SHERIFF APPEAL COURT

[2022] SAC (Civ) 14
KKD-B80-21, KKD-B81-21, KKD-B82-21

Sheriff Principal C D Turnbull
Appeal Sheriff R D M Fife
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by APPEAL SHERIFF THOMAS McCARTNEY

in appeal by

CB

Appellant

against

PRINCIPAL REPORTER

Respondent

Appellant: Brannigan, advocate; Joseph G Boyd & Co
Respondent: Flannigan, solicitor; Anderson Strathern
Child (AB): Chalmers, solicitor; Robert F MacDonald
Child (CB): Gleeson, solicitor; Gleeson McCafferty Law
Safeguarder: Lindsay

28 March 2022

Introduction

[1] Applications were made by the Principal Reporter to the sheriff at Kirkcaldy Sheriff Court in respect of each of three children in the one family under section 93(2)(a) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") and also under section 94(2)(a) in respect of one of the children for a determination on whether grounds of referral which had not been accepted at a children's hearing were established.

[2] The ground of referral was that in terms of section 67(2)(c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence. Those grounds of referral relate to allegations of assaults by the appellant on her three stepdaughters (not the children to whom the referrals relate). The Supporting Facts in respect of those grounds of referral relate to incidents on various occasions between October 1996 and October 2002. The victims were then between 12 and 17 years of age.

[3] There were separate grounds of referral in respect of each child that in terms of section 67(2)(c) of the 2011 Act the child has, or is likely to have a close connection with the person who has committed a schedule 1 offence, and in terms of section 67(2)(g) of the 2011 Act that the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009. Those grounds of referral relate to sexual offences by the children's father directed against different children.

[4] The applications proceeded to proof. In respect of the grounds relating to physical assaults by the appellant the sheriff heard evidence from two of the appellant's step daughters. The sheriff determined that the grounds of referral in respect of each child were established.

[5] Against those determinations the children's mother has appealed. An appeal by the children's father was abandoned prior to the appeal hearing. The appeal by the children's mother was directed at the grounds of referral relating to conduct by her.

[6] The appeal broadly raises two issues. Firstly, the fairness of the proceedings as a whole given that the evidence in chief of witnesses adduced by the reporter was allowed by the sheriff to be by written statement. Secondly, whether the sheriff erred in law in his

consideration of the evidence of what was said to be "the mutually exclusive" evidence of the two step daughters.

[7] The questions posed in the Stated Case are as follows:

i. Did I ensure the procedure adopted in this case was likely to ensure that the proceedings were fair overall?

ii. In particular, were my decisions (i) to allow the Reporter to lodge statements in lieu of evidence in chief where the credibility and reliability of witnesses was of fundamental importance to the outcome; (ii) to allow the Reporter to lodge statements when the 1997 Rules require affidavits; (iii) not to ensure there was no risk that the content of the statements could be contaminated by, for example, the witnesses retaining copies of their police statements; and (iv) to fail to direct the Reporter to recover historic social work, school and medical records for the witnesses who gave evidence against the appellant likely to result in the proceedings being unfair?

iii. If the procedure I adopted did not ensure that the proceedings as a whole were fair, has my failure to ensure the hearing was fair resulted in a procedural irregularity that vitiates my decision?

iv. Did I err in law by failing to address how the mutually exclusive testimony of two witnesses in relation to the same allegation could both be accepted as being credible and reliable?

v. If I erred in law in relation to my approach to contradictory witness testimony, is my error sufficient to vitiate my decision to find the section 67(2) (c) of the 2011 Act ground in relation to the appellant established?

vi. Did I err in law by finding the grounds of referral established without amendment of statement of fact b) to exclude the reference to the cane and [xxx Street], in circumstances where I was not satisfied that part of the statement of fact was established on the evidence?

[8] Question vi can be answered in the affirmative. The sheriff in the Stated Case accepts that it would have been appropriate to amend paragraph 2(b) of the Supporting Facts by deleting on line 1 thereof *"and 1 [xxx Street]"* and in line 2 *", canes".* Allowance of the appeal to that extent is not contentious and we will do so.

Submissions for the Appellant

[9] It was submitted for the appellant that the sheriff's acknowledged error in respect of Supporting Fact 2(b) is sufficient for there to be an error of law in finding the ground of referral to be established. That was because the establishment of the ground of referral is based upon establishment of the Supporting Facts of which paragraph 2 (b) is part. If the sheriff erred in respect of paragraph 2(b) anything which flows from or is based upon paragraph 2(b), namely the ground of referral, must by extension also contain an error.

[10] It was submitted for the appellant that the sheriff has failed to provide adequate reasoning as to why the evidence of two witnesses which was submitted to be mutually exclusive could each be accepted as credible and reliable. That constitutes an error of law which vitiates the sheriff's decision. In support of this submission the evidence of each witness in respect of various paragraphs of the Supporting Facts was subject to detailed scrutiny to identify points of divergence.

[11] It was further submitted that the procedure adopted by the sheriff at proof in allowing evidence in chief by written statements which were adopted by the witnesses did

not ensure fairness and that resulted in irregularities which vitiate his decision. This is a case where credibility and reliability of witnesses is of fundamental importance. In that situation it is preferable that witnesses give their evidence orally.

[12] Reliance was placed upon Rule 3.46A of the Act of Sederunt (Child Care and Maintenance Rules) 1997 ("the 1997 Rules"). In making provision for the expeditious determination of applications it specifically refers to the use of affidavits and does not make reference to any other kind of statement such as were utilised in this case.

[13] The manner in which the statements were correlated was challenged. It was said to be very concerning that reference is made by the reporter to "revisiting" and "revising" statements. This must also be viewed in the light of the witnesses having their police statement to hand at the time. Allowing the Reporter several opportunities to obtain statements, thereby compounding the ability of the witnesses to refine and hone their statements, is by its very nature an unfair process and moves increasingly further from the environment in which an affidavit would be obtained. It was submitted that taking all the circumstances together there is inherent unfairness in the proceedings such as to render there having been an irregularity.

[14] Counsel submitted that the sheriff erred in failing to direct the reporter to recover historic social work, school and medical records for the witnesses who gave evidence. Where the appellant had engaged her right to silence, counterbalancing measures were required to be put in place and one such measure would have been the recovery of potentially relevant documentation for use at proof. Rather than refuse the motion for recovery of documents the sheriff should have appointed a commissioner to take possession of the documents and to ascertain what, if anything, would have been of relevance.

[15] In all the circumstances it was submitted that the sheriff has erred in law and failed to ensure the proceedings were fair thus vitiating the findings in fact on which the ground of referral was based.

Submissions for the Respondent

[16] In respect of the sheriff's acknowledgement that deletions to paragraph 2 (b) of the Supporting Facts were appropriate, it was submitted that this in no way undermined the sheriff's findings beyond that paragraph. The indication by the sheriff that the evidence of one witness was not very strong was explicitly stated to relate to a specific part of paragraph 2(b).

[17] So far as the sheriff's assessment of credibility and reliability of the two witnesses is concerned the law is clear that an appeal court can only interfere with the sheriff's decision on the facts if it concludes that the evidence does not legally warrant the decision at which the sheriff has arrived. The assessment of the credibility and reliability of witnesses and the weight to be attached to the evidence were matters for the sheriff alone. The sheriff is entitled to select which witnesses he regards as credible and reliable and also to select which parts of the witness's testimony to accept or reject. The sheriff was entitled to conclude that any inconsistency between the evidence of the two witnesses did not detract from the view that the witnesses were honest and telling the truth and could be relied upon to a high degree. The evidence legally warranted the decision at which the sheriff has arrived and the weight to be given to any inconsistencies was a matter for the sheriff.

[18] With regard to the use of written witness statements, it was submitted for the respondent that these are admissible in any civil proceedings, by way of section 2 of the Civil Evidence (Scotland) Act 1988 ("the 1988 Act"). Section 9(b) of that 1988 Act specifically

provides that "civil proceedings" for the purposes of that Act includes hearings in respect of grounds of referral unless the ground of referral is an offence by the child.

[19] Rule 3.46A of the 1997 Rules does not limit the admissibility of witness statements to only affidavits. The rule does not prevent the sheriff from ordering or allowing parties to lodge signed written statements. Reference was made to various provisions which allow reference to prior statements in criminal proceedings.

[20] While the process of preparing the written statements was being criticised by the appellant it was submitted that the preparation of an affidavit would not necessarily be a one-off process and a draft affidavit could properly be subject to stages of revision before the witnesses deponed thereto.

[21] It was submitted that credibility and reliability of a witness being at issue is not a factor which renders the use of signed witness statements to adduce evidence in chief inappropriate. It was stated that presentation of witnesses' evidence in chief in the form of a statement is commended in modern practice. It results in the valuable saving of court time and is consistent with the summary nature of the proceedings which ought to be dealt with as expeditiously as possible. The opportunity to object to the admissibility of any part of a witness statement is achieved by statements being lodged and intimated in advance and in this case the appellant had and took that opportunity. Where issues of credibility and reliability were at issue those were capable of being tested on behalf of the appellant by cross examination. At the proof hearing in this case the sheriff had the benefit of assessing the witnesses' demeanour under cross examination.

[22] It was submitted that providing a witness with a copy of their statement, with a view to the witness adopting that as their evidence, was not a procedural irregularity. The process of taking a witness statement to be lodged in court normally involves speaking to a

witness more than once. The process allows the witness an opportunity to consider carefully what a draft statement says and to confirm its terms or instruct amendment before signing. The sheriff concluded and was correct to conclude that there was no basis for the suggestion that there had been undue rehearsal and no basis for any conclusion that the procedure was unfair to the appellant. Counsel for the appellant had the opportunity to cross-examine the witnesses on how they had prepared their statements.

[23] With regard to the motion to recover records, the sheriff did not err in concluding that this was a fishing exercise and refusing the motion. The application and submissions in support of it did not demonstrate that the documents were likely to be of material assistance or serve a proper purpose. The suggestion that the sheriff ought to have directed the Reporter to recover historic social work, school and medical records was made with no basis being advanced for the proposition that the sheriff had any such duty or power. It is for the parties to decide which evidence they wish to present, and for the sheriff to regulate the admission of that evidence by application of the rules of evidence applicable to the proceedings.

Other Parties

[24] There was appearance at the appeal hearing on behalf of two of the children and by the safeguarder. None made any substantial submission.

Discussion

Error in respect of supporting Fact 2 (b)

[25] The sheriff identified in the Stated Case that the evidence in respect of part of this Supporting Fact was "not very strong" and indicated that it would have been appropriate to

amend that supporting fact accordingly. The submission for the appellant that this identification by the sheriff of an error on his part undermined the ground of referral is without merit. That submission ignores that the ground of referral is supported by a number of other separate incidents about which the sheriff was satisfied to the required standard. The sheriff is clear in the Stated Case that his reservation as to the quality of evidence is limited to part of paragraph 2(b). We do not accept the submission that it in any way impacts the remaining Supporting Facts or the Ground of Referral.

"Mutually exclusive" testimony of two witnesses

[26] The two witnesses in respect of whom the quality of their evidence is challenged in this appeal are stepdaughters of the appellant. They are now adults and were giving evidence as to matters which occurred in their childhood twenty years or more ago. It is hardly surprising that their recollection in respect of specific events would not be identical and that some discrepancies would arise. The extent to which such discrepancies are material is very much a matter for assessment by the sheriff at first instance. As is well established an appeal court can only interfere in respect of findings of fact if the decision is plainly wrong or an error of law is identified.

[27] In this case the sheriff gave appropriate consideration to differences between the evidence of the two witnesses. The sheriff noted that the fact that the witnesses have different memories does not mean that they are lying or unreliable. He noted that it would be unusual for witnesses to give entirely identical accounts. The sheriff indicated that he was satisfied that both witnesses were giving an honest account as they remembered it and noted that there is no reason that both witnesses would have had an identical experience. The sheriff's conclusion was that any inconsistency did not detract from his view that the

witnesses were honest and telling the truth and could be relied on to a high degree. No basis has been identified upon which this court can interfere with that assessment of the evidence.

[28] In the Stated Case (paragraph 674) the sheriff noted that the submission on behalf of the appellant at the diet of proof concentrated on statement of fact 2(b). The sheriff noted that the submission recognised that there was a substantial degree of consistency in the evidence relating to the other statements of fact. We also note that in the application for the Stated Case the only specific material discrepancy identified was in respect of paragraph 2(b). Beyond that there was no more than a general assertion that there were material differences in the evidence. Yet at the appeal hearing a detailed analysis of the evidence of each of the witnesses was presented identifying where their evidence diverged in respect of each paragraph of the supporting facts.

[29] We consider this to be unsatisfactory. This presents as the type of exercise commented upon by the Inner House in *S* v *Locality Reporter Manager* 2014 Fam LR 109 as the type of appeal which simply should not occur. The submission gives the appearance of an exercise in trawling through the evidence seeking to identify all and any differences between the two witnesses. Had there been differences of such materiality as to undermine credibility or reliability one would have expected these differences to have been identified in the application for the Stated Case or at least by the stage of adjustment thereof. That would have allowed the sheriff to comment on these specific points in the Stated Case.

[30] The sheriff notes that the submission on behalf of the appellant at proof recognised that there was a substantial degree of consistency in evidence relating to the Supporting Facts other than 2(b). We are not persuaded by the submissions for the appellant that there

has been any error by the sheriff in assessment of the evidence other than so far as identified by the sheriff in respect of paragraph 2(b).

Unfairness by allowing evidence in chief by written statement

[31] The evidence in chief in respect of each of the appellant's two stepdaughters was by way of a signed written statement which they each adopted as their evidence once sworn as witnesses at the proof. Proceeding in this way was subject to objection. There are several strands to this point.

[32] While the questions posed in the Stated Case were directed at the fairness of the procedure, within that was a submission that the terms of rule 3.46A of the 1997 Rules disallowed the use of statements other than affidavits.

[33] Rule 3.46A is as follows:

> **"Expeditious determination of application**
>
> Prior to or at a hearing on evidence under rule 3.47 (or any adjournment or continuation thereof under rule 3.49), the sheriff may order parties to take such steps as the sheriff deems necessary to secure the expeditious determination of the application, including but not limited to—
>
> (a) instructing a single expert;
> (b) using affidavits;
> (c) restricting the issues for proof;
> (d) restricting witnesses;
> (e) applying for evidence to be taken by live link in accordance with rule 3.22".

[34] That rule is a provision directed at the expeditious determination of the application and allows the sheriff to make orders to that end. Five specific steps are identified in the rule but it is explicitly provided that such orders are not limited to those steps.

[35] Section 2 of the 1988 Act provides that a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the

statement of which direct oral evidence by that person would be admissible. Rule 3.46A does not innovate upon or in any way restrict that statutory provision and no issue as to use of written statements as evidence arises from rule 3.46A.

[36] The process by which written statements were obtained from the witnesses appears to have been somewhat convoluted and protracted. However evidence as to how the statements were drafted and completed was before the sheriff for consideration in deciding what weight, if any, could be attached to the statements thus obtained. The sheriff was aware that the witnesses had copies of their police statements. Most importantly the witnesses did attend at court and, having adopted on oath their written statements, were available for cross-examination. Each witness appears to have been cross-examined in some detail and at some length. That process allowed the sheriff to make a full assessment of the witnesses and their evidence, both by written statement and orally.

[37] We do not accept that evidence in the form of a written statement is necessarily of an inferior quality or less reliable than evidence given orally in court. It could be argued that evidence in the form of a written statement that has been carefully considered by the witness could be of a better quality than instant answers to questions in court. There is no doubt as to the competence of evidence by written statement. No unfairness arises from the evidence in chief being in the form of signed written statements adopted by the witnesses in itself.

[38] That having been said, the process by which such a statement is prepared is a relevant factor in assessment of the credibility and reliability of that evidence. It is not difficult to think of factors or circumstances which could cause a sheriff to conclude that evidence presented in such a way could not be relied upon, particularly in relation to material disputed issues of fact.

[39] It is a matter for consideration on the facts and circumstances of each case. If a party is intending to present evidence in chief by way of a signed statement then adopted by the witness, it is important that the party seeking to do so has careful regard to the process by which such a statement is prepared to avoid unfairness and to minimise the risk of such a statement being considered, in the particular case, to be unreliable or incredible due to issues relating to the preparation of the statement.

Recovery of social work records etc.

[40] *T*he sheriff's decision to refuse the motion to recover records cannot be faulted. No proper basis for granting such a motion was identified and the sheriff was correct to characterise the motion as a fishing exercise. A proof in children's referral proceedings remains an adversarial process. It is not for the sheriff *ex proprio motu* to direct the Reporter to recover social work or any other records. If a party considers that the recovery of such records is needed the matter is properly dealt with by the appropriate motion, which if opposed, can be decided by the sheriff after hearing argument.

Disposal

[41] In summary the sheriff did err in law in failing to amend Supporting Fact 2(b) as identified by him. He did ensure that the procedure adopted overall was likely to ensure that the proceedings were fair and his decisions in respect of written statements and recovery of historic records were not likely to result in the proceedings being unfair. He did not err in law in relation to assessment of the evidence of the witnesses and there has been no error such as it would vitiate his decision.

[42] Therefore we answer the questions in the stated case as follows:

i. Yes

ii. No

iii. Unnecessary

iv. No

v. Unnecessary

vi. Yes.

[43] We will allow the appeal in respect of question (vi) only. *Quoad ultra* we will refuse the appeal and remit the case to the sheriff with a direction to amend Supporting Fact 2(b) by deleting on line one "and 1 [xxx Street]", and in line 2 ", canes", and thereafter to direct the Principal Reporter to arrange a children's hearing on the established grounds in terms of section 108(2) of the 2011 Act.

[44] There was no motion for expenses by any party and we find no expenses due to or by any party.