

Introduction

1. The use of *Moorov* regularly features in applications to the Commission (e.g. David Patterson – successful referral albeit no written judgment was issued). The Commission’s position in relation to the application of the doctrine and indeed its progressive widening is discussed below.

2. By way of background, the doctrine derives from a 1930s case (*Moorov v HMA*¹) involving the prosecution of a Glasgow businessman, Samuel Moorov, who was accused and convicted of sexual offences against nineteen female employees over a period of three years. The offences took place in private, presenting obvious issues with corroboration; with a single witness speaking to each incident, under the then law of evidence none of them could be proved. In *Moorov*, however, the Lord Justice General (Clyde) set down a series of criteria under which separate incidents of criminality might corroborate one another. These are summarised more succinctly in the Stair Memorial Encyclopaedia:

“Where an accused is tried on two or more charges alleging similar acts which are so connected in time, character and circumstances as to justify an inference that they are instances of a course of similar conduct systematically pursued by him, the evidence of a single witness in relation to one charge may be corroborated by the evidence of another single witness in relation to another”²
(Emphasis added)

3. Earlier thoughts were that the doctrine only applied to sexual offences (where corroboration was generally difficult to find since offending generally took place in

¹ 1930 JC 68

² Stair Encyclopaedia, Vol. 10, para 769

private). However, the ambit of the doctrine has widened since the doctrine's conception and it has been found since then to be applicable to amongst other matters, and not exclusively, a series of apparently motiveless assaults by razor slashing (see *HMA v McQuade*³), a series of attempts to bribe professional footballers (see *McCudden v HMA*⁴), reset (see *Harris v Clark*⁵) and theft charges (see *Wilson v HMA*⁶).

The Commission's Position

4. When considering an application based on the alleged misapplication of *Moorov*, the Commission applies the following principles derived from previous decisions of the High Court:

- It has been long established that the crimes must be *"so inter-related by character, circumstances and time...as to justify an inference that they are instances of a course of criminal conduct systematically pursued by the accused person"* (*Ogg v HMA*⁷).
- The law has, however, moved on and is no longer limited in its application to *"the same crime"* (see e.g. *HMA v Cox*⁸) previously seen. Indeed it is the underlying similarity of the conduct which must be examined (see the Lord Justice General Hope delivering the Opinion of the Court in *McMahon v HMA*⁹ and, more recently, the Lord Justice General Hamilton's dictum in *B v HMA*¹⁰ which provides a comprehensive discussion on the current approach taken by the court).
- To establish a course of conduct, the mere identity of the charges libelled is insufficient. For example, in the case of *Farrell v Normand*¹¹, despite the case involving two charges of breach of the peace, only two days apart, and both charges involving causing fear and alarm to the complainers, the court held that

³ 1951 JC 143

⁴ 1952 SLT 357

⁵ 1958 JC 3

⁶ 2001 SCCR 455

⁷ 1938 JC 152

⁸ 1962 JC 27

⁹ 1996 SLT 1139

¹⁰ 2009 JC 88

¹¹ 1992 SCCR 859

Moorov was inapplicable because there was an element of indecency in only one of the two charges. Nevertheless the Commission notes that the question of whether the doctrine can be applied remains one of fact and degree and is dependent upon the circumstances of each case, see for example, the Lord Justice General Emslie's dictum in *Harvey v HMA*¹² in which he opined that: "*each attack* [involving two assaults which were closely connected in time and place, one of which involved striking the victim from behind with a beer can, and the other slamming a car door against the victim] *was an unprovoked and sudden assault upon a woman, unknown to her assailant. The two assaults were very closely connected in time and place and it does not matter a scrap that the particular method of assault was different*".

- Evidence of a single incident from one complainer may be capable of corroborating evidence from another of an entire course of conduct in relation to another complainer (*FJK v HMA*).¹³

- It is necessary for there to be independent evidence identifying the accused in relation to each of the relevant crimes. However, circumstantial evidence may well suffice (see, for example, *Lindsay v HMA*¹⁴).

- The doctrine must be applied with caution, to avoid a situation in which evidence showing a general disposition to commit some kind of offence might be treated as corroboration (*Ogg v HMA*). As per the Lord Justice Clerk Aitchison – the court must be satisfied with "*reasonable and practical certainty*" that the offences are instances of one course of conduct pursued by the same person.

- Where one of the factors relevant to *Moorov* is weak, the remaining factors require to be stronger to justify the application of the doctrine¹⁵. If, for example, the gap in time between various offences is lengthy, there must be some "special" or "extraordinary" link between the charges rendering the similarities

¹²1975 SCCR (Supp) 96

¹³2007 HCJAC 28

¹⁴1994 SLT 546

¹⁵*Tudhope v Hazelton* 1985 SLT 209. In *DS v HMA* 2017 SCCR 129, the court observed: "The other side of the coin of the point made in *Tudhope v Hazelton* is what was said by the Lord Justice Clerk (Carloway) in *S v HM Advocate* at para 10 'The more similar the conduct is in terms of character, the less important time gap may be.'"

“compelling”¹⁶. In *AK v HMA*¹⁷ the Appeal Court upheld a conviction involving the application of *Moorov* to an interval of some thirteen years, although the court also opined that “the features of this case are unprecedented” and added that “[i]t is highly unlikely that they will ever be repeated”.

- The test which must be applied, where it is contended that the *Moorov* doctrine ought not to have been applied, is ‘*whether it can be said, on no possible view, is there any connection between the charges in question*’ per Lord Osborne at page 21 of the opinion in *FJK v HMA*¹⁸.

Howden

5. Within the context of the present discussion, the rule in *Howden v HMA*¹⁹ is worthy of note. The rule in *Howden* is analogous to *Moorov* in the sense that it permits evidence supporting the commission of one crime to serve as proof of another²⁰. It operates, however, in situations in which it can be inferred that the perpetrator of two or more separate incidents was the same person²¹. If the jury is satisfied that this is the case, a positive identification of the accused in relation to one of the incidents will serve to cure any evidential deficiency caused by lack of identification in relation to the other(s).

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¹⁶ *RF v HMA* 2016 SCCR 319 at paragraph 22; *H v HMA* 2015 SLT 380 at paragraph 28; *B(R) v HMA* 2017 SCL 545

¹⁷ [2011] HCJAC 52

¹⁸ See also *Keaney v HMA* 2015 SLT 102 at paragraph 13

¹⁹ **1994 SCCR 19**

²⁰ It should be noted, however, that the court in *Howden* specifically disavowed any connection to *Moorov*, stating that its approach was derived from an application of the law relating to proof by circumstantial evidence.

²¹ On the limits of such an inference, see *McHale v HMA* 2017 SCCR 427