



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 42
HCA/2025/000021/XM

Lord Justice General
Lord Justice Clerk
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in the Reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995

by

HIS MAJESTY'S ADVOCATE

against

PK

Respondent

Lord Advocate: Solicitor General for Scotland (Gill KC), Harvey AD, Cox AD; the Crown Agent
Respondent: Jones KC, Loosemore, Simpson; PDSO, Dundee

25 September 2026

Introduction

[1] This is another case about corroboration of sexual offences. It follows on from *Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40, 2024 JC 140 and *Lord Advocate's References Nos 2 and 3 of 2023* [2024] HCJAC 43, 2025 JC 200. The respondent was convicted after trial in the High Court of ten charges, including eight charges of rape and sexual assault against two complainers. The Crown led evidence from two forensic biologists; they each testified that sperm cells attributable to the respondent were found on swabs taken

from one of the complainers shortly after the incidents labelled in two of the charges. The trial judge directed the jury, in light of the Full Bench decision in *Lord Advocate's Reference No 1 of 2023*, that this evidence was capable of corroborating the complainer's account that she had been raped. The respondent lodged a Note of Appeal against conviction on the grounds that the judge erred in this direction and that there had been a miscarriage of justice. He abandoned the appeal shortly before it was due to be heard.

[2] The Lord Advocate has taken the opportunity to seek further guidance from this court on how the law set out in *Lord Advocate's Reference No 1 of 2023* ought to be interpreted and applied in such circumstances. The questions referred for the court's opinion concern the corroborative effect of circumstantial evidence which supports and confirms a principal source on one of the facts constituting the crime but, when looked at in isolation, is not itself incriminatory. The issues include whether forensic-scientific evidence confirming penile penetration of a vagina, anus or mouth by an accused can corroborate a complainer's account that she has been raped. Looked at on its own, such evidence is equally consistent with the intercourse having been consensual. For the purposes of corroboration, does this matter?

Indictment and evidence

[3] Nine of the charges of which the respondent was convicted related to his conduct towards his former partner, VW. They travelled together to Scotland from Poland in 2015 and have a 13-year-old son, AB. They separated in October 2018 when the respondent moved out of their shared home, although they continued to have frequent contact for social and childcare purposes.

[4] Charge 1 concerned the sexual assault of VW's twin sister, MO, in 2018. She gave evidence that the respondent led her to a bedroom in his flat under false pretences, grabbed her breasts and threw her onto a bed before lying on top of her. The assault ended when she managed to push him off.

[5] Charges 4, 10, and 12 each libelled rape of VW on various occasions between 1 February 2018 and 4 June 2022. The evidence in support of these charges followed consistent themes: the respondent would pester VW, often while he was under the influence of alcohol, and would force himself upon her when she had repeatedly told him no.

[6] Charges 9 and 13 were charges of sexually assaulting VW in May and July of 2022. The conduct in charge 9, seizing VW's breasts, was witnessed by a friend. The offending in charge 13 was particularly violent, the respondent having dragged VW across a carpet and onto a landing before sexually assaulting her and shouting that she "belonged to him".

[7] In addition to the eight sexual charges, charges 14 and 16 libelled that the respondent breached bail conditions that he must not approach or contact or attempt to approach or contact VW. He breached these bail conditions on two occasions, having been granted bail on 14 July 2022 and again on 26 December 2022.

Charges 7 and 15

[8] The conduct in charge 7 took place on 18 January 2019. By this time VW had separated from the respondent. She was visiting MO at her flat in Dundee. The respondent lived a few floors above in the same block of flats. He was supposed to be looking after AB, and VW went to check on him. The respondent was drunk. They had an argument and she left, returning to MO's flat. The respondent followed her, and a further argument ensued.

When she sat on the sofa, the respondent sat on her lap. He tried to undress her and tore off

her leggings. He grabbed her legs, threw her off the sofa onto the floor, sat on her, and started touching her breasts. He tried to insert a finger into her anus and he touched her groin. He lay on top of her and penetrated her vagina with his penis. There was a moment when she kicked him off, but he came back. She shouted at him to take care of their son and not be pre-occupied with sex. When he stopped raping her, he left as if nothing had happened. VW reported the incident to the police the next day. She was forensically examined, and swabs were taken. She told Dr Kunwar that she had been raped. Dr Kunwar gave evidence that VW had complained of a burning sensation in her genital area; this was consistent with penetrative trauma. She was unable to tolerate the insertion of a proctoscope.

[9] Charge 15 libelled that the respondent raped VW between 31 December 2022 and 2 January 2023. VW was at a flat near to where the respondent lived. She was very drunk and she was taken to the respondent. She did not feel well, so she went to bed. The respondent entered the room and tried to touch her breasts and remove her underwear. VW started vomiting and told the respondent to leave her alone. He left her for a while but returned and pestered her for sex. She had no strength to resist because she was too drunk and too tired. He raped her, vaginally and anally, on several occasions. VW reported the incident to the police two days later.

Scientific evidence and joint minutes of agreement

[10] The Crown led evidence from two forensic biologists, Dr Jonathan Bevan and Dr Sarah Milne. Dr Bevan explained that sperm cells attributable to the respondent were found on high vaginal swabs taken from VW on 19 January 2019, the day after the conduct libelled in charge 7. Dr Milne gave similar evidence, in that semen attributable to the

respondent was found on endocervical and low vaginal swabs taken from VW on 4 January 2023, shortly after the conduct in charge 15.

[11] It was agreed by the parties in a Joint Minute of Agreement that DNA attributable to the respondent was found on various swabs taken from VW, consistent with the penetration of her vagina as libelled in charges 10, 12 and 15. It followed that the only charge of rape that was not supported by medical evidence of penetration or agreement as to penetration was charge 4. In addition, it was agreed in relation to charge 13 that DNA attributable to the respondent was found on the waistbands of VW's pants and shorts and on breast swabs taken from her on 11 and 12 July 2022.

Defence position

[12] The respondent gave evidence at trial. He denied raping VW. Whenever they had sex, it was always with her consent.

Speeches and charge

[13] The Advocate Depute invited the jury to apply the principle of mutual corroboration. He did not invite the jury to find that the scientific evidence supporting penetration could corroborate VW's account that she had been raped. However, when discussing charge 7, the Advocate Depute explained that:

"The essentials of the crime that require corroboration are that the crime happened and that the accused did it. And in that and subsequent charges where the DNA shows (*sic*) the presence of semen within the vagina, there's no question that there was sexual intercourse. There are two different ways of looking at this, from a lawyer's perspective, what we do is measure the sufficiency of the evidence for you to even be asked the question. In these charges there is a sufficiency of the evidence."

At times the Advocate Depute spoke of DNA findings supporting the crime of rape occurring. It is plain from the transcript of defence counsel's speech that he understood this to be an aspect of the Crown case. Defence counsel repeatedly reminded the jury that evidence of DNA findings did not inform whether sexual intercourse was consensual. Such findings were not capable of advancing the Crown case when the appellant accepted there had been instances of sexual intercourse but maintained they were consensual.

[14] The trial judge took considerable care in charging the jury on corroboration. He directed them repeatedly that both the commission of an offence and that the accused committed it must each be proved by evidence from more than one source. The elements of each charge were descriptive only; they did not require corroboration. Corroboration of the commission of an offence could be found in any evidence which supported or confirmed the complainer's account. He carefully and comprehensively directed the jury on the doctrine of mutual corroboration. As for standalone corroboration, distress evidence, if accepted, could corroborate a complainer's evidence about what happened during the incident so long as it was considered genuine and at least in part due to the nature of the incident. A *de recenti* statement could also corroborate a complainer's account.

[15] In directing the jury on each charge, the judge explained that charges 1 and 4 relied wholly on mutual corroboration. Charges 7, 9, 10, 12, 13 and 15 did not depend on mutual corroboration. Each of them could stand alone. Charge 7 could be corroborated by the evidence of sperm cells matching the respondent's DNA present in the high vaginal swabs taken from VW, and by the evidence of Dr Kunwar that VW had reported experiencing a burning sensation in her genitals. Charge 9 could be corroborated by direct eyewitness testimony. Corroboration for charges 10 and 12 could be found in the contents of the Joint Minute and in the evidence of Dr Milne regarding the presence of semen attributable to the

accused found on the vaginal and endocervical swabs taken from VW, together with the evidence of injuries observed on VW's body shortly after the incidents. Charges 13 and 15 could be corroborated by the distress exhibited by VW shortly after the incidents, the *de recenti* statements she made and by the discovery of the respondent's DNA on VW's pants, shorts, breasts and in her vagina.

The Reference

[16] The Lord Advocate has referred the following questions to the court under section 123(1) of the 1995 Act for authoritative guidance:

- (1) Can forensic-scientific evidence of penetration of the complainer's vagina by the accused's penis corroborate the complainer's account of rape?
- (2) Can forensic-scientific evidence of the accused's DNA on the complainer's clothes or breasts corroborate the complainer's account of sexual assault/assault with intent to rape?
- (3) Can any piece of direct or circumstantial evidence of penetration of the complainer's vagina by the accused corroborate the complainer's account of rape?
- (4) Can any piece of direct or circumstantial evidence which, before *Lord Advocate's Reference No 1 of 2023*, could only corroborate one element of the crime now corroborate the whole case against the accused?

Trial judge's report

[17] In a detailed and helpful report, the trial judge explained the reasoning for his direction that the jury could find corroboration of the complainer's evidence in relation to

charges 7 and 15 in the scientific evidence of the presence of the accused's sperm cells on the vaginal swabs taken from the complainer. The Full Bench in *Lord Advocate's Reference No 1 of 2023* made clear that what required corroboration was the account of the complainer rather than each "ingredient" of a crime. It would be wrong, standing that decision, to regard the scientific evidence as corroborative specifically, and exclusively, of the fact of penetration. Properly understood, such evidence corroborated the case, in other words the complainer's allegation or account of the commission of the crime. The corroborative evidence did not need to be more consistent with guilt than innocence. It followed that the DNA evidence was capable of being corroborative of the complainer's account that she had been raped.

Submissions

[18] The Crown and the respondent lodged detailed written submissions accompanied by a joint bundle extending to no fewer than 127 authorities. While adopting their written submissions in full, parties were agreed that the questions for the court turned solely on an interpretation of *Lord Advocate's Reference No 1 of 2023*. The main themes of the respective submissions may be summarised as follows.

Crown

[19] The Reference raised no new issue of principle beyond what the court decided in *Lord Advocate's Reference No 1 of 2023*. Corroboration ought not to be an overly technical matter; it should have clear and simple rules. For the court to answer "no" to any of the questions posed by the Reference would involve a failure fully to understand the logic of *Lord Advocate's Reference No 1 of 2023*.

[20] There was no requirement for the Crown to prove the separate elements of a crime by corroborated evidence. What required to be corroborated was the complainer's account (*Lord Advocate's Reference No 1 of 2023* at [235] and [239]). There was no requirement for corroborative evidence to be more consistent with guilt than innocence (*Fox v HM Advocate* 1998 JC 94, Lord Justice General (Rodger) at 100 H-I and 101 C-D and Lord Justice Clerk (Cullen) at 109 C). Circumstantial evidence was a valid and valued form of evidence for the purposes of corroboration (Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1819), ii, 383 and 384). Where the evidence was a mixed statement, for example an admission to penetration but with consent, the innocent explanation did not preclude the statement being corroborative (*Fox*, Lord Justice Clerk (Cullen) at 109 C). What mattered was the concurrence of testimony (*Megrahi v HM Advocate* 2002 JC 99, Lord Justice General (Cullen) at [34] – [36]). Where a complainer testified that she had been raped, DNA and other forms of circumstantial evidence confirming penetration supported and confirmed her account and was therefore corroborative.

[21] The rule that circumstantial evidence supporting and confirming the principal source provided corroboration was not category specific. It applied to all categories of circumstantial evidence, including *res gestae* and *de recenti* statements and distress, DNA and other forms of scientific evidence, medical evidence, any extrinsic source or circumstance supporting or confirming a complainer's account, and admissions (including mixed statements).

[22] The trial judge's approach to the corroborative effect of DNA evidence was instructive and helpful. He had properly recognised that the effect of *Lord Advocate's Reference No 1 of 2023* was to require corroboration of the Crown case as put in evidence by the complainer's testimony.

[23] A further practical example of the approach founded on by the Crown could be seen in the trial judge's report in *HM Advocate v Michael Brand* (unreported, High Court of Justiciary, 2 February 2024). In that case, the accused was convicted of two charges of rape and sexual assault by penetration committed against two complainers. Each complainer spoke to the accused penetrating her anus with his penis and fingers without consent. The trial judge reported that some of the accused's testimony concurred with that of the complainers to the extent that he accepted various aspects of the conduct, albeit he maintained it had been consensual. The Crown case relied on mutual corroboration. In the judge's charge, she directed the jury that the accused's testimony confirming the conduct was capable of providing corroboration for the complainers' accounts where there was concurrence of testimony. The trial judge's approach in *Brand* was a straightforward one, based on a correct interpretation of *Lord Advocate's Reference No 1 of 2023*. It was consistent with prior authorities on the corroborative effect of mixed statements (*Owens v HM Advocate* 1946 JC 119; *Higgins v HM Advocate* 1993 SCCR 542; *Croly v HM Advocate* 2004 SCCR 389; *McInally v HM Advocate* [2006] HCJAC 48, 2006 JC 224; *GAS v HM Advocate*, unreported, 19 February 2009). The cases of *Faulkner v HM Advocate* [2023] HCJAC 49, 2024 JC 235 and *EM v HM Advocate* [2024] HCJAC 9, 2024 SCCR 149 referred to by the trial judge in her report in *Brand* as being potentially at odds with her approach were decided in the context of appeals taken prior to the decision of the Full Bench in *Lord Advocate's Reference No 1 of 2023* and provided no real assistance. They had been decided on the basis of a pre-existing understanding of the law.

[24] The respondent's submission that the corroborative source required to confirm or support the evidence from the first source that the crime libelled had been committed was

misconceived. It incorrectly isolated the corroborative evidence from the principal source and ignored the principle that corroborative evidence need not be incriminatory.

[25] Where there was a logical position consistent with authority that was clear and straightforward to apply, there was no reason for loose notions of fairness to displace that position (*Lord Advocate's References Nos 2 and 3 of 2023*, Lord Pentland at [145] – [146]). That was particularly so in the context of the many safeguards afforded to accused persons. The safeguard afforded by corroboration had two limbs, an initial quantitative assessment carried out by the judge followed by a dual assessment by the jury, who considered both the quantity and quality of the evidence. It remained open to a jury to find a quantitative sufficiency of evidence but nevertheless acquit for want of corroboration of satisfactory quality.

[26] It was accepted that, to be corroborative, it was insufficient for evidence to confirm and support any minor aspect of the principal source of evidence, for example that the complainer had been wearing red shoes at the time of the offence.

Respondent

[27] The first three questions posed by the Reference fell to be answered in the negative. The fourth question should be answered in the affirmative but subject to the qualification that the concurring evidence must be capable, on at least one reasonable reading of the evidence as a whole, of supporting the inference that the crime libelled had been committed. Evidence of penetration, whether direct or circumstantial, had no bearing on the absence of consent and could not corroborate a complainer's account of rape.

[28] In any case, what required corroboration was that a crime had been committed and that the accused committed it (*Lord Advocate's Reference No 1 of 2023*). In the case of rape, the

crime was penetration without consent. A second source confirming or supporting solely penetration was silent on the crime. Such evidence was, adopting the language of the court in *Lord Advocate's Reference No 1 of 2023*, insufficient to support or confirm testimony that the crime libelled had been committed ([207], [208], [218], [221], [235] and [239]).

[29] On the Crown's approach, in cases where penetration was admitted, proof of lack of consent would essentially begin and end with the complainer's word. That reduced corroboration to a formality. Such an approach was unsupported by the Institutional Writers. Where Hume had given examples of circumstantial evidence as being corroborative, each was capable of having a bearing on the criminal act requiring proof (Hume, *Commentaries*, ii, 384). Burnett had warned against evidence being held as corroborative where it merely supported the credibility of a witness rather than supporting the testimony that a crime had been committed (Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (1811), 519). While the court departed from Burnett's principle in *Lord Advocate's References No 2 and 3 of 2023* on the matter of *de recenti* statements, the general principle remained undisturbed (*Fox v HM Advocate*, Lord Justice General (Rodger) at 99 E-G, Lord Kirkwood at 111 E). Alison allocated evidence by what it could prove (*Principles of the Criminal Law of Scotland* (i, 221)). He had expressly cautioned against holding evidence to be corroborative where it did no more than support or confirm the occurrence of sexual intercourse, rather than whether the crime of rape had been committed.

[30] While corroborative evidence did not have to be incriminating in itself, it required to permit an inference to be drawn that the criminal act had been committed. That did not offend against the court's disapproval of *Smith v Lees* 1997 JC 73 and did not resurrect the requirement for corroborated proof of *facta probanda*. Independent evidence of a complainer's distress shortly after the incident libelled could permit the inference that she

had been raped, whereas evidence solely supporting her account that she had been penetrated could not. The Crown's position was at odds with the position taken in *Lord Advocate's Reference No 1 of 2023*, where it was submitted by the Lord Advocate that evidence of a complainer's distress was corroborative of her account that she had been raped because it permitted the inference that the sexual intercourse was not consensual (*Lord Advocate's Reference No 1 of 2023* at [155]).

[31] DNA or other medical evidence could provide corroboration in certain circumstances. Medical evidence confirming or supporting a complainer's testimony that she was too intoxicated to consent was capable of corroborating an account of sexual assault (*Guthrie v HM Advocate* 2022 JC 201). DNA evidence could, plainly, corroborate identification of the accused. In cases where the presence of DNA evidence at a locus was indicative of criminality, such as in cases of housebreaking, that evidence could provide corroboration for commission of the crime (*McPherson v HM Advocate* [2019] HCJAC 21, 2019 JC 171; *Reid v HM Advocate* [2016] HCJAC 41, 2017 JC 37). Medical evidence of injury to the anus, vagina or other parts of the body could corroborate a complainer's testimony that she was raped since the evidence could reasonably yield an inference that the complainer did not consent (*Meighan v HM Advocate* [2021] HCJAC 38, 2022 JC 10). Where, in a case of rape, the evidence was such that no inference could be drawn as to the absence of consent, it would be incapable of providing corroboration of the crime (*Adamson v HM Advocate* [2011] HCJAC 26, 2012 JC 27).

[32] An admission by an accused which could reasonably be inferred to be an admission to the crime complained of was capable of providing corroboration (*CR v HM Advocate* [2022] HCJAC 25, 2022 JC 235; *LC v HM Advocate* [2022] HCJAC 47; *Kelly v HM Advocate* [2024] HCJAC 17, 2024 JC 354). An admission to engaging in sexual intercourse could not be

corroborative since it could bear no inference of an admission to rape. Properly construed, an admission by an accused to having engaged in sexual intercourse with the complainer's consent was a mixed statement (*Morrison v HM Advocate* 1990 JC 299). While such a statement was admissible in its entirety as proof of fact, that did not mean it was corroborative of a complainer's testimony that she had been raped. A statement of consensual intercourse was a denial of the crime libelled, not an admission to it. While a jury would be entitled to reject the exculpatory part of the statement, the admission to sexual intercourse could not bear the inference of an admission to the crime of rape. The authorities relied on by the Crown on the corroborative value of mixed statements were distinguishable from cases of sexual offences. They were examples of admissions to unlawful acts, such as assault, qualified by innocent explanations, such as self-defence (*Croly v HM Advocate*; *McInally v HM Advocate*). *GAS v HM Advocate* was equally distinguishable since the court had focused on the admissibility of a mixed statement, rather than the corroborative value of it.

[33] Authorities from the Commonwealth and Ireland did not support the Crown's approach. Corroboration in those jurisdictions performed a different function than in Scotland. In any event, there was no Commonwealth authority supporting the view that evidence of penetration could corroborate a complainer's testimony that she had been raped, whereas it had been articulated in various Commonwealth authorities that what required corroboration was that intercourse had taken place and that it had taken place without the complainer's consent (*James v R* (1971) 55 Cr App R 299 (PC, Jamaica), Viscount Dilhorne at 302; *S v Gentle* 2005 (1) SACR 420, Cloete JA at [18]).

Analysis and decision

[34] The Full Bench decision in *Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40, 2024 JC 140 provides the answers to the questions referred to the court by the Lord Advocate. It examined no fewer than 108 judicial precedents together with 31 authoritative legal texts. The case is a cornerstone of the modern law of evidence in Scotland, particularly, but not exclusively, for corroboration. Before answering the questions, it is necessary to analyse, in some detail, the Full Bench's reasoning and decision.

Lord Advocate's Reference No 1 of 2023

[35] *Lord Advocate's Reference No 1 of 2023* arose from the acquittal of an accused charged with rape. The complainer gave evidence that she and her boyfriend had been invited into the accused's flat, that she was given cans of lager which she thought could have been "spiked" and when her boyfriend left the flat to find tobacco, the accused attacked her by throwing her onto a bed, removing her clothing and having intercourse with her without her consent. The complainer's boyfriend gave evidence that, when he returned, he knocked on the door of the flat. The accused, who was naked, opened the door only slightly, following which the complainer ran out of the flat. She was in considerable distress, screaming and shouting that she had been raped. She pointed to the accused, saying, "it was him, he done it". The accused denied that there had been any sexual contact. Following the rules of evidence as they were understood at the time, the judge directed the jury that the boyfriend's account of the complainer's distress was capable of corroborating lack of consent and of supporting the complainer's general credibility. It could not, however, corroborate her testimony that she had been penetrated by the accused. To corroborate penetration, the

jury required to rely on the other facts and circumstances from which an inference of penetration could be drawn.

[36] Following the acquittal, the Lord Advocate referred two questions for consideration by this court:

- “(1) Did the trial judge err in determining that distress alone cannot corroborate the direct testimony of a complainer that penetration has occurred?
- (2) Is independent evidence of distress sufficient to corroborate a complainer’s direct testimony that penetration has taken place?”

[37] The court answered both questions in the affirmative. In so doing, it overruled the previous Full Bench decision in *Smith v Lees* 1997 JC 73 while disapproving *obiter dicta* on *de recenti* statements in *Morton v HM Advocate* 1938 JC 50. The Lord Justice General (Carloway), delivering the court’s Opinion, carried out a comprehensive analysis of the law of corroboration in Scotland over a period of more than two hundred and twenty-five years, including its origins, development and ultimately where the court had taken a wrong turn in the 20th century.

[38] Beginning with the Institutional Writers, Hume’s words in his *Commentaries on the Law of Scotland respecting Crimes* (1819) that “no one shall in any case be convicted on the testimony of a single witness” (ii, 383) was a statement of the law on which no judge had been able to improve. Circumstantial evidence was as good as, “nay better even” than a second direct witness to a crime for the purposes of corroboration (ii, 384). In wholly circumstantial cases, it was not necessary for two witnesses to establish each particular of a crime because the “aptitude and coherence of the several circumstances” often fully confirmed the truth of the story “as if all the witnesses were deponing to the same facts”, (*ibid*). While it is not difficult to find self-contradiction in the work of the Institutional Writers, Burnett, in his *Treatise on various branches of the criminal law* (1811) was largely

consistent with Hume, recording that, in circumstantial cases, something more than one witness was required to corroborate the offence. Alison, in his *Principles of the Criminal Law of Scotland* (1832), confirmed (at 89) that:

“Unquestionably the evidence of one witness will not in any case be sufficient; that is to say, it will not do for the prosecutor to examine one witness and close his case. But on the other hand, the evidence of one witness accompanied by a train of circumstances, each link of which is established by a single unexceptionable testimony, is unquestionably sufficient...”

[39] An important example of the approach taken by the courts at the end of the nineteenth century could be seen in *Lees v MacDonald* (1893) 20 R (J) 55, a private prosecution for poaching. The Lord Justice Clerk (Macdonald) confirmed (at 57) that “in any case any fact can be proved by one witness although the whole case cannot be so proved”.

Lord McLaren concurred (at 58), explaining that:

“It is not necessary to call two witnesses to prove each incidental fact in a case. The rule that two witnesses are required to prove the grounds of action ... has been... sometimes misunderstood. All that the law demands is that there should be two witnesses to prove a case, and provided that is so, any fact in the case may be proved by the testimony of one credible witness.”

[40] The early textbooks on the law of evidence were broadly in accordance with the writings of the Institutional Writers and with the approach taken in *Lees v MacDonald*. It was only in the fourth edition of MacDonald’s *A Practical Treatise on the Criminal Law of Scotland*, dated 1929, where there was a marked change in approach. A new passage had been inserted, stating (at 553) that:

“...the evidence of one witness is not sufficient to prove a criminal libel, or establish any fact essential to the commission of the crime, such as the identity of a vessel charged with illegal trawling, or the accused’s knowledge of the falsity of representations in a charge of fraud.”

That appeared to be in line with the case of *Lockwood v Walker* 1910 SC (J) 3, in which the same Lord Justice Clerk as in *Lees v MacDonald* said (at 5) that:

“No doubt our law does not require that every fact in a case shall be proved by two witnesses, but it most certainly does require that every crucial fact shall be so proved, or proved where there is only one witness by corroborative facts and circumstances proved, or by corroborative documentary evidence.”

That passage informed the case law for much of the 20th century.

[41] The next case of major significance was a speeding case, *Gillespie v Macmillan* 1957

JC 31. Two police officers were stationed at entry and exit points of a measured distance of road. When the appellant drove past the entry point, the first officer started his stopwatch, mounted his bicycle and travelled towards the exit point. On the appellant's exit, the second officer started his stopwatch. A third officer, some distance away, stopped the appellant in his car. The two stopwatches were then stopped simultaneously in the presence of the appellant, thus allowing the time taken to travel the measured distance to be calculated. It was argued that there was no sufficiency of evidence since the exact moments of entry into, and exit from, the measured distance were each spoken to by only one witness. Delivering the leading Opinion of a Full Bench, the Lord Justice General (Clyde) stated that “it is ... well settled that two witnesses are not required to prove every fact in a case”. His Lordship went on (at 36):

“In regard to the question of whether or not a crime has been committed, certain principles are now quite settled. Firstly, the evidence of a single witness to the commission of the crime may be sufficiently corroborated by surrounding facts and circumstances, so as to establish the necessary degree of certainty ... Secondly, in a case of circumstantial evidence, two witnesses are not necessary to each circumstance ... In a case of circumstantial evidence it is not a matter of one witness corroborating another, for each may be speaking to quite a separate and independent fact. It is the mutual interlacing and coincidence of these separate facts which can establish the case against the accused.”

On whether the evidence of one witness was insufficient to establish any essential fact, the Lord Justice General commented (at 38) that:

“This observation, so widely stated, ... would appear to be directly contradicted by ... Lord McLaren's opinion [in *Lees v MacDonald*] ... quoted with complete approval

in *Morton* ... Moreover the observation is also irreconcilable with both Hume (vol. ii, p. 384) and Alison (vol. ii, p. 552) and is ... unsound."

[42] The Lord Justice Clerk (Thomson) explained (at 38):

"Nothing is better established in our law than that no one shall be convicted on the testimony of a single witness, however credible. Before any question of the evaluation of the evidence arises, there must be proof of facts emanating from at least two separate sources."

Adding (at 40):

"...But law is a practical affair and has to approach its problems in a mundane common-sense way."

[43] By the post-war era, two lines of authority had emerged; one where "essential facts" required to be proved by corroborated evidence (*viz Lockwood v Walker*) and another where they did not: *Lees v MacDonald* and *Gillespie v Macmillan*. That was an unsatisfactory place for the law to stand.

[44] The high-point of the "essential elements" analysis was the 1997 Full Bench decision in *Smith v Lees*, a case concerning lewd, indecent and libidinous practices towards a 13-year-old girl. The Crown led evidence in support of the libel from a witness who had seen the complainer in a distressed condition following her being sexually abused in a tent on a camping trip. The court quashed the conviction. The Lord Justice General (Rodger) gave the leading Opinion, approving the requirement to corroborate each "essential element" of a crime, or each *factum probandum*. The other members of the court reached the same result, although their opinions were by no means identical in content. In *Lord Advocate's Reference No 1 of 2023*, the Lord Justice General (Carloway) recorded the decision, at [104], as requiring:

"... each fundamental, crucial or essential fact, otherwise *facta probanda* [to be] established by corroborated evidence ... In a rape case these facts were fourfold: (i) penetration of the vagina; (ii) by the penis; (iii) forcibly; and (iv) without consent".

In *Smith v Lees* the authorities supporting the alternative approach were held to be unsound and were disapproved. A Full Bench of five judges could not overturn *Gillespie v Macmillan*. The Lord Justice General and Lord Justice Clerk found it unnecessary to consider it on account of a Crown concession. Lord McCluskey's solution was to disparage it and propose that it was not of general application and only relevant to certain offences such as speeding.

[45] The question of what could constitute corroboration was equally convoluted. The court in *McLennan v HM Advocate* 1928 JC 39 and *McCrindle v Macmillan* 1930 JC 56, both cases concerning sexual offences against children, had confirmed that *de recenti* statements made by the complainers implicating each accused as the perpetrators were capable of corroborating the Crown case on identification. Those decisions were disapproved by the Full Bench in *Morton v HM Advocate*, where the court held that such evidence had a bearing on credibility only, and did not amount to corroboration in law. The Lord Justice Clerk (Aitchison) commented that corroboration was "the conjunction of separate and independent testimonies, each incriminating..."

[46] That is where the law rested until *Fox v HM Advocate* 1998 JC 94, a case of clandestine injury for which a Full Bench had been convened to reconsider *Mackie v HM Advocate* 1994 JC 132, in which the court quashed a conviction on the basis that circumstantial evidence relied on by the Crown was not more consistent with guilt than it was with innocence. The complainer in *Fox* gave testimony that she had woken to find the respondent having intercourse with her. She had displayed distress to others in the aftermath of the incident, evidence of which the Crown sought to rely upon as corroboration. The respondent had told the police that the complainer was awake and consenting to sex until she discovered that he was not the same man with whom she had had consensual sex earlier in the evening, at which point, he said, she became "quite upset". The court disapproved the decision in

Mackie v HM Advocate. It had introduced a new requirement, that corroborative evidence had to be more consistent with guilt than it did with innocence. To be corroborative, each source did not have to be incriminating in itself. What mattered was the concurrence of testimonies.

[47] In giving the leading Opinion, the Lord Justice General (Rodger) did not refer to *facta probanda* but, interchangeably, to essential elements and crucial facts. His four colleagues also proceeded on the basis that in a case of rape certain constituent parts of the offence each required corroboration. To that extent, the court proceeded on the analysis in *Smith v Lees* that was disapproved by the Full Bench of seven judges in *Lord Advocate's Reference No 1 of 2023*, but *Fox* remains an important decision. In explaining where the court had erred in *Mackie*, his Lordship began by explaining (at 100 I – 101 B):

“...it is of the very nature of circumstantial evidence that it may be open to more than one interpretation and ... it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view – which is the one that matters – the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard.”

That an accused offered an innocent explanation for circumstantial evidence did not deprive it of its corroborative effect. The jury might reject the innocent explanation and the jury could then (101 C-D):

“...consider any other possible explanations for the facts and circumstances. Having done so, they will be entitled to find that the circumstantial evidence fits with the direct evidence of the Crown witness. If that is their conclusion, then the circumstantial evidence as interpreted by them will confirm or support the direct evidence and complete the legal proof.”

Another Full Bench examined these passages in *Megrahi v HM Advocate* where the Lord Justice General (Cullen), delivering the court's Opinion, endorsed the proposition that

a piece of circumstantial evidence relied on as corroboration need not be incriminating in itself: [32] and [36].

[48] It was against that background that the Lord Justice General (Carloway) articulated the decision of the Full Bench in *Lord Advocate's Reference No 1 of 2023*. His Lordship stated, at [122], that ever since *Fox*, corroboration need not be incriminating in itself.

[49] Sufficiency of evidence did not depend purely on a qualitative assessment of evidence, but rather on an initial quantitative assessment of whether there were at least two sources of evidence, one corroborating the other: [189]. The basic principles as narrated by Hume were not in doubt: [190]. There did not require to be two or more eyewitnesses to a *fact*. The want of a second witness could be “supplied by the other circumstances of the *case*.”

[50] In any criminal case there required to be more than the testimony of one witness, but there did not need to be two eyewitnesses speaking to the case against the accused. A sufficiency could be derived either from facts and circumstances, spoken to by another witness which “confirmed the story” given by one eyewitness or alternatively from a combination of facts and circumstances alone, provided that there were at least two witnesses in the case: [191]. To be corroborative, circumstantial evidence, when looked at in isolation, did not need to point towards the guilt of the accused; rather, when taken together, they required to support or confirm the testimony of the complainer: [191].

[51] On what required to be corroborated, *Lockwood v Walker* was disapproved since it founded upon, *per incuriam*, a requirement to corroborate essential elements where there was no such requirement: [197]–[206], [217]. It was an outlier and stood in contrast to the later authoritative decision of the Full Bench in *Gillespie v Macmillan*: [206]. The reasoning of the Lord Justice Clerk (MacDonald) in *Lees v MacDonald* was correct and had been approved

by successive generations of judges: [71]. *Gillespie v Macmillan* was a classic example of the practical application of the principles in Hume and Alison and, as a decision of a Full Bench, was the law until decided otherwise by the legislature or a higher precedent: [205].

[52] The identity of the perpetrator of a crime required corroborated evidence: [207]. That was the decision of the Full Bench in *Morton v HM Advocate*.

[53] The Full Bench in *Smith v Lees* had fallen into error. Their starting point, the requirement for corroboration of “essential elements”, was not supported by the Institutional Writers, nor by the preponderance of authority: [216]. The judges in *Smith v Lees* had not attempted to critique the reasoning of the bench in *Gillespie v Macmillan*: [217]. They had fallen foul of all the cautionary remarks made by the Institutional Writers and by the court in *Gillespie*: [218]. The law was a practical affair. Moreover, their decision could not survive the analysis of corroboration in *Fox* and the cases following thereafter: [220]. Circumstantial evidence was corroborative of direct testimony if it strengthened, confirmed or supported that testimony. The corroborating circumstances did not require to be incriminating in and of themselves: [220].

[54] The Lord Justice General concluded in the following terms, at [235]:

“The basic rule is that no-one can be convicted on the testimony of one witness alone. Where there is direct (eyewitness) evidence of the crime, that evidence can be corroborated by another eyewitness or by facts and circumstances spoken to by at least one other witness. None of these individual facts and circumstances needs to be spoken to by more than one witness, and the offence to which the witness speaks need not be divided into several constituent parts. That applies equally in a wholly circumstantial case. Where there is one eyewitness, the facts and circumstances spoken to by one or more other witnesses are corroborative if they confirm or support the eyewitness evidence of the crime. They do not themselves, looked at in isolation, require to point towards the commission of the crime as if they were the equivalent of a second eyewitness. If they did that, they would, without the existence of the direct testimony, be sufficient as a wholly circumstantial case, provided that there was more than one witness in the case. What requires to be proved by corroborated evidence is the case against the accused. That is, first, that the crime, which is libelled, was committed and secondly, that it was the accused who

committed it. There is no requirement to prove the separate elements in a crime by corroborated evidence.”

Application of Lord Advocate’s Reference No 1 of 2023

[55] The law of evidence must be capable of easy explanation and application

(*Lord Advocate’s References (Nos 2 and 3 of 2023)* [2024] HCJAC 43, 2025 JC 200, Lord Pentland at [146]). The basic rule on corroboration is simple and straightforward. It is that no one can be convicted on the testimony of one witness alone. Expressed in that way, the rule can be easily understood and applied by judges and jurors. The law of evidence is a highly practical matter; it must avoid technicality and artificiality.

[56] The fundamental principles expounded by the court in *Lord Advocate’s Reference No 1 of 2023* are:

- (i) no one can be convicted on the testimony of one witness alone;
- (ii) what requires to be proved by corroborated evidence is the *case* against the accused;
- (iii) that is first that the crime was committed and secondly that it was the accused who committed it;
- (iv) there is no requirement to prove the separate elements in a crime by corroborated evidence;
- (v) to be corroborative, circumstantial evidence need not be more consistent with guilt than with innocence;
- (vi) the evidence relied on for corroboration requires to do no more than confirm or support the other evidence;
- (vii) corroborative evidence does not need to be incriminating in its own right;
- (viii) what matters is the concurrence of the whole evidence in the case; and

- (ix) there are two stages in the analysis and evaluation of evidence relied on as corroboration: first, a quantitative analysis by the judge as a matter of law and secondly a quantitative and qualitative analysis by the fact-finder.

[57] In addressing the questions posed in the Reference the court's duty is to follow and apply the law as it was authoritatively laid down by a Full Bench in *Lord Advocate's Reference No 1 of 2023*. It would be entirely wrong for this court to embark upon a new analysis of the law on corroboration, far less to depart from the authoritative statement of the law contained in *Lord Advocate's Reference No 1 of 2023*. Since the court's responsibility is faithfully to apply the common law of Scotland as thus settled, it does not assist to consider the law in other jurisdictions.

[58] Where a complainer gives an account of being raped or otherwise attacked all that is needed as corroboration of this testimony is evidence from a separate source confirming or supporting her account. The second source of evidence needs to fit with the complainer's account. It does not need to point towards the commission of the crime charged. Looked at in isolation, the second source will often be entirely neutral in the sense that it does not yield any inference of criminality.

[59] The central proposition of the respondent's argument was that the second source of evidence must *itself* be capable of confirming or supporting the evidence from the first source that the crime charged had been committed, by which he meant it must tend to show that the complainer did not consent. This proposition is unsound. First, it is inconsistent with the principle that the corroborative evidence does not need to be incriminating in its own right. It artificially isolates the corroborative evidence from the principal source of evidence and ignores the principle that what matters is the concurrence of the whole evidence, in other words its combined effect. Secondly, it reintroduces a requirement to

corroborate separate elements of the crime. That is precisely what the Full Bench in *Lord Advocate's Reference No 1 of 2023* rejected: [235]. It runs counter to Lord McLaren's correct statement of the law in *Lees v MacDonald* that, provided there were two sources of evidence available to prove the case, any fact could be proved by the testimony of one credible witness.

[60] The respondent's argument cannot be reconciled with the decision in *Lord Advocate's Reference No 1 of 2023* that independent evidence of *de recenti* distress can corroborate direct evidence from a complainer that she has been raped. Evidence of distress can corroborate the whole crime of rape, that is penetration and the absence of consent. Looked at on its own, the complainer's distress tells one nothing about whether there has been intercourse. If the respondent's argument was correct, distress could not corroborate the commission of the crime in its entirety. That would be contrary to the law as stated in *Lord Advocate's Reference No 1 of 2023*. Since distress is capable of corroborating the whole crime, it must follow that independent evidence of penetration (like independent evidence of distress) is properly understood as being a piece of circumstantial evidence capable of corroborating the whole case against the accused, assuming that there is corroboration of identification.

[61] If it is proved as a fact that the accused penetrated the complainer with his penis, this fact provides corroborative support for the complainer's evidence that the accused raped her. The evidence of penetration fits with her account of being raped. There are thus two sources of evidence which, when taken in combination, point towards commission of the crime of rape. One source is the complainer's direct evidence. The other is the circumstantial evidence that the accused penetrated her with his penis. The latter supports the former. There are two witnesses, the complainer and the witness who speaks to the evidence of penetration. The requirements for corroboration are thereby satisfied and there

is a sufficiency of evidence to prove the commission of the crime as a matter of law. Of course, it remains for the jury to decide whether they accept the direct evidence, and that relied on as corroboration, and determine that it does confirm, support or fit with the direct evidence. Even then, the ultimate protection for the accused is that before the jury convict, they must conclude beyond reasonable doubt that the accused committed the crime.

[62] Regarding the second question in the reference, the same principle applies.

Forensic-scientific evidence of the accused's DNA on the complainer's clothes or breasts can corroborate her account of sexual assault or assault with intent to rape.

[63] It follows also from the analysis in *Lord Advocate's Reference No 1 of 2023* that a statement by the accused that he has had sexual intercourse with the complainer is in the same position for the purposes of corroboration as scientific evidence showing that he has had intercourse with her. Such a statement, whether or not it is contained in a mixed statement, can corroborate the complainer's account that she has been raped. This is because the statement, like the scientific evidence, confirms or supports the complainer's account. The fact that the statement is a mixed one in the sense that it is as consistent with innocence as with guilt does not mean that it has no corroborative value. The jury would be entitled to accept the incriminatory part of the statement if they were satisfied that the Crown had displaced the accused's explanation (*Owens v HM Advocate* 1946 JC 119, Lord Justice General (Normand) at 124).

[64] *Lord Advocate's Reference No 1 of 2023* makes clear that any piece of circumstantial evidence can corroborate the entire case against the accused if there is also corroboration of the identification of the accused as the perpetrator.

[65] This analysis does not reduce corroboration to an empty formality, as the respondent submitted. There require to be two sources of evidence. There must be independent

support for the complainer's account. The jury will have to consider whether they are satisfied that there is corroborative evidence in both quantitative and qualitative terms. The requirement for corroboration remains an important safeguard under Scots law.

Answers to the questions

[66] Each of the questions falls to be answered in the affirmative, with a qualification of the fourth answer to make clear that both the commission of the offence and the fact that the accused committed it must be proved by corroborated evidence. The modern law is, therefore, as follows.

- (1) Forensic-scientific evidence of penetration of the complainer's vagina by the accused's penis can corroborate the complainer's account of rape.
- (2) Forensic-scientific evidence of the accused's DNA on the complainer's clothes or breasts can corroborate the complainer's account of sexual assault/assault with intent to rape.
- (3) Any piece of circumstantial evidence of penetration of the complainer's vagina by the accused can corroborate the complainer's account of rape.
- (4) Both the commission of the offence and the fact that the accused committed it must be corroborated. Any piece of direct or circumstantial evidence, which before *Lord Advocate's Reference No 1 of 2023* could only corroborate one element of the crime, can now corroborate the fact that the crime has been committed.

Postscript

[67] Having answered the questions it remains to observe that the Lord Advocate necessarily posed questions in a stark and somewhat artificial manner with a view to

clarifying that *Lord Advocate's Reference No 1 of 2023* means what it says. Cases in which evidence supporting penetration or sexual assault is the only source of corroboration of the commission of the crime will be rare. In this case, mutual corroboration was available on all of the charges and distress on some of them. There was some evidence of a complainer's statements *de recenti*, medical evidence of injury on some charges and evidence of ambiguous remarks to police officers offering potential support to the Crown case.

[68] The cases cited by parties in their written submissions offer many illustrations of the numerous ways in which corroboration has been found from sources that would not always have been recognised as corroborative. While the analysis of corroboration has changed following the Lord Advocate's References of 2023, the nature of circumstantial evidence remains the same. Examples, amongst others too numerous to mention, include: *Spendiff v HM Advocate* [2005] HCJAC 68, 2005 1 JC 338; *Munro v HM Advocate* [2014] HCJAC 40, 2015 JC 1; *Palmer v HM Advocate* [2015] HCJAC 126, 2016 SCCR 71; *PM v HM Advocate* [2017] HCJAC 92, 2018 SCCR 23; *Garland v HM Advocate* [2020] HCJAC46, 2021 JC 118; and *LW v HM Advocate* [2020] HCJAC 50, 2021 JC 125.

[69] Recognition of the corroborative potential of such items of circumstantial evidence may mean that the questions posed in this case will only rarely arise as live issues.