SCCRC Scottish Criminal Cases Review Commission

Position Paper

Sufficiency of Evidence

Introduction

1. After the Crown has concluded its evidence in a case the question may arise whether it has led sufficient evidence to entitle the jury to determine whether the accused was guilty of the offence for which he was charged. That question, if it arises, is one of law on which the judge must decide. Only if he answers it in the affirmative does the case go to the jury for determination.

2. The most important aspect of sufficiency is the requirement of corroboration. 'By the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged.'[1] The evidence of one eyewitness, for example, is never sufficient, however credible and reliable that witness appears to be (subject to a limited number of statutory exceptions).[2]

3. A convicted person may appeal his conviction (and may apply to the Commission) on the ground that there was insufficient evidence to support his conviction.

4. The Commission has referred to the High Court for determination several cases in which it has concluded there was insufficient evidence to support conviction. Those cases included *Campbell v HMA*[3] and *Fulton v HMA*,[4] both of which were concerned with whether the appellant had illegal possession of a firearm.[5]

[1] *Morton v HMA* 1938 JC 50, page 55, the Lord Justice Clerk (Aitchison).
[2] See, for example, the Road Traffic Offenders Act 1988 s21
[3] [2008] HCJAC 50.
[4] [2005] HCJAC 4.
[5] Contrary to the Firearms Act 1968, section 1(1(a), as amended.

5. In *Campbell* the appeal court, in applying the test for sufficiency in a wholly circumstantial case,[6] agreed with the Commission that there was insufficient evidence to entitle a jury to draw the inference, beyond reasonable doubt, that the appellant had knowledge of and control over the firearm.[7] Likewise, in *Fulton*, the circumstances of which were similar to those in *Campbell* – a shotgun was found in a flat in which the appellant had been staying but to which others had access – the appeal court concluded there was insufficient evidence to prove that the appellant had put the gun in the cupboard in which it was found.

The Commission's position

Taking the Crown case 'at its highest'

6. The evidential principles to be applied in answering the question whether there is sufficient evidence are clear: the evidence on which the Crown relied is to be taken 'at its highest' – that is to say, for the purpose of determining whether there is sufficient evidence, it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown.[8] Sufficiency of evidence is not concerned with whether the evidence the Crown led ought to be accepted.[9] The 'weight' to be accorded to the evidence is to be addressed only after all the evidence in the case has been led.[10]

7. The best way of illustrating this concept is by way of a simple example. If witness X positively identifies the accused in the commission of the offence with which he was charged, and witness Y makes an identification of resemblance of the accused, there is sufficient evidence,[11] and the judge must allow the case to go to the jury for determination. Where X has given evidence in such terms but has

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

For recent judicial discussion of the case see *Reid v HMA* 2016 SCCR 233 at page 238
[8] *Mitchell v HMA* 2008 SCCR 469, para 106.
[9] *Williamson v Wither* 1981 SCCR 214, page 217.
[10] *Gonshaw v HMA* 2004 SCCR 482, para 24.
[11] See, for example, *Ralston v HMA* 1987 SCCR 467; see also para 11 below.

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

The 'no-case-to-answer' submission

8. Procedurally, the defence is entitled at the end of the Crown case to make a submission of no case to answer.[13] The submission is to the effect that there is insufficient evidence for the case to go to the jury[14] for determination. The judge (or the sheriff/JP) must uphold such a submission unless he is satisfied that there is, taking the Crown case at its highest, sufficient evidence to convict.[15] Any evaluation of the quality of the evidence is irrelevant at that stage.

Corroboration

9. As indicated, for a case to be corroborated, the Crown must lead evidence against the accused from at least two separate sources. But it is only the 'crucial' facts[16] – the *facta probanda* – that need to be corroborated; those facts comprise the identification of the accused and the commission of the crime (both the *actus reus* and the *mens rea*, where this is an element of the offence charged, must be proved by corroborated evidence).[17] The nature of the offence may be such that several elements are crucial within it[18]; however, the discussion about what constitutes sufficiency of evidence in particular offences is outwith the scope of this paper.

[12] In such circumstances, in summary proceedings, the sheriff or the JP must allow the case to go to the finder of the facts – ie, himself – for determination. He might then acquit the accused because he took the view that the evidence of X was unreliable, a decision he will take almost immediately thereafter in circumstances in which the defence chose not to lead any evidence.
[13] Section 97 of the Criminal Procedure (Scotland) Act 1995 (solemn cases) and section 160 of that Act (summary cases).
[14] Or, in a summary case, the sheriff or the JP, in his role as the 'fact-finder'.
[15] In addition, in solemn procedure, after the close of the whole of the evidence or the conclusion of the prosecutor's speech to the jury, the accused is permitted to submit that the evidence is insufficient to justify his conviction (section 97A of the 1995 Act).
[16] Described as such in *Farrell v Concannon* 1957 JC 12, page 17.
[17] *Smith v Lees* 1997 SCCR 96.
[18] See, for example, *Branney v HMA* 2014 SCCR 620

10. Evidential facts – 'facts which individually establish nothing but from which in conjunction with other such facts, a crucial fact may be inferred'[19] – need not be corroborated.[20] Evidential facts are, in essence, circumstantial evidence.

11. Corroboration may take the form of wholly direct evidence – the evidence of two eyewitnesses, for example – or direct evidence from one witness supported by one or more piece of circumstantial evidence to which other witnesses spoke, or wholly circumstantial evidence to which separate witnesses spoke.

12. Where the Crown case depends on the evidence of two eyewitnesses, the evidence of those witnesses must be sufficiently similar to provide conjunction of testimony; it is not enough, for example, that the witnesses both say that they saw the accused punch the complainer, if the circumstances in which they say that happened are substantially different.[21]

13. The supporting evidence must be such as to connect the accused with the crime, but the degree of connection required will vary with each case.[22] It need not be particularly strong. Where one starts with an emphatic positive identification by one witness then very little else is required:[23] one positive identification may be sufficiently corroborated by an identification of resemblance,[24] or by one piece of circumstantial evidence – relatively weak DNA evidence has been held to meet the 'relatively weak threshold' needed for corroboration.[25]

[19] Walker and Walker: *The Law of Evidence in Scotland*, 3rd edition (2009), para 5.7.1.
[20] Hume, vol. ii, pages 384–386.
[21] See Renton & Brown: *Criminal Procedure*, 6th edition, para 24–69, and the authorities cited therein.
[22] Renton & Brown, para 24–76.1.
[23] *Ralston v HMA*, page 472; *WMD v HMA* [2012] HCJAC 46. In *Murphy v HMA* 1995 SCCR 55, para 60, as cited in *Kearney v HMA* [2007] HCJAC 3, the Lord Justice Clerk, in commenting on the relevant passage from *Ralston*, stated: '[T]he Lord Justice General is simply making the point that evidence may afford corroboration and even though it is small in amount, provided it has the necessary character or quality and it will have the necessary character or quality if it is consistent with the positive identification evidence which requires corroboration.'
[24] *Ralston v HMA*; see also *Nelson v HMA* 1989 SLT 215 ('his build'), *Murphy v HMA* ('just the height and the hair colour') and *Adams v HMA* 1999 JC 139 ('just basic looks'). It has been held that the equivocal nature of the supporting evidence is a matter for the jury to consider when assessing its weight (*Kelly v HMA* 1998 SCCR 660, page 665D–E).
[25] *McCreadie v HMA* [2011] HCJAC, para 3, Lord Emslie.

14. Further, it is not the law that circumstantial evidence is corroborative only if it is more consistent with the direct evidence for the Crown than with a competing account the defence has put forward.[26]

15. In a wholly circumstantial case, there are usually several pieces of evidence (albeit, in theory, two pieces of circumstantial evidence to which separate witnesses spoke may be regarded as satisfying the sufficiency test[27]). In such a case, for there to be a case to answer, the question is not whether each of the several circumstances points by itself towards the offence libelled; it is whether the several circumstances, taken together, were capable of supporting the inference, beyond reasonable doubt, that the accused was guilty of the offence for which he was charged.[28]

Confessions

16. Generally, a confession alone, irrespective of how many witnesses spoke to its making, is insufficient; any number of confessions are insufficient to convict, since a witness cannot corroborate himself; the demeanour of the accused at the time he made the confession cannot corroborate it; the amount of evidence needed to corroborate a confession depends on the circumstances of the case.[29]

17. The concept of a special knowledge, or self-corroborating, confession exists whereby the information contained in the confession is confirmed by other facts, and thus is corroborated by circumstantial evidence – where, for example, 'the confessor' described where he buried the body, evidence that the body was found where the person indicated can corroborate the confession.[30] In such a case, for the corroboration requirement to be satisfied, two witnesses must give evidence that the special knowledge confession was made.[31]

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[26] *Fox v HMA* 1998 JC 94, page 109, where the Lord Justice Clerk (Cullen) observed that it is not necessary that circumstantial evidence of itself should incriminate the accused, or that it should be unequivocally referable to the essential element of the charge which is to be established, but that what matters is whether it is capable of providing support or confirmation in regard to the *factum probandum* of which direct evidence has been given.

[27] *Morton v HMA*, page 52, the Lord Justice Clerk (Aitchison), quoting Hume, vol. ii, pages 383 and 384.

[28] *Little v HMA* 1983 JC 16, page 20, the Lord Justice General (Emslie), in delivering the opinion of the court; see also *Fox v HMA*, page 118, Lord Coulsfield, and *Al Megrahi v HMA* 2002 SCCR 509, paras 31–36.

[29] See Renton & Brown, para 24–78, and the authorities cited therein.

[30] *Manuel v HMA* 1958 JC 41.

[31] *Low v HMA* 1994 SLT 277. Alternatively, two witnesses must testify to the making of separate special knowledge admissions at different times (*Murray v HMA* [2009] HCJAC 47, para 42).

18. However, it does not matter that such a confession contains information that is both consistent and inconsistent with the facts; the judge is entitled to allow the case to go to the jury for it to determine whether the consistencies amount to corroboration of the confession.[32] Further, where information contained in the confession was known to the police, had been shared with the victim's family and friends, including the accused, and much of it had been disclosed through the media, it has been held that the judge is entitled to allow the case to go to the jury for it to determine whether the accused was aware of those facts because he was the perpetrator or because he had picked them up from other sources.[33]

19. Before such a confession and its attendant corroboration may constitute sufficient evidence, there must be independent evidence that the offence was committed.[34]

The *Moorov* doctrine

20. Under the *Moorov* doctrine, where an accused is being tried for two or more similar offences involving different complainers, the account of one complainer may be corroborated by the evidence of one of the other complainers and *vice versa*,[35] as long as there is sufficient "nexus"[36] or "connection"[37] between the two or more separate offences which allows the inference to be drawn that each incident formed part of some broader "course of conduct".[38] For the additional considerations that apply in such cases, and related cases, please see the Commission's position paper on the *Moorov* doctrine.

Date of Approval: 19 December 2014
Date of Last Review: 15 December 2016
Date of Next Review: December 2017

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