



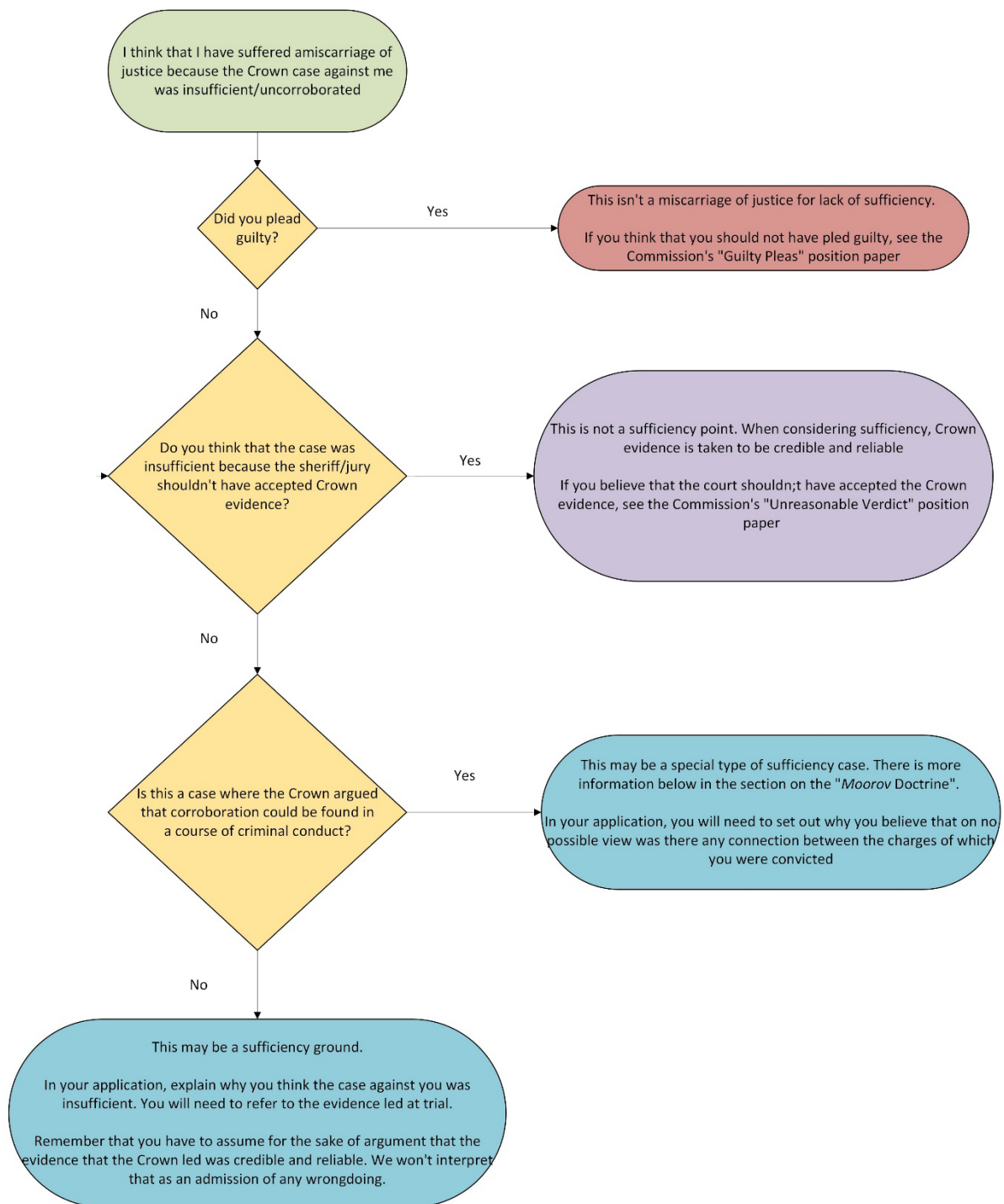
Submission Guidance:

Sufficiency & *Moorov*

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

- It is a miscarriage of justice if the Crown case was insufficient. There must be sufficient evidence to convict.
- The key rule of sufficiency is the requirement for 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.
- 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.**
- If you believe that the *Moorov* doctrine has been wrongly applied to your case, you need to show that on no possible view may it be said that there is any connection between the charges of which you were convicted.





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 jury¹ 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 their 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 says that the accused resembles the perpetrator of the

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.

offence, 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 jury¹⁵ 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 authority²⁰ 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 complainant, 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 complainant, 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

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 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 test²⁸). 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 consistencies amount to corroboration of the confession.³³ Furthermore, where

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).

³³ *Gilmour v HMA* 1982 SCCR 590.

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. In situations in which the Crown is unable to establish a sufficiency of evidence in relation to individual charges on the indictment or complaint, it can, and frequently does, rely upon the doctrine of mutual corroboration. This is commonly referred to as "the *Moorov* doctrine" (or just "*Moorov*") in recognition of the early 20th century case that established the modern law.³⁶ The boundaries of the doctrine are summarised succinctly in the Stair memorial Encyclopaedia as follows:

"Where an accused is tried on two or more charges alleging similar acts which are so connected in **time, character** and **circumstances** as to justify an inference that they are instances of **a course of similar conduct** systematically pursued by him, the evidence of a single witness in relation to one charge may be corroborated by the evidence of another single witness in relation to another"³⁷ (Emphasis added)

19. As a result of the generally private nature of sexual offending, the *Moorov* doctrine is most frequently applied in cases of that type. There is, however, no reason in principle preventing its use in any other mode of offending.³⁸

The Applicable Test

20. The test to be applied to establish whether the *Moorov* doctrine may be applied in any particular case is set out in the opinion of the court in *Reynolds v HMA*³⁹, in which it refused an appeal challenging the application of the *Moorov* doctrine in a case of

³⁴ *Wilson v HMA* 1987 JC 50.

³⁵ See, for example, Alison, vol. ii, page 580.

³⁶ *Moorov v HMA* 1930 JC 68

³⁷ Stair Encyclopaedia, Vol. 10, para 769

³⁸ By way of example, see *McCudden v HMA* 1952 SLT 357 (bribery of professional footballers) and *Wilson v HMA* 2001 SCCR 455 (theft).

³⁹ 1995 JC 142

assault and robbery on the basis that it did not accept that “on no possible view could it be said that there was any connection between the offences.” This standard now appears to be firmly established in the modern law on *Moorov*.⁴⁰ It follows from this that a trial judge may only withdraw charges from the jury where they believe that *on no possible view may it be said that there is any connection between the offences*. This is a low bar for the Crown to clear at trial and, correspondingly, a high one for an appellant to pass at an appeal against conviction.

Time, Character and Circumstances

21. It follows from the foregoing that the assessment as to whether charges are sufficiently connected by time, character and circumstances is a matter primarily for (in solemn cases, at least) the jury. The court will not in modern practice interfere with the exercise of this discretion except in the rare circumstances in which the test in *Reynolds* is made out.
22. In the 20th century cases that followed the decision in *Moorov*, the court set out various qualifications to or restrictions upon the doctrine, but these have been largely set aside by more recent developments. It was once thought, for example, that charges of lesser seriousness could not corroborate greater crimes⁴¹, but this suggestion has now been explicitly disavowed.⁴² Until relatively recently, the court was willing to set aside convictions where the gap in time between the charges was considerable. As late as 2019, the court in *RBA v HMA*⁴³ held that a gap of thirteen years between offences against two children was too long to sustain the use of the doctrine in a situation in which the Crown was unable to point to any “special or extraordinary”⁴⁴ connection between the offences. In *Duthie*, however, the full bench rejected the suggestion that there was any rule of law requiring “special, compelling or extraordinary circumstances” to support a course of conduct even where the gap between the offences was lengthy.⁴⁵ It went on to add that whilst the judge or sheriff might choose to direct the jury that in the case of a long time gap “strong” similarities would be required, there was no requirement to do so, adding that such a direction

⁴⁰ On this point, see, for example, the full bench decision in *Duthie v HMA* 2021 SCCR 100 at paragraphs 24 to 26

⁴¹ For example, that an allegation of sexual assault could not corroborate rape

⁴² *MR v HMA* 2013 SCCR 190 at paragraph 21.

⁴³ 2019 SCCR 349

⁴⁴ Opinion of Lord Brodie at paragraph 39

⁴⁵ At paragraph 28

“may be undesirable”.⁴⁶ It is thus the case that there is now as far as the Commission can see no “rule of thumb” as to the time interval that might ordinarily be permitted and a considerable reluctance to interfere with any conclusion that the jury might reach on that point.

23. It nonetheless remains the position that sexual and non-sexual offending may not generally corroborate one another through the operation of *Moorov*.⁴⁷

Single Complainer *Moorov*

24. In the ordinary course of events, a “*Moorov*” case will feature two or more complainers, each speaking to acts that the accused is said to have committed against them individually. In a case in which A is charged with offences against B and C, the most common state of affairs would be to hear the evidence of B and C. There is, however, no requirement for this pattern of evidence for the doctrine of mutual corroboration to apply. If C were for some reason unable to give evidence, then D, an eyewitness, could speak to the offence against C. Equally, *Moorov* corroboration is possible in a situation in which there is only one complainer, provided that in relation to at least one of the charges there is some other source of proof. If in the example above C is removed from the picture, sufficiency through mutual corroboration might nonetheless be achieved if A is charged with multiple offences against B and D can speak to at least one of those charges.⁴⁸

The Rule in *Howden*

25. Although not strictly an application of the *Moorov* doctrine, the rule in *Howden v HMA*⁴⁹ is analogous in the sense that it permits evidence supporting the commission of one crime to serve as proof of another. It operates, however, in situations in which it can be inferred from the evidence that the perpetrator of two or more separate incidents was the same person.⁵⁰ If the jury is satisfied that this is the case, a positive identification of the accused in relation to one of the incidents will serve to cure any evidential deficiency caused by lack of identification in relation to the other(s).

⁴⁶ The court thereby overruled the finding to the contrary in *S v HMA* 2018 SCCR 329

⁴⁷ *Duthie* at paragraph 22

⁴⁸ On this point, see *Wilson v HMA* [2016] HCJAC 70 and *Taylor v HMA* [2019] HCJAC 2

⁴⁹ 1994 SCCR 19

⁵⁰ On the limits of such an inference, see *McHale v HMA* 2017 SCCR 427

Dockets

26. Under section 288BA of the Criminal Procedure (Scotland) Act 1995, the Crown may add to an indictment or complaint “a docket which specifies any act or omission that is connected with a sexual offence charged”. In practice, prosecutors use this provision most frequently to allow them to lead evidence of events that might provide *Moorov* corroboration for other charges, but which cannot themselves form the basis of charges. This may be, for example, because the accused has previously been tried (whether convicted or acquitted⁵¹) or because the events are said to have taken place in a different jurisdiction. The common law also permits dockets to be used for similar purposes in non-sexual cases.⁵²

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⁵¹ *Fisher v HMA* 2023 JC 21

⁵² *RS v HMA* [2026] HCJAC 19 at paragraph 24