APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 37
HCA/2023/000164/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

SEAN ROBIN JAMES HOGG

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: D R Findlay KC; Duling; Keith Leishman & Co Defence
Respondent: R Charteris KC; Sol Gen, McLean; the Crown Agent

11 October 2023

Introduction

[1] This is an appeal against conviction on a charge in the following terms:

> "(002) on various occasions between 3 March 2018 and 10 June 2018, both dates inclusive, at Dalkeith Country Park, Dalkeith, Midlothian, you SEAN ROBIN JAMES HOGG did assault [KM], born …. 2004, c/o Police Service of Scotland, Dalkeith, and did threaten her, pull down her lower clothing, seize hold of her wrist, cause her to masturbate you, push her head down, penetrate her mouth with your penis, remove her tampon, penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[2] There were four charges on the indictment. Charge 1, a sexual assault, related to another complainer, KMM, while the remaining three charges (2-4) related to KM. Charges 3 and 4 were respectively charges of rape and sexual assault. The jury returned a verdict of not proven with regard to charges 1, 3 and 4. The libel of the charge on which the jury convicted had originally libelled two separate, specified, addresses in Edinburgh. There was evidence in relation to these and in relation to two separate incidents in Dalkeith Country Park, one in March and one in June. The jury were directed that corroboration for all but the last event in Dalkeith hinged on the application of the *Moorov* doctrine. In convicting the appellant the jury deleted the Edinburgh addresses but did not delete the libel "on various occasions", or any of the dates libelled.

Background

[3] Evidence was given by KMM by way of commission on 12 October 2022, the tape of which was played to the jury. KM's evidence had been taken by way of two JII's dated 19 October 2018 and 17 July 2019, a police statement dated 15 May 2020 and two commissions dated 26 August 2020 and 19 October 2020. The other important witness was AM, a friend of KM. He gave his evidence via special measures previously granted, namely a screen and supporter. Following the close of the Crown case, the appellant gave evidence.

Evidence of KM

[4] In respect of the libel in question, KM gave evidence that there had been two incidents with the appellant occurring in Dalkeith Park. The first incident took place on either 3 or 13 March 2018. She and the appellant were boyfriend and girlfriend and she had known him for just over a week. They had been drinking in the park. He pestered her for

sex, saying that if she did not agree he would get people to “jump her”. She said the appellant pulled her leggings down and told her to face the wall. He proceeded to have vaginal sex with her for a few minutes or so. She was crying and saying that she wanted to do it when she was sober. She was trying to make excuses, saying "dinnae" and "stop" and "stop it" and that it was too cold or it hurt or that she wanted to go home. They moved to another part of the park where a further incident of vaginal sex took place.

[5] The second incident in Dalkeith Country Park was in June 2018, where the appellant pulled her towards him and put her hands on his penis. She masturbated him and he tried to make her have oral sex with him. KM made an excuse that she needed to urinate. When she finished, the appellant pushed KM against the wall and pulled her leggings down. She was menstruating and told the appellant so. He said that it didn't matter and he pulled out her tampon. He was trying to have sex with her but was disturbed by CT walking up the hill towards KM, apparently with the intention of attacking her. The complainer and CT fought for reasons with which this appeal is not concerned. The complainer was left with a bleeding nose. In her police statement she stated that there had been a degree of penetration in this last incident.

[6] This narrative is a composite summary of her evidence as to these matters, which in reality was spread over various interviews or statements. Although there were some deficiencies in coherent detail in these various documents, the core detail so far narrated emerged reasonably clearly.

[7] The same cannot be said in respect of evidence as to disclosures made by the complainer, to whom they were made, and when. At the time of the first incident, the complainer did not think anything bad had happened. She then told somebody and they said it was rape and then she then told her mum and she said it was rape, as did her

grandmother. She had told some friends some of what had happened but not the full story. The first person she told the full story to was her friend AM. He was the only person she really trusted. The timing of any of these conversations, and in particular whether they occurred after the first incident or the second, was extremely difficult to assess, but in reality nothing turns on these save for the disclosure to AM. The timing – and nature - of that disclosure is a central issue in the appeal.

[8] The appellant had admitted penetration in relation to the March incident but had not done so in relation to the June incident.

Evidence of AM

[9] AM was a school friend of the complainer but did not know the appellant. The detail of his evidence, so far as relevant, is narrated later in this opinion. In brief, he gave evidence that at some time the complainer told him about something which had happened in Dalkeith Country Park, and she had appeared to him to be very upset when doing so.

The case as presented at trial

[10] The Crown case was solely based on the application of the doctrine of mutual corroboration between the two complainers. The Advocate Depute made this clear to the judge in a short discussion which took place prior to the speeches, during which he stated:

> "this is a case that's entirely dependent on *Moorov* and the jury would require to accept the accounts given by both for a conviction for anything. Essentially what I'm saying to your Lordship is that it's a *Moorov* case and, apart from deletions that the jury might choose to make themselves, it's really all or nothing in relation to these charges."

[11] The Advocate Depute did not suggest that the distress exhibited was of such a nature as to provide separate corroboration for any of the charges, or part thereof. The trial judge did not raise the issue. He appeared to agree with the Advocate Depute that the basis of the

case was a traditional application of the *Moorov* doctrine, and that no alternative verdicts need be addressed. After hearing the submissions of the Advocate Depute, the following exchange took place:

> "Judge: *Moorov*, and wouldn't need to direct on alternative charges.
>
> Advocate Depute: Exactly so.
>
> Judge: Thank you very much, Advocate Depute. That is one of the questions I had to raise, so that's very helpful."

[12] Despite this, the trial judge must at some stage have concluded that the evidence of apparent distress spoken to by AM (i) related to the June incident; and (ii) was capable of providing corroboration for the complainer in respect of that last incident. He did not raise this with the Advocate Depute or defence counsel. He directed the jury that the *Moorov* doctrine was available as corroboration for all elements of charge two, but in addition accordingly directed the jury that the evidence of distress could corroborate the complainer's evidence "in relation to the last rape she says she suffered".

The Verdict

[13] When the jury announced their verdict, and prior to the verdict being recorded, both counsel intimated that they had a legal matter to raise. The jury retired. The Advocate Depute submitted that the verdict could not stand; and the trial judge agreed, on the basis that it was incompetent to acquit on charge 1 but to convict on charge 2. The judge seemed to be about to record the verdict as an acquittal, before noting that distress might provide corroboration.

[14] Counsel submitted to the trial judge that the appellant should be acquitted or the jury re−directed on a *Moorov* only basis for the following reasons:

- the pre-speech discussion which confirmed this was a *Moorov* only case, on which basis both parties had addressed the jury;
- that it was not accepted that the distress in question was available as corroboration in the circumstances of the case, notwithstanding the directions which had been given; and
- the fact that the jury had failed to delete the words "various occasions", which was not in accordance with the directions given.

After further consideration, the trial judge directed the verdict to be recorded as returned by the jury.

Judge's report

[15] In his report the trial judge states that he considered it was open to the jury to find corroboration of the evidence of the very last incident libelled on the basis of the distress. He noted that there was some lapse of time between the incident and the distress being observed. From the evidence it appeared that it might be over a week. On the basis of *Ferguson* v *HM Advocate* 2019 SCCR 70, he did not consider that the lapse of time *per se* meant that the distress was not available for corroboration and therefore that the matter should be left to the jury. As to the procedure adopted, he considered that in view of *Garland* v *HM Advocate* 2021 JC 118 it was incumbent on him to identify any basis on which the evidence of KM might be corroborated. Distress was one such basis. The evidence on the matter had been given during the trial hence there had been ample opportunity for it to be addressed in the defence speech.

Submissions for the appellant

[16] Submissions were made in support of the propositions that a miscarriage of justice

had occurred as a result of (i) the trial judge's misdirection of the jury as to the corroborative effect of evidence as to the complainer KM's distress as exhibited to AM, since (a) the evidence was not such as was capable of providing corroboration of the complainer's account; and (b) in any event there was no corroboration of penetration in respect of the June incident (*Smith* v *Lees* 1997 JC 73); (ii) the verdict being perverse or (iii) at least one which no reasonable jury properly instructed could have returned; and (iv) the defence being deprived, by the course adopted by the trial judge, of the opportunity to make any submissions on distress.

These submissions were elaborated upon as follows:

(i)(a) The evidence of AM was incapable of providing corroboration in the way suggested by the trial judge. What it amounted to was that something of unknown detail was said to AM by the complainer after something of unknown detail had happened somewhere. It was not clear what the disclosure related to; who it related to; or when it was made. The trial judge misdirected the jury by suggesting that such vague evidence could provide corroboration in the circumstances of this case. This was not a matter to be left to inference, suspicion or speculation.

(b) Although *Smith* v *Lees* was currently under consideration by the High Court, as the law stands the appellant could only be convicted on the basis directed by the trial judge if there was independent corroboration of penetration in relation to the second incident. There was no such evidence, as conceded by the Crown.

(ii) A verdict which (a) appeared to cover both incidents, as implied by the retention of the words "various occasions" and a libel period of March to June; and (b) which included allegations which related to both the incidents in March and June was perverse as not being in accordance with the clear directions of the trial judge.

(iii) This was not in fact a jury which was properly directed; but if the court was not satisfied that the verdict was perverse, it cannot be said to be one which a reasonable jury properly directed could have returned.

(iv) In the pre-speech discussion and in his speech to the jury the Advocate Depute made it abundantly clear that the Crown relied only on mutual corroboration. This had clearly been the case throughout the trial. The potential of corroboration by distress was first raised by the trial judge in his charge. The defence were therefore deprived of the opportunity to make submissions on that point, to the judge or to the jury. By failing to alert parties that he intended to direct the jury on a basis of law different to that which had been the only one to feature in the pre-speech discussion, the judge denied the defence the opportunity to canvass what became a central and crucial issue in the case, as it is in the appeal.

[17] Senior counsel for the appellant submitted that the Crown's attempt to salvage something from the wreckage could not succeed. The primary motion for the Crown was that the court should (i) conclude that the apparent distress related to the March, not the June incident; (ii) amend the verdict as returned by the jury by deleting the reference to various occasions, to the month of June, as well as the words "seize hold of her wrist, cause her to masturbate you, push her head down, penetrate her mouth with your penis, remove her tampon". This was an attempt to reverse-engineer a verdict which was not open to the jury on the directions given and would not be justified on the evidence. It could not be said that the jury would have returned such a verdict had they been properly directed in the first place.

Submissions for the Crown

[17] The Solicitor General submitted that the jury's verdict should be understood to be a

conviction in respect of both the March and June incidents. In this respect it was accepted that there has been a miscarriage of justice in relation to the conviction of the appellant in respect of the second incident. The court was invited to substitute an amended verdict of guilty in terms of section 118(1)(b) of the Criminal Procedure (Scotland) Act 1995, reflecting a conviction in respect only of the March incident in the following terms:

> "(002) on 3 March 2018 at Dalkeith Country Park, Dalkeith, Midlothian you Sean Robert James Hogg did assault [KM], born … 2004, c/o Police Service of Scotland, Dalkeith, and did threaten her, pull down her lower clothing, penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[18] There was a clear route to conviction on such a libel. KM's evidence that the appellant penetrated her vagina with his penis was corroborated by the appellant's admission that he had sexual intercourse with KM once on that occasion. KM's evidence that she did not consent was corroborated by the distress that she displayed to the witness AM. It was submitted that "the preponderance of the evidence" suggested that this had taken place about a week after the first occasion. The judge's attribution of the distress to the second incident was a factual error, and it would have been appropriate for the jury to disregard this, and follow their own recollection that it was displayed about a week after the first incident and attributable to it.

Analysis and decision

[19] The Crown presented the case throughout as wholly dependent on the traditional application of *Moorov* between two complainers. The trial judge complicated matters by directing the jury that corroboration by distress could be found in relation to the June incident at Dalkeith Country Park. Given the discussion which had taken place, and the nature of the evidence, he misdirected himself in doing so; and he misdirected the jury.

[20] He misdirected himself in that it was procedurally inappropriate for him to have given the direction without raising the issue with parties, when (a) there had been a detailed discussion in which the Advocate Depute made it clear that the sole basis for approaching the case was *Moorov;* (b) where the judge appeared to have acknowledged this to be correct; and (c) both parties had addressed the jury on that common understanding. This formed the basis of a ground of appeal based on procedural unfairness and we consider that ground to be well-founded. Indeed, the Solicitor General virtually conceded as much. She drew an analogy with the issue of alternative verdicts, recognising that there may be situations where the trial judge requires to give a direction on an alternative verdict even where that has not been canvassed with the parties: *Duncan* v *HM Advocate* 2019 JC 9. By analogy the same may be said in respect of other directions. However, she did not go as far as suggesting that this was one such case. In her oral submissions she stated that this ground of appeal was the most difficult area for the Crown; and that she had considerable reservations about whether the procedure could be regarded as a fair one, but did not formally concede the appeal on this point.

[21] 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 (see *Garland* v *HM Advocate* 2021 JC 118, para 20). It is equally the case that, as with a direction on alternative verdicts the judge may require to do so

> "… even if, by that time, it may be too late to seek the views of the parties on the appropriateness of giving the direction." (*Duncan* v *HM Advocate*, para 28).

[22] It is a common, although not inevitable or mandatory, practice, for a discussion to take place at the conclusion of the evidence and prior to the speeches, during which such matters may be canvassed (*Duncan*; *Ferguson* v *HM Advocate* 2009 SLT 67; *Hopkinson* v *HM Advocate* 2009 SLT 292; *Miller* v *HM Advocate* 2021 SCCR 289). The practice is well-established and is referred to in detail in the Jury Manual under the heading "Judicial Management of Jury Trials".

[23] While the practice is neither mandatory nor inevitable, if the judge chooses, prior to the speeches, to engage in a discussion with parties determining the source and nature of the corroborating evidence to be relied upon, fairness demands that he should raise with parties any alternative approaches to corroboration which he considers to arise or upon which he intends to direct the jury. Here the issue went to the very root of the Crown case in respect of part of charge 2. It was abundantly clear that the issue had not occurred to either counsel and that they would not therefore address it in speeches. The main reason for a judge to raise an issue with parties at the close of the evidence is so that it may be addressed by them as they see fit in the course of their speeches. The actions of the judge deprived parties of that opportunity. In the present case, it is clear from the submissions made by counsel for the appellant after the verdict was returned, that she considered corroboration by distress not to have arisen in the way suggested by the trial judge. Raising the issue with the parties would have enabled this to be ventilated, and would have enabled the judge to be reminded that in any event there was no corroboration of penetration regarding the June incident, and that regardless of the value to be placed on the evidence of apparent distress, as the law currently stands (*Smith* v *Lees*), no conviction on that incident could follow in the absence of the application of *Moorov.* The procedure was manifestly unfair and prejudicial to the defence, and on this basis alone the appeal has to succeed.

[24] The absence of corroboration *per Smith* v *Lees* also means that the direction to the jury constituted a misdirection, but even were that not the case we consider that it was a misdirection in the circumstances of this case to direct the jury that the evidence of distress, such as it was, was in law available to them as corroboration. We say more of this below when dealing with the Crown's submissions as to the possibility of a substitute verdict.

[25] As it transpired, the jury clearly felt unable to apply *Moorov* since they acquitted in respect of the charge involving the other complainer. The fact that they also acquitted on the remaining charges concerning the present complainer is significant in this respect. The only possible basis for any verdict of guilt on charge 2 therefore was the direction relating to distress. The jury returned a verdict which indicated guilt in respect of both the March and the June incidents. Given that the clear direction was that corroboration by distress could only apply to the June incident that verdict is inept. There was no conceivable route to the verdict which the jury returned, and the Solicitor General was well advised not to support it.

A substitute verdict

[26] Nevertheless, the Crown sought to preserve the conviction on the basis that

- distress was "in fact and in law" available as corroboration of the complainer's evidence; and that
- on the evidence, the distress in question applied to the March and not the June incident.

[27] It is well established that distress may have corroborative value where the jury can be satisfied that the distress was a genuine and spontaneous reaction to, and was caused by, the conduct complained of rather than wholly a reaction to something extraneous. In *Moore* v *HM Advocate* 1990 JC 371, at p376/7, Lord Hope observed that the value of an observed

condition of shock or distress as evidence lies in its spontaneity and its independence, and in the relationship which it bears to the event. In another case he observed:

> "...it is not in doubt that the distress must be related to the activity which it is said to corroborate." (*McLellan* v *HM Advocate* 1992 SCCR 171, p 179)

There is no specified period of time from the alleged offence within which the distress must be seen to have been exhibited. In *Moore* Lord Hope said (p 376) that:

> "It would be absurd to apply some fixed test of time in terms of minutes or hours after the event. There must always be room for a difference of interval according to the circumstances of each case." (See also *Wilson* v *HMA* 2017 JC 135)

[28] That is not to say that the interval of time is irrelevant. As was said in *Moore* (p 377),

> "The shorter the interval the more likely it is that the condition is spontaneous and independent, and thus evidence in itself of what occurred. The longer the interval the more important it becomes to examine what happened during that period."

[29] It is essential to bear in mind, though, that the issue is not simply whether an interval of time has passed:

> "What matters is not the time interval as such but whether the shocked condition or the distress of the complainer was caused by the rape."(*Moore,* p 367, Lord Hope)

> "The interval between the alleged offence and the point at which distress is observed is a factor which a jury will wish to consider, but the important point is whether the jury are satisfied that the distress was caused by the offence." (*Wilson,* Lord Carloway, para 20; and see *Ferguson* v *HM Advocate* 2019 JC 53, para 14)

[30] Whilst it is for the jury to assess the evidence and determine whether the distress was genuine and had been caused by the alleged rape, the issue of whether it is capable of providing corroboration is a matter of law for the trial judge to determine (*Ferguson,* para 26). We agree with the observation of Lord Cowie in *Moore*, at p378, that

> "… [A]s a general rule, the question whether distress shown by the victim of an alleged rape, and spoken to by a third party, amounts to corroboration of the victim's evidence is one which should be decided by the jury under proper directions from the trial judge."

[31] As he also pointed out, however, there may be cases where in the circumstances no reasonable jury could regard the distress as corroboration of a complainer's evidence. Such cases may be expected to be exceedingly rare: where there is clear evidence of observed distress which is capable of being accepted as genuine and attributed to an event libelled the matter should be left to the jury to assess. However, the evidence must reach a basic level of detail such as would entitle the jury to accept it as having corroborative value. The evidence must be such that, considered as a whole, the jury would be entitled reasonably to conclude that there was objectively observed and genuine distress which was related to the activity it was said to corroborate. For present purposes that means that the evidence had to be such as would enable the jury to conclude that the complainer exhibited genuine distress to AM, which was related to, and caused by, the March incident.

[32] We do not consider that the evidence in this case would have entitled the jury to reach such a conclusion without indulging in a significant degree of speculation. We recognise that great care must be taken before excluding distress as corroboration simply because an interval of time has passed; and we stress that our conclusion is not based only on such a consideration. Nor should the matter be withheld from the jury because the evidence is capable of more than one interpretation, only one of which would suffice for corroborative purposes. That would be a matter for the jury since it is for them to decide what interpretation of circumstantial evidence (of which observed distress is an example) to adopt. Rather, it is our view that the evidence as a whole simply does not have corroborative value. Mr Findlay was hardly exaggerating when he said that what the evidence amounted to was that "Something was said to AM by the complainer after something had happened somewhere". The fundamental point is that at no time during the trial was there any attempt to set up the circumstances in which the complainer spoke to AM as having

corroborative effect. The complainer was twice examined on commission but in neither examination was she asked whether she was distressed when speaking to AM; how that distress manifested itself; and what had caused it. Such evidence is of course not a prerequisite for the use of distress as corroboration, as long as there is evidence from some other source which indicates that there was distress, in circumstances where the jury would be entitled to draw the inference that it was both genuine and caused by the incident in question. It might have been possible to elicit that evidence from AM, but there was no attempt to do so. Although he asked about her demeanour at the time, the Advocate Depute led the evidence of the complainer having spoken to AM for the purpose of showing that she had made a disclosure to a confidant and in support therefore of her credibility, but no evidence was taken from him as to the content and detail of that disclosure. Indeed, the Advocate Depute made it clear that he eschewed any such approach. The sum evidence of distress was the statement of AM that "she appeared to me to be very upset". He was not asked what gave him that impression, how the distress manifested itself, or what she told him at the time he got that impression.

[33] The evidence of AM was that at some unspecified point he became aware that the complainer and the appellant were "in a relationship"; that a few weeks after the time – unspecified – that she first mentioned him she told AM about "something" that had happened in Dalkeith Country Park. Attempts by means of leading questions to clarify when this was said relative to the incident to which it related were not successful. "It might have been a week or more before she told you anything; is that fair? – No." In cross –examination AM was asked if the complainer told him "something happened in the woods in Dalkeith", to which he agreed. He was asked "Did she tell you about a week after it allegedly happened? - From what I can remember. Around that time." How he was

supposed to know how long it was after the event is opaque. He was asked whether she mentioned the appellant having threatened to stab her, but since this allegation was not a feature of evidence relating to either the March or the June incident it did not advance matters.

[34] The evidence of the complainer as to when she had spoken to AM, and whether it was after the March or June incident was entirely unclear. The Solicitor General referred to some passages in the complainer's evidence which she submitted were consistent with the conversation having taken place shortly after the March incident, but these merely indicated that the conversation might have taken place at any time during the relevant period. In fact there is other evidence more strongly suggesting that the conversation took place in June, namely the complainer's assertion that AM was the first person to whom she told "everything", and in particular her JII dated 17 July 2019, production 10, which focused on the June incident.

[35] It will be apparent from the foregoing that there was no real detail of what the disclosure to AM concerned. The Advocate Depute having introduced the notion that the complainer spoke about "something" which had happened in Dalkeith Country Park followed this up with the question "What she told you related to her not wanting to have sex with someone; is that fair? – Yeah". Even if we make the leap to assume that the "someone" was the appellant, there is no way of knowing what was said to have happened, and no means by which a jury could consider it relatable to either the March or the June incident. The Advocate Depute specifically decided not to elicit detail of what the complainer said. It seems entirely likely that he would have been able to do so had he tried, given what is said in *Wilson* at para 35:

> "Once it is accepted that the evidence of distress was admissible as potentially corroborative, it would be unrealistic to exclude evidence of what the complainer had said at the time when the distress was observed. It is not clear why the Crown were so circumspect in not leading evidence of what the complainer had said, given that, in due course, the jury had to decide whether the distress had been caused by the incident."

[36] In short, the evidence is not such as would enable a jury to reach a conclusion that there was observed distress which was genuine and caused by the actions of the appellant alleged in the March incident, as opposed to any other cause. The evidence relied on by the Crown is far too vague as to timing, context and circumstances to be available for corroborative purposes. For that reason alone it would not be open to us to substitute the verdict sought by the Solicitor General.

[37] In any event, even had we been satisfied that there was evidence of corroborative value, we would have declined the invitation to substitute the verdict sought. It would not in our view be justifiable for this court to amend the verdict to reflect an approach to the case so radically different from that which had been adopted at the trial. The direction given by the trial judge was not a mere factual error, such that the jury could have ignored it and proceeded on the view that it referred to the March rather than the June incident, as the Crown submitted. It was a direction in law, albeit an erroneous one for the various reasons we have identified. We reject entirely the suggestion that it would have been appropriate for the jury to disregard this direction, and return the verdict now sought by the Crown.

[38] The result is that the appeal must succeed, and the appellant must be acquitted. We should make it clear however that we are satisfied that, but for the error of the trial judge, this would have been the result at trial. The only available means of corroboration was the application of *Moorov*; without that there could be no route to any verdict of guilt. The jury having rejected *Moorov* there could be only one result: acquittal.

Postscript

[39] We note that during the pre-speech discussion the trial judge raised with parties the question whether another issue, namely that of reasonable belief in consent, arose in the case. The trial judge – correctly- considered that it did not, but heard submissions on the matter. As a result he was persuaded – wrongly- that it was an issue. This is of no moment in the substance of this appeal, but we draw attention to the need for trial judges to pay close attention to the case of *Maqsood* v *HMA* 2019 SCCR 59.