Hilary Term
[2017] UKSC 20
On appeal from: [2013] CSIH 101

JUDGMENT

Gordon (Appellant) *v* Scottish Criminal Cases Review Commission (Respondent) (Scotland)

before

Lord Kerr
Lord Clarke
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

22 March 2017

Heard on 13 December 2016

Appellant
Mungo Bovey QC
Gerry Coll
(Instructed by Drummond Miller LLP)

Respondent
Gerry Moynihan QC
Chris Pirie
(Instructed by Scottish Criminal Cases Review Commission)

LORD REED: (with whom Lord Kerr, Lord Clarke, Lord Hughes and Lord Hodge agree)

Introduction

1. This appeal arises out of an application for judicial review of a decision taken by the Scottish Criminal Cases Review Commission ("the Commission") under section 194B(1) of the Criminal Procedure (Scotland) Act 1995, as amended ("the 1995 Act"). That subsection provides, so far as material:

> "The Commission on the consideration of any conviction of a person ... who has been convicted on indictment or complaint may, if they think fit, at any time, and whether or not an appeal against such conviction has previously been heard and determined by the High Court ... refer the whole case to the High Court and, subject to section 194DA of this Act, the case shall be heard and determined, subject to any directions the High Court may make, as if it were an appeal under Part VIII or, as the case may be, Part X of this Act."

2. The grounds for a reference under section 194B(1) are set out in section 194C:

> "(1) The grounds upon which the Commission may refer a case to the High Court are that they believe -
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> (a) that a miscarriage of justice may have occurred; and
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> (b) that it is in the interests of justice that a reference should be made.
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> (2) In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings."

3. It is also relevant to note section 194DA. So far as material, it provides:

> "(1) Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.
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> (2) In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings."

4. Sections 194C(2) and 194DA were inserted into the 1995 Act by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 ("the 2010 Act"), a piece of emergency legislation which was enacted on the day after this court gave judgment in *Cadder v HM Advocate* [2010] UKSC 43; 2011 SC (UKSC) 13; [2010] 1 WLR 2601.

5. These proceedings arise out of the Commission's consideration of the appellant's conviction for rape. The Commission decided not to refer his case to the High Court of Justiciary. They accepted that a miscarriage of justice might have occurred, but they did not believe that it was in the interests of justice that a reference should be made. The condition laid down in section 194C(1)(b) was therefore not met. The appellant challenges that decision on the basis that the Commission's decision was vitiated by errors of law.

6. The appellant's application for judicial review was refused by the Lord Ordinary, Lord Pentland. That decision was upheld by an Extra Division (Lord Menzies, Lady Clark of Calton and Lord Wheatley). The present appeal against their decision was brought before the introduction of a requirement that permission to appeal should be obtained.

The factual background to the appeal

7. On 12 August 2001 the appellant had sexual intercourse with a woman who then reported to the police that she had been raped. She was medically examined, and vaginal swabs were taken from her for forensic examination. The following day, the appellant was informed by the police that the allegation had been made. As requested, he went to a police station and was interviewed by police officers. At the

beginning of the interview he was cautioned. He confirmed that he fully understood the caution and that he had attended the police station voluntarily. He was asked if he wished to have a solicitor advised, but declined. In accordance with practice at the time, and the law as then understood, he was not offered the option to consult a solicitor before the interview, and no solicitor was present during it. When questioned, he freely admitted having had sexual intercourse with the complainer at his flat, and maintained that it had taken place with her consent. As a result of his admission, the semen found on the vaginal swabs was not subjected to DNA analysis. That also was in accordance with the usual practice at the time, when the fact that sexual intercourse had taken place between an accused and a complainer was not in dispute. The appellant was subsequently charged with the rape of the complainer, and also with indecent assaults on two other women.

8. The subsequent trial took place between 30 August and 5 September 2002. At the trial, the appellant was represented by a highly experienced Queen's Counsel. He pled guilty to one of the charges of indecent assault, and the other charge of indecent assault was withdrawn. In relation to the charge of rape, the Crown relied on the appellant's admission as corroboration of the complainer's evidence that sexual intercourse had occurred, that being an element of the offence which must be proved by corroborated evidence. A videotape of the appellant's interview was therefore played to the jury as part of the Crown case, without objection. Corroboration of the complainer's evidence as to the other essential element of the offence, namely that she had not consented to sexual intercourse, was provided by other Crown witnesses, who gave evidence of her being in a state of shock and distress shortly after her encounter with the appellant, and of injuries which were found when she was medically examined. There was also evidence that a decorative chain on her trousers had been broken, although her clothing was otherwise undamaged.

9. In cross-examination, the complainer accepted that she had initially given the police an untrue account of where the incident occurred, when she had stated that she had been raped in a lane near the nightclub where she met the appellant, rather than at his flat, some miles away. She explained that she had been disorientated. In relation to the evidence of her being distressed, the line of cross-examination sought to attribute her distress to her consumption of alcohol and medication, and to the appellant's having rejected her at the end of their encounter. It was also established that the complainer initially told the police that she had been taken from the nightclub forcibly, but later said that she left it willingly. She had explained her earlier account by saying that she had been embarrassed to admit that she had gone home with a man she had only just met.

10. The appellant elected not to give evidence, but relied on the interview as setting out his defence to the charge, namely that the sexual intercourse had been

consensual. As a result, he avoided having his version of events subjected to cross-examination.

11. The appellant was convicted. He was sentenced to five years' imprisonment on the rape charge and admonished for the indecent assault. The sentence was completed long ago.

12. The appellant's case is fairly typical of rape cases of that period. It was usual for persons accused of rape to be interviewed by the police without having the opportunity to consult a solicitor. It was common for them to accept that sexual intercourse had taken place and to maintain that it was consensual. It was common, in those circumstances, for the police not to complete forensic examination of samples which might have provided independent corroboration of the fact of sexual intercourse, since the accused's admission at interview rendered such examination unnecessary. It was usual for the Crown then to rely on the admission as part of the Crown case at the trial. It was common for the accused to rely on the exculpatory part of the interview in his defence.

The first appeal

13. The appellant appealed against his conviction for rape on three grounds. The first was defective representation. He claimed that evidence should have been led from a number of witnesses who could have given evidence about such matters as his kissing the complainer in the night club prior to their going to his flat, and the lack of noise from his flat at the material time. The second ground was that the jury had been directed on the law of rape in accordance with the decision in *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435, which post-dated the incident. The third ground concerned the prejudicial effect of pre-trial publicity. Each ground was considered at first sift (by a single judge) on 20 June 2003. Leave to appeal was refused, the first sift judge giving detailed reasons for his decision. However, at second sift (by three judges) on 23 December 2003, leave to appeal was granted, but only on the defective representation ground. Notwithstanding that decision, on 30 April 2004 the court allowed the appellant to lodge two additional grounds of appeal. The new grounds related to the adequacy of corroboration, and to the directions given on mens rea. At the hearing of the appeal on 29 September 2004, it was only the new grounds which were relied upon. The appeal was refused: *Gordon v HM Advocate* 2004 SCCR 641.

The second appeal

14. The appellant applied to the Commission to have his case referred back to the High Court on a number of grounds, namely prejudicial pre-trial publicity, the effect of the development in the law of rape between the incident and the trial, the sufficiency of the evidence, misdirection on the law of rape, failure by the Crown to disclose that the complainer's clothing had been seized by the police, and police misconduct and failures in relation to the investigation of the incident, the gathering of evidence and the disclosure of evidence.

15. In April 2007 the Commission referred the case back to the High Court, primarily on the basis that (1) the police investigation had been defective in a number of respects, (2) there had been a failure by the Crown to disclose a statement taken from the complainer in which she said that she shouted during the incident, contrary to her evidence at the trial (although the defence knew at the trial that such a statement had been made, and the complainer was cross-examined on the basis that she had made such a statement), and (3) the Commission had discovered evidence that the complainer had previously been in a relationship with one of the witnesses who had given evidence of her distress. In accordance with section 194B(1) of the 1995 Act, the referral was dealt with as a second appeal.

16. On 20 April 2007 the appellant made a further application to the Commission, on the basis that there had been an imbalance between men and women on the jury. The Commission rejected the application on the ground that the case had already been referred, and the matter could be raised as a ground of appeal. In the event, the matter was not pursued.

17. The appellant's grounds of appeal were lodged in June 2007. They concerned the matters identified by the Commission, and also a failure to disclose that the complainer had been charged by the police with child neglect in relation to an occasion several months after the incident involving the appellant, when her estranged husband reported that their 11 year old daughter had been left at home on her own. The charge had not been pursued.

18. The appeal had an extended procedural history, described in the judgment of Lord Carloway in *Gordon v HM Advocate* [2009] HCJAC 52; 2009 SCCR 570. In the light of that judgment, in July 2009 the appeal was set down for a hearing on 26-28 January 2010. On those dates the appellant appeared on his own behalf, having parted company (not for the first time) with his legal representatives. He sought to have the hearing discharged in order to instruct fresh counsel and solicitors, but that application was refused in view of the protracted procedural history and the age of

the conviction, amongst other matters. The appeal was refused on 6 May 2010: *Gordon v HM Advocate* [2010] HCJAC 44; 2010 SCCR 589.

19. In its opinion, delivered by Lord Carloway, the court considered each of the grounds of appeal with meticulous care. Its conclusion reflected its evaluation of the likely effect on the jury's verdict of the additional or undisclosed evidence, and of the potential evidence which was unavailable because of defects in investigation:

> "The points raised in this appeal are essentially matters of fact which the appellant maintains might, or perhaps would, have made a difference in the jury's deliberations. But the reality is that this was a complainer who was demonstrated to have given different accounts to the police and others after the occurrence of the incident. The defence brought out a number of points in favour of the defence position, including the lack of damage to the clothing. There was ample material available at the trial which could have persuaded the jury that there was a reasonable doubt about the guilt of the appellant. But, the jury had no reasonable doubt and it is easy to see why. Although there were substantial variations in the complainer's early accounts, she ultimately spoke clearly to leaving the nightclub, ending up at the appellant's flat and being raped by him.
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> ... [T]he evidence of the bruising to the complainer's breast, arms, thighs and buttocks must have seemed to the jury, as it does to this court, to be of some note. The ornamental chain of her trousers was broken. In addition, it was not disputed that the complainer had left the appellant's flat abruptly. She did not go home, as might have been anticipated after a consensual event, but went first to a male friend's house in the early hours of the morning in a distressed state. When she left his flat, she still did not go home, but called a female friend to pick her up from a shopping centre some time around 3.30 am, when she was witnessed still to be in a state of distress. In addition, there was the appellant's own account where, at parts of his interview, he accepts that he escorted the complainer to his flat when he knew she was in a drunken state. He admitted that things 'got a wee bit out of control' at some point, albeit that he had an alternative explanation for this. He admitted that he did not provide the complainer with his name or address, so that she could telephone a taxi. The jury would have been entitled to regard these admissions as highly supportive of the complainer's account and not consistent with an episode of consensual intercourse.

> The evidence therefore fully entitled the jury to reach the verdict they did and nothing in the grounds of appeal or otherwise has persuaded the court that a miscarriage of justice did occur, or even might have occurred, in this case." (paras 105-107)

The Cadder decision

20. On 26 October 2010, several months after the appellant's second appeal had been refused, this court gave judgment in the case of *Cadder v HM Advocate.* It held that the right under article 6 of the European Convention on Human Rights not to incriminate oneself implied that a suspect should be permitted access to legal advice prior to and during interrogation by the police, unless there were compelling reasons in the particular circumstances of the case which justified a restriction on the right of access to a solicitor; and that, as a general rule, answers to police questioning conducted without the opportunity of access to legal advice ought not to be admitted in evidence. However, their admission in evidence did not in itself make the trial unfair. A conviction would only be quashed if (per Lord Hope at para 64) it was clear that there was insufficient evidence for a conviction without the evidence of the police interview or that, taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict had they not had that evidence before them.

21. This decision was not unexpected. There had however been considerable concern about its practical implications, partly because of an apprehension that the resultant change in understanding of the law might form the basis of appeals by the large numbers of persons who had previously been convicted on the basis of evidence obtained at interviews conducted without their having had access to a solicitor. Such persons had been properly convicted under the law as it was understood at the time of their trial and any subsequent appeal, but they might, following *Cadder,* argue that they were the victims of a miscarriage of justice. There was little if any authority on the approach which the High Court should take to applications for extensions of time to lodge notices or notes of appeal, based upon developments in the law. If the ordinary approach to applications for extensions were adopted, then it appeared that such applications might be granted in large numbers of cases, since the lateness of the application would generally be excusable. There was also uncertainty as to whether the refusal of applications would in any event be compatible with Convention rights. Even if the court adopted a restrictive approach, the refusal of applications might simply result in a flood of references by the Commission.

22. In *Cadder,* this court considered the retroactive effect of its own decision in an effort to address those concerns. Lord Hope, in a judgment with which the other

members of the court agreed, referred to dicta in earlier decisions of this court, to the effect that it has an inherent power to limit the retrospective effect of its decisions. The Convention principle of legal certainty suggested that there would be no objection to this on Convention grounds. He concluded, however, that the exercise of that power was precluded in this context by the statutory regime created by the Scotland Act 1998. Furthermore, the relevant Strasbourg authority (*Salduz v Turkey* (2008) 49 EHRR 19) had not laid down a new principle: far from making a ruling that was not applicable to acts or situations that pre-dated its judgment, it ruled that the applicant's Convention rights were violated in 2001, when the relevant events took place.

23. Nevertheless, Lord Hope considered that there were strong grounds for ruling, on the basis of the principle of legal certainty, that the decision in *Cadder* did not permit the re-opening of cases which had been finally determined. After referring to judgments of the European Court of Human Rights concerned with the principle of legal certainty in the application of the Convention, to the decision of the Supreme Court of Ireland in *A v Governor, Arbour Hill Prison* [2006] IESC 45; [2006] 4 IR 88, and to that of the Court of Appeal in England in *R v Budimir* [2010] EWCA Crim 1486; [2011] QB 744, Lord Hope stated:

> "In the light of these authorities I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court of Justiciary. It will be for the Appeal Court to decide what course it ought to take if a reference were to be made to it on those grounds by the commission". (para 62)

The reference to the public interest in that passage, and in a similar passage in the judgment of Lord Rodger (para 103), should be understood as referring to the interests of justice, in accordance with section 194C(1) of the 1995 Act.

24. Lord Rodger, in a judgment with which the other members of the court also agreed, observed (para 101) that guidance could be derived from the judgment of Murray CJ in *A v Governor, Arbour Hill Prison* at paras 36-38:

> "[T]he retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position ... No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

25. Lord Rodger considered that Murray CJ's description of the effect of a decision which alters the law as previously understood could be applied to Scots law, and that such an approach was also compatible with the Convention:

> "For instance, in *Smith v Lees* 1997 JC 73 the Court of Five Judges overruled *Stobo v HM Advocate* 1994 JC 28 and thereby laid down a more restrictive test for corroboration in cases of sexual assault. The new test applied to the appellant's case and to other cases that were still live. But it could never have been suggested that the decision meant that convictions in completed cases, which had been obtained on the basis of the law as laid down in *Stobo*, were ipso facto undermined or invalidated. Similarly, in *Thompson v Crowe* 2000 JC 173, the Full Bench overruled *Balloch v HM Advocate* 1977 JC 23 and re-established the need to use the procedure of a trial within a trial when the admissibility of statements by the accused is in issue. But, again, this had no effect on the countless completed cases where convictions had been obtained on the basis of evidence of such statements by the accused which judges had admitted in evidence without going through that procedure. So, here, the court's decision as to the implications of article 6(1) and (3)(c) of the Convention for the use of evidence of answers to police questioning has no direct effect on convictions in proceedings that have been completed. To hold otherwise would be to create uncertainty and, as Murray CJ rightly observes [in *A v Governor, Arbour Hill Prison A v Governor, Arbour Hill Prison,* para 38], cause widespread injustices. And the Strasbourg court has pointed out that the principle of legal certainty is necessarily inherent in the law of the European Convention (*Marckx v Belgium* (1979) 2 EHRR 330, para 58). In *A v Governor, Arbour Hill Prison* (para 286) Geoghegan J

> said that he was 'satisfied ... that it would be wholly against good order if convictions and sentences which were deemed to be lawful at the time they were decided had to be reopened.' I emphatically agree. And that policy is, of course, embodied in section 124 of the 1995 Act which makes interlocutors and sentences pronounced by the Appeal Court 'final and conclusive and not subject to review by any court whatsoever', except in proceedings on a reference by the Scottish Criminal Cases Review Commission." (para 102)

26. In the subsequent cases of *Lang and Hastie v United Kingdom* (2012) 55 EHRR SE 7, in which applications were made to the European Court of Human Rights by persons who had been refused extensions of time to appeal on a *Cadder* basis, the court referred approvingly to "the legal certainty the Supreme Court properly sought to introduce when it limited the effect of its ruling in *Cadder*" (para 32).

The 2010 Act

27. A legislative response to *Cadder* had been prepared in anticipation of this court's decision, and as earlier explained, the 2010 Act was immediately enacted. As well as amending the legislation governing the rights of persons arrested or detained by the police, so as to provide them with a right of access to a solicitor, and making consequential amendments to legal aid legislation, it amended the provisions of the 1995 Act relating to references by the Commission as explained earlier. As a result, in determining whether or not it was in the interests of justice that a reference should be made, the Commission was required to have regard to the need for finality and certainty in the determination of criminal proceedings. The High Court was also given the power to reject references if it considered that it was not in the interests of justice that any appeal arising from the reference should proceed; and in that regard it also was required to have regard to the need for finality and certainty in the determination of criminal proceedings.

28. Although the immediate occasion for the enactment of the provisions of the 2010 Act concerning references by the Commission was the case of *Cadder*, it is important to appreciate that those provisions have a wider significance. They are not confined either to *Cadder*-type cases or to other cases concerned with changes in the law. It is inherent in the role of the Commission that it qualifies the principle of finality in criminal proceedings, otherwise secured by statutory provisions concerning the time limits for bringing appeals and the finality of the disposal of appeals by the High Court. The justification for that inroad into finality and legal certainty is the need to provide a mechanism for the review of cases where a possible miscarriage of justice comes to light after the exhaustion of rights of appeal. This is

necessary not only in the interests of the potential victim of a miscarriage of justice but also in order to maintain public confidence in the administration of justice. Certainty and finality nevertheless remain important considerations for any system of criminal justice: the re-opening of cases which have been completed has significant implications for the victims of crime, and the families of deceased victims, as well as for those who have been convicted. Public confidence in the administration of justice is also damaged if the outcome of completed proceedings appears to be merely provisional. There are in addition more pragmatic considerations. In a legal system with limited resources, the public interest requires priority generally to be given to dealing with current cases.

29. In order for these considerations to be taken into account, it is necessary that the Commission should not merely ask itself whether a miscarriage of justice may have occurred, but also whether it is in the interests of justice that the case should be referred to the High Court; and that, in deciding the latter question, it should have regard to the need for finality and certainty in the determination of criminal proceedings.

The post-Cadder application to the Commission

30. On 7 May 2010, the day after the refusal of his second appeal, the appellant made another application to the Commission, raising matters relating to forensic findings. On 29 October 2010 the appellant also sought to have his case referred on the basis of the *Cadder* decision, issued three days earlier. The Commission declined to make a reference on the grounds relating to forensic findings, saying in a statement of reasons dated 25 February 2011 that they did not believe that a miscarriage of justice might have occurred. In relation to *Cadder*, the Commission decided to defer their decision until judgment had been given in a number of appeals to this court. No issue is taken with that decision in this appeal.

31. In response to further submissions on behalf of the appellant, relating to scientific matters and also making allegations of unfairness and oppression at the hearing of the second appeal, the Commission declined to make a reference on those grounds in a supplementary statement of reasons dated 30 September 2011. No issue is taken with that decision in this appeal.

32. Following the giving of judgment by this court in the case of *Ambrose v Harris* [2011] UKSC 43; 2012 SC (UKSC) 53; [2011] 1 WLR 2435 and related appeals, the Commission addressed the *Cadder* ground in a statement of reasons dated 27 January 2012. They considered that, since the Crown had relied upon the appellant's admission that sexual intercourse had occurred as corroboration of the

complainer's evidence in that regard, and no other corroborative evidence existed, there might have been a miscarriage of justice.

33. The remaining question was whether it was in the interests of justice that a reference should be made. In that regard, the Commission noted the requirement to have regard to the need for finality and certainty in the determination of criminal proceedings, in accordance with section 194C(2) of the 1995 Act. They noted that the appellant had been convicted in 2002, long before the decision in *Cadder* or the judgments of the European Court of Human Rights on which it was based. They noted the history of the previous applications and appeals. They stated that they considered the following matters to be relevant:

(1) The amount of time that had passed since the conviction.

(2) That the appellant had never disputed that he had sexual intercourse with the complainer, and had relied on the interview at his trial in order to present his defence of consent.

(3) That, in so far as the Crown had used the interview not only as corroboration of sexual intercourse having taken place, but also to undermine the appellant's credibility, no objection had been taken at the trial (whereas objection had been taken, successfully, to the admissibility of a further interview).

(4) That no issue had been raised in the two appeals as to the fairness of the manner in which the interview was conducted.

In the light of these considerations, the Commission concluded that it was not in the interests of justice to refer the case back to the High Court.

34. In the light of further submissions on behalf of the appellant, the Commission confirmed their decision in a supplementary statement of reasons dated 27 April 2012. The submissions argued that the appellant's case should be regarded as exceptional, particularly because he had been unrepresented at the hearing of the second appeal and had lacked the necessary knowledge to raise a *Cadder* point. The Commission accepted, as they had in their earlier statement of reasons, that the appellant could not be criticised for raising the point only after the decision in *Cadder*, and considered that the reasons for his not having raised the point earlier were not relevant to the question of whether it was in the interests of justice to refer his case. In relation to that question, the Commission adhered to their earlier reasoning. They emphasised in particular the fact that the appellant had at no stage

disputed the veracity of what he said to the police, together with the fact that he relied upon the interview in order to present his defence of consent.

The proceedings below

35. On 13 September 2012 the appellant commenced proceedings for judicial review of the Commission's decision not to refer his case back to the High Court on the *Cadder* ground. It was argued that the Commission had erred in taking account of the amount of time that had passed since the conviction, or had in any event attached undue weight to that consideration. It was also argued that the Commission should have given greater weight to the adverse impression which might have been created in the minds of the jury by the appellant's attitude towards women, as revealed by the interview: an attitude described as one of flippancy, coarseness, indelicacy and selfishness. Finally, it was argued that notwithstanding what had been said by this court in *Cadder* about the need for finality in criminal proceedings, the appellant's case should have been treated as exceptional, particularly since he had been unrepresented when his appeal was heard, and the *Cadder* appeal had then been pending. In those circumstances, it was argued, the High Court should have advised him to seek an adjournment of the hearing of his appeal.

36. On 24 January 2013 the Lord Ordinary refused the application: [2013] CSOH 13. In a careful judgment, Lord Pentland considered fully the various points made on behalf of the appellant, and rejected each of them. His decision was upheld by the Extra Division on 6 November 2013: [2013] CSIH 101.

The present appeal

37. The issues raised by the appellant in the present appeal are stated to be "whether the Commission erred in law in taking into account the following considerations, when, had *Cadder* applied, the interview that provided the corroboration of the Crown case would have been inadmissible and the appellant would not have been convicted:

> "(1) that the appellant had not disputed the truth of what he told the police at interview;
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> (2) that the appellant had not challenged the fairness of the police interview or its use at his trial in that, before *Cadder*, there was no basis upon which to do so; and

(3) that the appellant made use of the interview at trial, when this was a course of action decided upon in circumstances forced on the appellant, namely that the interview was already before the jury."

38. In relation to the first of these matters, Lord Pentland said:

> "[I]t was clearly relevant for the respondents to recognise that the petitioner has never disputed the truth of what he told the police in his interview and, in particular, that he has never suggested that he did not have sexual intercourse with the complainer. What he now seeks to do is to take advantage of a subsequent change in the law rendering inadmissible evidence which was not in dispute at the trial, videlicet evidence that he admitted having intercourse with the complainer. It would, in my opinion, be repugnant to the interests of justice if the petitioner were now to be permitted to invoke *Cadder* for the purpose of ruling out uncontested evidence that was essential to the technical sufficiency of the Crown case at his trial. To do so would allow the petitioner to transform what was a non-issue at the trial into an issue of critical importance years later. That would run counter to the principle of finality and certainty that is central to the fair working of the criminal justice system."

I respectfully agree. The fact that the evidence in question was and remains undisputed is plainly relevant to an evaluation of whether it is in the interests of justice to make a reference. It would not normally be in the interests of justice to quash a conviction merely because, under the law as now understood, there was a lack of admissible corroboration of a fact which had never been in dispute.

39. Counsel for the appellant submitted that, if the appellant had been offered the opportunity to consult a solicitor, and if (1) he had taken advantage of that opportunity, (2) he had been advised on corroboration, self-incrimination and his right to remain silent, and (3) he had exercised his right to remain silent, then he might not have admitted having sexual intercourse, in which event the interview would not have provided the necessary corroboration that sexual intercourse had occurred. That also is a relevant consideration. So too, for that matter, are factors affecting the likelihood of each of those conditions being satisfied: for example, the fact that the appellant actually declined to have intimation of his being interviewed given to any solicitor (para 7 above), the fact that other potentially corroborative evidence was available, in the form of the semen found on vaginal swabs (para 7 above), and the fact that a person accused of rape might have been advised that the only defence, if sexual intercourse could be proved to have taken place, was one of consent, and that the credibility of such a defence would be enhanced if it were put

forward at the earliest opportunity. The fact that it was because of the answers given at interview, and the admissibility of those answers under the law at that time, that the semen was not subjected to examination so as potentially to provide other corroborative evidence, is also relevant. The relevance of considerations such as these does not, however, in any way detract from the relevance of the fact that the truth of what was said at interview about sexual intercourse taking place was and remains undisputed.

40. In relation to the second matter, Lord Pentland said:

> "I also consider that it was plainly important for the respondents to acknowledge that in the course of two full appeals against his conviction the petitioner never challenged the fairness of the manner in which the police conducted the interview. Nor did he seek to argue on appeal that the use made of the interview by the Crown at his trial was unfair."

I again agree. Counsel for the appellant argued that there was no basis on which the appellant could have challenged the fairness of the interview or its use at his trial, before *Cadder*. But that misses the point. The decision in *Cadder* established a new basis on which evidence of answers to police questioning might be inadmissible, but there were already other well-established grounds of objection, including unfairness in the conduct of the interview or in the use made of it at the trial. The short point being made by the Commission was that, in the appellant's case, unlike some others, the fairness of the conduct of the interview and the use made of it at the trial had not been challenged. That was plainly relevant to an evaluation of where the interests of justice lay.

41. The third matter was not raised in quite the same way before the courts below, but Lord Pentland accepted that the fact that the appellant had chosen to rely on his police interview to present his defence to the jury was a relevant consideration. Again, I agree. Counsel for the appellant argued that this was a course of action decided upon in circumstances forced upon the appellant, namely that the interview was already before the jury. That is not a complete answer. Given that the appellant's admission that sexual intercourse had taken place was admissible under the law as it then stood, he was entitled to have the whole of the interview placed before the jury, as a matter of fairness, so that the jury were aware that the admission was made in the context of his also maintaining that intercourse had been consensual. The result was that, although he was entitled to give evidence in his own defence, he did not have to do so in order for his defence to be placed before the jury: they had already heard his account to the police. He did not, therefore, have to expose his account to cross-examination. That afforded him an opportunity which would not have existed if the interview had been inadmissible. In the event, he availed himself

of that opportunity. That was a matter which could properly be taken into account by the Commission when evaluating the course of action which the interests of justice required.

42. Counsel for the appellant also argued that the approach to the application of the "interests of justice" test in section 194C of the 2009 Act which had been adopted by the Commission in the present case was inconsistent with the approach to the application of the corresponding test in section 194DA by the High Court in *M v HM Advocate; Gallacher v HM Advocate* [2012] HCJAC 121; 2012 SCL 1027. It was argued that the case of *Chamberlain-Davidson v HM Advocate* [2013] HCJAC 54; 2013 SCCR 295 was a good illustration of the approach proposed by the appellant.

43. There are a number of difficulties with these arguments. One arises from the fact that the High Court has not itself seen its task in applying the interests of justice test in section 194DA as identical to that of the Commission applying the corresponding test under section 194C. In *M v HM Advocate; Gallacher v HM Advocate*, Lord Justice-General Hamilton, delivering the opinion of the court, considered the role of the Commission and its relationship with the court, and stated:

> "Although this court has been given the power to reject a reference in language that replicates the provision applicable to the Commission (section 194DA(1), (2)), it cannot be right for us simply to duplicate the Commission's function and give effect to our own view. In light of the impressive record of the Commission, it is unlikely that we will have cause to differ from its judgment on this point. I think that we are entitled to assume, unless the contrary is apparent, that the Commission has considered the criteria set out in section 194C and has duly made its independent and informed judgment on them. In my view, we should reject a reference only where the Commission has demonstrably failed in its task; for example, by failing to apply the statutory test at all; by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse." (para 33)

44. As the Lord Justice-General pointed out in that passage, the Commission makes an independent judgment. It is therefore possible, as was noted in the Report of the Carloway Review (2011), that "there may be cases in which the SCCRC and the High Court could reach a different decision on where the interests of justice may lie" (para 8.2.11).

45. A further difficulty with the argument is that the expression "the interests of justice", which appears in both section 194C and section 194DA, is not susceptible of a precise legal definition which can be applied mechanically. It requires an evaluation of a broad nature, based on an assessment of the particular circumstances of individual cases. Thanks to the thoroughness of the Commission's reports and the High Court's judgments in the present case, this court has access to a wealth of information about the facts which led the Commission to conclude that a reference was not in the interests of justice. Its knowledge of the other cases relied on in argument is derived entirely from the judgments of the High Court in those cases, and is more limited. Certain points of distinction are however readily apparent.

46. The cases of *M v HM Advocate* and *Gallacher v HM Advocate*, which were decided together, raised the question whether the court should reject two references under section 194DA. Each reference concerned the admission of a police interview prior to *Cadder*. In the case of *M v HM Advocate* (the subsequent stage of which is reported as *RMM v HM Advocate* [2012] HCJAC 157; 2013 JC 153), where the appellant had been convicted of rape, the statements made during the interview went to the issue of consent: in relation to that issue, the appellant gave several potentially incriminating answers to questions put to him. At his trial, he did not accept the truth of those answers, and gave evidence in his own defence. The interview was then used in cross-examination, and in the prosecutor's speech to the jury, to attack his credibility. There was also a lack of clarity in the verdict. The appellant was still serving his sentence.

47. In *Gallacher v HM Advocate*, the appellant made admissions during a police interview which could be held to show special knowledge of a series of sexual offences. He claimed that the police had bullied him and briefed him as to the answers he should give to their questions. That, he maintained, was how he came to show special knowledge. The court allowed the references to proceed.

48. In each of those cases, the circumstances were very different from those of the present case. None of the factors referred to in para 37 above appears to have been present. Most importantly, the statements in question in those cases went to an issue which was in dispute at the trial and remained in dispute. Their veracity was not accepted.

49. The case of *Chamberlain-Davidson v HM Advocate* was concerned with a conviction for attempted rape, where the appellant had told the police at interview that he had met the complainer in the street, had said hello, and had grabbed her wrists when she started to scream. The latter admission was the only corroboration of the complaint of assault. The Commission made a reference on grounds concerned with misdirection. They declined to make a reference on a *Cadder* ground, for similar reasons to those given in the present case: the appellant had

served his sentence; all parties had proceeded in good faith on the understanding that the interview had been conducted fairly and that its contents were admissible; the appellant had never denied the veracity of the incriminating statement he had made; and he had relied on his police interview by way of his defence. The court decided not to reject the reference under section 194DA: [2012] HCJAC 120. Subsequently, in the exercise of its power under section 194D(4B) of the 1995 Act to grant leave for the appellant to found the appeal on additional grounds, the court allowed additional grounds of appeal to be received, including a ground raising a question as to the retroactive effect of the decision in *Cadder*: [2012] HCJAC 122. In the event, that point was not discussed at the hearing of the appeal. The Crown conceded that, if there was not a sufficiency of evidence without the police interview, the appeal must succeed. It succeeded on that basis. Nothing in that case suggests that the Commission erred in taking account of the matters mentioned in para 37 above.

50. It follows that the Commission did not err in any of the respects complained of, as the courts below correctly held.

Conclusion

51. For these reasons, I would dismiss the appeal.