Corroboration generally/Corroboration in rape etc.

Corroboration required for identification and commission

Lord Advocate's Reference No 1 of 2023

1. A full bench of 7 judges has restated the law on corroboration as being that explained by Hume. Certain earlier decisions have been overturned and disapproved (i.e. *Smith v Lees* 1997 JC 73; *Cinci v HM Advocate* 2004 JC 103 along with some dicta in *Morton v HM Advocate* 1938 JC 50).

2. For every crime, there must be more than one source of evidence but there are only two matters which must be corroborated:

1. that the crime was committed and
2. that the accused committed it.

3. It is the case on that charge which must be corroborated not the individual facts which constitute the crime. Accordingly, it is no longer required that individual elements or ingredients of a crime are corroborated. If the evidence of commission of the crime comes from a complainer or eyewitness, corroboration may be found in evidence which supports or confirms the evidence which the complainer or eyewitness has given.

4. As the full bench noted, "Hume's approach involved looking at cases holistically and in the round, based on the type of evidence normally available in the case under consideration."

5. It follows that in a case of rape or sexual assault, a piece of circumstantial evidence, such as observation of a complainer's distress de recenti by another witness can corroborate the complainer's account and thus the commission of the crime.

6. Where a witness hears the complainer's account de recenti, and witnesses emotional disturbance, ie distress, then both the distress and the complainer's reported account are viewed as real evidence, independent from the complainer, and thus corroborative of her account that she was raped or assaulted as the case may be.

7. A statement made *de recenti,* even if there is no accompanying distress, can corroborate the complainer's account of commission and identification.

In *Lord Advocate's References 2 & 3 of 2023* [2024] HCJAC 43, 2024 SLT 1207, a full bench of 9 judges determined that a witness reporting a complainer's statement, if made *res gestae* or *de recenti,* is of itself apt to corroborate her evidence of the commission of the crime. The majority of the court, 8 judges, also determined that a complainer's statement *res gestae* or *de recenti*, spoken to by another witness, is a separate source and capable of corroborating the complainer's evidence identifying the accused as perpetrator.

The same majority determined that *McCrindle* v *MacMillan* 1930 JC 56 was correctly decided and wrongly overruled in *Morton*. *Dicta* in *Morton* to the effect that evidence from another source of a complainer's statement *de recenti* could not provide corroboration were disapproved.

Duties on a judge generally in directing the jury

8. In *Garland v HM Advocate* [2020] HCJAC 46, 2021 JC 118 the appellant was charged with sexual assault of a child by compelling her to touch the appellant's penis and placing his hand inside her pants and touching and rubbing her bottom. It illustrates where corroboration can be found and also the obligations on a judge in directing the jury where the Crown speech fails to identify a relevantly corroborated case.

On the latter point, Lord Justice General Carloway said this at paragraph [20]:

> "it is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful. The judge's understanding of the AD's speech reflected the focus on the letters, or rather a letter, rather than the appellant's testimony. He left it to the jury to decide whether the letter contained "any admission". He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration."

Lord Carloway then explained where corroboration could be found. This explanation should be taken to proceed on the basis that the jury were entitled to reject the part

of the appellant's evidence in which he said that contact between the back of the complainer's hand and his penis was accidental and accept that there was such contact. At paragraph [22]:

> "The following facts and circumstances, when taken together, provided sufficient corroboration of the complainer's direct testimony. First, the relationship between the appellant and the complainer was not a familial one, or at least not strongly so. The appellant's relationship with the complainer's mother had only commenced about three months before the incident. The complainer was not living in her mother's home, but with her grandmother. Secondly, notwithstanding the relatively remote nature of the relationship, the appellant was buying the complainer presents of significant value. The jury would have been entitled to consider that he was deliberately ingratiating himself to her. Thirdly, the incident occurred when the complainer's mother was away at work and would therefore not be returning home at the material time. Fourthly, the appellant accepted that he was in bed with the complainer, that is to say an 11 year old girl, at about 4.00pm. The jury would have been entitled to regard this as unusual in a situation in which he was only supposed to be looking after the complainer in the period between her return from school and going to her grandmother's house. Fifthly, the appellant also accepted that he was in close physical contact with the complainer, involving at least cuddling, under the bedcovers. That, in itself, would have been a strong corroborative circumstance had it been spoken to by an independent eye witness, and it is no less so when it is described by the appellant. Sixthly, the appellant accepted that the complainer's hand was touching his penis, albeit over his shorts, on two separate occasions. The same consideration applies here in relation to testimony from an eye witness who might have observed this happening."

9. In *Hogg v HM Advocate* [2023] HCJAC 37, 2024 JC 54, a different bench chaired by the Lord Justice Clerk endorsed *Garland* and affirmed, at paragraph [21], that:

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

10. Nevertheless, judges must be careful not do to so having given parties to understand that they would direct on a different basis. In such circumstances a judicial change of mind ought to be communicated by the judge to the parties before speeches, and certainly before the defence speech. See *Hogg*.

In *Cowan v HM Advocate* [2024] HCJAC 35, 2025 JC 25, it was open to the jury to conclude that the complainer was asleep when she was penetrated but her evidence was not entirely clear about this and it was also open to the jury to conclude that all penetration occurred when she was awake. The prosecutor did not ask her whether or not she had consented. The Crown maintained, and the trial judge directed the jury, that sleep was the only route to a guilty verdict. The appeal court determined that, since it was open to the jury to conclude from her account that even if she was awake, she had not freely agreed to intercourse, the trial judge should have directed the jury accordingly. The jury should have been directed on the two routes to verdict available on the evidence.

Sources of corroboration

11. Corroboration may be supplied by another witness also giving direct evidence, or by a witness giving evidence of facts and circumstances which are capable of supporting the direct evidence.

12. Corroboration may also be found in an agreed fact in a joint minute or the conclusive proof of a fact in a joint minute may itself constitute full legal proof of an essential fact or facts e.g. if it is set out in a joint minute that the accused penetrated the complainer's vagina with his penis, then there is no further evidence required for identification although such evidence will often be given by a complainer.

13. Corroboration of a complainer's account may be found:

- in a statement made by an accused person either orally or in electronic messages;
- from evidence of things including CCTV footage and
- occasionally in words or noises which form part of the res gestae.

14. Very commonly, corroboration of a complainer's evidence will be sought from one or more adminicles of circumstantial evidence and emotional disturbance/distress observed by another witness is a common example. The most authoritative guidance is now to be found in the *Lord Advocate's Reference No 1 of*

2023 [2023] HCJAC 40, 2024 JC 140. There is guidance on distress elsewhere in the Jury Manual, see chapter on "Corroboration: Evidence of Distress".

Lord Advocate's Reference No 1 of 2023 determined that a report by a witness of a complainer's de recenti statement was real evidence and, when made in the context of distress, could provide corroboration of the complainer's evidence of the commission of the crime.

Lord Advocate's References Nos 2 & 3 of 2023, as noted above, determined that a report by a witness of a complainer's statement de recenti (or res gestae), is capable of corroborating both her evidence implicating the accused as perpetrator and the commission of the crime.

15. However, the circumstances which are capable of affording corroboration are wide and variable and careful consideration ought to be given to all relevant evidence in evaluating sufficiency. Examples of corroboration being found in circumstances which do not neatly follow particular examples in cases which had been decided previously can be seen in *PM v HM Advocate* [2017] HCJAC 92, 2018 SCCR 23; *LW v HM Advocate* [2020] HCJAC 50, 2021 JC 125, *Munro v HM Advocate* [2014] HCJAC 40, 2015 JC 1, and *Garland v HM Advocate* all of which are discussed below.

16. Most of these cases proceeded on an analysis of where corroboration might be found for constituent elements of the offence, an approach now disapproved and consigned to history by the full bench in *Lord Advocate's Reference No 1 of 2023*.

Corroboration from an implied admission

17. In *CR v HM Advocate* [2022] HCJAC 25, 2022 JC 235, where the appellant was charged with specific crimes of lewd, indecent and libidinous practices against two complainers, the court agreed with the trial judge that it was open to the jury to find corroboration from implied admissions made in response to a non-specific allegation by a complainer that he had sexually abused her.

18. It was also open to the jury to find corroboration when a non-specific allegation by one of the complainers in the presence of the other, "…you know why we're here. You have to admit it because I can't take any more of this…[the second complainer] can't take any more and we need to talk about what happened" was met with the appellant replying: "I couldn't help myself but I'm not like those people you hear about on the radio, on the news."

19. The court rejected the proposition that there had to be evidence of the detail of the conduct in question having been put to the appellant, to which his answers were a response, before the answers could be regarded as an admission.

The court distinguished *Gracie v HM Advocate* 2003 SLT 217 and *G v HM Advocate* 2012 SLT 999, casting some doubt about the soundness of the decision in *Gracie* at paragraph [15] of the opinion, before explaining:

> "[19] If the impression has been gained from Gracie and G that only unequivocal admissions in the clearest terms may provide corroboration of a crime, that is not consistent with long established authority. In the first place, such an approach would not be consistent with the law on corroboration. In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact (*Fox v HM Advocate* 1998 JC 94). The trial judge properly directed the jury that where there is a primary source such as an eye witness,
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> "all that is required for corroboration is evidence that provides support for or confirmation of, or fits with the main source of evidence about an essential fact."
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> [20] In relation to admissions, it is well established that it is not only clear and unequivocal admissions which have evidential value. In *Greenshields v HM Advocate* 1989 SCCR 637 a reply to being cautioned and charged for murder and dismemberment that "You don't think I did it myself do you; but I'm telling you nothing about it until I see my lawyer", was considered to be capable of constituting an implied admission to murder."

20. In *Lingard v HM Advocate* [2023] HCJAC 42, 2024 JC 46 in giving the opinion of the court, the Lord Justice General noticed and applied the reasoning of the court given by the Lord Justice Clerk in CR. He explained:

> "[17] In *CR v HM Advocate* it was said (Lord Justice Clerk (Lady Dorrian), delivering the opinion of the court, at paragraph [15]) that:
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> "Whether, and to what extent, a comment or reply made by an accused person may properly be regarded as an admission is a fact specific question, the answer to which depends on the nature and content of the comment and the circumstances in which it was made. The contextual situation is important."

> [18] The court agrees with the rationale in *CR v HM Advocate* and is unable to identify any reason to distinguish it from the present case…"

21. The court in *CR* "*readily distinguished*" both *Gracie v HM Advocate* and *G v HM Advocate* because in these cases, "rightly or wrongly", there was insufficient means by which to identify the nature of the conduct to which the accused's comments were related. In *CR*, the context was "clearly an allegation of having sexually abused" the complainer. The court was at pains to point out that, if *Gracie* or *G* had given the impression that only unequivocal admissions in the clearest terms could provide corroboration, that was not consistent with authority. It was sufficient if the admission was capable of providing support for, or confirmation of, or fitted with, the principal source of evidence (*Fox v HM Advocate*). It was not only clear and unequivocal admissions which had evidential value (*Greenshields v HM Advocate*). *CR v HM Advocate* has been followed in *WM v HM Advocate* [2022] HCJAC 28, 2022 JC 248.

The significance of failing to challenge or refute an accusation

22. In a case of assault, *WM v HM Advocate*, the court examined a conversation in which there was an allegation put to the appellant which he did not challenge or refute. The principles are equally relevant when considering corroboration in other cases.

There were charges of assault against each of complainers A and B and clear admissions in respect of B. Complainer A had given a statement, which was evidence in chief per section 271M of the 1995 Act, implicating the appellant in repeatedly assaulting him by hitting him to the head and that sometimes his mother would tell the appellant to stop it but retracted it on commission, saying his grandmother had made him say it. The court noted that the jury could reject the retraction and prefer what was in the statement. The issue in the appeal was whether there was free-standing corroboration of the charge featuring A. The relevant evidence came in a telephone call with JG, the mother of both A and B. The court explained:

> "[5] The corroboration relied on was in the form of comments made by the appellant in the course of telephone calls made between him and JG during his period on remand, which calls had been recorded and transcribed. Much of the content related to assaults on B. There were however other passages relied on in relation to A.

> [6] In one call the two were discussing the children in general, albeit with some specific reference to B, and the issue of his parentage. The appellant stated that he wanted all the children "Every single wan ah them" home (they were by then in foster care). JG disputed this, repeatedly saying "Naw ye don`t". and "Naw ye don`t … ye don`t even give a Fuck". The appellant then said "They`re aw ma boys ….aye they are, that`s the wie ah see them". The conversation continues with comments about child B, and then turns to the issue of the appellant`s past disciplining of the children where he says-
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> "An even you, even you did me for when Ah grabbed G by the face. Ah know Ah've done that a couple of times an you get me tolt for that baby an Ah love you for it. Stop bein that rough wi him he`s only fuckin 10 an aw that baby. Ah love you for that Ah dae. Ah dae baby so see it doesnae matter what anybody…. See any times that Ah have wanted tae an Ah`ve been beelin` baby you shout, you shout behind me they`re only fuckin weans you, fuckin wrap it and it makes me stop you know that dain`t ye?"
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> [7] There shortly follows a further exchange as follows:
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> "Appellant … Ah`m sorry ..for all the bad years we had. Am ur. They fuckin haunt me baby. JG Baby it`s awright. Appellant: They geen me the guilty heed baby. Ah`m sorry baby. JG Well stop hittin them. Appellant Yer ten times better than that baby. You`re a million times better than one, you`re ma darling you ur. Man you`re no even that an aw you`re ma big smoking hot darling".

In determining that it was open to the jury to find corroboration from this conversation, the court applied *Fox v HM Advocate* and concluded:

> "[13] The statement "Well stop hittin' them" was made in the context of a much broader conversation in which the appellant made comments regarding his attitude and behaviour towards the children in question. The fact that he did not remonstrate with the comment, deny or dispute it, may be a relevant factor in considering what to make of the conversation as a whole, but it is the conversation as a whole which must be examined to identify whether the evidence may properly be said to be criminative of the accused.
>
> [14] The statement made by JG to the appellant was made in the course of a conversation in which the appellant refers to disciplining the children to such an extent that JG required to intervene to stop him. This also accords with the evidence of A regarding JG, that "She 6 tells ma dad to stop it." It would be

> open to the jury to treat the relevant parts of the conversation as criminative of the appellant having hit the children, including A. It is correct to say that the trial judge did not give specific directions in relation to the failure of the appellant to respond to what was said by JG. However that was not the real issue: the real issue, as his directions made clear, was whether the conversation provided corroborative support for the primary evidence. The trial judge directed the jury that the content of this, including to some extent what was said by JG, could provide independent corroboration. The jury were directed that it was a matter for them to determine the significance of what was said in the phone calls, and that the conversations had to be taken as a whole. The evidence of the conversation as a whole was clearly capable of providing support for the primary evidence in the case. The appeal will therefore be refused."

23. *LC v HM Advocate* [2022] HCJAC 47, a case of rape constituted by penetration continuing after the withdrawal of consent, illustrates a situation where the appeal court decided that the jury could not reasonably infer that the appellant's answer at police interview was an admission capable of corroborating the complainer's evidence (paragraph [20]). The trial judge's direction to the jury that it could constitute corroboration was found to be a material misdirection.

24. Where the Crown had proposed another answer as a possible source of corroboration, and the judge had suggested to the jury that it was not but did not give an explicit direction to that effect and may have left the jury thinking that it was a matter for them to determine, this was also held to be a misdirection (paragraph [19]).

25. It remains open to question whether nonetheless the jury could have accepted one part of the appellant's admissions, "*she said stop*," and rejected another, that he had then immediately stopped.

26. Once past the stage of no case to answer, evidence given by the accused or a defence witness may provide a further source of corroboration of commission and/or identification.

Assessing sufficiency

27. In considering a submission on the sufficiency of evidence, and whether evidence is capable of affording corroboration, the correct approach is to take the evidence at

its highest and, for circumstantial evidence to be interpreted in the way most favourable to the Crown as Lord Justice General Carloway explained in *LW v HM Advocate*:

> "[12] Where absence of consent is to be corroborated by circumstantial evidence, the question will be whether the circumstances are capable, in combination, of yielding an inference which supports or confirms the complainer's testimony. When this arises as a question of sufficiency, the evidence relied upon by the Crown is to be taken at its highest. It is to be interpreted in the way most favourable to the Crown (*Mitchell v HM Advocate* [2006] HCJAC 84, 2008 SCCR 469, Lord Justice General (Hamilton), delivering the opinion of the court, at [106])."

What is required of corroboration?

28. As the introductory written directions explain, corroborative evidence does not need to be more consistent with guilt than with innocence. All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with, the main source of evidence about an essential fact. This was stated to be the law in the full bench decision of *Fox v HM Advocate* and was applied in *Chatham v HM Advocate* [2005] HCJAC 49, 2005 SCCR 373. The full bench in *Lord Advocate's Reference No 1 of 2023* referred to Fox approvingly (see paragraphs [193] and [220]). It was applied and restated in the context of implicit admissions in a series of appeal decisions in June, July, and August 2022; see paragraphs [17] to [22] above. If a judge is directing a jury, the judge must have been satisfied that there is evidence which is capable of providing corroboration and it will then be for the jury to decide whether it does.

29. As Lord Justice General Carloway explained in *Garland v HM Advocate*, at paragraph [21]:

> "...where the question is whether proof of certain facts and circumstances affords sufficient corroboration of direct testimony, it is not necessary for those facts and circumstances to be more consistent with the direct evidence than an explanation or account given by an accused. It is sufficient that they are capable of confirming or supporting the complainer's testimony. It is a matter for the jury to determine whether to accept the facts and circumstances as corroborative or to interpret their meaning in a different manner."

Identification

30. As a matter of generality, it is long established that where there is a positive and unequivocal identification of the accused by an eye witness, very little else is required to provide corroboration (*Ralston v HM Advocate* 1987 SCCR 467). In *Ralston* a second witness speaking to a resemblance was sufficient. Adoption of the principle in the sexual offence context is seen in *WMD v HM Advocate* [2012] HCJAC 46 and *PM v HM Advocate* discussed below. It has been suggested that the phrase "very little else is required" should not be used in directions (*Kearney v HM Advocate* [2007] HCJAC 3, Lord Johnston giving the opinion of the court at paragraph [31]).

Corroboration in rape cases etc

31. In most, but not all, cases of rape and sexual assault the principal source of evidence will be the complainer who is likely to speak to the identification of the accused, the requisite act of penetration or other sexual activity and the absence of consent. Identification is not usually in dispute in such cases, it is often the subject of a joint minute and there is rarely any difficulty with corroborating the identification of the accused.

32. Even if a complainer does not say in terms that there was no consent, its absence can in appropriate circumstances be legitimately inferred from the complainer's account of the whole circumstances.1 A more recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no “free agreement” in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T drive, “Appeal opinions, pre-trial” folder. Guidance was given to the same effect in *Cowan v HM Advocate*.

33. In *HM Advocate v SM (No 1)* [2019] HCJAC 39, 2019 JC 176 the court explained that the definition of consent, free agreement, introduced by the Sexual Offences (Scotland) Act 2009 did not innovate on what consent already meant at common law. Accordingly, what was decided in the cases referred to in the preceding paragraph is relevant also for common law rape. Please note that, in the rare case in which an issue may arise as to the accused's state of mind, i.e. whether he lacked an honest (common law) or reasonable (2009 Act) belief, corroboration is not required and any

necessary inference can be drawn from the evidence of the complainer (see *Briggs v HM Advocate* [2019] HCJAC 63, 2019 SCCR 323 (common law) and *Maqsood v HM Advocate* [2018] HCJAC 74, 2019 JC 45 (2009 Act)). This was re-affirmed in *AA v HM Advocate* [2021] HCJAC 9, 2021 JC 190 and by a full bench in *Duthie v HM Advocate* [2021] HCJAC 23, 2021 JC 207.

Particular examples

34. Against this background, it may assist judges to note examples of situations in which evidence was once authoritatively determined to be sufficient to constitute corroboration in cases of rape which may be relevant when considering sufficiency at the close of the Crown case, or the close of the evidence, or when formulating closing directions.

NB The following decisions come from an era in which the court was looking for corroboration of elements rather than considering matters holistically as the law now requires. Whilst they are illustrative of what the effect of certain kinds of circumstantial evidence was considered to be, they must now be considered through the lens of the law as now explained in *Lord Advocate's Reference No 1 of 2023*.

35. It was observed that dishevelment of a complainer's clothing could in certain circumstances corroborate the complainer's account of penetration.

In *Jamal v HM Advocate* [2019] HCJAC 22, 2019 JC 119 in giving the opinion of the court at paragraph [20], Lord Justice General Carloway explained in a passage of general relevance, that:

> "There is no sound reason for restricting the availability of corroboration of the act of rape to the type of scientific, medical or other evidence set out above. In relation to penetration, corroboration can be found in facts and circumstances which 'support or confirm' the direct testimony of the commission of the completed crime by the complainer (*Fox v HM Advocate*, Lord Justice-General (Rodger), p 100). In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in *Smith v Lees* (Lord Justice-General (Rodger), p 79). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an

> extreme nature, as a significant factor which, at least when taken with other circumstances, 'supports or confirms' a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape, in whatever form, can be seen as being corroborated when all the surrounding facts and circumstances are taken into account."

36. The finding of the appellant's pubic hair inside the crotch area of the complainer's pants was held to be capable of corroborating a complainer's account of penile/vaginal penetration.

See also *Munro v HM Advocate*. In giving the opinion of the court at paragraph [7], Lord Justice Clerk Carloway explained, in refusing the appeal, that:

> "...Where there is an allegation of rape, which of course involves proof of sexual intercourse in the sense of penetration, the finding of an accused's pubic hair adhering to the inside crotch area of a complainer's pants will support the complainer's testimony that sexual intercourse occurred. In that connection, it is not something dependent upon a scientific view of consistency, as a scientist rather than a lawyer would use that term, but whether an appropriate inference of fact can be drawn by a jury."

37. The finding of the appellant's DNA in semen in-mixed with DNA from the complainer on a duvet cover found some months after the incident on the bed on which the complainer said she was raped could corroborate the complainer's account of penetration.

In *Palmer v HM Advocate* [2015] HCJAC 126, 2016 SCCR 71 in giving the opinion of the court at paragraph [11], Lord Justice Clerk Carloway explained, in refusing the appeal, that:

> "...There is evidence that the duvet cover had been on the complainer's bed at the material time. The finding of the appellant's semen, in-mixed with the DNA of the complainer, was indicative that there had been sexual activity involving ejaculation by the appellant on that bed. That provided sufficient support or confirmation of the complainer's evidence that penetration had taken place."

Consent, distress, injury etc

38. The complainer's account of the commission of the crime may in certain circumstances be corroborated by the presence of injury on a complainer's person or by evidence of emotional disturbance or distress observed by another witness, and in certain circumstances by evidence of damage to clothing. These are just some examples of circumstantial evidence capable of providing corroboration of a complainer's evidence.

Corroboration found by inference from the nature of family relationships

39. *LW v HM Advocate*, paragraph [12] of which is quoted above, also provides an illustration of how the absence of consent could be corroborated by inference from the nature of the family relationships of those involved. There was a section 259 statement by a deceased complainer implicating her father as having raped her on various occasions when she was between 16 and 19 and he was between 28 and 31. Intercourse was corroborated by a joint minute which established that the appellant had fathered the complainer's child. The part of the decision relevant to the corroboration of the absence of consent starts by noting, at paragraph [11], that incest is a cultural taboo before explaining, in paragraph [12], how sufficiency is to be evaluated.

The circumstances from which the necessary inference could be drawn were then explained:

> "[13] In the complainer's situation, not only had she been in a close family relationship with the appellant, which was in effect one of parent and child, she had also been in that relationship since childhood. There was a significant age gap between the appellant and the complainer, albeit not one that would cause concern in relationships involving adults. The complainer's mother was in a continuing relationship with the appellant. It is the combination of these circumstances, which permits an inference to be drawn, that provides confirmation or support for the complainer's account that sexual relations with her stepfather took place without her consent."

Corroboration in a case where the complainer was asleep or otherwise incapable of consenting because of the effect of alcohol etc

40. *HM Advocate v Bilaal Afzal* [2019] HCJAC 37 demonstrated that it was the absence of consent which had to be proved on the basis of corroborated evidence and not necessarily the fact of being asleep.

41. The accused was charged with raping the complainer, "while she was asleep and incapable of giving or withholding consent." The trial judge upheld a submission of no case to answer on the ground that there had to be corroborated evidence that the complainer was asleep and whilst one witness had spoken to that, that was not precisely what the complainer had said. She spoke of being awake but hazy when she felt her vagina being penetrated by a penis. The Crown's appeal was sustained, Lord Justice General Carloway explaining that:

> "[7] The complainer gave evidence that she had not consented to having intercourse with anyone other than Kamil. There was scientific evidence that she had intercourse with someone other than Kamil. That other person was the respondent, as testified to by the witness and as demonstrated by the DNA findings. Taken at its simplest, the witness said that the complainer was asleep at the material time. There is scientific evidence of intercourse having taken place with the respondent. The complainer said that she did not consent to having intercourse with the respondent. In these circumstances the jury would be entitled to find that the complainer had not consented to intercourse with the respondent, but that such intercourse had taken place. That would entitle the jury to return a verdict of guilty of rape. There is a sufficiency of evidence in that regard."

42. Reference was made in submissions to *Van Der Schyff v HM Advocate* [2015] HCJAC 67, 2015 SCL 783. In *Van Der Schyff*, the charge was sexual assault, under section 3 of the 2009 Act, and the libel so far as can be ascertained from the judgment included averments that the complainer had been asleep and whilst she was incapable of withdrawing or giving her consent the assault had occurred. The complainer's evidence was that she had awoken to find that her underwear had been removed but was drowsy and affected by alcohol and felt unable to say or do anything to stop the accused touching her vagina. She did not consent.

Somewhat surprisingly, the sheriff directed the jury that it was necessary for the jury to accept that the complainer was asleep, but the phrase "*asleep and*" was deleted in

their guilty verdict, but the phrase, "*whilst she was incapable of withdrawing or giving her consent*," remained. The appeal court rejected a submission that there was a miscarriage of justice where the appellant's argument was that the verdict was contrary to the sheriff's direction.

In paragraph [14], Lord Justice Clerk Carloway, giving the opinion of the court, observed:

> "...The sheriff could have given a specific direction that the jury could have deleted the whole element of the libel in relation to capability of giving consent, but his general direction on that matter was sufficient..."

43. This may be seen as supporting the view, urged on the jury at the trial by the fiscal depute and on the appeal court by the advocate depute, that the jury could, on the evidence, have properly convicted even if all reference to capability of consent was deleted. Such an interpretation would be consistent with the decision in *Afzal*.

See also *Cowan v HM Advocate*.

44. Where the allegation is that intercourse occurred because a complainer was incapable on account of the effect of alcohol of consenting, it was determined by the court in *Maqsood v HM Advocate*, Lord Justice General Carloway giving the opinion of the court, that:

> "[19] In a case, as here, where intercourse is admitted or otherwise proved, and the Crown contend that the complainer was incapable of consent as a result of the effect of alcohol, that incapacity does require formal proof. It will be proved where the complainer speaks to such a state (as the complainer did here) and there is supporting evidence of that state. The corroboration in this case came from the evidence of the complainer's friend, the bar staff, the CCTV recording and the complainer's boyfriend and his mother. In this situation it is the complainer's state of intoxication, rather than any distress, that is important. If it is held that the complainer could not consent because of the effects of alcohol, that is all that is required as a matter of sufficiency. The jury would still have to consider an accused's evidence that the complainer was not so incapacitated through drink that she could and did consent, but that is another matter."

45. In *HM Advocate v MMI* [2022] HCJAC 19, 2022 SLT 1150, where there was evidence suggestive of the complainer's substantial intoxication before and after an

act of intercourse which followed her being picked up by a stranger in a bar, it was open to the jury to infer that she had been incapable of consenting at the time of the incident.

The Lord Justice General explained at paragraph [9] of the opinion of the court:

> "It is important to note at the outset that a judge does not have the power to direct a jury to return a not guilty verdict on the ground that no reasonable jury could convict (Criminal Procedure (Scotland) Act 1995, s 97D). This differs from the position in England and Wales (*R v Galbraith* [1981] 1 WLR 1039, Lane CJ at 1042). Where no issue of corroboration arises (and there is none in this case), it is only where there is no evidence from which a jury can infer that a fact in issue is proved that a no case to answer can be sustained. Where the issue is one of capacity to consent, that is to reach a "free agreement" (Sexual Offences (Scotland) Act 2009, s 12), it will rarely be open to a judge to sustain a submission where the evidence is of a young woman, "alone at night and vulnerable through drink, [who] is picked up by a stranger who has sex with her within minutes of meeting her". This is only a partial quotation from Hallett LJ in *R v H* [2007] EWCA Crim 2056 (at paragraph [34]), where the complainer was only 16 and had said that she would not have consented in the circumstances. However, the court agrees with Hallett LJ that issues of consent and capacity to consent should normally be left to the jury to determine. So it is the case here."

46. However, evidence of distress was already recognised as having a part to play as illustrated in *Wright v HM Advocate* [2005] HCJAC 117, 2005 SCCR 780 where the complainer's evidence that she was asleep and awoke to find the appellant penetrating her was capable of being corroborated by evidence from her husband that she had gone to bed between 9.30 and 10.30pm, and at 11pm was seen to be wearing a nightgown and in a state of distress after the appellant left her room. These circumstances were capable of supporting her evidence that she was asleep and the court also observed that, "*distress was, in the particular circumstances, an important element of the total picture.*"

It is more than that now.

47. *Fox v HM Advocate*, Lord McFadyen had directed at first instance that distress could corroborate the complainer's evidence that sexual intercourse took place against her will and it is apparent that evidence about the complainer being drunk,

being sick and being put to bed along with evidence of distress was considered to be sufficient corroboration, penetration being amply proved by the complainer's account and an admission by the appellant.

The libel, taken from the report at 1998 SCCR 115, narrated:

> "[O]n 4th June 1995 at 19 Glenartney Terrace, Perth, you did assault [A.T.] and while she was unconscious, asleep, then under the influence of alcohol and bereft of the power of resistance, remove her bra and pants, handle and insert your fingers into her private parts, force her legs apart, lie on top of her and have sexual intercourse with her without her consent, to her injury."

Lord Justice General Rodger explained that:

> "The essential elements in the charge of clandestine injury were (1) that the appellant had intercourse with the complainer and (2) that at the time of the intercourse she was in such a state of intoxication as to be incapable of consenting or not consenting to sexual interference. The Crown therefore required to prove these elements by corroborated evidence. The first element was not in doubt since the appellant admitted the intercourse. So far as the second element was concerned, the trial judge directed the jury that corroboration of the complainer's evidence that she had not consented could be found in the evidence of various witnesses that she had been in a state of distress following the sexual encounter with the appellant."

The trial judge had directed the jury, according to Lord Rodger's paraphrase:

> "... on what can constitute corroboration of her evidence that intercourse took place without her consent while she was asleep. The trial judge first refers to the evidence about the complainer being drunk, being sick and being put to bed. He then continues:
> 'Another matter to which you are entitled to have regard is the evidence about the complainer's distressed state immediately after the alleged incident...'"

48. Whilst much of the reasoning in the case is directed at overturning Lord Hope's decision in *Mackie v HM Advocate* 1994 JC 132 all of the judges agreed with Lord Rodger's, and the trial judge's decision, that there was sufficient evidence to permit the conviction of the appellant of clandestine injury.

49. It should be noted that *Fox* was decided in 1998 and the opinion in *Van Der Schyff* and the decision in *Afzal* may be taken as what was at this time a sound illustration of what was required to prove a charge of rape where identification and penetration had been established; simply that the complainer did not consent.

Miscellaneous

50. In *PM v HM Advocate* issues arose as to corroboration of identification and commission in a charge libelling sexual offending against a child aged between 3 and 5 which included sexual touching, digital/anal penetration and oral penetration and thus rape. She was 5 and 6 when she gave her accounts in a series of joint investigative interviews which formed evidence in chief. The facts of the case are quite complex and are not fully summarised here.

51. The last date of the libel was 15 April 2015 and the complainer's mother spoke to the appellant being the only male in their house that day and to his having opportunity and to other circumstances, which included the complainer's ability to describe lesions on the appellant's penis, the presence of which was also spoken to by the mother, were sufficient to provide the very little which was required to corroborate the complainer's identification (see paragraphs [27] and [28] of the opinion).

52. In paragraph [29], the court was discussing corroboration of averments which included digital penetration of the child's anus using a lubricant and penile penetration of her mouth.

> "...The descriptions and simulations given by this very young complainer in her recorded evidence were indicative of knowledge of sexual matters which would not be expected of a girl of the age of this complainer. The evidence of [a psychologist that the sexual knowledge exhibited by the complainer was unusual for a child of her age] was one of the elements of the body of circumstantial evidence which supported the complainer's account. Further elements included the lesions on the appellant's penis, which the complainer was able to describe accurately; this, and her description of the appellant's penis as being "hard like bones", is consistent with the complainer's face being very close to the appellant's erect penis, and indeed, being in physical contact with it. There was the evidence about the blue coloured lubricant, which "tingled" and felt like it burned, and the evidence of the complainer's mother in this regard. Taking all the factors to which the advocate depute referred us,

> we are satisfied that there was ample circumstantial evidence available to the jury, should they choose to accept it, to provide sufficient support for the complainer's account. We do not consider that there is substance to the first or second grounds of appeal."

53. At paragraph [30], the court affirmed the soundness of the trial judge's directions that accurate gestures representing sexual activity which the child was able to act out for the camera recording the joint investigative interview was not a statement de recenti but evidence of behaviour from which, in combination with the evidence of the psychologist and the application of common sense, incriminating inferences could be drawn supportive of her evidence of what had been done to her.

Is corroboration required for the use of a knife in a charge of rape? - No

54. In *Yates v HM Advocate* 1977 SLT (Notes) 42, also reported as a note at page 378 of the report of *Moore v HM Advocate* 1990 JC 371. The terms of the charge are not reproduced in either report and so care is needed in determining what can be taken from it but, in a case in which the complainer gave evidence that she was compelled by threats with a knife to go to a secluded place where the appellant had raped her, the court concluded on appeal that distress was capable of corroborating her account and it was not necessary for there to be distinct corroboration for the use of the knife. Although there was no corroboration from any source that a knife was used, the jury was entitled to convict of rape leaving the reference to the knife in the libel.