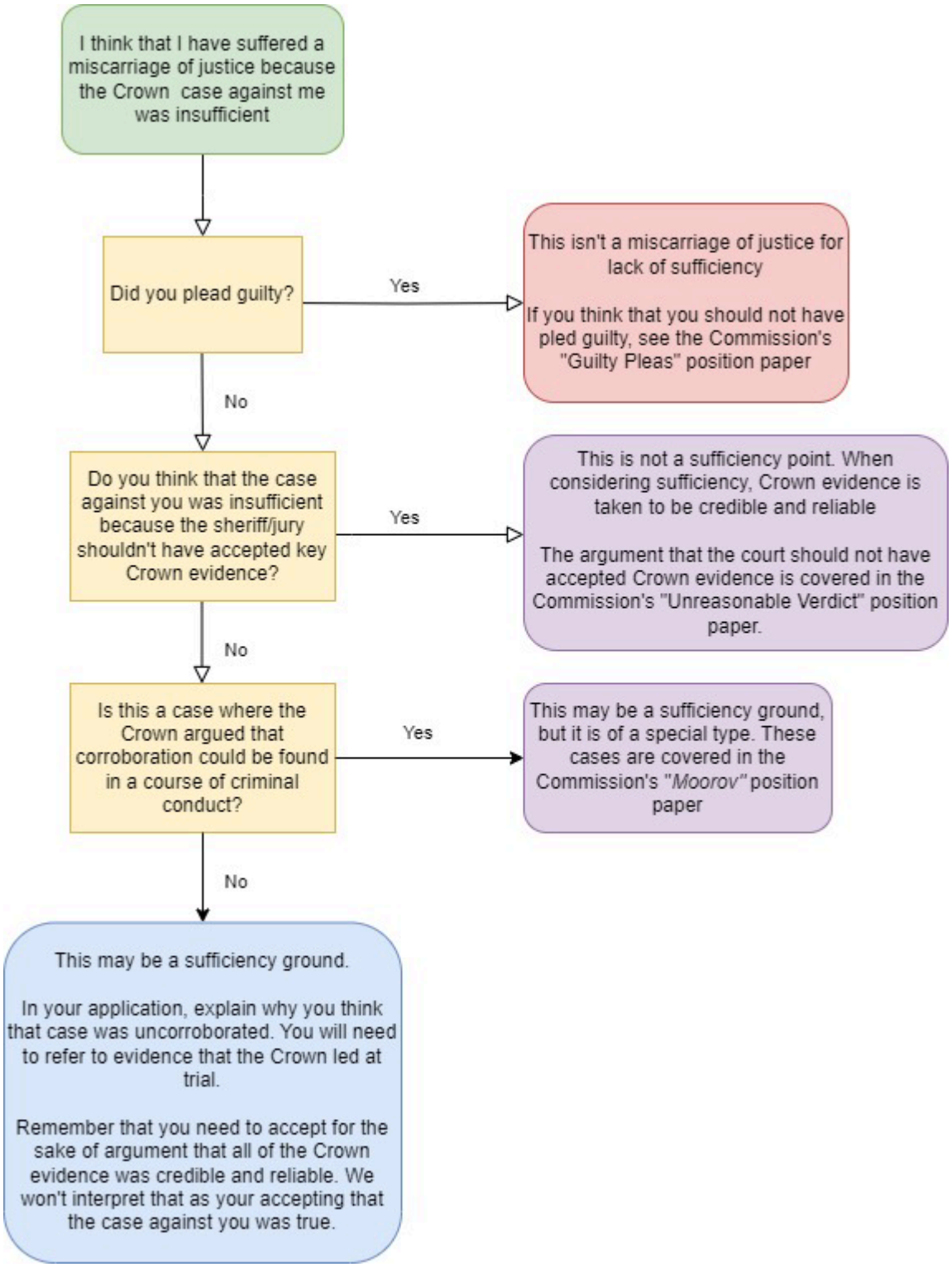
Submission Guidance:

Sufficiency

This paper provides guidance for those thinking of applying to the Commission on the basis that the case against them lacked sufficiency. It summarises the Commission's understanding of the law. For a fuller explanation, see the Commission's more detailed position paper.

Sufficiency – in Brief

- In Scotland, the key rule for determining whether or not a criminal case is sufficient (whether or not there is enough evidence to convict) is the requirement of corroboration.
- Corroboration requires that the commission of the offence and the identity of the offender be established by evidence from at least two separate sources.
- There are, arguably, some exceptions to this rule, most notably in the form of the *Moorov* doctrine and special knowledge confessions.
- It is a miscarriage of justice if a conviction is recorded when the Crown case against the accused was insufficient.
- In assessing sufficiency, Crown evidence is taken at its highest.
    - This means **you need to treat all of the Crown evidence as if it were true.**


I think that I have suffered a miscarriage of justice because the Crown case against me was insufficient
Did you plead guilty?
Yes
This isn't a miscarriage of justice for lack of sufficiency
If you think that you should not have pled guilty, see the Commission's "Guilty Pleas" position paper
No
Do you think that the case against you was insufficient because the sheriff/jury shouldn't have accepted key Crown evidence?
Yes
This is not a sufficiency point. When considering sufficiency, Crown evidence is taken to be credible and reliable
The argument that the court should not have accepted Crown evidence is covered in the Commission's "Unreasonable Verdict" position paper.
No
Is this a case where the Crown argued that corroboration could be found in a course of criminal conduct?
Yes
This may be a sufficiency ground, but it is of a special type. These cases are covered in the Commission's "Moorov" position paper
No
This may be a sufficiency ground.
In your application, explain why you think that case was uncorroborated. You will need to refer to evidence that the Crown led at trial.
Remember that you need to accept for the sake of argument that all of the Crown evidence was credible and reliable. We won't interpret that as your accepting that the case against you was true.

Position Paper:

Sufficiency

This paper sets out the Commission's approach when dealing with this area of law.

Introduction

1. After the Crown has concluded its evidence in a case the question may arise whether it has led sufficient evidence to entitle the court to determine whether the accused was guilty of the offence for which they were charged. That question, if it arises, is one of law on which the judge must decide. Only if the judge decides that the Crown has led sufficient evidence does the case go to the jury[1] for determination.
2. The most important aspect of sufficiency is the requirement of corroboration. 'By the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence from two separate sources implicating the person accused with the commission of the crime or offence with which he is charged.'[2] The evidence of one eyewitness, for example, is never sufficient, however credible and reliable that witness appears to be (subject to a limited number of statutory exceptions).[3]
3. A convicted person may appeal their conviction (and may apply to the Commission) on the ground that there was insufficient evidence to support his conviction.
4. The Commission has referred to the High Court for determination several cases in which it has concluded there was insufficient evidence to support conviction. Those

[1] This paper is drafted with a view primarily to solemn (judge & jury) procedure. The same principles apply to summary (judge only) procedure. In the latter case, the sheriff or JP plays the role of both judge and fact-finder.
[2] *Morton v HMA* 1938 JC 50, page 55, the Lord Justice Clerk (Aitchison).
[3] See, for example, the Road Traffic Offenders Act 1988 s21

cases included *Campbell v HMA*[4] and *Fulton v HMA*,[5] both of which were concerned with whether the appellant had illegal possession of a firearm.[6]

5. In *Campbell* the appeal court, in applying the test for sufficiency in a wholly circumstantial case,[7] agreed with the Commission that there was insufficient evidence to entitle a jury to draw the inference, beyond reasonable doubt, that the appellant had knowledge of and control over the firearm.[8] Likewise, in *Fulton*, the circumstances of which were similar to those in *Campbell* – a shotgun was found in a flat in which the appellant had been staying but to which others had access – the appeal court concluded there was insufficient evidence to prove that the appellant had put the gun in the cupboard in which it was found.

The Commission's position

Taking the Crown case 'at its highest'

6. The evidential principles to be applied in answering the question whether there is sufficient evidence are clear: the evidence on which the Crown relied is to be taken 'at its highest'. In other words, Crown evidence must be treated as credible and reliable and interpreted in the way most favourable to the Crown.[9] Sufficiency of evidence is not concerned with whether the evidence the Crown led ought to be accepted.[10] The 'weight' to be accorded to the evidence is to be addressed only after all the evidence in the case has been led.[11]

7. The best way of illustrating this concept is by way of a simple example. If witness X positively identifies the accused in the commission of the offence with which they were charged, and witness Y makes an identification of resemblance of the accused,

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[4] [2008] HCJAC 50.
[5] [2005] HCJAC 4.
[6] Contrary to the Firearms Act 1968, section 1(1(a), as amended.
[7] See para 13 below.
[8] The police had searched the flat of the appellant's girlfriend, and had found a rifle which had been well-concealed behind a water tank in a hall cupboard; various people had keys and/or access to the flat; there was no evidence that the appellant's prints had been found on the rifle, on the water tank or in the cupboard; however, his prints, together with seven unidentified prints, were found on one of two plastic bags wrapped around the rifle, but there was no evidence assisting with the date on which, or circumstances in which, his prints came to be on the bag.

For more recent judicial discussion of the case see *Reid v HMA* 2016 SCCR 233 at page 238
[9] *Mitchell v HMA* 2008 SCCR 469, para 106.
[10] *Williamson v Wither* 1981 SCCR 214, page 217.
[11] *Gonshaw v HMA* 2004 SCCR 482, para 24.

there is sufficient evidence,[12] and the judge must allow the case to go to the jury for determination. Where X has given evidence in such terms but has added, for example, that their eyesight is not very good and they did not have their glasses on at the relevant time, there remains sufficient evidence, and the judge must allow the case to go to the jury for determination. Of course, in such circumstances, the jury might then acquit the accused because it took the view that the evidence of X was unreliable.[13]

The 'no-case-to-answer' submission

8. The defence is entitled at the end of the Crown case to make a submission of no case to answer.[14] The submission is to the effect that there is insufficient evidence for the case to go to the jury[15] for determination. The judge must uphold such a submission unless they are satisfied that there is, taking the Crown case at its highest, sufficient evidence to convict.[16] Any evaluation of the quality of the evidence is irrelevant at that stage.

Corroboration

9. As indicated, for a case to be corroborated, the Crown must lead evidence against the accused from at least two separate sources. That leaves open the question as to what requires to be corroborated. It has always been accepted that the identity of the accused requires to be established by corroborated evidence.[17] Following the approach of the full bench in *Lord Advocate's reference (No 1 of 2023)*[18] the only other matter that requires corroboration is the commission of the offence itself.[19] That case overruled or disapproved a line of 20th century authority[20] that had held that where a crime had more than one essential element, each component part required

[12] See, for example, *Ralston v HMA* 1987 SCCR 467; see also para 11 below.
[13] In such circumstances, in summary proceedings, the sheriff or the JP must allow the case to go to the finder of the facts – ie, themselves – for determination. They might then acquit the accused because they took the view that the evidence of X was unreliable, a decision they will take almost immediately thereafter in circumstances in which the defence chose not to lead any evidence.
[14] Section 97 of the Criminal Procedure (Scotland) Act 1995 (solemn cases) and section 160 of that Act (summary cases).
[15] Or, in a summary case, the sheriff or the JP, in their role as the 'fact-finder'.
[16] In addition, in solemn procedure, after the close of the whole of the evidence or the conclusion of the prosecutor's speech to the jury, the accused is permitted to submit that the evidence is insufficient to justify their conviction (section 97A of the 1995 Act).
[17] *Morton v HMA*
[18] [2023] HCJAC 40
[19] *Lord Advocate's Reference (No 1 of 2023)* at paragraph 235
[20] Principally *Smith v Lees* 1997 SCCR 96.

corroboration. For that reason, decisions on corroboration that predate 2023 should be treated with caution.

10. Corroboration may take the form of wholly direct evidence – the evidence of two eyewitnesses, for example – or direct evidence from one witness supported by one or more pieces of circumstantial evidence to which other witnesses spoke, or wholly circumstantial evidence to which separate witnesses spoke. In some circumstances, the distress of the complainer, as observed by a third party, may serve to corroborate the Commission of the offence.[21]

11. Where the Crown case depends on the evidence of two eyewitnesses, the evidence of those witnesses must be sufficiently similar to provide conjunction of testimony; it is not enough, for example, that the witnesses both say that they saw the accused punch the complainer, if the circumstances in which they say that happened are substantially different.[22]

12. The supporting evidence must be such as to connect the accused with the crime, but the degree of connection required will vary with each case.[23] It need not be particularly strong. Where one starts with an emphatic positive identification by one witness then very little else is required:[24] one positive identification may be sufficiently corroborated by an identification of resemblance,[25] or by one piece of circumstantial evidence – relatively weak DNA evidence has been held to meet the 'relatively weak threshold' needed for corroboration.[26]

13. Further, it is not the law that circumstantial evidence is corroborative only if it is more consistent with the direct evidence for the Crown than with a competing account the defence has put forward. Such evidence need not, in itself, point to the guilt of the

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[21] On this point (and the subject of *de recenti* statements) see generally *Lord Advocate's reference (No 1 of 2023)*

[22] See Renton & Brown: *Criminal Procedure*, 6th edition, para 24–69, and the authorities cited there.

[23] Renton & Brown, para 24–76.1.

[24] *Ralston v HMA*, page 472; *WMD v HMA* [2012] HCJAC 46. In *Murphy v HMA* 1995 SCCR 55, para 60, as cited in *Kearney v HMA* [2007] HCJAC 3, the Lord Justice Clerk, in commenting on the relevant passage from *Ralston*, stated: '[T]he Lord Justice General is simply making the point that evidence may afford corroboration and even though it is small in amount, provided it has the necessary character or quality and it will have the necessary character or quality if it is consistent with the positive identification evidence which requires corroboration.'

[25] *Ralston v HMA*; see also *Nelson v HMA* 1989 SLT 215 ('his build'), *Murphy v HMA* ('just the height and the hair colour') and *Adams v HMA* 1999 JC 139 ('just basic looks'). It has been held that the equivocal nature of the supporting evidence is a matter for the jury to consider when assessing its weight (*Kelly v HMA* 1998 SCCR 660, page 665D–E).

[26] *McCreadie v HMA* [2011] HCJAC, para 3, Lord Emslie.

accused. What matters is that whether it is capable of providing support or confirmation to the Crown case.[27]

14. In a wholly circumstantial case, there are usually several pieces of evidence (albeit, in theory, two pieces of circumstantial evidence to which separate witnesses spoke may be regarded as satisfying the sufficiency test[28]). In such a case, for there to be a case to answer, the question is not whether each of the several circumstances points by itself towards the offence libelled; it is whether the several circumstances, taken together, were capable of supporting the inference, beyond reasonable doubt, that the accused was guilty of the offence of which they were charged.[29]

Confessions

15. Generally, a confession alone, irrespective of how many witnesses spoke to its making, is insufficient; any number of confessions is insufficient to convict, since a witness cannot corroborate himself; the demeanour of the accused at the time he made the confession cannot corroborate it; the amount of evidence needed to corroborate a confession depends on the circumstances of the case.[30]

16. The concept of a special knowledge, or self-corroborating, confession exists whereby the information contained in the confession is confirmed by other facts, and thus is corroborated by circumstantial evidence – where, for example, 'the confessor' described where he buried the body, evidence that the body was found where the person indicated can corroborate the confession.[31] In such a case, for the corroboration requirement to be satisfied, two witnesses must give evidence that the special knowledge confession was made.[32]It does not matter that such a confession contains information that is both consistent and inconsistent with the facts; the judge is entitled to allow the case to go to the jury for it to determine whether the

[27] *Fox v HMA* 1998 JC 94, page 109, Lord Justice Clerk (Cullen); *Lord Advocate's Reference (No 1 of 2023)*, paragraph 220
[28] *Morton v HMA*, page 52, the Lord Justice Clerk (Aitchison), quoting Hume, vol. ii, pages 383 and 384. See also *Langan v HMA* 1989 SCCR 379, in which the court treated the evidence of two experts speaking to a single bloody fingerprint as sufficient identification of the accused.
[29] *Little v HMA* 1983 JC 16, page 20, the Lord Justice General (Emslie), in delivering the opinion of the court; see also *Fox v HMA*, page 118, Lord Coulsfield, and *Al Megrahi v HMA 2002 SCCR 509,* paras 31–36.
[30] See Renton & Brown, para 24–78, and the authorities cited there.
[31] *Manuel v HMA* 1958 JC 41.
[32] *Low v HMA* 1994 SLT 277. Alternatively, two witnesses must testify to the making of separate special knowledge admissions at different times (*Murray v HMA* [2009] HCJAC 47, para 42).

consistencies amount to corroboration of the confession.[33] Furthermore, where information contained in the confession was known to the police, had been shared with the victim's family and friends, including the accused, and much of it had been disclosed through the media, it has been held that the judge is entitled to allow the case to go to the jury for it to determine whether the accused was aware of those facts because they were the perpetrator or because they had picked them up from other sources.[34]

17. Before such a confession and its attendant corroboration may constitute sufficient evidence, there must be independent evidence that the offence was committed.[35]

The *Moorov* doctrine

18. Under the *Moorov* doctrine, where an accused is being tried for two or more similar offences involving different complainers, the account of one complainer may be corroborated by the evidence of one of the other complainers and *vice versa*,[36] as long as there is sufficient "nexus"[37] or "connection"[38] between the two or more separate offences which allows the inference to be drawn that each incident formed part of some broader "course of conduct".[39] For the additional considerations that apply in such cases, and related cases, please see the Commission's position paper on the *Moorov* doctrine.

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[33] *Gilmour v HMA* 1982 SCCR 590.
[34] *Wilson v HMA* 1987 JC 50.
[35] See, for example, Alison, vol. ii, page 580.
[36] *HMA v Moorov* 1930 JC 68.
[37] *Moorov*, page 80, the Lord Justice Clerk (Alness).
[38] *Moorov*, pages 77–75, the Lord Justice General (Clyde).
[39] *Moorov*, page 89, Lord Sands.