



22 March 2017

## PRESS SUMMARY

**Gordon (Appellant) v Scottish Criminal Cases Review Commission (Respondent) (Scotland)**  
[2017] UKSC 20  
*On appeal from [2013] CSIH 101*

**JUSTICES:** Lord Kerr, Lord Clarke, Lord Reed, Lord Hughes, Lord Hodge

### BACKGROUND TO THE APPEAL

The appeal arises out of an application for judicial review of a decision taken by the Scottish Criminal Cases Review Commission (“the Commission”) under s.194B(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) not to refer the appellant’s rape conviction to the High Court of Justiciary.

In 2001 the appellant had sexual intercourse with a woman who then reported to the police that she had been raped. The appellant was interviewed by the police, and in accordance with practice and the law as it was understood at the time, he was not offered the option to consult a solicitor before the interview, and no solicitor was present during it. During the interview, he admitted having had sexual intercourse with the complainer, but maintained that it had been consensual. As a result of his admission, semen found on vaginal swabs was not subjected to DNA analysis. At trial, the appellant elected not to give evidence but relied on the interview as setting out his defence of consent. The appellant was convicted and sentenced to 5 years’ imprisonment.

The appellant appealed against his conviction unsuccessfully. His case was also referred by the Commission, again without success. The appellant then applied to the Commission for a second referral of his case. Following the decision of the Supreme Court in *Cadder v HM Advocate* – that article 6 of the European Convention on Human Rights required suspects to be permitted access to legal advice prior to and during interrogation by the police – the appellant also sought to have his case referred on that basis. The Commission declined to make a reference on any of the grounds advanced. In relation to the *Cadder* ground, the Commission 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 correlative evidence existed, there might have been a miscarriage of justice. However, the Commission did not believe it was in the interests of justice that a reference should be made, given the time that had passed since conviction, and that the appellant did not dispute the veracity of the interview or the fairness of the manner in which it had been conducted, and had relied on it at trial. The grounds for a reference set out in s.194C(1) were therefore not met. The appellant applied for judicial review of the Commission’s decision. That application was refused by the Lord Ordinary and the ruling was upheld by the Extra Division. The appellant appealed to the Supreme Court.

### JUDGMENT

The Supreme Court unanimously dismisses Mr Gordon’s appeal. Lord Reed gives the judgment, with which the rest of the Court agrees.

## REASONS FOR THE JUDGMENT

The Extra Division and the Lord Ordinary were correct to conclude that the Commission did not err in law in any of the ways suggested by the appellant.

The Commission was right to take into account the fact that the appellant had not disputed the veracity of what he had told the police in the interview. The fact that the evidence in question was and remains undisputed is plainly relevant to 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. While it is a relevant consideration that if the appellant had been offered the opportunity to consult a solicitor, matters might have taken a different course, and the interview might not have provided the necessary corroboration that sexual intercourse had occurred, it is also relevant that it was because of the answers given at interview, and the admissibility of those answers under the law at the time, that the semen found on the swabs were not submitted to examination, so as potentially to provide other corroborative evidence. These considerations do not however detract from the relevance of the fact that the truth of what was said at interview was and remains undisputed. [37-39]

The Commission was also correct to take into account the fact that the appellant had not challenged the fairness of the way in which the interview had been conducted or its use at the trial. Prior to *Cadder* there were well-established grounds of objection on which the appellant could have relied in the event of unfairness in the conduct of the interview or the use made of it at the trial, and his failure to do so was plainly relevant to where the interests of justice lay. [40]

It was also a relevant consideration that the appellant had relied on the interview in order to present his defence to the jury. The appellant's argument was that this course of action was forced upon him. Although 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 so that they were aware that the admission was made in the context of his contention that the sexual intercourse had been consensual. The result was that, although the appellant 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. He could therefore avoid exposing his defence 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. [41]

The Commission's approach to the "interests of justice" test in s.194C of the Act was not inconsistent with the application in the case law of the corresponding test in s.194DA, which applied to the High Court. The High Court has not treated its decision under s.194DA as identical to that of the Commission under s.194C; although the power to refer is couched in the same language, the role of each body is different. Further, the authorities relied on by the appellant in any event concerned different circumstances. [42-50]

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>