SHERIFF APPEAL COURT

[2017] SAC (Civ) 37
DNF-B404-16

Sheriff Principal C D Turnbull
Sheriff A L MacFadyen
Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

NM

Appellant

against

CHILDREN'S REPORTER

Respondent

and

IM

Party Minuter

Appellant: Moore; Ross & Connel
Respondent: Guy (sol adv); Anderson Strathern
Party Minuter: Aitken; Millard Law

13 December 2017

[1] An application to the sheriff for a determination upon the issue of whether a ground under section 67 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") has been established is frequently one of the most difficult matters upon which a sheriff is called upon to adjudicate, having regard to the combination of a civil standard of proof; grounds which can involve allegations of criminal behaviour (for example, section 67(2)(b) of the 2011 Act);

and the requirement of securing the evidence of children by the most appropriate means. The overriding requirement to achieve a fair hearing in the determination of the rights of all parties involved can be a challenging and complex exercise, particularly where the evidence of a child has been pre-recorded and the children's reporter forms the view, in the circumstances of the particular case, that the child's parole evidence may not assist in the resolution of the issues before the sheriff. The present case brings these considerations into sharp focus.

[2] The appellant married LM in 1997. They have three children, namely, FM (born 23 September 2000); IM, the party minuter in this appeal (born 16 January 2003); and EM (born 6 January 2006). FM and IM made a number of allegations of sexual abuse against *inter alios* the appellant. The children's reporter arranged for a children's hearing in respect of IM and EM, on the basis of those allegations which, if established, would fall within the grounds contained within section 67(2)(b) and (g) of the 2011 Act. The supporting facts were not accepted by the appellant or LM. The children's reporter made an application to the sheriff for a determination as to whether the grounds were established.

[3] Six case management hearings took place before evidence was led in the application. These proceeded between 18 November 2016 and 3 March 2017. It is apparent from the interlocutors of those hearings that the application was carefully managed by the sheriff throughout the process. On 16 December 2016, in the course of the second case management hearing, the children's reporter indicated that it was not her intention to call IM as a witness; rather she proposed relying upon the terms of IM's joint investigative interviews ("JIIs"). IM was listed as a witness for her mother, LM. She appears not to have been on the list of witnesses for the appellant.

[4] On 6 March 2017 LM lodged a child witness notice in respect of IM. The special measures considered most appropriate for the purpose of taking IM's evidence were (a) the giving of evidence in chief in the form of a prior statement, namely the visually recorded JIIs which IM had taken part in (such special measure being available in applications of the type before the sheriff by virtue of section 22A of the Vulnerable Witnesses (Scotland) Act 2004); (b) a supporter; and (c) a live television link. The child witness notice was granted unopposed on the first day of the hearing of evidence, namely, 7 March 2017.

[5] The court heard evidence on ten separate days between 7 and 28 March 2017. The parties were represented by counsel and agents. Within that period IM's evidence in chief was led by the children's reporter in the anticipated manner, namely, by way of her three JIIs. The JIIs had taken place on 1 September 2016; 5 September 2016; and 12 December 2016. A transcript of each interview was available to the court. No issue was taken with IM's evidence being led in this way. It is important to note that IM made allegations against the appellant in a JII on 1 September 2016 and then retracted them in a JII on 7 December 2016.

[6] The hearing of evidence resumed on 3 May 2017. On that date, counsel for LM advised the court that IM would not be giving evidence. In his note the sheriff observes that he fully expected IM to give evidence in person. The sheriff was advised that IM did not want to attend court. The sheriff records that no objection was taken to this by any party, in particular by counsel for the appellant.

[7] Evidence was led on three further days in May 2017, concluding on the fourteenth day, namely, 17 May 2017. Between 3 May and 18 May 2017 neither counsel for the appellant nor any other party raised any objection, observation or motion about the absence at proof of IM or any perceived effect on the fairness of evidence. No motion was made for proceedings to be adjourned. No objection was taken to the further leading of evidence in

the absence of IM. No motion was made for the safeguarder, during the meeting appointed by the court by interlocutor of 3 May, to ascertain IM's preparedness to give evidence under different circumstances and with appropriate measures in place. No motion was made for IM's evidence to be taken on commission in more amenable surroundings. No motion was made by the appellant to place IM on his own list of witnesses. The presiding sheriff was given no reason by the appellant or any other party to identify that the absence of IM posed a fundamental obstacle to fair procedure or fair assessment of evidence. These were all matters readily identifiable at the time by the appellant, and there was no obstacle to their being raised at the time. The hearing of evidence was accordingly permitted to proceed to conclusion, without any assessment of whether any unfairness to the appellant had arisen or could be remedied by further evidence or procedure. The sheriff heard submissions on the evidence on 19 May 2017. In the course of submissions, the appellant submitted that IM's evidence was not sufficient to enable the court to find the grounds established; referred the sheriff to *Schatschaschwili* v *Germany* (2016) 63 EHRR 14; and argued that the sheriff should have no regard to IM's evidence, describing it as unfair.

[8] On 24 May 2017 the sheriff found that the appellant had committed certain sexual offences against FM and IM and that the ground contained within section 67(2)(b) of the 2011 Act had been established. Furthermore, he found that EM had a close connection with the appellant (a person who had committed an offence under Part 1 of the Sexual Offences (Scotland) Act 2009) and that the ground contained within section 67(2)(g) had also been established. The sheriff found that a number of other allegations were not established. The sheriff remitted the matter to the children's reporter to proceed as accords. The appellant appeals against the decision of the sheriff.

[9] In reaching the decision he did, the sheriff clearly accepted parts of FM's evidence and rejected others, as he was entitled to do (see *C* v *Miller* 2003 SLT 1379 at para 81). This appeal turns upon the question of whether or not the sheriff was entitled to have regard to the evidence of IM in the particular circumstances by which it came before him.

[10] Shortly before the hearing of the appeal, IM lodged a minute with this court seeking to be sisted as a party to the appeal. There being no objection by any party, IM was granted leave to enter the process as a party minuter, in terms of rule 15.6 of the Sheriff Appeal Court Rules 2015.

[11] The sheriff's stated case poses two questions for the opinion of this court. Firstly, was he entitled to have regard to the evidence of IM? Secondly, was he entitled to find the grounds of referral established? Helpfully, in his stated case, the sheriff states that had he considered that he was not entitled to have regard to the hearsay evidence of IM, he would not have found any of the grounds established.

Submissions

[12] The appellant accepted that IM's evidence was both competent and admissible in proceedings of this nature; and that the reliance upon hearsay evidence does not preclude a fair trial. The appellant placed considerable reliance upon the decision of the Inner House in *JS* v *Children's Reporter* 2017 SC 31, which held that admissibility is a necessary but not sufficient threshold requirement for the admission of evidence. The sheriff had the power to exclude even admissible evidence if he had good reason to do so.

[13] The appellant relied upon the court's overriding duty to ensure that the proceedings were fair and that Article 6 was not breached. He argued that the evidence of IM did not meet the threshold requirement, as more particularly considered in *Schatschaschwili* and in

Al-Khawaja v *UK* (2012) 54 EHRR 23. The appellant argued that there was no good reason why IM had not been led in evidence; that IM's evidence was decisive; that IM would have been cross-examined by the appellant on matters of substance and inconsistent prior statements; that sufficient counterbalancing factors were not present; and, as such, the hearing could not be considered fair having regard to the weight of IM's evidence. The appellant invited the court to answer both questions stated by the sheriff in the negative and to remit the case to the sheriff with a direction to hold that none of the grounds of referral were established.

[14] The party minuter, IM's submissions were in similar, although somewhat more developed, terms to those of the appellant, helpfully and properly identifying relevant factors that should be considered by the court in determining whether or not the proceedings were unfair. IM invited the court to answer both questions stated by the sheriff in the negative and to remit the case to the sheriff with a direction to dismiss the application and discharge IM from the referral to the children's hearing.

[15] The respondent argued that the *Al-Khawaja* test becomes entirely circular and unnecessary where the party who wishes to question the witness can readily do so by calling them for that purpose. In essence, the respondent argues that the *Al-Khawaja* test was not engaged in the particular circumstances of this case, however, if it was engaged the appellant was not deprived of the opportunity to test IM's evidence and the proceedings were, accordingly, fair. The respondent invited the court to answer both questions stated by the sheriff in the affirmative and to remit to the case to the sheriff to proceed as accords.

Discussion

[16] The starting point in this appeal is the sheriff's duty to ensure a fair hearing. The

court and the children's reporter are public authorities who each have the consequent obligation not to act in a way which is incompatible with a Convention right, see *JS* at para [34]. Convention rights include the right to a fair trial, which is set out in Article 6. For present purposes it is only the first part of Article 6(1) that is relevant. That provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[17] In determining whether a party has received a fair hearing the overall fairness of the proceedings in question must be evaluated. In making this assessment the court will look at the proceedings as a whole, including the way in which the evidence was obtained and having regard to the rights of witnesses where necessary (cf. *Schatschaschwili* at para 101). As explained in *Taxquet* v *Belgium* (2012) 54 EHRR 26:

> "The Court's task is to consider whether the method adopted … has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair."

[18] In *JS* (at para [34]), under reference to *Schatschaschwili*, the Inner House observed that determining whether a party has had a fair hearing means that it is necessary to have regard to every aspect of the proceedings before concluding that the trial was in fact fair. One particular defect in procedure will not necessarily render the trial unfair.

[19] In the present case, from the early stages of the proceedings, the children's reporter made it clear that she intended to rely on the hearsay statements of IM in the absence of the witness (see para [3] above). The *Al-Khawaja* test was held by the Inner House in *JS* to be applicable in circumstances where the state (in this case, a children's reporter) relies on a

hearsay statement in the absence of a witness. The relevant passage from para [36] of the opinion of the court in *JS* is as follows:

> "What the Al-Khawaja test consists of is an evaluation of fairness from three interacting perspectives in circumstances where the state relies on a hearsay statement in the absence of the witness, the object of which is to consider the proceedings as a whole (Schatschaschwili, para 112). It will not necessarily be unfair to admit an untested statement in the absence of the witness but reliance on a statement which cannot be tested raises a question about fairness which the court requires to determine by reference to the answers to three questions: Was there good reason for the absence of the witness? Was the hearsay statement led in his place the sole or decisive reason for the decision in question? Were there counterbalancing factors which compensated for such handicaps as the admission of untested evidence gave rise to? The answer to any one of these questions will not in itself be determinative. For example, an answer in the negative to the first question will not be conclusive of unfairness but it will weigh in the unfairness side of the balance (Schatschaschwili, para 112). Of course, these are not questions which are necessarily capable of a yes or no answer; a reason may be more or less good, a statement may not be decisive but it may be important, counterbalancing factors may compensate handicaps to a greater or lesser extent. Just where the answers lie in the spectrum of possible answers will have to be taken into account. When it comes to counterbalancing factors, they must be such as to permit a fair and proper assessment of the reliability of the hearsay evidence.

Does the Al-Khawaja test apply?

[20] The respondent's argument is that in the circumstances of the present case, the *Al-Khawaja* test did not come in to play. Unlike *JS*, the court had made no order precluding the cross-examination of the child. The respondent had not objected to IM being called as a witness by LM. A conscious decision was taken by LM not to call IM as a witness. The appellant did not take issue with that or raise the issue of fairness with the court prior to evidence concluding. In such circumstances, the respondent argued that the test in *Al-Khawaja* did not apply.

[21] Unlike the circumstances in *JS*, it is not the case that the statements relied upon could not be tested. In *JS* the sheriff actively prevented witnesses being called whilst admitting

their JIIs. Here the means by which IM was to give evidence was canvassed before the court and special measures were approved, without objection by the appellant or the respondent. The appellant chose not to call IM. It would have been open to the appellant to raise the issue of fairness at this stage. Indeed we go further; if the appellant contended that LM's decision not to call IM impacted upon the fairness of the proceedings, he should have raised the issue. He did not.

[22] The sheriff did not raise the issue of fairness. Even in the unusual circumstances of this case, he should have done so, however, we have some sympathy for him standing the position he was confronted by. He expected IM to give evidence. When counsel for LM advised the sheriff that IM would not give evidence, the appellant, through counsel, chose to say nothing on the issue. LM made nothing of it either. The appellant chose to wait until the evidence had concluded before raising the issue of fairness. In light of the contradictory nature of IM's JIIs, the decision not to say anything of the absence of IM could have been a tactical one. We can readily understand a sheriff's reluctance to intercede in circumstances where a party who is represented by counsel chooses not to raise an issue.

[23] For reasons we give below, we have resolved this appeal by applying the *Al-Khawaja* test. It is therefore not necessary for us to address the question of whether or not it applies in the unusual circumstances of this case.

Was there good reason for the absence of the witness?

[24] The circumstances of IM's absence are explained above. IM was to be led as a witness for LM. IM did not wish to give evidence. LM and the appellant chose to respect that position. Refusal to appear is normally not a good reason for not giving evidence, but that assessment has to be softened in the context of a child who knows she will be required

to give evidence of an intimately traumatic nature. In such circumstances, non-appearance by a vulnerable witness is at least capable of being attributed to good reason. However, what lay behind IM's reasons was never properly explored. The reason for that was, principally, because the appellant chose to remain silent on the issue, and let the hearing of evidence take its course.

Was the hearsay statement led the sole or decisive reason for the decision in question?

[25] In this case, the hearsay evidence of IM which the sheriff chose to accept was decisive. The sheriff confirms that to be the position in his note. That is not to say that it was the sole or even the main evidence in the case. The importance of IM's evidence was largely as a comparator to the evidence of her sister.

Were there counterbalancing factors which compensated for such handicaps as the admission of untested evidence gave rise to?

[26] In her submissions, IM concedes that had she given evidence there would not have been an unfair hearing. IM categorises this as a counter balancing measure and maintains that it was no longer available when she decided not to give evidence. Such an approach is misconceived. The measure continued to be available. If it had been utilised it is conceded that that would have ensured a fair hearing. The appellant chose not insist upon IM giving evidence. He was entitled to make that choice, however, he cannot then argue that the proceedings became unfair because he chose not to call IM. As noted by the sheriff (a) the appellant had every opportunity to question IM; and (b) no case management decision was made that prevented the appellant so doing. Accordingly, the first counterbalancing factor

was that the appellant was properly represented and made an apparently tactical decision not to raise the issue, far less to address or resolve it.

[27] Second, in his stated case, the sheriff provides detailed reasoning as to why he considered that the evidence of IM was reliable, insofar as it made allegations against the appellant; and why the evidence of IM's retraction JII was unreliable. The sheriff clearly also had regard to the other evidence available. He makes it clear that the weight he attached to evidence from IM's JIIs took account of the fact that it had not been the subject of cross-examination. The counter-balancing measure identified in *Schatschaschwili* at para [126]) is also present in this case.

[28] Third, as noted above (see para [5]), the court had the benefit of both seeing IM make allegations in a JII and withdraw them in a subsequent one. The availability of video recordings of IM's JIIs allowed the sheriff the opportunity of observing IM's demeanour under questioning and forming his own impression of her reliability (see *JS* at para [31] and *Schatschaschwili* at para [127]).

[29] Furthermore, in respect of the grounds he found established, the sheriff placed considerable reliance upon the availability of the corroborative evidence of FM, which supported IM's evidence. In *Schatschaschwili* (see para [128]) the Court considered as an important factor supporting an absent witness's statement the fact that there were strong similarities between the absent witness's description of the alleged offence committed against her and the description given by another witness (with whom there was no evidence of collusion) of a comparable offence committed by the same defendant. This holds even more true where, as was the case here, FM gave evidence at the hearing and her reliability was tested by cross-examination. It is notable that such a measure is described in *Schatschaschwili* as a considerable safeguard.

[30] A fourth counterbalancing measure identified in *Schatschaschwili* (see para [130]) is the provision to the applicant or defence counsel of the opportunity to question the witness during the investigation stage. In the present case, IM was precognosced by the appellant's solicitors.

[31] A fifth counterbalancing measure, identified in *Schatschaschwili* at para [131], is also present. The appellant was afforded the opportunity to give his own version of the events and to cast doubt on the credibility of IM, pointing out any incoherence or inconsistency with the statements of other witnesses. IM's identity being known to the appellant, he was able to identify and investigate any motives IM may have had for lying and therefore had the opportunity to contest effectively IM's credibility, albeit to a lesser extent than in a direct confrontation. The appellant took the opportunity afforded to him and gave evidence.

[32] In our view, the counterbalancing factors present in this matter were sufficient to permit a fair and proper assessment of the reliability of IM's hearsay evidence. Notwithstanding the weight the sheriff attached to IM's evidence, the counterbalancing factors were of sufficient weight for us to conclude that they permitted a fair and proper assessment of the reliability of the hearsay evidence of IM. Moreover, notwithstanding the duty incumbent upon the court to ensure a fair hearing, any challenge to the fairness of the proceedings ought properly to have been raised as soon as it became apparent that IM would not be led as a witness by LM. To say nothing at that stage and to then raise the issue in submissions was inappropriate. The issue of a fair hearing is not one parties can intentionally put to one side in the course of proceedings and then invoke at the stage of submissions. Irrespective of the duties incumbent upon the court, fairness cannot be selectively applied. The appellant had every opportunity to address the issue at the time, in

a number of possible ways. The very least of these was to bring the matter to the attention of the court and of the other parties, so the matter could be considered and addressed.

Other Factors

[33] In considering the proceedings as a whole, as we are required to do, there are a number of other factors present in this case that must be taken in to account.

[34] Before the hearing commenced, the means by which IM's evidence was to be introduced was aired by way of the child witness notice lodged on behalf of LM (see para [4] above). The appellant was represented by counsel at that hearing. The child witness notice was granted unopposed.

[35] Unlike the position in *JS*, the court did not prevent the child giving evidence. Indeed, the sheriff fully expected IM to give evidence in person.

[36] At the point of the proceedings at which it became clear that IM was not to be led as a witness (see para [6] above), the appellant was represented by counsel. No representations were made on behalf of the appellant at that stage.

[37] No challenge to the fairness of the proceedings was made until the appellant's closing submissions, after evidence had been led and concluded.

[38] We incline to the view that the sheriff erred in relation to his approach to the evidence of IM. He took the view that if evidence had been competently led, he required to take it into account; and was not entitled to disregard it. Having regard to *JS* (see para [12] above), that approach is misconceived. Equally, the issue of fairness should have been raised by the sheriff when it became apparent that IM would not give evidence, although we have some sympathy for the view that he was entitled to regard a lack of objection or submission at the time as an indication that the parties did not identify or anticipate any

unfairness arising. Nevertheless, looking at the whole circumstances of the case, including the counter-balancing measures, in our assessment the proceedings before the sheriff were fair.

Decision

[39] In the foregoing circumstances, we shall refuse the appeal; answer both questions for the opinion of the court in the affirmative; and remit to the sheriff to proceed as accords, directing that he remit the case back to the children's reporter to proceed as accords in light of the established grounds.