APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Eassie
Lord Reed

[2011] HCJAC 3
Appeal No: XC731//09

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

NEIL STRACHAN
Appellant;

against

HER MAJESTY'S ADVOCATE
Respondent:

_____

Appellant: Keenan, Solicitor Advocate, Bryce, Solicitor Advocate; Capital Defence, Edinburgh
Respondent: Bain, Q.C., A.D.; Crown Agent

14 January 2011

The charges

[1] The appellant went to trial with seven others on an indictment which contained 54 charges. Not all of these charges were directed against the appellant. The charges against him were as follows:

> "(1) between 12 February and 9 November 2007, both dates inclusive, at 58/9 Duff Street and Crown Decorator Centre, Unit 6 Elizafield Estate,

Newhaven Road, both Edinburgh and elsewhere to the Prosecutor unknown you NEIL STRACHAN did have in your possession indecent photographs or pseudo-photographs of children: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52A(1) as amended;

(2) between 12 February 2004 and 31 January 2006, both dates inclusive, at 58/9 Duff Street and Crown Decorator Centre, Unit 6 Elizafield Estate, Newhaven Road, both Edinburgh and elsewhere to the Prosecutor unknown you NEIL STRACHAN did take or permit to be taken or make indecent photographs or pseudo-photographs of children: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(a) as amended;

(3) between 12 February 2004 and 31 January 2006, both dates inclusive, at 58/9 Duff Street and Crown Decorator Centre, Unit 6 Elizafield Estate, Newhaven Road, both Edinburgh and elsewhere to the Prosecutor unknown you NEIL STRACHAN did distribute or show indecent photographs or pseudo-photographs of children: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(b) as amended;

(4) between 12 February 2004 and 31 January 2006, both dates inclusive, at 58/9 Duff Street and Crown Decorator Centre, Unit 6 Elizafield Estate, Newhaven Road, both Edinburgh and elsewhere to the Prosecutor unknown you NEIL STRACHAN did have in your possession a number of indecent photographs or pseudo-photographs of a child or children with a view to them being distributed or shown by you to others: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(c) as amended;

(9) on 31 December 2005 or 1 January 2006 at 58/9 Duff Street, Edinburgh, you NEIL STRACHAN did assault [JL], born 22 June 2004, c/o

Lothian and Borders Police, Edinburgh and did penetrate his hinder parts with your private member and did thus have unnatural carnal connection with him;

(10) on 31 December 2005 or 1 January 2006 at 58/9 Duff Street, Edinburgh, you NEIL STRACHAN did use lewd, indecent and libidinous practices and behaviour towards [B], born 31 October 1999, c/o Lothian and Borders Police, and did repeatedly touch him in an indecent manner to the Prosecutor unknown whilst he was asleep;

(43) on various occasions between 16 August 2004 and 9 November 2007, both dates inclusive, at Flat 3, 22 Marionville Road, Edinburgh, you NEIL STRACHAN and JAMES RENNIE did distribute or show indecent photographs or pseudo photographs of children to each other: CONTRARY to the Civil Government (Scotland) Act 1982, Section 52(1)(b) as amended;

(54) between 27 July 2004 and 16 December 2007, both dates inclusive, you NEIL STRACHAN, JAMES RENNIE, ROSS PHILLIP WEBBER, CRAIG BOATH, NEIL WILLIAM ARCHIBALD CAMPBELL and JOHN MILLIGAN did at 58/9 Duff Street, The Crown Decorator Centre, Unit 6 Elizafield Industrial Estate, Newhaven Road, Flat 3, 22 Marionville Road, LGBT Youth Scotland, John Cotton Business Centre, 10 Sunnyside, all Edinburgh, at an address in Currie, Edinburgh, 37 Gilbert Avenue, North Berwick, East Lothian, 27 Gourdie Street, Dundee, 13 Glendaruel Avenue, Bearsden, Glasgow and Flat 2/2, 19 Wanlock Street, Glasgow conspire together and with others to meet whether by means of web cameras or other means including by telephone to participate in the commission of sexual offences including lewd, indecent and libidinous practices and behaviour, indecent assault, rape, sodomy and assault against children and in particular

against [F], born 28 August 2003, c/o Lothian and Borders Police, Edinburgh [and] in pursuance of said conspiracy and while acting in concert with others you did:

(a) on various occasions between 16 August 2004 and 6 February 2008, both dates inclusive, at 58/9 Duff Street, The Crown Decorator Centre, Unit 6 Elizafield Industrial Estate, Newhaven Road, Flat 3, 22 Marionville Road, LGBT Youth Scotland, John Cotton Business Centre, 10 Sunnyside, all Edinburgh, at an address in Currie, Edinburgh, 37 Gilbert Avenue, North Berwick, East Lothian, 27 Gourdie Street, Dundee, 13 Glendaruel Avenue, Bearsden, Glasgow and Flat 2/2, 19 Wanlock Street, Glasgow you NEIL STRACHAN, JAMES RENNIE, CRAIG BOATH, NEIL WILLIAM ARCHIBALD CAMPBELL and JOHN MILLIGAN did whilst acting along with Lachlan Moar Anderson, c/o Lothian and Borders Police, Edinburgh and others whose identities are to the Prosecutor unknown, arrange to meet and gain access to said [F]for the purposes of committing sexual offences against him;

(b) on 28 July 2004 at Flat 3, 22 Marionville Road, Edinburgh or elsewhere you JAMES RENNIE did whilst a member of an e-mail distribution group which included the e-mail address grasso666@yahoo.com believed to be Matthew Grasso, a resident of the United States of America respond to an e-mail purporting to be from [JD], aged 14 years, using the e-mail address jmd2k4@hotmail.com whose identity is to the Prosecutor unknown to

said distribution group for the purposes of gaining access to said [JD] and taking indecent images of said [JD] and a younger boy;

(c) between 7 August 2004 and 10 August 2004, both dates inclusive, at Flat 3, 22 Marionville Road, Edinburgh you JAMES RENNIE did whilst acting along with another whose e-mail address was manicstreet5@hotmail.com and who was also known as Chester White, believed by the Prosecutor to be Patrick Terence Lalleman, discuss carrying out sexual offences and assault against a child and arrange to meet in furtherance thereof;

(d) between 16 August 2004 and 30 December 2005, both dates inclusive, at 58/9 Duff Street and Flat 2/3, 22 Marionville Road, LGBT Youth Scotland, John Cotton Business Centre, 10 Sunnyside, all Edinburgh you JAMES RENNIE and NEIL STRACHAN did by means of e-mail correspondence arrange to meet and gain access to the said [F] for the purpose of committing sexual offences against him;

(e) between 16 August 2004 and 9 November 2007, both dates inclusive, at Flat 3, 22 Marionville Road, Edinburgh or elsewhere you JAMES RENNIE and NEIL STRACHAN did use lewd, indecent and libidinous practices and behaviour against said [F] and did lie on a bed with him and force him to suck your private member;

(f) between 10 July 2005 and 16 December 2007, both dates inclusive, at 13 Glendaruel Avenue, Bearsden, Glasgow and Flat 3, 22 Marionville Road, Edinburgh, you JAMES RENNIE and NEIL WILLIAM ARCHIBALD CAMPBELL did make arrangements to meet and gain

access to said [F] for the purpose of commission of sexual offences against him;

(g) between 29 July 2005 and 31 July 2005, both dates inclusive, at 58/9 Duff Street and Flat 3, 22 Marionville Road, both Edinburgh or elsewhere to the Prosecutor unknown you NEIL STRACHAN and JAMES RENNIE did contact and arrange to meet up with another whose identity is to the Prosecutor unknown, for the purpose of gaining access to and committing sexual offences against male children aged under 14 years known as [A] and [L] and you NEIL STRACHAN did send you JAMES RENNIE images of said children;

(h) on 9 October 2005 at Flat 2/3, 22 Marionville Road, Edinburgh and Flat 2/2, 19 Wanlock Street, Glasgow or elsewhere, you JAMES RENNIE did by means of electronic communication contact you JOHN MILLIGAN and state that you wanted to share a child believed to be said [F] for the purposes of committing sexual offences against said [F];

(i) between 23 November 2005 and 16 June 2006, both dates inclusive, at Flat 2/2, 19 Wanlock Street, Glasgow, you JOHN MILLIGAN did by means of electronic communication with a male known as Your Humble Narrator, whose identity is to the Prosecutor unknown, discuss arrangements to gain access to said [F], offer to facilitate access to him and discuss gaining access to him for the purpose of taking indecent images and committing sexual offences against him;

(j) between 7 December 2005 and 2 October 2006, both dates inclusive, at Flat 2/2, 19 Wanlock Street, Glasgow you JAMES MILLIGAN did

whilst acting along with another who used the e-mail address manicstreet5@hotmail.com and was also known as Chester White believed by the Prosecutor to be Patrick Terence Lalleman discuss committing sexual offences and assault against a child and arrange to meet in furtherance thereof;

(k) between 11 March 2006 and 17 October 2006, both dates inclusive, at Flat 2/2, 19 Wanlock Street, Glasgow you JOHN MILLIGAN did by means of electronic communications with a male known as Connor discuss committing sexual offences together against a child and gaining access to said [F] for the purpose of committing sexual offences against him;

(l) on 29 July 2006 at at an address in Currie, Edinburgh, Flat 2/3, 22 Marionville Road, Edinburgh and at Flat 2/2, 19 Wanlock Street, Glasgow you JOHN MILLIGAN and JAMES RENNIE did whilst acting together use lewd, indecent and libidinous practices and behaviour towards said [F] and you JAMES RENNIE did by means unknown to the Prosecutor sexually abuse him whilst you JOHN MILLIGAN did by means of a telephone listen to said sexual abuse being carried out and did speak to said [F];

(m) between 30 July 2006 and 26 October 2007, both dates inclusive, at Flat 3, 22 Marionville Road, Edinburgh and at Flat 2/2, 19 Wanlock Street, Glasgow or elsewhere you JOHN MILLIGAN and JAMES RENNIE did by means of electronic communication make arrangements to gain access to said [F] for the purposes of committing sexual offences against said [F], and did discuss filming the sexual

offences perpetrated by you, JAMES RENNIE, and distributing them to others and did discuss the use of web cameras for you JOHN MILLIGAN to watch you JAMES RENNIE commit sexual offences against the said [F];

(n) you JAMES RENNIE having committed the crime libelled in charge (18) hereof, did whilst acting along with you JAMES MILLIGAN on 12 November 2006 at Flat 3, 22 Marionville Road, Edinburgh and Flat 2/2, 19 Wanlock Street, Glasgow did by means of electronic communication discuss searching for said child and committing sexual offences against him;

(o) on various occasions between 27 August 207 and 5 October 2007, both dates inclusive, at 37 Gilbert Avenue, North Berwick, East Lothian you ROSS PHILLIP WEBBER did whilst acting along with others known as vodkamartinis@hotmail.com and drj2010uk@yahoo.com attempt to make arrangements to meet up with them and gain access to children for the purposes of committing sexual offences against children;

(p) on 29 August 2007 at Flat 2/2, 19 Wanlock Street, Glasgow you JOHN MILLIGAN did whilst acting along with another known as Connor whose identity is to the Prosecutor unknown use lewd, indecent and libidinous practices and behaviour against a child aged 12 years whose identity is to the Prosecutor unknown and in particular you JOHN MILLIGAN did view by means of a web camera the said Connor committing sexual offences against said child; and

(q) between 30 September 2007 and 16 December 2007, both dates inclusive, at Flat 3, 22 Marionville Road, Edinburgh or elsewhere to the Prosecutor unknown you JAMES RENNIE did offer to allow said Lachlan Moar Anderson to listen to you committing sexual offences against said [F] by means of a telephone."

The conviction

[2] The appellant was found guilty of charges (1), (2), (3) and (4) as amended and guilty of charges (10) and (54) as libelled. He was found guilty of charge (43) restricted to a single day and of charge (9) restricted to attempted penetration. The court made an Order for Lifelong Restriction and specified a punishment part of sixteen years.

The scope of the appeal

[3] The appellant sought to appeal against conviction on charges (3), (4), (10), (43) and (54). Leave to appeal was refused in relation to charges (3) and (4). Leave was granted in relation to charges (10), (43) and (54). His appeal against sentence is outstanding.

The background

[4] The background to this prosecution was an investigation by the police into the activities of a number of adult males who were suspected of having committed paedophilic offences. A central figure in that investigation was the co-accused James Rennie. He faced a substantial number of charges. He was convicted of all the charges on which the Crown ultimately sought a conviction against him. Rennie has

been described by the trial judge as "at the heart of a conspiracy" libelled in charge (54).

Charge (10)

[5] The ground of appeal in relation to charge (10) is to the effect that there was insufficient evidence in law to entitle the jury to return a verdict of guilty on that charge. Further, that there was no evidence that the appellant "did repeatedly touch" the child in an indecent manner.

[6] Charge (9) and charge (10) are related. The children in these charges are brothers, [JL] being about 18 months of age at the time of the offence and [B] being a little over 6 years. The offences were both alleged to have taken place in the children's home, where their parents had left them in the care of the appellant and another man over the immediate Hogmanay festivity. The evidence against the appellant on charge (9), against his conviction on which he takes no appeal, was overwhelming. Against a background of evidence that the appellant had a strong interest in the sexual abuse of children (including the anal penetration of infants), evidence was adduced that a camera used to film the gross abuse of [JL] (a cropped image of which was recovered) was a camera which had been in the possession of the appellant at the relevant time and had been used by him to record a condition of shingles from which he had been suffering; the same camera also showed a portrait of him. Expert evidence linked physical features of the abuser on the image with physical features of the appellant. On the appellant's computer was a folder which, though empty when recovered, was in a state consistent with having transferred an image or images. A few days after this abuse the appellant on 6 January 2006 e-mailed the following message to Rennie:

> "Hi mate, my number is still the same i'll txt you with my number. We have had a bit of fun had the 6yo staying but only messed when he was asleep, had th 18 month at new year we had some fun wi him, we will need to meet and sawp vids."

Attached was the image showing the abuse. In a subsequent e-mail to Rennie the appellant admitted that it was he who appeared on the image.

[7] The Crown case against the appellant on charge (10) relied in the first place on a construction of the above e-mail. The construction put upon it was that the statement "We have had a bit of fun had the 6yo staying but only messed when he was asleep" imported that, in some way, the precise nature of which could not be proved, the appellant had tactilely interfered indecently with the 6 year old child, [B]. In the surrounding circumstances and against the background that, as discussed in relation to charge (54) below, he had repeatedly communicated with Rennie in relation to "access to" (that is, sexual abuse of) young children, including an e-mail on 18 August 2004 in which he stated that he had had experience (clearly, in the context sexual experience) with a 2 year old and a 6 year old, the jury would , in our opinion, have been entitled to construe the e-mail to that effect – that is, as a claim, amounting to an admission, by the appellant of using lewd, indecent and libidinous practices and behaviour towards [B] on the occasion when he was in the appellant's care on that Hogmanay. In his subsequent e-mail to Rennie the appellant said, under reference to the image of abuse of the 18 month old, "ive got others wi the 6yo wen he was asleep but cant send them". These others, which by implication were also of sexual abuse, were not recovered. The only remaining question on this charge is whether there was corroboration of the admission. In our view there was. There was clear independent evidence that the appellant had access to the child [B] on the same occasion on which

he sexually assaulted his younger brother. In the e-mail of 26 January 2006 the appellant claimed to have sexually abused, albeit in different ways, both children in his charge. The abuse of the younger child was amply corroborated by the real evidence of the recovered image. That confirmation of abusive conduct was sufficient, in our view, to support the composite admission made by the appellant of having interfered with both children, including the elder child, on the same occasion.

Charge (43)

[8] The issue on charge (43) is again of sufficiency of evidence. The burden of that charge is that the appellant and Rennie met at Rennie's home and showed indecent photographs or pseudo-photographs of children to each other. The jury restricted the conviction on that charge to a single occasion. That can be identified on the evidence as Saturday 21 August 2004. The Crown's case on this charge was circumstantial. E-mails passing between the appellant and Rennie in the days immediately prior to that Saturday disclosed that they then discovered that they both lived in the Edinburgh area and were anxious to meet to share paedophilic materials. The appellant had a portable hard drive on his computer. Expert evidence established that Rennie's hotmail account had been accessed by the appellant's hard drive on that Saturday. Evidence from the same experts explained that such access could have arisen in one of two ways: either Rennie had physically used the appellant's hard drive to access the account or Rennie had provided the appellant with his password. The latter explanation was thought to be less likely. The inference which was sought to be drawn was that, in pursuance of the e-mail proposals to meet, the appellant had on the Saturday in question brought his hard drive to Rennie's house where the two together had with the use of that hard drive accessed paedophilic images.

[9] In the whole circumstances of the appellant's conduct this charge is of limited significance. Indeed, on one view, which the Advocate Depute acknowledged, it is covered by the ambit of charge (3). However, we are satisfied that the evidence in question was open to the inference that Rennie and the appellant had met on that Saturday at Rennie's house and had there shown to each other paedophilic images.

Charge (54) – the scope of the conviction

[10] The remaining charge which arises for consideration in this appeal is charge (54). The terms of that charge (of conspiracy) have been set out above. They are elaborate. The jury returned in respect of the appellant a unanimous verdict of guilty on this charge without any deletion or amendment. On the evidence this gives rise to a difficulty. The charge is addressed to the appellant, Rennie and four other accused who are alleged at various addresses to have conspired together with others "to meet whether by means of web cameras or other means including by telephone to participate in the commission of sexual offences". A non-exhaustive list of such offences is then given. It includes rape. The offences are alleged to have been directed "against children and in particular [F]". It is then alleged that in pursuance of that conspiracy various actions followed.

The evidence

[11] The evidence upon which the Crown relied in seeking a conviction against the appellant on this charge was e-mail traffic between him and Rennie. With one minor exception, which for present purposes can be ignored, there was no evidence that the appellant had any contact with any of his co-accused other than Rennie or even knew of their existence. There is nothing to suggest that the relevant e-mail traffic went

beyond the appellant and Rennie. While Rennie may have been involved in a wider conspiracy, there was no evidential basis upon which the appellant could be convicted beyond a possible conspiracy between himself and Rennie. There was no evidential basis upon which any such conspiracy could be said to have contemplated rape. The Advocate depute, who herself conducted the Crown's case at the trial, advised us that in her address to the jury she had made it plain that, as against the appellant, the conspiracy upon which she sought a conviction was restricted to one between the appellant and Rennie. Unfortunately, the trial judge's charge, while involving elaborate and in general sound directions on the law of conspiracy, failed to include a direction that the scope of any conspiracy upon which the jury could return a verdict of guilty against the appellant was restricted to one between him and Rennie. In these circumstances they returned the unrestricted verdict noted above. That verdict, in our view, cannot stand. At best for the Crown the verdict on this charge would require to be amended by restriction.

[12] Before addressing whether that would be appropriate we note, in summary form, the evidence upon which the Crown relied as against the appellant on this charge. The e-mail traffic opened on 16 August 2004 when the appellant, having discovered Rennie's pornographic website, e-mailed Rennie to congratulate him on it and to express his interest in the sexual abuse of babies and boys. On 17 August Rennie responded saying that he was in Edinburgh "and have access to a baby boy if you are near me". Other evidence suggested that in context "access" to a baby boy meant access for the purpose of sexually abusing the child. The boy in question was the child [F], whose godfather was Rennie. The e-mail ended with an enquiry as to the appellant's whereabouts. The following day this exchange of e-mails took place:

"From: RENNIE

To: STRACHAN

Sent: 17 August 2004 08:14:54

Subject: RE: Hi

I am in Edinburgh and have some access to a baby boy if you are near me?

Where r u?

From: STRACHAN

To: RENNIE

Sent: 18 August 2004 14:54:02

Subject: RE: Hi

hi sorry don't online as much as I'd like 2. ive had experience but ages age wi a 2 & 6, don't have access now :((muy msn is marksmith29@hotmail.com, hope 2 hear from u soon, wot age r u?

mark.

From: RENNIE

To: STRACHAN

Subject: RE: Hi

Date: Wed, 18 August 2004, 16:10:35 +0000

That is kinda cool that you are so close! I am 30, are you 29? We def need to meet, if it works out I would like to share my b with u, as this is much hotter than solitary.

I also have some other pics we could look at. I have a number I use for this thing only, maybe you can text me when you get a chance. I check it about 2 times a day.

…481

I was wondering if you stay alone? And if you will be able to accom some time to look at stuff.

It is so cool you and me are so close! cant wait to hear from you. I might have the b this weekend if you are interested?

Kenny"

On Thursday 19 August the following exchange took place:

"From: STRACHAN

To: RENNIE

Subject: RE: Hi

Sent: Thu, 19 Aug 2004, 11:39:23 +0000

Im 31 i'd love to meet up, i dont live alone i have a bf thats why i cant get online as much as i would like, do u live alone wot area of edinburgh u in?

I have pics too & a couple of vid clips. Is the b yours and age? Got ur number will txt 2day, im really lookin forward to our meet.

Mark

From: RENNIE

To: STRACHAN

Subject: RE: Hi

Sent: Thu 19 August 2004 12:27:58 +0000

I stay in east edin – not my b – he is 1. Sorry need to dash – text me when u can and we will arrange?

From: STRACHAN

To: RENNIE

Subject: RE: hi

Date: Thu, 19 August 2004, 13:15:55 +0000

hi, ive sent u a txt my num is …921 if u didnt get it. talk soon

mark"

There was evidence from which it could be inferred that the appellant and Rennie met to share paedophilic material on the Saturday of that week (see discussion of charge (43) above). There is then an apparent gap in the e-mail traffic. It resumed on 13 September. Then and thereafter the following e-mails passed:

"From: RENNIE

To: STRACHAN

Sent: 13 September 2004 07:11:42

Subject: RE: Hi

hi,

might be on for sat 2 oct in the morning with b? put this is your diary.

From: RENNIE

To: STRACHAN

Sent: 01 October 2004 08:53:30

Subject: RE: Hi

hi mark,

do you want to meet up for a wander around town this saturday? It could be a lot of fun? text me.

From: RENNIE

To: STRACHAN

Subject: RE: Hi

Sent: Wed, 20 Oct 2004 14:59:51 +0000

hi there,

i am back now. do you want to meet up sometime soon?

From: STRACHAN

To: RENNIE

Subject: RE: Hi

Sent: Fri, 22 October 2004 23:08:22 +0000

hi, yeah that would be good, not sure about going to McD's bit dodgy hanging around. No news of the b yet? need 2 get copies of some of ur vid clips, speak soon.

Mark

From: STRACHAN

To: RENNIE

Subject: RE: Hi

Sent: Thu, 28 October 2004 14:24:57 +0000

hi m8,

how are you doing had any fun lately? Did you know that photoisland is shutting down, wot a disaster! no news yet bout the b yet?"

The "Photoisland" website was closed down because of misuse by the paedophilic community. There was no evidence that the appellant became involved in any actual abuse of the child [F]. Subhead (e) of charge (54) alleged that Rennie and the

appellant had sexually abused that child in the way described but the only evidence of this was a statement made by Rennie in the absence of the appellant.

[13] As regards other children, the only evidence was an e-mail sent by the appellant to Rennie some months later on 29 July 2005 with the following text:

> "From: STRACHAN
>
> To: RENNIE
>
> Subject: Re: HI
>
> Date: Fri 29 Jul 2005 15:41:37 +0000
>
> hi mate, i mite have found us a contact wi 2 b's 2 & 4 willing to share**,** think he is gen only problem is he is in warrington Im gonna see on cam on thursday the 11 aug thats his next time wi them.
>
> mark xx
>
> Content-Disposition: attachment; filename= 'A 5a.JPG'
>
> Content-Disposition: attachment; filename= 'L 11.jpg'"

Attached were photographs of the two children in question. The photographs were not indecent. There was no evidence of this opportunity having been followed up.

[14] The appellant contends that at their highest these e-mail communications could not warrant the conclusion that the appellant conspired with Rennie to commit sexual offences against [F] or any other child. While Rennie had in August 2004 informed the appellant that he had access to [F], there was nothing to suggest that the appellant had agreed with Rennie to carry out any abuse. Likewise, while in July 2005 the appellant had told Rennie of a possible contact with a view to abusing two other children, there was nothing to suggest that Rennie had agreed to any such arrangement.

The law

[15] In *Crofter Hand Woven Harris Tweed Co* v *Veitch* 1942 SC (HL) 1 (a civil case) the Lord Chancellor, Viscount Simon, (at page 5) said:

> "Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it. … The crime consists in the agreement, though in most cases overt acts done in pursuance of the combination are available to prove the fact of agreement."

In the context of a criminal trial in Scotland the trial judge (Lord Ross) gave a direction to the same effect in *Sayers and Others* v *HM Advocate* 1981 SCCR 312 at page 315-6. He said:

> "Conspiracy when regarded as a crime is the crime (*sic*) [query, 'agreement'] of two or more persons to effect any criminal purpose whether as their ultimate aim or only as a means to it, and the crime is complete if there is such agreement even though nothing is done in pursuance of it. The crime consists of the agreement, though in most cases overt acts done in pursuance of the combination are available as proof of the fact that they have agreed."

[16] An essential element of the crime is accordingly that there is proved to have been an agreement between the alleged conspirators. In the present case one is not concerned with any agreement as to the means by which any abuse might be achieved but with whether there was any agreement as to the aim, namely, the commission of sexual offences against a child or children. Agreement imports the assent of two or more persons to a course of action. The agreement can be express or implied. It is important to resist the temptation to introduce into the simple concept of an agreement

for this purpose ideas derived from the civil law of contract (*Reg.* v *Anderson* [1986] AC 27, per Lord Bridge of Harwich at page 37). A meeting of minds, a consensus to effect an unlawful purpose suffices. If, on the other hand, what has occurred has not passed from the sphere of negotiation or intention to become a matter of agreement, the crime of conspiracy has not been committed (see *R* v *Walker* (1962) Crim L R 458).

Analysis of the evidence

[17] The e-mail traffic between the appellant and Rennie opens with Rennie informing the appellant that he (Rennie) has access to a baby boy. There then is an enquiry by Rennie as to whether the appellant has had "any real experience" or has access [to children]. The appellant responds by saying that he has had prior experience (with children aged 2 and 6) but has no present access. Rennie then proposes a meeting. If that "works out", he would like to share the boy with the appellant "as this is much hotter than solitary". There is then a suggestion that Rennie might have access to the boy that weekend "if you are interested". The appellant responds by enquiring as to whether the child is Rennie's and what age he is. He says he is really looking forward to meeting Rennie. There is no express response to the suggestion that Rennie "share" the boy with him. Rennie then replies to the effect that the child is one year of age. As discussed above, there is evidence upon which it can be concluded that the appellant and Rennie met that Saturday at Rennie's home. There is no evidence that access was in fact had to the child that weekend. The subsequent e-mails tend to suggest that there was not. On 13 September Rennie tells the appellant that "it might be on for sat 2 oct in the morning with b … put this in your diary". This amounts to an invitation to the appellant to join Rennie in abuse of

the child on that day, if the child is available. There was no recorded response by the appellant to that provisional invitation. Nor is there any evidence that abuse in fact occurred on 2 October. The following e-mails concern suggestions that the appellant and Rennie meet (again). The last e-mails of importance are those of 22 October when the appellant enquires of Rennie whether there was any news of the boy and that of 28 October when he makes a similar enquiry.

[18] The proper inference from this correspondence as a whole is that the appellant had shown interest in the potential sexual abuse with Rennie of the child [F]. Although there is no recorded response by the appellant to Rennie's specific proposal that, if the meeting between them worked out, he [Rennie] would like to share the boy with the appellant, the legitimate inference is that they did in fact meet and, from the subsequent e-mails, that that meeting had "worked out", that is, that from Rennie's point of view the appellant was a suitable accomplice in the abuse of the child. The e-mail of 13 September amounted to a proposal by Rennie to the appellant that they share the child on the morning of 2 October, if he is available. So far as appears he was not. However, the appellant continues to correspond with Rennie on the topic and twice enquires whether there is any news about (the availability of) the boy. From these latter responses it could, in our opinion, properly be inferred that the appellant had agreed with Rennie that, in the event of the child becoming available, he would join with him in the commission of sexual offences against that child. That suffices for the purposes of the crime of conspiracy.

[19] As to the e-mail in the following year in relation to the children in Warrington, this demonstrates an interest by the appellant in actual abuse of other children. He says that he may have "found us" a relevant contact, importing a continued interest in sharing children with Rennie. While the absence of any recorded response from

Rennie precludes there being an agreement between them on actual abuse of these children, this communication sheds some additional light on the appellant's position in the previous year. It is consistent with his having agreed to share [F] with Rennie.

[20] In these circumstances it would, in our judgment, have been open to the jury to return a restricted verdict of guilty against the appellant on charge (54). Although there is authority for the view that at least in some circumstances a general verdict of "guilty as libelled" can be returned even though the whole libel has not been proved (*Myers* v *HM Advocate* 1936 JC 1; see also *Sweeney and Another* v *X* 1982 SCCR 509 at pages 523-4), the Advocate depute did not urge us to sustain the conviction on that basis. In any event, in the circumstances of this case we do not regard a general verdict as appropriate.

[21] Before addressing whether and, if so, what alternative verdict might be substituted, we consider the events set out in the lettered subparagraphs of charge (54) and thus averred to have occurred in furtherance of the conspiracy. Of these only paragraphs (a), (d), (e) and (g) could on the evidence have been acts done in furtherance of a conspiracy between the appellant and Rennie. The remainder would require to be excluded. Paragraph (a), stripped of references to conspirators other than the appellant and Rennie, is identical to paragraph (d) and is accordingly redundant. As to paragraph (e), while there was evidence against Rennie in respect of this abuse, there was no evidence in this respect against the appellant. It would accordingly fall to be deleted. As to paragraph (g) this relates to the children in Warrington. The appellant's e-mail of 29 July 2005 is relevant to this. It carries the implication that the appellant in furtherance of a joint interest in abusing children other than [F] had made contact with an unidentified third person and was to view on camera about two weeks later what might be abuse perpetrated on these children.

Although, so far as direct abuse of these children by the appellant and Rennie is concerned matters were at an early stage, this can be seen as action in furtherance of the conspiracy between these two. However, there being no evidence that any arrangement was in fact made to meet up with the third person, the averment to that effect would require to be deleted. Although para (d) adds little to the general averments of conspiracy, a verdict of guilty which included it was open to the jury.

An amended verdict

[22] The Advocate depute submitted that, if the court was of the view that the verdict on charge (54) as returned could not stand, we should exercise our power under section 118(1)(b) of the Criminal Procedure (Scotland) Act 1995 by setting aside the verdict of the trial court and substituting therefor an amended verdict of guilty. Mr Keenan for the appellant submitted that in the circumstances we should not exercise that power. Section 118 provides:

> "(1) The High Court may … dispose of an appeal against conviction by –
>
> ….
>
> (b) setting aside the verdict of the trial court and …, subject to subsection (2) below, substituting therefor an amended verdict of guilty;
>
> …
>
> (2) An amended verdict of guilty substituted under subsection (1) above must be one which could have been returned on the indictment before the trial court."

There is no doubt that the amended verdict of guilty which we have in mind could have been returned on the indictment before the trial court. The discretion conferred

by section 118(1) is expressed in unrestricted terms (contrast the previous more restricted provision in section 3(2) of the Criminal Appeal (Scotland) Act 1926; *Kent* v *HM Advocate* 1950 JC 38). The correct test is, in our view, what is in the interests of justice (see *Jamieson* v *HM Advocate* 1987 SCCR 484 at page 488). The proper inference from the jury's verdict is that they accepted the Crown case on this charge as presented to them. That, we were informed, was, so far as the appellant was concerned, a conspiracy with Rennie. Although we have not seen a transcript of the Advocate depute's address to the jury, she assured us that that was the stated scope of her case against the appellant. Mr Keenan, whose junior also appeared at the trial, did not challenge that assurance. In these circumstances it is in the interests of justice that a restricted verdict be substituted on this charge.

Disposal

[23] We shall accordingly, in relation to charge (54), set aside the verdict of the trial court and substitute a verdict of guilty of that charge under deletion in the averments of conspiracy of (1) the names from "ROSS PHILIP WEBBER" to "JOHN MILLIGAN" inclusive, (2) the addresses from "at an address in Currie, Edinburgh" to "Flat 2/2, 19 Wanlock Street, Glasgow" inclusive and (3) the word "rape" and in the lettered paragraphs of all of those paragraphs except paragraphs (d) and (g), the latter also being subject to deletion of the words "and arrange to meet up with another whose identity is to the Prosecutor unknown". The appeal against conviction is allowed to that extent. *Quoad ultra* it is refused. The case is continued for consideration of the appeal against sentence.