

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 a charge of rape. The charge read:

"on 10 June 2022 at [REDACTED], Edinburgh you [REDACTED] did assault [REDACTED], c/o Police Service of Scotland [REDACTED], and did remove her shoes, seize her on the body, seize her hair and neck, push her head to the ground, restrain her, remove her tights and underwear, struggle with her and repeatedly penetrate her vagina with your penis, and you did thus rape her, to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

3. The case proceeded to trial from 20 to 29 November 2023 and concluded with a majority verdict of not proven.

4. The accused and complainer, ██████████ met in the Bourbon nightclub in Edinburgh city centre. They left the nightclub together and walked to ██████████.

5. ██████████ gave evidence that they climbed into ██████████ so that the accused could urinate in one of the bushes. Whilst in the bushes together, she tripped and fell on the ground. The accused told her she looked good in that position. She laughed at this until the accused started taking her shoes and tights off. She told him she was menstruating and did not want anything to happen. ██████████ gave evidence that the accused pushed her face into mud on the ground and raped her, once from behind and then, after pushing her onto her back, from the front, whilst holding one hand over her mouth. After ejaculating, he left her in the bushes. ██████████ shouted for help, but no one came, so she left the gardens, wearing no shoes or underwear, and sought help from passers-by on ██████████.

6. The police were called and the accused was arrested the following evening as he attempted to enter the same nightclub.

7. In addition to ██████████ evidence, the Crown led the following adminicles of evidence:

(i) CCTV footage of the accused and complainer kissing together in the nightclub (this to rebut the accused's evidence that lovebites on his neck were obtained during the incident in ██████████).

(ii) CCTV footage of the accused's walking around the city centre alone after the incident (this to rebut the accused's account that he had left ██████████ so quickly because he wanted to meet his friend).

(iii) Evidence from the two passers-by, ██████████ as to ██████████ extreme distress and dishevelment when she sought their help on ██████████; from the attending police officers, who gave evidence that ██████████ remained distressed until

she was taken home at 6 or 7 am the next morning; and from the medical examiner who observed her to be distressed and anxious several hours later.

(iv) [REDACTED] *de recenti* statements to [REDACTED] and the police officers that she had been raped.

(v) Medical evidence of injuries to both the complainer and accused.

(vi) Photographs of [REDACTED] underwear, showing blood, which the police recovered from the gardens, with her trainers, sunglasses and disposable vape.

8. The accused gave evidence that the sexual intercourse was consensual; penetration and the finding of the accused's semen on [REDACTED] endocervical and perianal swabs were agreed by joint minute.

9. In her speech to the jury, the Advocate Depute relied on [REDACTED] evidence and the adminicles of evidence at paragraph 7 above. She also stated that, if the jury were satisfied that what [REDACTED] had said to [REDACTED] was so soon after the event that her words were intimately bound up with what had happened in the gardens, then they, the jury, would be entitled to treat that evidence as corroborative, even if they did not have the evidence of [REDACTED] distress and dishevelment when she said those things.

10. In his charge to the jury, the learned trial judge directed the jury that this was wrong and asked the jury to disregard it. The distress shown to the passers-by and police was corroborative; the *de recenti* statements served only to enhance the strength of the distress evidence.

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

12. 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

[OVER]

(iv) 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. Paul Anthony Haran, Public Defence Solicitors Office, 9 York Place, Edinburgh, EH1
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