HIGH COURT OF JUSTICIARY

[2019] HCJ 46
IND/2018-3217

OPINION OF LORD MATTHEWS

in causa

NH

Minuter;

against

HER MAJESTY'S ADVOCATE

Respondent;

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Minuter: Connelly, Duling; Aamer Anwar & Co, Glasgow
Respondent: S Borthwick, AD; Crown Agent
For SCRA: Sharpe; Anderson Strathern LLP, Edinburgh

17 April 2019

Introduction

[1] The Minuter has been indicted at the instance of the Respondent in relation to two charges of sexual offences in respect of a child (his daughter MN), contrary to sections 18 and 20 of the Sexual Offences (Scotland) Act 2009 (charge 1) and sections 28 and 30 of the 2009 Act (charge 2). He also faces charges of assault in respect of two other children and a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. He has submitted a preliminary objection to the admissibility of evidence in accordance with

section 79(2)(b)(iv) of the Criminal Procedure (Scotland) Act 1995 and has also raised a compatibility issue covering effectively the same ground.

[2] The case called before me for a hearing on 19 and 20 March 2019. A previous hearing had been adjourned in order that intimation could be made to the Scottish Children's Reporter Administration ("SCRA") and a brief submission was made on their behalf before me.

[3] No oral evidence was led. An extensive Joint Minute was agreed and I was provided with affidavits of the Minuter and the sheriff who presided at the referral proof which has given rise to the difficulty and more details of which are to follow.

[4] Broadly speaking, the history of the case is that MN, the complainer in charges 1 and 2 made a disclosure about them, following which her mother contacted the police. The matter was investigated and reported to COPFS. The only available evidence on these matters was the account given by the complainer and Crown counsel marked the case no proceedings. As I understood it, no intimation of this was given. This was in 2017. A summary complaint was raised in relation to charges 3, 4 and 5 after the decision not to proceed on charges 1 and 2 was taken. The complaint was served on 2 June 2017. Before that complaint proceeded to trial the circumstances were referred to the Reporter and a Children's Hearing was held on 2 August 2017. An order was made that MN would reside in a residential unit, have no contact with the Minuter and have contact with her mother at MN's discretion and under the supervision of social workers. The Minuter remained within the family home while two other children were accommodated with their mother elsewhere. The grounds of referral were predicated on statements of fact which, amongst other things, reflected charges 1 and 2. They were not accepted by the Minuter and his wife and a referral proof was held at Glasgow Sheriff Court. As at the date of the proof all three children had been removed from the care of their mother and the Minuter had no contact with them. At the proof on 12 February 2018 the mother was

represented by senior counsel while the Minuter was represented by an experienced junior counsel. The child MN was also represented. As neither the Minuter nor his wife understood English an interpreter was appointed for each of them.

[5] Evidence was heard on 12, 13, 14, 15 and on the morning of 16 February 2018. Thereafter an adjournment was sought and granted to allow a possible resolution.

[6] Having taken advice from his solicitor and counsel, the Minuter accepted amended grounds of referral, the supporting facts in respect of which reflected *inter alia* the allegations in charges 1 and 2 on the indictment. Crown production 6 is a certified copy amended statement of grounds which accurately reflects the amended grounds and the supporting facts.

[7] The interlocutors are set out in Crown production 7. The amended statement was read out in the presence of the parties by the Reporter's representative before the grounds were accepted by the Minuter through his counsel, acting on instructions which had been given by him. The sheriff asked the Minuter and the children's mother individually whether they now accepted the amended grounds and they both confirmed their acceptance. He did not go over the grounds in detail because the Reporter had done so when explaining the amendments to be made. The sheriff proceeded on the basis that the Minuter accepted the grounds only after having discussed his decision in detail, through the interpreter, with his counsel and solicitor. Given that he was represented by experienced counsel, the sheriff was, quite understandably, satisfied that he understood the consequences in those proceedings of accepting the grounds for referral so he did not ask him directly in terms if he understood the consequences.

[8] The sheriff made certain interim orders, the details of which do not matter for present purposes.

[9] He did not administer any warning to the Minuter before his acceptance of the amended grounds that his acceptance of these grounds might render him liable to criminal proceedings. He did not warn him that it might be used as evidence against him in criminal proceedings. Neither of these warnings is standard practice in referral proofs before a sheriff. The sheriff was not aware of any such admission being used to found, or as evidence in, criminal proceedings and did not specifically consider that matter in the context of this case.

[10] The advocate depute accepted that this was the first time that the Crown had attempted to use what happened in a referral proof before a sheriff in support of criminal proceedings.

[11] It appears that the Social Work Department volunteered to the reporting officer the fact that the grounds were accepted. The reporting officer in turn told the person who had been preparing the case for the Crown. The matter was then re-reported on 17 April 2018 to COPFS for Crown counsel's opinion on whether it was competent or appropriate to seek to lead evidence of the acceptance of the grounds in order to corroborate the complainer's evidence on charges 1 and 2. On 20 April 2018 Crown counsel issued instructions to proceed by way of petition warrant including these allegations and an indictment duly followed. It included the matters which would have been dealt with on summary complaint.

[12] There then ensued a period of correspondence between COPFS and SCRA. The Crown advised SCRA of the decision to raise a petition warrant and indicated that the procurator fiscal had instructed the police to obtain statements from the Reporter who conducted the proof and an assistant reporter who had also been present. Initially SCRA declined to agree to their staff providing statements and raised certain policy concerns to which I will turn shortly. The Crown made it clear that the request for information was being made in terms of section 179 of the Children's Hearings (Scotland) Act 2011. That is in the following terms:

"**179 Sharing of information: prosecution**

(1) This section applies where—

(a) by virtue of this Act, the Principal Reporter, a children's hearing or the sheriff has determined, is determining or is to determine any matter relating to a child,
(b) criminal proceedings have been commenced against an accused,
(c) the proceedings have not yet been concluded, and
(d) the child is connected in any way with the circumstances that gave rise to the proceedings, the accused or any other person connected in any way with those circumstances.

(2) The Principal Reporter must make available to the Crown Office and Procurator Fiscal Service any information held by the Principal Reporter relating to the prosecution which the Service requests for the purpose of—

(a) the prevention or detection of crime, or
(b) the apprehension or prosecution of offenders."

[13] Criminal proceedings had commenced against the Minuter in connection with other children and the child NM was connected with them. The petition warrant was issued on 23 April 2018 before the obtaining of a statement from the Reporter and the assistant. The Crown having stated that the request was on the basis of section 179, the Reporter agreed that statements could be provided and the statements made it clear that the information was given in terms of section 179. All of this information is based on the advocate depute's oral submissions which were not in dispute in this regard.

[14] The advocate depute referred to the Scottish Government's Explanatory Notes to the Bill which became the 2011 Act. Paragraphs 416 to 418 of these Notes are in the following terms:

"416. There is no explicit power in the [Children (Scotland) Act 1995] or the Local Government etc (Scotland) Act 1994 allowing the Principal Reporter to share information such as expert reports and transcripts of care and protection proceedings with COPFS.

417. The information-sharing power is mandatory, rather than permissive, but restricted to specific circumstances where there are both criminal proceedings

> and care and protection proceedings and COPFS request specific information (for example expert reports and transcripts of care and protection proceedings) from the Principal Reporter.
>
> 418. There is not widespread practice of COPFS seeking information from the Principal Reporter and it is thought that this duty will only be used in a small number of exceptional cases, and where COPFS have been unsuccessful in obtaining this information from other sources."

[15] Parties agreed that this was indeed the first statutory provision allowing the Principal Reporter to share information with COPFS. There had been nothing to that effect in, for example, the Social Work (Scotland) Act 1968 or the Children (Scotland) Act 1995.

[16] It seems to me that this is one possible explanation why this situation has not arisen before, although there are no doubt other reasons, one being the question of policy.

[17] There are two other matters of fact which have to be noted. The first of these is particularly significant. It is accepted that counsel then representing the Minuter had discussed matters with him and had advised him that acceptance of the grounds would not have any impact on criminal proceedings. For the avoidance of doubt I should point out that he was represented by different counsel before me. The Minuter's affidavit indicated that he specifically sought advice from counsel about whether any acceptance of the grounds was capable (*sic*) or might be led as evidence against him in the criminal proceedings and was advised that that was not the case. He goes on "on that basis I agreed to accept the amended grounds of referral on the basis it was not capable of being construed as an admission of guilt in the criminal proceedings."

[18] The advocate depute fairly accepted that it was open to me to infer from this that he would not have accepted the grounds had he not been given that advice. That is indeed the inference which I draw.

[19] The second matter was raised in oral argument by the advocate depute. He told me that there had been a recent trial involving the murder of a child. Referral proceedings were running in connection with other siblings. Counsel for the accused at the referral was concerned about the acceptance of the grounds and how that might affect the murder case. Counsel approached the advocate depute involved with the trial and sought an undertaking that no evidence led or acceptance of grounds would be relied on in the trial and, having considered the matter, the Crown gave such an undertaking in that case. Against that factual background I turn to consider the legal issues arising.

The issues

[20] The essence of the preliminary plea minute is contained in paragraphs 10 to 12 which are in the following terms:

> "10. That counsel for the Minuter provided advice in accordance with the established procedure regarding acceptance of grounds of referral either at a Children's Hearing or a referral proof, namely, that any such acceptance of grounds is not deemed to amount to evidence which may help a subsequent prosecutor make out a criminal charge against that party.
>
> 11. That where any such acceptance of grounds was to be subsequently relied upon in criminal proceedings, the principle against self-incrimination would come into play and the court must warn the witness against such a consequence arising from the acceptance of referral grounds.
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> 12. That in the present case no such warning was issued by the court nor by counsel representing the Minuter, as was in accordance with normal procedure."

[21] The compatibility issue minute refers also to the lack of warning by the court and goes on at paragraphs (j) and (k) to say the following:

> "(j) That in the absence of such procedural safeguards, the Minuter's Article 6 rights have been interfered with. Reliance on said acceptance of the referral grounds should be deemed inadmissible on the basis that it interferes with Article 6(1) which implicitly provides protection against self-incrimination to

ensure that there is a fair trial. In the present case, in the absence of the acceptance of the grounds of referral, the prosecution do not have any corroborative evidence in respect of charge 1 and 2 on the indictment.

(k) That the principle contained in Article 6(1) is closely linked to the presumption of innocence contained in Article 6(2)."

[22] In paragraph (l) of the compatibility issue minute, breaches of Article 6 and Article 7 are alleged in the following terms:

"(l) that the admission of the acceptance of referral grounds as evidence, contrary to common practice, is not in accordance with the requirement for legal certainty where an accused should have the ability to act within a settled framework without fear of arbitrary or unforeseeable state interference. The exercise of power by public officials must be governed by clear and publicly-accessible rules of law. The rules applied to acceptance of grounds of referral have developed to prevent any such acceptance being relied upon in subsequent criminal proceedings. This accounts for the absence of a warning by the court or counsel against self-incrimination. Any change to this established approach, to be compatible with the accused's Article 6 and Article 7 rights, would require clear and publicly-accessible rules of law to be introduced."

Policy considerations

[23] A letter was written to the court by agents for SCRA and counsel adopted its contents.

[24] The thrust of SCRA's position was that the need to safeguard and promote the welfare of a child throughout the child's childhood was the paramount consideration in Children's Hearing proceedings. SCRA were concerned for the consequences for future proof hearings if a parent's acceptance of grounds of referral might be led in evidence against him in a criminal trial. If that was a possibility it would seem very likely that legal advisers would be very reluctant to advise them to accept the grounds. Evidence would have to be led in proofs in circumstances where they might otherwise be resolved. There would be an increase in the numbers of proofs, children and other vulnerable witnesses might require to give evidence where that could have been avoided, there would be a delay in the conclusion of proof proceedings, with a consequent delay in a hearing being able to make a longer term decision

about the need for a compulsory supervision order if the grounds were established, and there would be increased costs to the public purse.

[25] It was also pointed out that there would be a risk that having heard evidence the sheriff would not find the statement of grounds established. I thought that was a very poor point indeed.

[26] The letter referred to three authorities, namely *Humphries,Petitioner* v *X & Y* 1982 SC 79, *Ferguson* v *P* 1989 SC 231 and *P* v *Kennedy* 1995 SC 47. The leading case was said to be *Ferguson* v *P.* In that case relevant persons who were also accused in criminal proceedings asked the court to allow these proceedings to take priority over the referral because the rehearsal of evidence would be prejudicial. There was an incrimination in the case of *Humphries* and in that case the sheriff thought that the trial should take priority. There was no incrimination in *Ferguson* and it was made plain by the Lord Justice Clerk that *Humphries* was a special case.

[27] Reference was made in particular to the Lord Justice Clerk's comments at page 237 as follows:

> "We wish to stress that the case of *Humphries* must be regarded as a highly special one, and that it is not authority for the proposition that a sheriff should adjourn an application to him for a finding as to whether grounds of referral have been established merely because criminal proceedings have been or may be taken against one or both of the parents of the children. In the normal case there is no reason why such an application to the sheriff should not be disposed of finally prior to the hearing of any such criminal proceedings. Disposal of such an application by a sheriff does not mean that a parent facing criminal charges will not receive a fair trial. An application to the sheriff is heard in chambers, and although the press may be present, they are not able to report the proceedings in such a way as to lead to identification of the parties concerned. More importantly, the Crown are not represented at the hearing of the application by the sheriff in chambers. In these circumstances we are not satisfied that it would be prejudicial to a criminal trial if evidence had been led before the sheriff in relation to the referral. It is only in very special and extraordinary circumstances that proof before the sheriff prior to a criminal trial of a parent would be likely to give rise to prejudice."

[28] Mr Sharpe, advocate, who appeared for SCRA, highlighted the fact that the press could not report the proceedings and the Crown were not represented. He submitted that referral proceedings were ring-fenced and were *sui generis*. The standard of proof was the balance of probabilities.

[29] The whole ethos of Children's Hearings was that where grounds were denied they had to be referred to the sheriff. They were for the care and protection of children. If the Crown sought to use the acceptance of the grounds it would introduce a criminal element into the hearing.

[30] It would mean that any relevant person likely to be an accused would be advised to deny the grounds of referral.

[31] He agreed with me that it was not a proper consideration as a matter of law that a sheriff might not find grounds established.

[32] Ms Connelly, advocate, for the Minuter also relied on these policy grounds and submitted that I could take them into account. The advocate depute, on the other hand, submitted that they were not a matter for me but a matter for the Lord Advocate and SCRA. He pointed out, further, that the policy was already addressed in an information sharing protocol between SCRA and COPFS, entered into in 2014. That is Crown production 21. SCRA's concerns were addressed at paragraph 24 as follows:

> "Particular caution must be exercised in the request for any information about what was said at a Children's Hearing for the purposes of using it as evidence in a criminal prosecution. This includes any statement by a potential accused, which might otherwise be admissible as a statement against interest. As a general rule, it is not desirable that evidence of what was said at the Children's Hearing should be utilised in a criminal trial, unless there are exceptional circumstances. The same concerns arise in relation to an accused's acceptance of a statement of grounds prior to any proof proceedings. Any requests for such information should be submitted to Policy Division at Crown Office and thereafter Crown counsel's instructions will be obtained."

[33] The advocate depute submitted that on the face of it at least there had been a recognition between SCRA and COPFS since 2014 that there was potential for a situation such as the present one to arise and an acknowledgement that such evidence might be admissible in criminal proceedings. While it had never happened before, there was no, established procedure, as the Minuter argued, regarding the admissibility of the acceptance of grounds at a Children's Hearing. Furthermore, the information sharing protocol was publicly available.

[34] I am inclined to agree with the advocate depute that the policy is really not a matter for me. The fact that referral proceedings are *sui generis* is of course well-established but I do not accept the argument that they are somehow ring-fenced. The Lord Justice Clerk's comments in *Ferguson* were in the context of the possibility of prejudicing future proceedings by, for example, pre-arming potential witnesses who might come to find out what had been said. The three authorities referred to by SCRA were of no material assistance and in any event predate section 179 of the 1995 Act. The argument ignores that section, which provides specifically for the exchange of information for the purposes of criminal proceedings. If the approach of the Minuter and SCRA is correct then the purposes of the statute would be frustrated. Furthermore, it seems to me that the argument for SCRA is a difficult one for them to maintain given that they entered into the protocol for information sharing and presumably agreed to paragraph 24.

Submissions for the Respondent (the Crown) on the merits.

[35] The advocate depute adopted his written submissions in oral argument. These can be summarised as follows. While there might exist a common practice that admissions in Children's Hearings were not led in evidence in criminal trials there was no "established procedure" and there was no authority which deemed such evidence to be inadmissible in

criminal proceedings. There were no rules covering it. The admission amounted to a statement against interest made by the accused and was admissible as an exception to the ordinary rule excluding hearsay evidence. Reference was made to a number of authorities in support of that but I need not go into those.

[36] Reference was made to a number of civil cases about vicarious admissions made by counsel or solicitors but again I need not go into those since the sheriff took from the Minuter that he accepted the grounds on the basis of the statements of fact.

[37] The Crown contended that the acceptance amounted to a judicial admission in the referral proceedings but they were extrajudicial admissions for the purposes of the criminal proceedings. The Crown's position was that they carried no more weight than an admission of confession made, for example, to a witness in a trial or during the course of a police interview. The Crown accepted that the admission made in the referral proceedings must be subject to the same scrutiny and fairness considerations as would other extrajudicial admissions.

[38] So far I do not consider any of this to be controversial.

[39] The depute then turned to the information sharing protocol and sections 172 and 179 of the 2011 Act. I have already referred to section 179. Section 172 deals with the obverse situation where the Reporter obtains evidence from the prosecutor.

[40] It was highlighted that there was a statutory framework in place which placed a positive obligation on the Reporter to provide information to COPFS. Such information must be required for the purpose of the prevention or detection of crime or the apprehension or prosecution of offenders. It was submitted that the statutory framework enacted by Parliament envisaged that situations might arise where the prosecutor required the Reporter to provide information with a view to using that information for the prosecution of offenders.

[41] The Crown was mindful of the policy implications of utilising such a procedure, as I have already indicated. Such steps would only be followed in "exceptional" cases. (See paragraph 24 of the protocol.) It was emphasised that the protocol was a publicly-available policy document which was available for download on both the public SCRA and COPFS external websites. Both the statutory framework and the protocol made it clear to practitioners that there existed the possibility of information being shared between the two organisations for the purposes of the prosecution of offenders. It was a situation which might reasonably be anticipated to arise in exceptional cases.

[42] The Crown submitted that this was an exceptional case. That arose out of the very serious nature of the conduct accepted, specifically multiple occasions of oral rape of the daughter of the accused aged between 9 and 13 carried out over a period of some 5 years and the fact that without the evidence of acceptance of the grounds of referral there was an insufficiency of evidence to bring criminal proceedings.

[43] The protocol was designed for such an exceptional case and the fact that this was the first test case since it was agreed was evidence of the Crown's approach to exceptionality.

[44] It was not for the court to rule on the policy considerations. I have to say that I did not think that the circumstances were particularly exceptional in the sense of being unusual in the High Court but that was not to say that they were not exceptional in the context of a referral, a matter to which I will return. I agree, however, that it is not for me to dictate policy to either of the organisations concerned.

[45] The depute argued that the acceptance of the grounds was akin to a voluntary statement. There was no questioning of the Minuter, no requirement on him to accept the grounds and no obligation on the court to warn him.

[46] Reference was made to Renton & Brown paragraph 24 – 33.1 and the case of *Mullen* v *HM Advocate* 2012 JC 186.

[47] It was a different matter if a witness was called and required to answer questions under oath. There was an obligation on the court in those circumstances to give a warning because of the element of compulsion.

[48] Reference was made to *O'Neill* v *Wilson* 1983 JC 42. That appeal proceeded on an assertion that the appellant was immune from prosecution because he had given evidence in a previous trial and it did not in terms turn on the effect of the lack of a warning on the admissibility of his evidence in later proceedings, although the question of such a warning was referred to.

[49] It was submitted that the lack of a warning did not of itself render the admission of the evidence unfair or a breach of the Minuter's Article 6 rights. It was submitted that consideration ought to be given to the fairness of the acceptance as a whole and I was invited to consider a number of factors. According to the written submission, these were as follows:

(a) The court and counsel for the Minuter ensured that he understood the proceedings and the evidence;

(b) He was represented by able counsel who advocated for his rights during the course of the proof and engaged in extensive discussions and negotiations on his behalf;

(c) Counsel discussed the terms of the grounds of referral and the adjustments made with the Minuter;

(d) The Minuter was given the opportunity to confirm that he was aware of and satisfied with the grounds and the amendments, both directly and through his counsel, and he accepted having conducted himself in the manner described;

(e) He confirmed directly through his interpreter that he did accept the amended grounds.

[50] There was nothing unfair in the obtaining of the admission. The Crown's position was that the acceptance of the grounds was not obtained or elicited by anyone but was volunteered by the Minuter. There cannot therefore be said to have been any interference with his right to a fair trial.

[51] There were no rules which had been developed to prevent acceptances of grounds being relied upon in criminal proceedings, the acceptance of these grounds was admissible evidence in criminal proceedings and the absence of a warning was explained by the lack of a requirement for one given that he volunteered his acceptance and was not being asked any questions by any party which might elicit an incriminating response.

[52] The rules regarding the use of evidence, including the use of the acceptance of grounds in referral proceedings in subsequent criminal proceedings, were clear and publicly-accessible.

[53] Finally, the advocate depute made reference to a number of European authorities where decisions not to prosecute a case had been held to have put the state in breach of Article 2 of the Convention. These were *MC* v *Bulgaria* (2005) 40 EHRR 20, *Opuz* v *Turkey* (2010) 50 EHRR 28, *Osman* v *UK* (2000) 29 EHRR 245 and *X & Y* v *The Netherlands* (1986) 8 EHRR 235.

[54] The Crown's point was that bearing in mind the statutory scheme they could not turn a blind eye to the Minuter's acceptance of the grounds.

[55] I invited the depute to address me on the implications of the legal advice which the Minuter was given.

[56] In response to that he referred to five authorities.

[57] The first was *Duncan* v *HM Advocate* [2009] HCJAC 12 where counsel advised the appellant to plead guilty to a reduced charge. After conviction he appealed to the High Court on the grounds that the plea was forced on him by his counsel and he considered it to be one of convenience in order to obtain a lesser sentence. His appeal was refused. The only ground on which he could complain about what had happened would have been that the circumstances under which he came to tender the plea were clearly prejudicial to such an extent that there was a miscarriage of justice. Counsel had not misrepresented the evidential position to the appellant and he was given clear and unambiguous advice. Thereafter he gave his unequivocal and informed consent.

[58] The second case was *Griffith* v *HM Advocate* [2013] HCJAC 84. I will turn to this authority later.

[59] The third was *HM Advocate* v *Auld* [2016] HCJAC 18.

[60] In relation to *Duncan*, the advocate depute submitted that parallels could be drawn with the instant case. The plea, like the acceptance of the grounds, was tendered with the benefit of legal advice as to the consequences of the acceptance in the context of the case. Compulsory measures of care were imposed and the Minuter knew that there would be these consequences. However, it seems to me that the consequences in the instant proceedings are entirely different.

[61] The case of *Auld* was not particularly helpful. The Crown wanted to rely on a statement made to a prison officer and the circumstances are easily distinguishable. The same can be said for the case of *Tole* v *HM Advocate* [2013] HCJAC 109, which dealt with statements to a psychiatrist. Incidentally Ms Connelly for the Minuter sought to rely on that case as authority for the view that I could enter into questions of policy, in light of the second sentence in paragraph 12 of the opinion which read as follows:

> "However, if the evidence has been unfairly obtained then it ought, as a matter of legal policy, to be excluded."

It seems to me, however, that the word "policy" is used in an entirely different context from the one under discussion here.

[62] Reference was also made to the case of *Birnie* v *HM Advocate* [2012] HCJAC 64, which dealt with the voluntariness of a statement made after an interview without legal advice. Once again I did not find that case to be of much assistance.

[63] In *Griffith*, to which I have already referred, the appellant had been on trial with a co-accused and had given evidence in support of a special defence of alibi. His evidence tended to undermine the co-accused's position and he was asked by the latter's counsel about previous convictions. One of his grounds of appeal was that his representation had been defective in that he had not been advised of the risk of his convictions being disclosed if he gave evidence. Counsel who appeared for him at trial accepted that he had not given that advice and that that was an oversight. Paragraphs 33 to 35 of the Opinion of the Court are in the following terms:

> "[33] In considering these submissions we begin with the fact that the underlying rationale - and indeed the scope- of an appeal on the basis of defective representation which was recognised in *Anderson (JM)* v *H M Advocate* is that, because of the professional failures of those acting for the accused in the presentation of the case, the accused's defence was not presented to the jury (or, in summary procedure, the judicial fact-finder); hence the proceedings were unfair. But as counsel for the appellant properly recognised, it cannot be said in the present case that the appellant's instructed defence was not advanced, since it plainly was. The matter is presented as being one of the appellant's having been deprived of taking an informed decision as to whether to give evidence in support of his pleaded defence by reason of the defective advice of his trial counsel.
>
> [34] While the argument for the appellant proceeds on the failure of counsel at the trial to advise the appellant prior to his giving evidence of the risk of being cross examined on the basis of his record of offending, it may be commented that in a sense the seeds of the problem were sown earlier in the preparation for the trial. Nothing is said in the ground of appeal - or was said to us by counsel for the appellant - to the

> effect that those acting for and advising the appellant were not alert at the time of lodging the special defence of alibi to the potential problems which might ensue from that special defence, which required, or was likely to require, the appellant to give evidence if the defence were to be maintained and substantiated.
>
> [35] At the trial diet, the horns of the dilemma which was inherent in the decision to lodge a special defence of alibi had no doubt become much sharper horns. But a decision whether to give evidence had to be taken. Counsel for the appellant therefore understandably analysed the issue in terms of the appellant's not having been able to take an informed decision. However, even assuming that it were ever appropriate for the court to examine, in the context of an appeal against conviction, the soundness of advice given to an accused on the wisdom of following a particular defence presented to the trial court or of giving evidence in support of that defence, nothing was offered as to the course which might have been pursued by the appellant if appropriately informed. As counsel for the appellant recognised, were the appellant not to have given evidence, the special defence of alibi, which had been read out to the jury, could not be maintained by counsel in his presentation to the jury of the defence case. Counsel for the appellant did not submit that, had the appellant not given evidence, the state or nature of the evidence adduced by the prosecutor was such that there was any reasonable possibility that the jury would not have found the case against the appellant proved to the requisite standard."

[64] One of the features, it seems to me, which persuaded the court to refuse the appeal was that nothing was said about what the appellant might have done had he been properly advised. That is not the same in this case. I accept that he would not have accepted the grounds of referral had he been advised that that acceptance might be relied on in criminal proceedings.

[65] The advocate depute's position was that the advice given by counsel was, albeit tendered in good faith, nonetheless wrong.

Submissions for the Minuter on the merits

[66] In opening her submissions, Ms Connelly referred to the suggestion that the acceptance of grounds was a voluntary statement. She pointed out that in Paragraph 24 to 55 in Renton & Brown, dealing with voluntary statements by an accused person, it is said that

statements to magistrates and procurators fiscal are inadmissible as they have to be in the form of a declaration. However, that refers, in my opinion, to a completely different context.

[67] The Minuter's affidavit made it plain that if he had been advised that the admission could be relied on in criminal proceedings he would not have accepted the grounds. I accept that that is the position, as I have indicated. The Crown had relied on the protocol and the legislation as signposting and authorising the course of action which they now sought to take but that did not appear to have been the view of any other party including SCRA, the sheriff or counsel. No one knew that it was a possibility. That offended against the principle of legal certainty. That was fundamental as to whether or not to allow the evidence to be admitted. If the Crown were to depart from common practice, fair notice required to be given.

[68] As far as the written submissions are concerned they may be summarised as follows.

[69] If the acceptance of the grounds of referral was to be relied upon in criminal proceedings the principle against self-incrimination would come into play and the court had to warn the relevant party against such a consequence. No such warning was issued by the court nor by counsel representing the Minuter, as was in accordance with normal procedure. The Minuter was afforded the protection of Article 6 of the Convention.

[70] It was accepted that statements made on oath by an accused person in previous proceedings would be admissible in evidence but under the following caveat. The acceptance of grounds by the Minuter's counsel was followed by the sheriff directly addressing the Minuter and asking whether they were accepted, without going into details of the grounds or, more importantly, giving any warning as to the consequence of the grounds being accepted. Reference was made to the case of *Brown* v *McPherson* [1918] JC 3 as authority for the proposition that no conviction could proceed upon an admission given by an accused's agent,

whether rightly or wrongly. However, it seems to me that this is neither here nor there given that the Minuter himself was asked whether he accepted the grounds.

[71] It was argued that the acceptance of the grounds did not amount to a statement, confession or statement against interest. The Crown contended that the acceptance of the grounds amounted to judicial admissions which could be relied upon as corroboration in the criminal trial. Reference was made to Walker & Walker at paragraph 9.1, which distinguished extrajudicial admissions from judicial ones, the latter being generally conclusive and binding for the purposes of the cause in which they were made. It was pointed out at paragraph 11.2.1 that in order to be the equivalent of proof and to make evidence of the fact to be proved unnecessary they had to be clear or unequivocal, and must be read along with any qualifications and explanations that accompanied them.

[72] As I have indicated, however, the Crown accepted that the acceptance of the grounds was not a judicial admission for the purposes of the criminal proceedings. That is in any event, what I find to be the case. The other factors referred to by Ms Connelly went to the weight to be attached to the acceptance of the grounds and not to the admissibility of the evidence about that.

[73] Counsel referred to the case of *Howitt* v *HM Advocate* 2000 JC 284. It respectfully seems to me that that case is of no assistance to the Minuter. While a jury's verdict in one trial is not an evidential fact in another one, an admission of guilt by a person in one trial might be proved in later proceedings.

[74] It was argued that there might be many reasons why an individual accepted grounds of referral. It was submitted that grounds of referral should be considered similar to an "Alfred plea" in the USA, namely a plea of guilty in a criminal court whereby a defendant does not admit to the criminal act and asserts his innocence. The Minuter had been advised

that his acceptance of grounds would not mean anything in criminal proceedings and that it might facilitate the return of the children to their mother. The question of the motivation of those who offer to plead guilty was reflected upon in *Strathern* v *Sloan* 1937 JC 76. That case related to the question of the use which might be made of a plea of guilty which was not accepted by the prosecutor. At page 80 the court pointed out that:

> "it is not unfamiliar that a panel may offer a plea of guilty, not because he is guilty of the offence charge, but because a public trial might disclose facts more harmful to his own reputation, or the reputation of others, than the recording of a plea of his own confession."

That respectfully seems to me to be again a matter of weight and is a jury question.

[75] Reference was also made to the case of *Mitchell* v *Harrower* 2017 SCCR 512 but that related to questioning which conflicted with the terms of a caution which had been administered. It is of no assistance in the current circumstances.

[76] It was submitted that the general principle was that no man was bound to incriminate himself. Again I have no difficulty with that.

[77] Reference was made to *Saunders* v *United Kingdom* (1996) 23 EHRR 313 where the court held that there had been a violation of the applicant's Article 6(1) rights in that he was in effect compelled to incriminate himself by being required to answer certain questions during interviews by Department of Trade and Industry inspectors.

[78] *HM Advocate* v *Von* 1979 SLT 62 was also referred to.

[79] I have no difficulty with these authorities. The right not to incriminate oneself is an important one but the question here is whether in the circumstances which have arisen that right was infringed. It is not an absolute right, Ms Connelly recognising this by reference to cases under section 172 of the Road Traffic Act 1988. She pointed out also that some statutes specifically preserve the right against self-incrimination or provide that the incriminating

answers may not be used in evidence against their maker, for example, sections 102(8) and 103 (8) of the Proceeds of Crime Act 2002.

[80] I pause to note that there is no such statutory provision in relation to Children's Hearings or referral proofs before a sheriff.

[81] The written submissions quoted paragraph 24 of the information sharing protocol but nonetheless argued that the Crown's approach was an unprecedented change to the known and accepted position that acceptance of grounds of referral would not be relied upon as corroboration in subsequent criminal proceedings. The protocol provided for the sharing of information but did not provide for reliance on acceptance of grounds of referral in the absence of a judicial warning as corroboration in a criminal case. If there was to be a change of policy the Minuter and his counsel had a right to be informed of that in advance of grounds of referral being accepted. Otherwise this was a retrospective change in legal process which was highly prejudicial to the Minuter. The exceptional nature of this case was known to the Crown prior to the referral proceedings. For the Crown now to seek to rely on the acceptance of grounds interfered with the safeguards afforded to an accused by Article 6.

[82] The legal advice was tendered on the basis of commonly accepted procedure and the sheriff confirmed what he understood to be the usual practice. Allowing the Crown to use this could have profound consequences. The ramifications would be wider than the Minuter's case. In other contexts the courts had declined to make a ruling where the proper context for a radical change in the law was in Parliament. While the court did not have the power to set policy, the wider policy effects had to be considered and that might necessitate a larger bench or Parliamentary considerations. The SCRA was an internationally renowned and progressive body and the welfare of children was dealt with in a positive way.

[83] The change in practice was retrospective and underpinned the Article 6 breach. The Crown said that they would only do this in exceptional circumstances but that did not deal with the question of legal certainty. While the advocate depute had referred to the case of a child murder that was not something which was publicly recorded. In any event, that case could be distinguished because the Minuter was not facing the charges he now faces at the time of the referral proof.

[84] A proper construction of the protocol led to the conclusion that it would only be documents such as expert reports that should be shared and nowhere was there a reference to the acceptance of grounds of referral. I pointed out, however, that there was such a reference in paragraph 24. It would also be covered by the reference to the transcript of the proceedings. In my opinion it could easily be inferred that acceptance of grounds would be relied on.

Discussion

[85] The first thing I wish to make clear is that it is not for me to assess the value of the evidence which the Crown seek to rely on by way of corroboration. The only issue which I have to determine is its admissibility.

[86] The starting point is, I think, the statutory provision, namely section 179 of the 2011 Act. In my opinion the clear purpose behind that is to allow material relating to referrals to be given on request to the Crown for the purposes of criminal proceedings. It is not merely for intelligence.

[87] It is accepted on all hands that material such as this has never been used in a prosecution before. In the first place, there was no statutory provision in relation to the exchange of information prior to 2011 and, in the second place, it may be that considerations

of policy have prevented its being done. Thirdly, there may not previously have been a case which could properly be called exceptional.

[88] Parliament has clearly intended that there should be such an exchange and the purposes are also evident. There is nothing retrospective about the law on which the Crown are seeking to rely. The fact that this is the first time it has been attempted has nothing to do with retrospectivity. Furthermore, the depute's reference to the murder case showed that at least one member of the profession was alive to the issue.

[89] As far as the policy is concerned, it is not for me to dictate to either Crown Office or SCRA in what kinds of cases material like this should be exchanged, if it should be exchanged at all. Both COPFS and SCRA have recognised the policy implications of this, hence the information sharing protocol. Having recognised that this will be done from time to time by entering into the protocol, I am surprised, as I have indicated, that SCRA are now arguing that it should not be done at all. That is, however, a matter for them.

[90] It seems to me that if prosecutions were to be maintained in breach of a publicly stated policy then such prosecutions might reasonably be categorised as oppressive or at least unfair. However, I do not consider that the circumstances of this case are in fact in breach of the stated policy.

[91] I am told by the advocate depute that this case is an exceptional one, such as is envisaged by the protocol. It is clearly not exceptional in High Court terms, the offences themselves being the sorts of offences with which the High Court deals daily and the lack of corroboration of the evidence of individual complainers is often a feature.

[92] The extent to which this sort of thing features in Children's Hearings is outwith my recent experience. No submissions were advanced to me as to the numbers of such cases or the frequency with which they appear in Children's Hearings. However, I do not recall ever

having dealt with such a case when I presided over such hearings in another capacity for a period of some ten years. I have no reason to disagree with the advocate depute when he argues that the case is exceptional, at least in referral terms, and even if the precise meaning of exceptional is unclear it seems to me that such a case as this would fall within the definition.

[93] It is not necessary, however, for me to express a concluded view upon that in the circumstances of this case for reasons which I will explain shortly.

[94] The only reference to Article 7 is in the compatibility issue minute, in a short paragraph. I can see the force in an argument that if the law itself is not clear then there would be a breach of the Article, although, as I have said, in my opinion section 179 and its purposes are perfectly clear. It is not so obvious to me that Article 7 applies where it is not entirely clear if the Crown will prosecute in a particular case in the exercise of their discretion and I heard no specific argument on the point. An attempt has been made to indicate when they will seek to use the information from Children's Hearings in the protocol and the use of the word "exceptional" indicates that it will happen rarely. That is not to say that it will not happen at all and practitioners should be alive to the possibility that this might be the case.

[95] I have already indicated a preliminary view that the current case is an exceptional one, whatever might be said about the protocol more generally. However, perhaps consideration should be given to the question whether the protocol could be made clearer or at least Crown Office could take it upon themselves to set out the types of cases in which information from a hearing will be sought. This should be of considerable assistance to advisers.

[96] The submission that a warning should have been given to the Minuter is, in my opinion, misconceived. The analogy sought to be drawn by the advocate depute with voluntary statements is not, by any means, a perfect one but the acceptance of the grounds can properly said to be a voluntary act. It is to be contrasted with situations where such warnings

are commonly given, which involve an element of questioning in a police station, for example, or where a person has been sworn or affirmed as a witness and has to tell the truth, the whole truth and nothing but the truth.

[97] It is well recognised that suspects require to be cautioned and I need say no more about that.

[98] As far as witnesses are concerned, unless a witness is a *socius criminis* he could lay himself open to prosecution if he makes admissions of criminal conduct while giving evidence. If that is likely to arise the court will give him the appropriate warning. See the discussion in *O'Neill* v *Wilson*. Otherwise such a witness might feel under a compulsion to answer all of the questions.

[99] In the instant case there was no compulsion on the Minuter to accept the grounds of referral. He had been given advice by his counsel and it was not for the sheriff to go behind that advice and give him a warning any more than it would be for a judge or sheriff to warn an accused that if he pleads guilty to a charge he would render himself liable to a sentence.

[100] Having indicated that the acceptance of the grounds had been voluntary and that the Crown were entitled to seek information about it for the purposes of prosecution, one might think that was the end of the matter.

[101] However, it is not.

[102] In my opinion, the crux of the matter is the advice which was given to him.

[103] If that advice was correct then obviously the evidence is inadmissible.

[104] The Crown contention is that the advice was incorrect, albeit given in good faith and for perfectly understandable reasons.

[105] I agree with the advocate depute in this regard.

[106] I can well understand why that advice was given, since the acceptance of grounds had never been used in criminal proceedings before, but that was against a background of practice. There is no rule against it. Neither is there any "established procedure". On the contrary, I have found that the law specifically provides for it.

[107] Thus, while I have categorised the Minuter's acceptance of the grounds as voluntary, I find that its voluntariness was vitiated since it was predicated upon the advice which was given.

[108] The advocate depute conceded that questions of fairness would arise in connection with the proposed use of the acceptance of the grounds, just as they would in relation to any admission by an accused person.

[109] It is competent for appellants to argue that they have been defectively represented, in so called *Anderson* appeals, although the success rate is very low.

[110] I can see no reason in principle why an objection to evidence cannot succeed when it is based on advice, the nature of which can be established and which is objectively wrong. As I read the cases of *Duncan* v *HM Advocate* and *Griffith* v *HM Advocate*, which were very fairly brought to my attention by the advocate depute, the way is open for such an argument to succeed.

[111] The circumstances in which it can succeed will, however, be exceptional and such cases will be few and far between.

[112] In this case, an officer of the court has given clear advice which I find to have been wrong. I find that the Minuter acted upon that advice and that he would not have done so had he been told that his acceptance of the grounds might be used as evidence in a criminal trial. This distinguishes the case from *Griffith*.

[113] In my opinion, it would be unfair for the Crown to be able to rely on the acceptance of the grounds in these circumstances and, on that limited basis, I uphold the preliminary issue minute.

[114] I am not satisfied that a case has been made out for a breach of Article 7 or that any issue arises under Article 6 which is not already covered by the common law.

[115] In these circumstances I repel the compatibility issue minute.

[116] I am grateful to both counsel for their researches and their careful submissions.