UNTO THE RIGHT HONOURABLE THE LORD JUSTICE GENERAL, THE LORD JUSTICE CLERK AND LORDS COMMISSIONERS OF JUSTICIARY

LORD ADVOCATE'S REFERENCE UNDER SECTION 123(1) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

in

HIS MAJESTY'S ADVOCATE

against

[redacted]

HUMBLY SHEWETH:

1. That the facts which give rise to this reference are as follows.

2. The accused was indicted in the High Court of Justiciary on two charges of lewd, indecent and libidinous practices and behaviour towards two brothers, [redacted] In their final form, the charges read:

"(001) on an occasion between 4 February 1988 and 16 November 1990, both dates inclusive, at [redacted] *West Lothian you* [redacted] *did use lewd, indecent and libidinous practices and behaviour towards* [redacted]*, then aged between 5 and 7 years, c/o Police Service of Scotland,* [redacted] *and you did induce him to put a condom onto your penis and you did put a condom onto his penis;*

and

(002) on an occasion between 4 February 1988 and 16 November 1990, both dates inclusive, [redacted], *West Lothian you* [redacted] *did use lewd, indecent and libidinous practices and behaviour towards* [redacted], *then aged between 10 and 12 years, c/o Police Service of Scotland,* [redacted] *and you did sit astride him, pin his arms above his head, rub your penis on his face and attempt to penetrate his mouth with your penis."*

3. The case proceeded to trial from 27 to 30 November 2023 and concluded with majority verdicts of not proven on both charges.

4. [redacted] had four sons: [redacted] They separated in December 1987 and [redacted] began living with [redacted]. The boys stayed with [redacted] and visited [redacted] every second weekend. [redacted] later married and she became [redacted]

5. [redacted] gave evidence that, April or May 1990, he engaged the accused as childminder to look after the boys.

6. [redacted] gave evidence that, on one weekend when the boys were staying with him and [redacted], aged 7 at this time, blurted out to him that '[redacted] had been showing him how to put condoms on. ([redacted] gave evidence that what he in fact said was that he and the accused had been blowing up condoms, but it is suggested that nothing turns on the discrepancy.) [redacted] gave evidence that [redacted] was normal as he said this, that it was a matter-of-fact statement. Nonetheless, he was sufficiently concerned as to call the police.

7. [redacted] gave evidence that, in three visits by the police over the same weekend, [redacted] repeated what he had said to the police. All of this was heard by [redacted], who sat in with her son as he spoke to the police. She noticed no reaction in him as he said all this. On those visits, the police spoke to the other boys: none of them had anything to report and nothing therefore came of the police investigation.

8. [redacted] gave evidence that he immediately became aware of [redacted] allegation and what it was about. At the time, he chose not to speak to [redacted] because he could see that [redacted] was upset: that he was uncharacteristically quiet.

9. This was therefore an unusual situation where there was distress without a *de recenti* statement ([redacted] evidence) and *de recenti* statements without distress ([redacted] evidence).

10. In 2019, [redacted] went back to the police with a stronger memory of what happened. By this time, [redacted] had begun to experience flashbacks of a time when the childminder had straddled him and tried to put his penis in [redacted] mouth. [redacted] also spoke to the police and the current proceedings commenced. Both [redacted] gave evidence at trial in line with the charges as libelled. There was only one change to the indictment: charge 1 initially referred to 'on various occasions'; this was changed to 'on an occasion' to reflect [redacted] evidence at trial.

11. At the close of the Crown case, in the absence of the jury, the Advocate Depute indicated to the judge that, in his speech to the jury, he intended to take the following approach to corroboration:

Charge 1 ([redacted]):

(i) conventional corroboration, that is [redacted] evidence plus either: (a) [redacted] evidence of distress; or (b) the *de recenti* statement to [redacted]; or (c) the *de recenti* statements to the police heard by [redacted]; or

(ii) mutual corroboration with [redacted] evidence on charge 2.

Charge 2 ([redacted]):

Mutual corroboration only.

12. The judge indicated that he was content to hear submissions on this point and to give a ruling on it. If having received the ruling, the Advocate Depute wished to take the same approach and risk correction in the judge's charge, it was a matter for the Advocate Depute.

13. The Advocate Depute therefore made the following submissions to the trial judge:

(a) that, as expressed in paragraph 226 of *Lord Advocate's Reference No 1 of 2023* 2023 SLT 1115, there is a 'body of authority' that *de recenti* statements on their own are corroborative, even in the absence of distress;

(b) this body of authority is itself set out in *Lord Advocate's Reference No 1 of 2023;*

(c) the proposition that *de recenti* statements on their own can be corroborative applies particularly in cases involving children (among the early twentieth century authorities, see *McLennan v HM Advocate* 1928 JC 39);

(d) a *de recenti* statement should not lose its corroborative value merely because the child making it is too young to understand what has happened and to be distressed while making the statement; and

(e) separately, what [redacted] saw in his son was distress and thus corroborative.

14. Defence counsel took the position that, while there was force in the Advocate Depute's submission about *de recenti* statements, the law was not there yet. He accepted that what [redacted] had seen was distress.

15. The judge ruled that what [redacted] had seen was distress and corroborative. The *de recenti* statements heard by [redacted] were not corroborative. He would therefore give the standard direction on *de recenti* statements. A separate defence no-case-to-

answer submission that there was insufficient corroboration of identification was also repelled at this stage.

16. The Advocate Depute indicated to the judge that, having made submissions and received a ruling, it would be inappropriate for him to go against that ruling in his speech to the jury: he would not therefore suggest to the jury that the *de recenti* statements to [redacted] were corroborative.

17. The accused did not give evidence and there was no other defence evidence.

18. In his speech to the jury, the Advocate Depute thus relied only on the distress shown to [redacted] as corroborating [redacted] account on charge 1 and, thereafter, on mutual corroboration between the two charges. He relied on the statements to [redacted] in the traditional way: as showing that [redacted] had been consistent in his account.

19. In his charge to the jury, the judge directed the jury along the same lines, and gave the standard directions on distress and *de recenti* statements.

20. A point of law thus arose in relation to the first charge in this trial: whether a *de recenti* statement on its own is corroborative. This point of law requires the authoritative determination of the Court.

21. The Lord Advocate accordingly refers this point of law for your Lordships' and Ladyships' opinion, in the form of the following questions:

(1) Is a *de recenti* statement on its own corroborative? That is, is a *de recenti* statement corroborative even in the absence of distress?

(2) If a *de recenti* statement refers (directly or by inference) to the accused as being responsible for the crime, can it corroborate the complainer's subsequent evidence both that the crime libelled was committed and that it was the accused who committed it?

(3) If a *de recenti* statement on its own is corroborative, at what point in time or in what circumstances does that statement stop being corroborative and become inadmissible hearsay?

(4) Was *Morton v HM Advocate* 1938 JC 50 wrong in holding (*per* LJC (Aitchison) at 53) that a *de recenti* statement is admissible as bearing upon credibility only and that the statements of an injured party, although made *de recenti* of the commission of a crime, do not in law amount to corroboration? If so, should *Morton* be overruled?

MAY IT THEREFORE PLEASE YOUR LORDSHIPS/ LADYSHIPS:

(i) to order service of this Reference upon the persons designed in the schedule appended hereto;

(ii) to fix a date for the hearing of this Reference and to order intimation of said date to said persons;

(iii) upon consideration of these present, to answer the point of law submitted for the opinion of your Lordships/Ladyships; and

to do further or otherwise as to your Lordships/Ladyships shall seem proper.

ACCORDING TO JUSTICE

DOROTHY R BAIN KC,
LORD ADVOCATE

PAUL HARVEY, AD

DOMINIC SCULLION,
ADVOCATE

SCHEDULE OF SERVICE

1. Neil James Robertson, Central Court Lawyers, 15, Grampian Court, Beveridge Square, Livingston, EH54 6QF