SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS, AT ABERDEEN

[2022] SC ABE 11

ABE-B657-19

JUDGMENT OF SHERIFF PHILIP MANN

In Summary Application

By

Iain Livingstone QPM, Chief Constable (designate), the Police Service of Scotland, Tulliallan Castle, Kincardine, Fife, FK10 4BE

against

SAI

Aberdeen, 18 March 2022

The sheriff, evidence having been led and concluded and having heard the submissions of both parties:

Makes the following findings in fact:

1. This court has jurisdiction.

2. The respondent did not do any of the acts within subsection (5) of section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

Makes the following finding in law:

1. The respondent, not having on at least two occasions done an act within subsection (5) of section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 is not liable to have a risk of sexual harm order made against him in terms of subsection (6) of said section.

Therefore, assoilzies the respondent from the craves of the writ; Finds the applicant liable to the respondent in the expenses of the cause except in so far as otherwise previously determined; Allows the respondent to lodge an account of those expenses and remits the same, when lodged, to the auditor of court to tax and to report.

Sheriff Philip Mann

NOTE

Introduction

[1] This is a summary application for a risk of sexual harm order against the respondent under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

[2] I heard a proof via the webex platform over two days and heard submissions this morning. The applicant was represented by Mr McLaren, Solicitor, and the respondent was represented by Mr Mullen, Solicitor.

The Law

[3] Section 2 of the 2005 Act is in the following terms:

> **2 Risk of sexual harm orders: applications, grounds and effect**
>
> (1) The chief constable of the Police Service of Scotland may apply for an order under this section (a "risk of sexual harm order") in respect of a person if it appears to the chief constable that–

(a) the person has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (5) below; and

(b) as a result of those acts, there is reasonable cause to believe that it is necessary for such an order to be made.

(2) An application under subsection (1) above may be made to any sheriff–

(a) in whose sheriffdom the person against whom the order is sought resides;

(b) in whose sheriffdom that person is believed by the applicant to be;

(c) to whose sheriffdom that person is believed by the applicant to be intending to come; or

(d) whose sheriffdom includes any place where it is alleged that that person did an act within subsection (5) below.

(3) An application under subsection (1) above shall be made by summary application.

(4) Such an application shall be made within–

(a) the period of 3 months beginning with the date on which the matter mentioned in subsection (1)(a) above appears to the applicant to be the case; or

(b) such longer period as the sheriff considers equitable having regard to all the circumstances.

(5) The acts referred to in subsections (1) and (2) above are–

(a) engaging in sexual activity involving a child or in the presence of a child;

(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;

(c) giving a child anything that relates to sexual activity or contains a reference to such activity;

(d) communicating with a child, where any part of the communication is sexual.

(6) On the application, the sheriff may make a risk of sexual harm order if satisfied that–

(a) the person against whom the order is sought has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (5) above; and

(b) it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person.

(7) Such an order–

(a) prohibits the person against whom the order has effect from doing, or requires that person to do, anything described in the order;

(b) subject to subsection below, has effect for a fixed period (not less than 2 years) specified in the order.

(8) The only prohibitions or requirements that may be imposed by virtue of subsection (7) above are those necessary for the purpose of protecting

children generally or any child from harm from the person against whom the order has effect.

Interim Order

[4] The application was warranted for service on 22 August 2019. The respondent was made the subject of an interim risk of sexual harm order, on the opposed motion of the applicant, by an interlocutor of this court dated 2 October 2019. That interim order has been in place continuously up to this point, having been continued from time to time since it was originally granted.

The Evidence

[5] It is not necessary for me to describe the evidence in detail other than as appears in my analysis and decision below.

Submissions

[6] There was no dispute between agents as to the law. Their submissions centred on credibility, reliability and sufficiency. There is no need to set out agents' submissions in detail.

Analysis and Decision

[7] The application alleges that on each of various occasions spanning a number of years the applicant exposed his penis or genitalia to one or other of four young girls. There is no need for me to describe the allegations in detail, it being suffice to say that the respondent does not dispute that the acts concerned come within subsection (5) of section 2 of the Act.

Nor does the respondent dispute that if I am satisfied that the respondent did at least two of the acts alleged then I may make a risk of sexual harm order against him if I am satisfied that it is necessary to make such an order for the purpose of protecting children generally or any child from harm from him.

[8] Several witnesses gave evidence in person. All of them had previously sworn affidavits or, in the case of police officers, had prepared operational statements. Each witness adopted his or her affidavit or statement as their evidence in chief.

[9] Only one of the four girls gave evidence in person. She is currently aged 17. She spoke of an incident, when she was aged 5, which occurred in the shop operated by the respondent and his family. She said that she was at the door of the shop when the respondent and another male entered. She said that the respondent exposed his penis to her as he entered the shop.

[10] The evidence was that other persons, in addition to the girl and the respondent, were present and in the vicinity of where the incident as described by the girl took place. They were the girl's mother and grandmother and the respondent's wife and two sons. None of those witnesses gave evidence that was even remotely supportive of the girl's evidence, albeit that there was evidence that the girl told her mother and grandmother at the time that the man who had entered the shop had shown her his "willy".

[11] The girl's mother was not able to say whether or not the incident as described by her daughter had occurred but she did not believe at the time of the alleged incident or at a later time when the respondent and his eldest son came to her house to fit a carpet that the respondent had done anything wrong. She and her husband had decided to involve the police only after having been told by others that the respondent had been "done for flashing at kids".

[12] Whilst the girl came across as being credible in the sense that she was not deliberately trying to mislead the court, I am unable to regard her evidence as being credible and reliable when assessed against the evidence of her mother, which can be described at best for the applicant as being neutral, and the evidence of the respondent, his wife and two sons (in respect of whom I had no doubts about credibility and reliability) which amounted to a categorical denial. I accept that there was evidence of other incidents of a similar nature involving three other girls but for reasons that I think will become clear I am not prepared to regard that other evidence as lending support to the credibility and reliability of the girl's evidence. Had I found the girl's evidence to be credible and reliable it would have been open to me to find the allegation that she made to be proved on the balance of probabilities without necessarily looking for corroboration elsewhere. As it is, I am not satisfied, even on the balance of probabilities, that the applicant has proved this allegation.

[13] None of the other girls gave evidence. There was hearsay evidence, given by the parents of one of these other girls and in the form of transcripts of joint investigative interviews of these other girls spoken to by other witnesses, of similar acts having been done towards these other girls by the respondent. One of the acts was said to have been done in a field near a public park when the girl in question approached the respondent and engaged in throwing a ball for the respondent's dog. Another act was said to have been done when that same girl passed the respondent's property whilst the respondent was washing his car. The other acts were said to have been done in the homes of the other two girls where the respondent was engaged in laying carpets.

[14] I have serious reservations about the hearsay evidence. I accept the evidence as proving, as was accepted by the respondent in any event, that the allegations were made. But, none of the witnesses was able to give any evidence supportive of the truth of the

allegations, albeit that there was evidence of disclosures having been made to the parents of one of the other girls.

[15] Mr Mullen did not raise the following issue but, nonetheless, I am entitled to take it into account because it has a significant bearing on the credibility and reliability of the evidence of these other girls. The issue is that the evidence led by the applicant in respect of these other girls was not the best evidence that could have been led. In the circumstances of this case the best evidence would have been that of the girls in person with the recording of the joint investigative interviews played to the court as their evidence in chief or, at the least, the recordings played to the court as the sole evidence of the girls. The reasons for that best evidence not having been led were not explored in evidence.

[16] Transcripts are a poor substitute for the visual and audio recordings of the interviews. It is impossible for me, or anyone, to form a judgment as to the credibility and reliability of a witness from the printed page. Had I been able to see and hear the actual interviews and the reactions, demeanour and body language of the girls and their verbal delivery as they spoke in those interviews I would have been able to assess their credibility and reliability. I was denied that opportunity. Had I been able to form a favourable view of the credibility and reliability of even just one of these other girls it might well have changed my view of the credibility and reliability of the first girl and it would have been open to me to find at least two of the allegations relied upon by the applicant proved on the balance of probabilities. It is nothing to the point that the police or anyone else formed a favourable view of the girls' credibility and reliability and believed what they said. That assessment and that decision rests with me and me alone.

[17] On the whole matter I am not satisfied that the applicant has proved any of the allegations against the respondent. The respondent is entitled to be absolved in these summary civil proceedings. It follows that the interim order falls as of now.

Expenses

[18] Parties were agreed that expenses should follow success except in so far as otherwise previously determined. I have made the necessary order.