



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 7
HCA/2025/000142/XC

Lord Justice General

Lord Doherty

Lord Clark

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 74(1) OF THE
CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

ANAS BANI ALMARJEH

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Green, Reid (sol adv); Paterson Bell (for McGovern Reid Court Lawyers)

Respondent: Harvey AD, Loosemore (ad hoc) AD; the Crown Agent

6 June 2025

Introduction

[1] This is an appeal under section 74 of the Criminal Procedure (Scotland) Act 1995

against a ruling made at a continued preliminary hearing. The appellant has been indicted

in the High Court on 8 charges. They include charges of rape, sexual assault, sending

indecent messages and attempting to defeat the ends of justice. There are three complainers.

Charge 3 is in the following terms:

“(003) between 21 November 2019 and 25 December 2022, both dates inclusive, at [6 addresses in Glasgow] and [an address in Durham] you ANAS BANI ALMARJEH did engage in a course of behaviour which was abusive of your partner or ex-partner, [AB], c/o Police Service of Scotland, Helen Street, Glasgow, in that you did on various occasions:-

- a. act in an aggressive manner, shout, throw items and damage property;
- b. utter derogatory comments towards her;
- c. control what she could watch and listen to;
- d. monitor and control her use of her mobile telephone, access said mobile telephone without her consent and delete messages and contacts on same;
- e. monitor and control her movements and activities;
- f. monitor and control her contact with family and friends;
- g. prevent her from telling her family her whereabouts;
- h. control what she could eat and drink and what she could feed her daughter;
- i. control her appearance and what clothing she wore;
- j. remove her bank card and money from her property;
- k. utter threats towards her and her family;
- l. lock her out of her home;
- m. throw items at her;
- n. prevent her from taking her prescribed medication and induce her to take other medication that was not prescribed to her;
- o. record videos of her when she was upset and in a distressed state;
- p. post videos and photos on social media showing her in a distressed state and post derogatory comments about her;
- q. compel her to leave her employment;
- r. did compel her to marry you;
- s. seize her by the body, pin her down, push her head towards your penis and penetrate her vagina, anus and mouth with your penis without her consent to her injury;
- t. on an occasion, prevent her from going to the dentist;
- u. on an occasion, repeatedly call her, attend uninvited at an address where you knew she would be, shout at her and demand that she enter your car;
- v. on an occasion, attend uninvited at an address where you knew she would be, refuse to leave when requested to do so and place your foot in a doorframe to prevent it from closing;
- w. on an occasion, strike her on the head with a mobile telephone;
- x. on an occasion, push her on the body causing her to fall off a bed and thereafter cover her mouth to her injury;
- y. on an occasion, shout at her and punch her on the head to her injury; and
- z. on an occasion, lunge forward causing others to fall into her causing her to fall and strike her head on furniture to her severe injury;

CONTRARY to the Domestic Abuse (Scotland) Act 2018, Section 1;
and it will be proved in terms of section 5 of the Domestic Abuse (Scotland) Act 2018
that the aforesaid offence was aggravated by reason of involving a child."

[2] At a continued preliminary hearing on 24 March 2025 the court repelled a preliminary issue minute challenging jurisdiction in respect of charge 3. The issue raised was that the court did not have jurisdiction because some of the offending behaviour was alleged to have taken place at an address in Durham, England. The preliminary hearing judge repelled the plea of no jurisdiction and granted leave to appeal. A trial has been set down for 13 October 2025.

The PH judge's reasons

[3] Charge 3 labelled a single offence of engaging in a course of behaviour which was abusive of a partner or ex-partner contrary to section 1 of the Domestic Abuse (Scotland) Act 2018. The alleged criminality flowed from the various specified instances of conduct forming part of a course of behaviour. The circumstances fell to be distinguished from those where a crime was committed abroad by a United Kingdom national. Statutory provision intervened to allow for such conduct to be prosecuted in Scotland or elsewhere in the United Kingdom. The circumstances were also different from those referred to in passages from the institutional writers relied on by the appellant where a person had committed a crime in another country and subsequently fled to Scotland.

[4] Under the common law it was competent to libel in a Scottish indictment events, including criminal acts, occurring in a foreign jurisdiction where there was alleged to be a continuing crime (*Lauchlan and O'Neill v HM Advocate (No. 2) 2015 JC 75*). The same approach applied in the context of a statutory offence. In the present case the Crown was not seeking to prosecute a crime which began and ended in England. It was seeking to

prosecute a contravention of section 1 of the 2018 Act which was a crime said to have commenced in Scotland, then continued in England and ended in Scotland. The focus of a charge brought under section 1 of the 2018 Act was the course of abusive behaviour, not the individual elements within it (*Bain v HM Advocate* 2024 JC 326).

The appellant's submissions

[5] In essence, four grounds of appeal were advanced, although some tended to overlap. First, the preliminary hearing judge erred in holding that the intention of the 2018 Act was to provide for cross-border jurisdiction. Secondly, she erred in finding that the common law on cross-border jurisdiction had developed since the time of the institutional writers. Thirdly, she erred in finding that the 2018 Act engaged the principle of continuing crime (*crimen continuum*). Fourthly, the preliminary hearing judge erred in failing to have regard to the unfairness likely to arise in relation to disclosure and the ability to cite witnesses further of Scotland.

[6] The Crown had advised the appellant's representatives that all the alleged sexual offending in charge 3 took place in England. There was no provision in the 2018 Act indicating that Parliament intended to extend its provisions beyond Scotland save for the express provision made in section 3 concerning extra-territorial jurisdiction for conduct occurring outside the United Kingdom. Section 3 was intended to give effect to the United Kingdom's obligations under the 2014 Istanbul Convention (*the Council of Europe Convention on preventing and combatting violence against women and domestic violence* (CETS No. 210)). The Scottish Parliament had apparently proceeded merely on the basis of a ministerial assurance during the passage of the Bill that the common law would allow for prosecution of an offence under section 1 of the 2018 Act committed in England and Wales and also in

Scotland; in the absence of express provision, such an assurance was of no consequence. The fact that Scotland had a separate legal system meant that cross-border jurisdiction was an exception to the normal jurisdictional rules; there had to be express statutory provision in order for such an exception to apply. This had been done in the case of other legislative provisions; for example, sections 11(4) and (5) of the Criminal Procedure (Scotland) Act 1995 and section 54 of the Sexual Offences (Scotland) Act 2009.

[7] The common law had not developed in such a way as to allow for cross-border jurisdiction in the case of offences under section 1 of the 2018 Act. Statements made by the institutional writers concerning cross-border jurisdiction were not of general application; they were limited to cases of dishonesty and other offences specifically mentioned. The circumstances of the present case could be distinguished from those of *Clements v HM Advocate* 1991 JC 62 in which the practical effects of contraventions of the Misuse of Drugs Act 1971 (an Act passed by the UK Parliament) were experienced in Scotland. That decision pre-dated the creation of the Scottish Parliament. *Laird v HM Advocate* 1985 JC 37 could also be distinguished. There, a fraudulent scheme required various steps to be taken in both Scotland and England in order to effect completion of the crime. In the present case, all of the sexual elements contained in charge 3 are alleged to have occurred only in England. Such behaviour constituted distinct criminal offences in England and Wales. These offences were capable of being tried separately and independently in that jurisdiction. The material aspects of the alleged offending (particularly the physical and sexual assaults) occurred in England. Any punitive sentence likely to be imposed on conviction on charge 3 would, for the most part, reflect behaviour occurring in England. The offending in England was not integral to or necessary to prove the commission of a course of abusive behaviour occurring in Scotland. The English behaviour was capable of adding to and forming part of

a course of abusive behaviour occurring in Scotland, just as it was capable of standing alone and being prosecuted in England. It did, however, entirely change the gravity of the offence in charge 3.

[8] The alleged sexual offending that occurred in England could be incorporated in a docquet, thereby ensuring there was no prejudice to the prosecution of the case, while acting in accordance with the principles of comity and fairness. While the appellant accepted that it was competent to libel criminal acts from a foreign jurisdiction to provide corroboration of offences committed in Scotland, this would normally be achieved by using a docquet or an evidential charge. A charge prosecuted in Scotland which included criminal acts committed abroad would only be competent where those acts were necessary and integral to proof of the charge. A desire to prosecute similar offences together where those offences occurred within different jurisdictions in the United Kingdom was not competent.

[9] There was no special feature of the 2018 Act that provided a basis for jurisdiction on the ground that all aspects of the alleged offence fell to be treated as continuing elements of a single crime. The offence was no different from any other offence in terms of being composed of separable parts. Verdicts could be returned on distinct offences averred in a charge under section 1. The terms of the 2018 Act did not specify that the incidents of a course of behaviour had to be continuing in character.

[10] Reference was made to a written answer given by the former Lord Advocate (James Wolffe QC) to a question in the Scottish Parliament in 2017 in which he explained that in deciding whether or not a prosecution should take place in Scotland in circumstances where there was jurisdiction in another territory, a number of factors would be taken into account.

[11] The preliminary hearing judge failed to have regard to the fact that disclosure of evidence through the police in England would be beyond the reach of the defence in

Scotland. The Crown could not certify that full disclosure had been given where material was held by an authority in England. The practical difficulties relating to disclosure were likely to give rise to significant unfairness.

The Crown's submissions

[12] The common law rules on cross-border jurisdiction applied to section 1 of the 2018 Act as they did to any other crime tried by the Scottish courts, whether statutory or at common law. It was important to distinguish between two different concepts: extra-territorial jurisdiction and cross-border jurisdiction. The former related to the ability of the courts to try an accused for an act or omission done entirely outside the jurisdiction. Given that such instances would involve the courts trying offences which would be within the jurisdiction of a foreign court (or a court elsewhere in the United Kingdom), it normally requires a specific statutory provision to confer jurisdiction on the Scottish courts; an example would be section 11 of the 1995 Act.

[13] Cross-border jurisdiction was a different concept. It covered the situation where a crime, in its preparation, commission or effects, took place across two or more jurisdictions. In such cases, although the offence might be statutory, the Scottish courts had jurisdiction on the basis of the common law rules on cross-border jurisdiction (*Clements, supra*). In contrast to extra-territorial jurisdiction, there was no need for the legislature, when creating a new offence, also to specify that the rules on cross-border jurisdiction applied: the Misuse of Drugs Act 1971, for instance, contained no such provision but, since *Clements, supra*, it was a common situation to which the rules on cross-border jurisdiction applied. It made no difference whether the legislation was passed at Westminster or at Holyrood.

[14] A Memorandum of Understanding between the Crown and the Crown Prosecution Service was entered into in 2024. It codified previous informal arrangements for consultation in the case of cross-border crime. The Memorandum acknowledges that, while it is possible to include conduct occurring in England and Wales within the libel of a Scottish charge, such libelling should be considered carefully in accordance with the provisions of the 2018 Act in conjunction with the application of the common law. In the present case there had been consultation between the two prosecuting authorities under the previous informal arrangements. On 3 July 2024 the CPS advised that the complainant in charge 3 did not wish to make allegations to the police in England. A police investigation could not, therefore, take place in England and Wales. The CPS stated that it had no views as to the proposed way to proceed. It effectively assented to there being a prosecution in Scotland.

[15] There was no threat to the independence of the respective legal systems if cases such as the present one were allowed to proceed in Scotland. Comity or constitutional practice would not be undermined. The difference between extra-territorial and cross-border jurisdiction had applied since the time of the institutional writers and was not unique to Scots law. Different considerations applied in each case. The idea behind the principle of comity was that each state would govern matters within its own territory, meaning that by default any matter will lie within the jurisdiction of one, and only one, state. Respect for the principle of comity underpinned the general rule that crimes did not normally have extra-territorial effect without express provision by the legislature. That, however, did not apply to cross-border jurisdiction (*Clements, supra*, at page 69). Where the commission of a crime spanned borders, it would be illogical to suggest that the principle of comity required that the default position was that neither jurisdiction could prosecute it for fear of interfering with the other jurisdiction's sovereignty. That would result in a prosecutorial void.

[16] There were broadly three rules on cross-border jurisdiction or, putting it another way, three bases for the Scottish courts to have jurisdiction over cross-border offences. The first arose where a material part of the offence was committed in Scotland (*Laird, supra*). The second was where the harmful or practical effect of the offence was felt in Scotland (*Clements, supra*). The third was where the offence was a continuing crime (*crimen continuum*) which was committed partly outside Scotland and partly in Scotland (*Lauchlan and O'Neill, supra*).

[17] As the essence of an offence under section 1 of the 2018 Act was a course of abusive behaviour it was clear that the Scottish courts could have jurisdiction where the offence took place both in Scotland and in other parts of the United Kingdom. This was under the common law rules on cross-border jurisdiction. As a course of behaviour was behaviour on at least two occasions, it was clearly possible for behaviour occurring in different locations to form part of a single section 1 offence and for that course of abusive behaviour to have continuing and practical effects in Scotland. For that reason, all three rules or bases for jurisdiction could apply in the present case, not just the continuing crime basis relied on by the Crown before the preliminary hearing judge.

[18] Before the preliminary hearing judge, the Crown explained that the course of behaviour which was the subject of charge 3 began in Scotland, continued in England, and then ended in Scotland.

[19] Subsequent to the preliminary hearing the complainant had given evidence on commission. She confirmed that she met the appellant and started a relationship with him in 2019 when they were both living in Glasgow. About six months into the relationship, she moved to Barrhead where she lived for about a year. After this the complainant moved to Durham for about four months. She then moved back to Glasgow. She gave evidence of

various forms of abusive behaviour spanning the time period during which she lived at these various addresses. Taking her evidence at its highest, cross-border jurisdiction would be established on all three bases: a material part of the alleged offending taking place in Scotland, the harmful or practical effects on the complainant being felt here, and the alleged course of abusive behaviour forming a continuing crime across the six Glasgow addresses and the one Durham address. On that basis the Scottish courts had jurisdiction over that part of the course of abusive behaviour alleged to have taken place in England and Wales.

[20] The presumption against extra-territorial effect did not apply in the present case. The appropriate presumption was that the common law was not disappplied by statute in the absence of express provision. It was clear that Parliament intended that the normal common law rule on cross-border jurisdiction referred to by the minister should apply. *Clements, Laird and Lauchlan and O'Neill* each applied the common law rule and were indistinguishable from the facts of the present case.

[21] A verdict could not competently be returned on the indictment for a rape or assault committed wholly in England. If at the end of the Crown case, there was insufficient evidence that abusive behaviour took place in Scotland the case would have to be deserted *pro loco et tempore*.

[22] In a case where criminal conduct was alleged in Scotland and other jurisdictions, the Crown was subject to the usual disclosure obligations under the Criminal Justice and Licensing (Scotland) Act 2010. If necessary, an application for commission and diligence could be made. It was notable that the appellant did not allege any specific unfairness. The full range of powers in the 1995 Act to cite and take the evidence of witnesses in another part of the United Kingdom applied as they did in any other criminal case in Scotland. No unfairness arose in that connection.

Decision

[23] At the outset it is important to understand that the present case is concerned with cross-border jurisdiction and not with extra-territorial jurisdiction. These are two distinct concepts.

[24] Contrary to the appellant's submissions, the institutional writers did not limit the application of the cross-border principle to particular types of case. They stated the principle in broad and general terms. Thus Hume (*Commentaries on Crime*, Vol II, page 53) refers to the Scottish courts having jurisdiction in the case of offences having a "continuance of time and succession of acts, whereof part may happen here and part abroad". He gives as examples: composing or printing a libel in England and circulating it in Scotland; writing an incendiary letter in England and arranging for it to be received by the addressee in Scotland; and the forcible abduction of a woman from England to Scotland. Alison (*Practice of the Criminal Laws of Scotland*, pages 74 to 77) finds jurisdiction in the principle of *crimen continuum* for crimes committed partly in Scotland and partly elsewhere. He gives the example of a person standing on the English side of the border who discharges a gun at a man on the Scottish side. He states that "no reasonable doubt can be entertained of the competence of trying him in this country, where his crime has taken its destined effect". Alison also refers to jurisdiction existing in Scotland in the case of offences partly committed in Scotland and partly in England.

[25] Macdonald: *Criminal Law in Scotland* (5th ed, page 191) says that it is not essential to the jurisdiction of the High Court of Justiciary that the whole of the acts constituting the crime should have been done in Scotland. He cites the example of a person in England who forwards a package to Scotland containing an explosive substance and says that in such a

case "the Scottish courts would certainly have jurisdiction". He refers on the same page to there being jurisdiction in Scotland "if an act done out of Scotland take practical effect in Scotland". On page 222 Macdonald refers to jurisdiction being established by the *crimen continuum* rule.

[26] It can thus be seen that the institutional writers and Macdonald considered that cross-border jurisdiction in Scotland could arise because of the *crimen continuum* principle or on the ground that the practical effect of the crime was experienced in Scotland or on the basis that a material part of the crime was committed in Scotland and part of it in another jurisdiction in the United Kingdom. One can discern a strong sense of pragmatism and common-sense.

[27] Case law supports the view that there are a number of bases on which cross-border jurisdiction can arise. In *Laird v HM Advocate* 1985 JC 37 this court held that where various steps were taken in two jurisdictions to complete a fraudulent scheme, it was sufficient to find jurisdiction in one jurisdiction if the events in that jurisdiction played a material part in the fulfilment of the scheme as a whole. The position in the present case is similar: the Crown alleges that the events said to have occurred in Scotland constituted a material part of the single course of abusive behaviour perpetrated by the appellant against the complainant on both sides of the border.

[28] In *Clements v HM Advocate* 1991 JC 62 the court took the view that each person found to have been concerned in the supplying of a controlled drug was involved in a single enterprise carried out in the United Kingdom. The interests of justice and the public interest would be best served by trying all those who participated in the chain of criminality in the courts of the part of the United Kingdom where the harmful effects of the criminality would be felt, in that case Scotland. The Lord Justice General (Hope) observed at page 69 that the

case involved territorial limitation as between the different jurisdictions within the United Kingdom. This depended on constitutional practice, not on international comity. In the present case it is obvious that the complainer would have experienced the effects of the abusive conduct (wherever it took place) while she was in Scotland. Nothing turns on the fact that the offence in *Clements* was created by an Act of the Westminster Parliament and the 2018 Act by the Scottish Parliament. The principle of cross-border jurisdiction applies to both types of statute.

[29] In *Lauchlan and O'Neill v HM Advocate (No 2)* 2015 JC 75 the Lord Justice Clerk (Carloway) delivering the opinion of the court said the following at paragraph [24]:

“It is, of course, competent to libel events, including criminal acts, occurring in a foreign jurisdiction in a Scottish indictment. That is apparent from Macdonald: *Criminal Law* (5th ed), where it is said (p 222):

‘Where a *crimen continuum* is committed partly in Scotland and partly in another country, it is not a good objection to the indictment that the *locus* of some of the acts done in carrying out the offence is set forth as being in the other country (*John Mackay* (1866) 5 Irv 329; *Will E Bradbury* (1872) 2 Couper 311), and evidence may be led in support of such acts as bearing on the substantive crime charged (*Ernest Joseph* 1929 JC 55).’

HM Advocate v Joseph (supra) is a classic example of a continuing crime; being a fraudulent scheme for obtaining money from the public in Scotland by various steps, some taking place in Scotland but others in London and Brussels. *Laird v HM Advocate* 1985 JC 37 involved a scheme to obtain money from a company in London by various material acts committed in Scotland. This too is competent, but these are both examples of a *crimen continuum*.“

[30] In considering how these well-established rules apply in the present case it is important to recall the nature of the offence created by section 1 of the Domestic Abuse (Scotland) Act 2018. Section 1(1) provides that a person commits an offence if the person (A) engages in a course of behaviour which is abusive of A’s partner or ex-partner (B). As a matter of statutory construction, it is plain that the offence is the engaging in such a course of abusive behaviour, whatever its length. In *CA v HM Advocate* 2023 JC 8 the Lord Justice

Clerk (Dorrian), delivering the opinion of the court, said at paragraph [10] that it is “the course of behaviour which is the core of the offence”. In *Bain v HM Advocate* 2024 JC 326 the Lord Justice General (Carloway) in delivering the opinion of the court stated at paragraph [8] that section 1 of the 2018 Act creates an offence of engaging in a course of abusive behaviour towards a partner or former partner.

[31] Once it is understood that the essence of the section 1 offence is a course of abusive behaviour amounting to a single offence, it becomes entirely clear that the Scottish courts can have jurisdiction under the common law rules on cross-border jurisdiction over such an offence which takes place both in Scotland and in other parts of the United Kingdom. Since a course of behaviour is behaviour on at least two occasions (section 10(4)), it is clearly possible for behaviour occurring in different locations to form part of a single section 1 offence and for that course of abusive behaviour to have continuing and practical effects in Scotland. Accordingly, all three rules or bases for cross-border jurisdiction may often apply in cases such as the present one.

[32] Charge 3 sets out a detailed narrative amounting to a continuing crime, material parts of which are alleged to have taken place at various locations in different parts of the United Kingdom. This will be far from unusual in cases of domestic abuse alleged to have occurred over a significant period of time in the course of a lengthy relationship. It would be absurd if a single course of behaviour of the type featuring in charge 3 had to be prosecuted in multiple jurisdictions. Such an approach would unnecessarily and unjustly magnify the traumatic impact of the prosecution on the complainant. It would make no practical sense and would be clearly detrimental to the interests of justice and to the public interest.

[33] The authorities make clear that where a continuing crime is alleged and some components of the offence took place in Scotland and others occurred in England and Wales, the Scottish courts have jurisdiction to try the offence. It makes no difference that the continuing offence is one created by statute.

[34] Over and above the rationale based on a continuing crime, jurisdiction also arises in the present case on the basis that a material part of the offence was committed in Scotland (*Laird, supra*) and on the ground that the harmful effect of the offence was experienced by the complainer in Scotland (*Clements, supra*).

[35] The fallacy in the appellant's argument is illustrated by the following example. Suppose that a man subjected his partner to a sustained course of abusive behaviour in their home in Scotland. He did the same during a weekend break to England. It would be unjust and contrary to the policy and purpose of the 2018 Act if the Scottish courts had jurisdiction in respect of the abusive conduct occurring over a period of years in the couple's Scottish home, but not in respect of the same type of behaviour which took place during the weekend trip to England. It is obvious in such a case that a material part of the offending took place in Scotland.

[36] Another example showing that the appellant's approach is unrealistic and misconceived would be where the abuse comprises threatening or demeaning texts or social media posts. There the impact of such messages will be experienced by the complainer in Scotland, whether the messages are sent to her by the accused while he is in Edinburgh or in London. The Scottish courts would have jurisdiction in such a case in respect of all the messages on the basis of the crime taking effect here.

[37] The appellant argued that the absence of express provision for cross-border jurisdiction in the 2018 Act meant that the Scottish Parliament cannot have intended there to

be such jurisdiction. The argument is misconceived. It ignores a fundamental rule of statutory construction. It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication (*R (Rottman) v Metropolitan Police Commissioner* [2002] 2 AC 692 (HL), Lord Hutton at paragraph 75.

[38] The Scottish Parliament must be presumed to have been aware of the common law rule; indeed it is notable that the minister referred to it at stage 2 during the Parliamentary passage of the Bill when moving an amendment to provide for extra-territorial jurisdiction for offending outside the United Kingdom. The amendment became section 3 of the 2018 Act, which provides that an offence under section 1 can be constituted by a course of behaviour occurring wholly or partly outside the United Kingdom. Section 3 has nothing to do with cross-border jurisdiction. It deals with the entirely different issue of extra-territorial jurisdiction. Express provision was needed to create extra-territorial jurisdiction. It was not required to confer cross-border jurisdiction because the common law already provided for such jurisdiction. In passing section 1, Parliament must be taken to have proceeded on the footing that the existing common law rule on cross-border jurisdiction within the United Kingdom would apply after the enactment of the 2018 Act. There was no need for this to be spelled out in the 2018 Act.

[39] There is no potential unfairness to the appellant in any of this. No actual prejudice was identified. The Crown is subject to the normal rules and remedies on disclosure of evidence. If thought necessary, an application for Commission and Diligence can be made to recover evidence in England. The appellant is entitled to cite and take the evidence of witnesses in England should that be considered necessary. Nor was counsel for the appellant correct to contend that, in view of the terms of paragraph 9(2) of Schedule 3 to the

Criminal Procedure (Scotland) Act 1995, it would be open to the jury at the trial to return an alternative verdict of rape on charge 3. Such a verdict could not be returned. First, part 's' of charge 3 on the indictment does not libel rape. Second, there is no jurisdiction for the Scottish courts to indict and try the conduct described in part 's' as a separate offence. For that reason, that conduct does not "itself constitute an indictable offence" in terms of paragraph 9(2).

[40] In the result the appeal is refused and the case can now proceed to trial on the date already appointed.