*Younas*, para [56]).

In the light of these authorities we have considered the judge’s charge. This is a case where the medical evidence was crucial. We have transcripts of the evidence and it is not easy to follow. It is impossible to criticise the trial judge for attempting to distil it and to remind the jury of the salient points of it. In doing so, he drew the attention of the jury to the various points made by the defence in relation to it. It cannot be said that the judge was not entitled to embark on this exercise. He could well have been criticised had he not done so. We detect no imbalance in the charge. It follows that there is no substance in the second ground of appeal.

[57] For all these reasons we refused the appeal.