SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

[2026] SC INV 71

IN23000469

NOTE BY SHERIFF IAN HAY CRUICKSHANK

in the cause

PROCURATOR FISCAL, INVERNESS

against

JAMES ALEXANDER BARTON

Coakley, procurator fiscal depute
Kennedy, advocate; PDSO, Inverness

INVERNESS, 21 April 2026

Introduction

[1] The issue to be determined during the course of this trial relates to the admissibility of screenshots taken from a mobile telephone. They purport to be evidence of indecent written communications sent, or attempted to be sent, to a child between 13 and 16 years of age. That is an alleged contravention of section 34(1) of the Sexual Offences (Scotland) Act 2009.

[2] As is often the case, the recipient of the alleged indecent written communications was not a child. She was a decoy as part of what is referred to as a "paedophile hunter" group. In simple terms, the decoy, Miss P, gave evidence that she entered into a conversation online with someone using the profile "Alex Barton". Having received what she perceived to be indecent communications, she captured these as "screenshots" from her mobile telephone. She contacted the police and provided information to a police officer.

That police officer has also given evidence in this case. Miss P forwarded by email to that officer the various screenshots. These were collated by the Crown and have been spoken to as a production.

[3] A timeous objection was taken to the admissibility of the screenshots. As this is a summary prosecution, I was invited to hear evidence under reservation. As it has transpired, all Crown evidence has now been led. The objection has been made on the basis that these screenshots should be held to be inadmissible because they are not "best evidence". By that I take the objection to be that the screenshots are not best evidence of the written communications.

[4] I am obliged to both Mr Kennedy and Miss Coakley for providing me with written submissions in advance of today's calling of this case. I have had the opportunity to consider these submissions as expanded by further oral submissions today.

Additional information

[5] It was confirmed in evidence that, during the lifetime of this prosecution, Miss P had been requested by the police to provide her telephone for examination. This had been initiated by a request from the defence to the Crown for access to the device. It is unclear when exactly that request was first made but, according to Miss P, this was a considerable period of time after she had initially handed the information to the police. In evidence Miss P confirmed she was given only a brief opportunity to comply with that request. Miss P would have been happy to allow the telephone to be examined by the police, but she was not prepared to have it examined by the defence. Her reasons included that this was a decoy device which had been used in a number of cases. The extent of the efforts made by

the defence via the Crown to obtain the device was not explored in detail either in evidence or in submissions.

[6] I note that the defence had previously sought to raise this issue by way of a plea of oppression and as an associated devolution issue all going to the fairness of the process. Although a diet of debate had been assigned, these lines of attack were not ultimately insisted upon. The core basis of the objection is now maintained by way of this admissibility challenge.

[7] Although I do not know what the outcome was, I was advised that there had been a forensic examination of the accused's device. The Crown had allowed access to the device which had been seized by them. It appears that the Crown did not carry out a forensic examination of the accused's device, or at least no such examination has been presented as part of the Crown case.

[8] Reference was made to a defence expert report principally during submissions on admissibility. Only exerts were referred to and these were general in nature. They were not references to the specific examination carried out or directed to any difficulty encountered in not having access to the device in question. The report has not at this stage been produced and it was not put to any Crown witness in specific terms. I do not know whether the defence expert report will feature in evidence in the event that the defence objection is repelled.

[9] Having heard initial submissions on the admissibility objection, I referred parties to a case I considered maybe of some relevance. This was the case of *Anderson* v *Laverock* 1976 JC 9 - a case not of the digital age. The issue was whether the use of secondary evidence at trial, being photographs taken of salmon, caused unfairness where the accused had been

deprived of the right to inspect and examine the salmon themselves. On appeal it was held that there had been material prejudice and the conviction was quashed.

Submissions for defence

[10] Mr Kennedy submitted that what we had were unverified screenshots of what was in fact the primary source of evidence, namely Miss P's mobile device. Although the defence had sought access to that device for forensic interrogation, they were not afforded the opportunity to do this. On the basis primary evidence was, or should be available, ie the mobile device, secondary evidence being a mere screenshot and the witness's commentary on it was, or should be, regarded as inadmissible.

[11] The point was expanded that if disclosure of the device had been made this would have facilitated forensic examination. That examination would have allowed certain matters to be established. These would have been:

1. To secure the primary source of evidence of the original social media interactions.
2. To verify date/time stamping of the screenshots.
3. Provide a precise and complete chronology of the interactions.
4. Establish proof of the complete unedited content of the social messaging between devices.
5. Provide confirmation that the accused's device was the point of origin for all the incoming messages and the destination of outgoing messages from the decoy telephone.

[12] It was submitted that examination of the decoy telephone would authenticate and corroborate the screenshot digital evidence. It was acknowledged that screenshots are

routinely admitted and used in criminal trials without the requirement for further verification of the principal device. It was suggested that in such cases the evidence relied upon did not typically turn on the screenshot evidence alone. It was further conceded that there may be public policy issues for not taking possession of a complainer's mobile device for lengthy periods of time, but this could be balanced by the fact that the information held on devices could be cloned. This, it was submitted could be done very quickly thus allowing return of the device without huge delay.

[13] Mr Kennedy provided further submissions on what non-disclosure of the decoy device has meant for the defence. Reading these further submissions short, in an entrapment situation such as we have here, access to the decoy telephone would ensure the screenshots were uncontaminated, the contact would be verified, and it would have been authenticated. Further, where digital or IT evidence is challenged its authenticity cannot be presumed. The provenance of digital evidence must be established. The presumption of regularity does not extend to an assumption that software is functioning properly.

[14] In summary Mr Kennedy argued that evidence of alleged social media activity should be corroborated by forensic interrogation of the device. This would allow for the making of expert findings connecting, or where appropriate not connecting, the messaging to the accused's device. Editing or manipulation as it stands could not be excluded. It would not be reasonable to infer that the devices involved were working appropriately simply on the basis of a witness speaking to the screenshots. Ultimately, the refusal to allow the defence an opportunity to examine the device should render the secondary evidence of the screenshots inadmissible.

[15] Mr Kennedy submitted that the case of *Anderson* v *Laverock* supported a number of arguments advanced by him. For the reasons stated by him, the refusal to allow the defence

to forensically examine the decoy's telephone led to the same unfairness as had arisen in this earlier case.

Submissions for the Crown

[16] In response, Miss Coakley submitted that the parole evidence of Miss P was the primary evidence of the alleged exchanges. The screenshots were secondary evidence and provided corroboration to the primary source of evidence. The screenshots were documentary evidence and admissible once the provenance had been established which the Crown stated had been achieved.

[17] It was further submitted that screenshots are routinely used in prosecutions. Nothing inherent in these screenshots would render them different or subject to different rules. They were evidence of communication between the decoy and the profile of "Alex Barton". If the defence submission was accepted, then the mobile devices of all complainers would require to be seized and made subject to forensic analysis. This would be contrary to the workings of the justice system.

[18] It was accepted by the Crown that the decoy telephone was not seized or lodged as a production. That had been an operational matter for the police. The Crown had not sought an analysis of the decoy telephone as it considered that the screenshots were sufficient. Enquiries were carried out at the behest of the defence, but all the issues raised by these requests were irrelevant to the question of admissibility of the evidence in question.

[19] It was submitted that, absent the decoy telephone, there was no prejudice to the defence by that device neither being produced nor forensically examined. There could be no prejudice as the defence had the opportunity to cross-examine Miss P providing an opportunity to test both the primary and secondary evidence. Separately, the defence had

had an expert examine the accused's telephone. This would have given the defence the opportunity to put the defence position, if assisted by their expert, to the Crown witnesses therefore providing a basis to test the Crown case.

[20] It was unclear to the Crown how, in any event, analysis of the decoy telephone could provide the information that the accused's device was the point of origin for all the incoming messages and the destination of outgoing messages from the decoy telephone. That could only be achieved by analysis of the accused's device.

[21] The Crown accepted it must corroborate that the accused was the person who committed the offence. But Miss Coakley submitted there was no rule that electronic communications must be corroborated by forensic examination. In summary, the screenshots were admissible and there was no prejudice to the defence or to the accused's right to a fair trial.

[22] In relation to the case of *Anderson* v *Laverock* Miss Coakley submitted that the subject matter of that case could be distinguished from the present. The purpose of the necessity to examine the principal production in that case was different. It was something that only examination of the production could provide. That was not the case regarding the decoy telephone. This earlier case did not weaken the Crown submissions regarding the evidential challenge here.

Decision

[23] For present purposes, the only matter to be determined is whether the screenshots should be admitted as evidence. As such, I am not considering whether there has been corroboration of the two essential elements in any charge, namely whether the offence has

been committed and that it was the accused who committed it. These are matters for further submission should any be made.

[24] The best evidence rule is often applied to the use of documentary or other productions. Primary evidence should be produced wherever practical. Secondary evidence may be relied upon where it may be either impractical or not possible to produce the primary source of evidence. Objection to reliance on secondary evidence will be upheld where it would be prejudicial or unfair to allow that in lieu of the primary source.

[25] There are many cases where secondary evidence is led when it is not reasonably practicable to produce the primary source at trial. In such circumstances the defence should be given a reasonable opportunity to examine the primary source of evidence if its condition is relevant to proof of guilt or essential to the accused's defence. Failure to allow that opportunity may render secondary evidence incompetent *(Renton and Brown's Criminal Procedure*, 6th Edition at paragraph 24-04).

[26] In *Anderson* v *Laverock* the subject matter was entirely different, the same relating to what I will call a poaching offence. The issue was not that the salmon should have been available for production at trial, but the mischief was the disposal of the salmon without allowing the accused an opportunity to examine them first. This prevented the accused from properly challenging the evidence about the marks seen on the fish by witnesses who had seen the fish and who spoke to the marks on the salmon as they appeared in the photographs. As the marks were crucial to establish the method by which the fish had been caught, it was held that the accused had suffered material prejudice.

[27] Of relevance in that case are the following observations of LJC Wheatley:

> "It seems almost unnecessary to propound that in the interests of justice and fair play the defence, whenever possible, should have the same opportunity as the prosecution to examine a material and possibly contentious production. The fact that

> such opportunity has not been afforded to the defence is not per se a ground for quashing a conviction. There may be a variety of reasons, some good some bad, why the opportunity was not provided…The question then arises: 'Was there prejudice?' and 'If so, was it of such materiality as to cause such an injustice that the ensuing conviction falls to be quashed?'" (page 14)

and:

> "Where it is reasonably practicable, as it was here, we are of the opinion that the person who has lawfully seized the fish and intends disposing of it...(he) should inform the person from whom it has been seized that the fish is going to be disposed of and that, before it is, he will have the opportunity of examining it or having it examined. Reasonable practicality will depend on the circumstances…" (page 15)

The material prejudice was identified thus:

> "Since the marks or absence of significant marks on the fish were crucial to establishing the Crown case…we cannot say that the deprivation of the opportunity to have them examined before disposal by or on behalf of the appellant did not result in material prejudice to him. It may be that even if such an opportunity had been provided and evidence contradictory of the Crown case had been adduced, even from an independent expert, the sheriff would have reached the same conclusion, but that is a matter of pure speculation…" (page 16)

[28] It has been accepted here that it is not unusual for screenshots to be relied upon. The recipient of the screenshots will ordinarily be called as a witness to speak to the fact that they received written communications via an electronic device. They will be referred to the screenshot as a production to identify the written communications they received. To that end, I accept the Crown submission that in this case the primary evidence comes from Miss P. She can and did speak to the nature and extent of the electronic communications she received and the circumstances in which she received them. She spoke to the making of the screenshots and to her passing these to the police. The police officer spoke to the interaction with Miss P and to the screenshots she sent to him. To that extent the Crown have established the provenance of the screenshots now relied upon as a production. With provenance established, does the production in this case, for that is what it is, become admissible in order to be spoken to by a witness?

[29] Quite often, in cases such as this, the Crown will produce evidence of a forensic examination of a mobile device. In my experience that is seldom, if ever, the complainer's telephone or computer. Ordinarily such an examination is undertaken on the device seized from the accused. More often than not the purpose of that forensic examination is to establish a possible link between the accused's device and the complainer's device. That examination might retrieve data from the accused's device inviting a conclusion that there have been messages sent from that device to the recipient device, or at least to a particular social network account. The purpose of that is to assist in corroborating the essential fact that it was, or at least it could be reasonably inferred that, the accused committed the crime.

[30] I do not accept the defence submission that examination of Miss P's device would provide confirmation that the accused's device was the point of origin for all the incoming messages and the destination of outgoing messages from the decoy telephone. It seems logical that an examination of the accused's device is best placed to provide that information. I have to be careful on this point as I have not heard expert evidence about such things but, from other cases I have knowledge of, the accused's device, or more properly examination thereof, would provide evidence of what information or data an expert had retrieved from it. That would include incoming and outgoing digital communications which may be of relevance. Of course, the primary evidence of that, unless the terms of a report were agreed, would come from the expert himself. That expert would speak to the terms of his report, and he could be cross-examined on his conclusions if that were relevant.

[31] On the other matters that the defence say examination of the mobile telephone would have established (see para [11] above) I am not convinced that the inability to examine Miss P's telephone has resulted in material prejudice. From the nature and extent of the

cross-examination undertaken of Miss P I did not note any particular line of questioning which sought to challenge any of these listed material issues to any specific extent. I cannot see how any of the matters raised regarding being deprived of the opportunity to examine the telephone affects the central issues of first, where the written communications were sent from and, second, whether certain of the messages contained in the screenshots qualify as being indecent in nature.

[32] In every case, consideration has to be given to balancing the necessity to examine an article against the relevance of that examination to the nature of the charge and the defence to be advanced. It is the lack of this justification here that leads me to conclude that any prejudice is not sufficiently material to rule in favour of the screenshots being inadmissible. On the information available to me, either in the evidence heard under reservation, or in submissions, that bar has not been cleared.

[33] We must bear in mind, setting aside the electronic nature of the alleged exchanges, what we are looking at is the best evidence of whether there has been a written communication of an indecent nature sent to a child, or as in this case believed to have been sent to a child. What exactly is the best evidence of that written communication? It seems to me that the defence did not expect the Crown to simply produce the telephone as a production. That would be of no evidential value in itself. There would have had to be an evidentiary process undertaken that replicated the communications which are said to be on the device. If that was a requirement on the Crown, then it would necessitate a forensic examination of the device. If the defence are right in their expectations, it therefore suggests that in each case of this nature the Crown would be obliged to carry out a forensic examination of the recipient device and produce that in evidence. That should neither be necessary nor justified in all such cases.

[34] The best evidence of a written communication being received comes from the person who says they received it. The primary evidence for that therefore comes from Miss P. When Miss P received the written communications, it was she who produced the screenshots a copy of which she sent to the police and which she spoke to in evidence by reference to the Crown production. On that basis, the screenshots support and corroborate Miss P's account that she received these communications. That does not provide evidence of who sent the communication, or from where they were sent which is at the heart of the charge. That is a separate matter.

[35] The best evidence of the written communication itself depends on the media by which the communication was composed. If that were a handwritten note or letter, then the best evidence has to be the note or letter itself which should be produced and spoken to by the witness who received it. In the digital age, where the written communication is received electronically on a device it would be impractical to produce the electronic device in court and have the witness activate the device and read the communications from that device. Common sense would dictate that the electronic written communication should be captured in a form that can be best produced and referred to whilst evidence is being given in regard to it. In that respect, I cannot see any inherent unfairness in relying on a screenshot which is reproduced and copied as a paper production.

[36] On the above basis, the screenshots as a production, with the chain of provenance having been established, are admissible as such. Unlike the case of *Anderson,* the defence although deprived of the opportunity to examine the device have not been deprived of the opportunity to attack or counter the inferences which could be drawn from the screenshots and where they may have been sent from. That is because the accused has had the opportunity to examine his own device being the conduit used to allegedly send the

indecent written communication. Deprivation of that opportunity might well have supported both a devolution issue and a plea in bar of trial. As is, the challenge does not assist in upholding an evidentiary objection in the circumstances of this case. Accordingly, I overrule the defence objection as to admissibility.

Observation

[37] By way of observation, I note that the defence focussed their efforts to obtain access to Miss P's telephone via requests made to the Crown. The Crown has an ongoing duty to disclose anything which is material. If it does not do so then in any case, solemn or summary, where a defence statement has been lodged a ruling on disclosure can be sought (section 128 of the Criminal Justice and Licensing (Scotland) Act 2010). That of course would relate to an order to aid disclosure of material or information within the knowledge or possession of the Crown.

[38] I do note that the defence in this case lodged an application under section 128 of the 2010 Act. Their application was limited to seeking recovery of the accused's devices which were at that time held by the police. Reading the court minutes, it seems that there was a Crown concession that the devices would be made available for examination. That is what transpired.

[39] An important issue here is that the Crown has never had possession of the decoy device. In submissions the Crown stated that seizure of the decoy device would have been an operational matter for the police. That might be true, but it remains a matter for the Crown to request the police to make further enquiries or obtain additional productions if the Crown assess that these are relevant to proving the case. Here the Crown considered that to be unnecessary. That is a decision for them. What the implications of that maybe will come

down to whether the Crown has, on all the evidence adduced, proved the essential elements of this charge.

[40] There is no doubt that the Crown have a duty to disclose and allow inspection of productions in their possession. If they are reticent about allowing that then the arbiter would be the court who would consider whether the conditions of a section 128 application have been met. I am not convinced that the Crown is obligated to assist the defence in accessing a production when it is not in the Crown's possession and where there is no intention by the Crown to rely on those productions.

[41] No application has been made in this case to the court to aid recovery of the decoy device. The ultimate gatekeeper of fairness in any proceedings is the court. Where recovery of evidence is considered vital the decision to facilitate recovery would ultimately be a judicial decision. There is specific provision for recovery of documents (section 301A of the Criminal Procedure (Scotland) Act 1995). An order for recovery will be granted if the court is satisfied that it is in the interests of justice to grant such an order. The court would have to be satisfied that the order for recovery of the documents requested would be of likely assistance in the proper preparation and presentation of the defence case. An assessment is required to be given not only to the preparation or presentation of the accused's defence but to whether the inability to examine an article would lead to inherent unfairness (*McLeod* v *HMA (No 2)* 1998 JC 67).

[42] Case law has been concerned with the recovery of documents, but academic opinion confirms the belief that there is no reason to restrict this process to documents, and, in criminal proceedings, it could also apply to objects. The same tests would apply (see *Walker and Walker, The Law of Evidence in Scotland*, 5th Edition at paragraph 18.2.7). Whether the court could have competently assisted the defence in recovery in this case, and if competent

by what means, would have depended on the material relied upon to support the argument that inherent unfairness would result in the absence of recovery. On the information presented to me I doubt whether the court would be persuaded to aid recovery. However, whether based on further or additional material the court could have competently assisted the defence to recover the device, and by what means, are not questions which require to be answered on this occasion.