SHERIFF APPEAL COURT

[2019] SAC (Civ) 5
EDI-F620-12

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal by

SY

Pursuer and Appellant

against

FA or Y

Defender and Respondent

Pursuer and Appellant: Party
Defender and Respondent: McWilliams; Cowan and Co, Solicitors, Glasgow

11 February 2019

Introduction

[1] This is an appeal by SY, the pursuer and appellant, against the decision of the sheriff at Edinburgh to refuse his application for residence and contact in relation to the children of his relationship with the respondent. At the time of this appeal only two of the parties' four children were under sixteen years of age. The sheriff heard a proof over five days before issuing a judgment refusing the pursuer's craves.

Background

[2] The parties separated in May 2012. The respondent left the appellant without notice, effectively fleeing. Proceedings were raised shortly thereafter and have made their way slowly through the court, delayed in part by a variety of attempts to explore a workable contact regime (direct, supervised, indirect, and via skype) together with family therapy, before being dismissed at a child welfare hearing. After a successful appeal to this court by the (then and current) appellant, the case was remitted to the sheriff at Edinburgh to hear evidence. After proof, the appellant was unsuccessful and now appeals the sheriff's final judgment.

Appellant's Submissions

[3] The appellant has a number of grounds of appeal as narrated in the note of appeal which he prepared and lodged himself. SY represented himself as he had done at the proof. He was an articulate and intelligent litigant, but his lack of familiarity with the legal landscape was reflected in his approach to the appeal. He had prepared a note of argument as well as the note of appeal.

[4] His position was that the sheriff did not have material which entitled her to make the findings in fact which she did; she had refused to allow him to conduct the proceedings in the way he wished and restricted his ability to call evidence or cross examine witnesses leading to unfairness in the proceedings. He asserted that the sheriff had made errors of fact in that she had accepted the defender's account; this had been exacerbated by her accepting other material which she should not have accepted as supportive of the defender's account. He submitted that the sheriff's decision was not supported by the evidence and the sheriff

had "substituted the respondent's views" for the view of the court. He complained that the sheriff had allowed late information to be received which prejudiced him, that the views of the children were distorted and overvalued (although this did not appear in the note of appeal there was no objection to the matter being canvassed), that the wrong legal test had been applied in reaching a decision and that there was a public interest in the appeal because of the flawed outcome. I mean no disrespect to the appellant by not rehearsing in detail the arguments presented; he followed the note of argument closely in the oral submissions which I heard.

Respondent's Submissions

[5] Mr McWilliams for the respondent also referred to his note of argument. He opposed the appeal. Essentially he submitted that the sheriff's approach to the evidence, particularly in the absence of shorthand notes, could not be challenged. The sheriff had applied the correct legal test and had reached a decision which was justified by the material which she had before her. The appeal should be refused.

General observations on the law

[6] Given the appellant's status as an unrepresented litigant, some preliminary matters familiar to those who appear more regularly before the courts are worth emphasising.

[7] Firstly, there were no extended notes of evidence, which the appellant acknowledged, but did not seek to address by motion for adjournment or other approach. I was accordingly unable to consider the terms of the evidence from which the sheriff drew the findings in fact, nor indeed any record of exchanges which might have demonstrated

some of the impediments to effective participation which the appellant claimed to have encountered.

[8] Macphail; *Sheriff Court Practice* 3rd Edition makes it clear that at paragraph 18.63 that

> "Where the appellant had not produced the shorthand notes, it was held that it was not open to the sheriff principal to hold that the sheriff failed to address his mind to the evidence and had not dealt with certain parts of it.".

The authority for that proposition is *Anderson* v *Harrold* 1991 SCLR 135, where Sheriff Principal Bennett said such an exercise would be "purely speculative in the absence of notes" in turn making reference to *Thomas* v *Thomas* 1947 SC (HL) 45 at p61 where Lord Simonds said

> "The trial Judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration."

[9] At paragraph 18.109 of *Macphail* reference is made to *Allardice* v *Wallace*, 1957 SLT 225. That was a case where there was a proof, but no shorthand writer was present. It was held on appeal to the Court of Session that since there was no record of the evidence it was incompetent for the sheriff to alter the findings in fact of the sheriff substitute. The Court of Session recalled the interlocutor of the sheriff and restored the decision of the sheriff substitute. Lord Justice-Clerk Thomson said at p227:

> "Although a proof was taken the evidence was not recorded. Only the Sheriff-Substitute can know what the evidence was. It is only by his findings in fact that the facts of the case can come before an appeal court. As we do not and cannot have the evidence, we ourselves are much in the same position as if we were considering a stated case or as the House of Lords are when hearing an appeal from the Court of Session in a cause originating in the Sheriff Court. That means that we are bound by the findings in fact and that the appeal is limited to questions of law. The Sheriff was in exactly the same position."

[10] The Sheriff Appeal Court is similarly entitled and bound in the absence of compelling reasons to assume that the sheriff has taken consideration of the whole evidence

and is thereby prohibited from making different or further findings in fact. That undermines significantly the position adopted by the appellant. (See also *PK* v *JM* [2014] 7 WLUK 290 where Sheriff Principal Stephen dealt with the absence of extended notes).

[11] Secondly, as a matter of law, corroboration of evidence is not required; the need for corroboration in civil proceedings was removed by section 1(1) of the Civil Evidence (Scotland) Act 1988. In civil proceedings such as this action, any fact can be established by evidence from a single credible source. The weight to be given to any evidence is a matter for the court. Such evidence can include indirect or second hand evidence (hearsay) in terms of section 2 of that Act.

[12] Thirdly, the proof is not part of an ongoing process which can be revisited by the introduction at a later stage of evidence or submissions not before the sheriff at proof; it is rather the culmination of the procedure leading to a degree of finality (absent a change in circumstances after the event which would justify a variation of any order). The sheriff does not have an investigatory role. The sheriff considers matters on the basis of the material which the parties select. The sheriff has a responsibility to ensure that proceedings are conducted with reasonable expedition. During the proof the sheriff has an active role.

> "…the sheriff's role at a proof is not confined to ruling on objections and otherwise sitting impassively in silence. He possesses the power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision. Equally, he can encourage the use of affidavits and other documents (such as reports) in place of oral evidence, or as the equivalent of evidence in chief." *NJDB* v *JEG* 2012 SC (UKSC) 293; Lord Reed at paragraph [34].

[13] The Inner House has determined that the structure of the law and the paramountcy given to the welfare of the child comply with the requirements of Article 8; (*White* v *White* 2001 SC 689 at p700E).

[14] The role of an appellate court is clear in cases of this type, involving the regulation of parental relations with children, and I adopt and endorse the analysis by Lord Malcolm in *J* v *M* 2016 SC 835 where he said at paragraph [11] and following (I paraphrase)

> [11] … the relevant general principles … can be summarised as follows:
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> (1) In terms of section 11(7)(a) of the 1995 Act, the judge must treat the welfare of the child as the paramount consideration. The issue is: What is best for the child? … [T]he court must have regard to a number of specified matters, including the need to protect the child from any abuse (defined as including any conduct likely to cause distress), and the need for co-operation between the parents (1995 Act, section 11(7A)-(7E)).
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> (2) Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child (sometimes referred to as "exceptional circumstances") … This approach is reflective of the general background of it almost always being conducive to the welfare of a child that parental contact is maintained … [T]here must be "a reasonable basis" for a decision to refuse such an application.
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> (3) … [I]n the context of what are sometimes called intractable cases, it is not appropriate for the court, in effect, to give a veto to a parent who, for no good reason, and come what may, is simply intent on preventing contact …
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> (4) For an appellate court to interfere with a decision of this kind, it is not enough to disagree with the court below, in the sense that it would have

> reached a different decision. Absent some clear error, such as applying the wrong test, an appellate court can only interfere if the decision is plainly wrong; that is in the sense that no reasonable judge could have reached it. A "generous ambit" is given to the judge hearing the proof to reach an unappealable judgment (*G* v *G* [[1985] WLR 647], Lord Fraser of Tullybelton, p652) … [W]here the sheriff has seen and heard the witnesses, "it would be unusual for an appeal court to interfere with the sheriff's judgment on the issue of custody. The sheriff will obviously have advantages which no scrutiny of the transcript of the evidence by an appeal court, however careful, can hope to replicate"… This general approach was recently confirmed by this court in *EM* v *AM* [[2016] CSIH 2], and was the subject of a careful review of the case law by Professor Norrie ("Appellate Deference in Scottish Child Protection Cases" [(2016) 20 (2) Edin LR 149]).
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> [12] … [I]n general it is strongly in the interests of a child to maintain a relationship with both parents, before a contrary position is taken, the court must, after carefully weighing all the relevant circumstances, identify factors which justify such a serious step and demonstrate that it is conducive to the welfare of the child. This is no more than one would expect in a proper application of section 11(7) of the 1995 Act ..."

Application of the law to this case

[15] For the reasons explained I cannot look beyond the sheriff's findings in fact. It can be seen that the excerpt from *J* v *M* makes reference to an appeal court's "scrutiny of the

transcript", which is regarded as very much second best to the advantage of seeing and hearing the witnesses. This court has had no transcript to scrutinise. This court cannot assess whether the sheriff "blocked" or interfered with the appellant's cross examination. There is nothing in the note which would justify such an assessment of the sheriff's approach. The sheriff narrates at paragraph [76] her rationale for restricting repeated, persistent, unfair and baseless questioning, a matter within her power.

[16] The appellant's position was also undermined by a misunderstanding of the laws of evidence. He characterised the respondent's evidence as "unsupported facts" and "mere statements". The appellant had successfully argued before this court previously that there should be a proof. There has now been a proof. The respondent made a good impression on the sheriff. While a cross check of supporting direct or documentary evidence may be an important component of the court's determination of credibility and reliability, for the reasons explained in paragraph [10] above, the sheriff is entitled to proceed on the unsupported account of the respondent. She did so. Accordingly the sheriff has not, as the appellant put it, "substituted the respondent's views for the views of the court"; she has considered and weighed up the respondent's evidence, and having accepted it as credible and reliable, has factored that acceptance into her decision.

[17] In relation to hearsay evidence, the sheriff was entitled to accept the evidence of Ms Foy in reporting the children's recollection of violence (at finding in fact 48) and the evidence of Mrs Girdwood (see paragraphs [137]-[159]) in relation to the children's account of their experiences. The sheriff's approach is entirely justified by the law regulating evidence in civil cases.

[18] The appellant asks the appeal court to ask "Has the court considered the whole case?"; I find that the court has. The sheriff explained, principally in paragraphs [70]-[72], the steps which she had taken to focus the evidence and the issues which were of concern – principally what was in the best interests of the children in relation to the residence and contact arrangements. There is nothing in the material before me which would support the proposition that the pursuer was deprived of a reasonable opportunity to present his case; it is not an unfettered or unqualified opportunity to present the case as he sees fit. From the material before me, I cannot detect any error in her approach to or management of the proof which would vitiate the decision. The appellant was able to effectively participate.

[19] The appellant relies on a public interest argument, submitting that the sheriff has in some way proceeded to exclude contact on the basis of a previous conviction. That is to misunderstand the judgment. The sheriff made no general principle about a conviction precluding contact.

[20] Certain findings in fact are worth highlighting

- The sheriff found that the respondent was the victim of domestic abuse by the appellant in December 2011. (Finding in fact 16).
- The appellant was responsible for controlling behaviour. (Finding in fact 145).
- His abusive and violent behaviour was not limited to the incident in December 2011. (Finding in fact 138).
- The December 2011 incident was witnessed by the children. (Finding in fact 24).
- The children were physically chastised. (Finding in fact 137).

- Each of the children has been affected by the conflict between the parents (now only SY and IY are affected) and have expressed the view that they do not want to see the appellant. (Findings in fact 127 and 128).
- The respondent obtempered all court orders anent contact. (Finding in fact 139).
- The respondent encouraged contact. (Findings in fact 50, 77, 81, 140-142).
- By contrast, the appellant was critical of the respondent. (Finding in fact 65).

[21] I have already made reference to the various attempts to establish a contact regime through direct, supervised, indirect and skype contact. Some of the contact succeeded, for some of the children, but the findings in fact reflect trends - in increasingly unsatisfactory contact, and in increasing reluctance to attend, hardening into refusal.

[22] The sheriff has plainly treated the welfare of the children as the paramount consideration and taken account of the provisions of section 11 of the Children (Scotland) Act 1995, even when parties did not make specific reference to the statutory background; that included the important provisions of section 11 (7A)-(7E) (see paragraphs [8], [160] and [168]-[172] of the sheriff's note).

[23] The sheriff has recognised the importance of the paternal bond and has accepted evidence that some of the contact with some of the children was successful. She carried out a careful balancing exercise and provided a reasoned basis for refusing the appellant's craves, in particular having regard to the emerging views of the children (paragraph [140] of the note), the respondent's supportive attitude towards contact, the various attempts made to identify and establish a contact regime which operated in the best interest of the children,

as well as the pursuer's admitted behaviour (the assault in December 2011) and the behaviour which the sheriff found established.

[24] This was not a case which can be described as "intractable" in the sense used in *J* v *M*; the respondent was not someone who was intent on preventing contact whatever the circumstances. Indeed, the sheriff points out one unusual feature; despite a recommendation from the child welfare reporter to cease contact the respondent continued to facilitate its operation. (See paragraph [163] of the note "it is rare for a party to agree to further contact when a child welfare reporter has withdrawn support ..."). That formed part of the picture which the sheriff had in relation to determining whether the welfare of the children was best served by the continuation of contact.

[25] Accordingly the sheriff has applied the correct test, has carried out a balancing exercise and has identified a reasonable basis for the orders made. There is only one remaining basis for an appellate court to interfere with this decision; it must be satisfied that the decision is plainly wrong in the sense that no reasonable judge could have reached it. That is a high hurdle and the appellant has failed to clear that hurdle. The decision was reasonably open to the sheriff on the facts as she found them to be. In all the circumstances the appeal must be refused.

[26] The respondent was content that there be no expenses due to or by either party. I so order.