
**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 55**
XA47/19
XA48/19

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the cause

by

LO and EO

Appellants

against

THE CHILDREN'S REPORTER AND ANOTHER

Respondents

**Appellants: Parties**
**First Respondent: Guy, sol adv; Anderson Strathern LLP**
**Second Respondent: Ardrey; David Kinloch & Co**

19 November 2019

[1] On 28 January 2019 a children's hearing dealt with an application for a review of compulsory supervision orders (CSOs) which involve three children, NO, EO and MO. In respect of NO and EO, the decision was that the CSOs be continued and varied for 1 year, with a further review in 3 months. In respect of MO the review was deferred. The application had been made by the children's parents. They appealed the decisions to the

sheriff in terms of section 154 of the Children's Hearings (Scotland) Act 2011. The appeal in respect of MO was refused as incompetent. Those involving NO and EO were refused on their merits. The parents requested that the sheriff state cases to this court. The questions posed require this court to rule on whether the sheriff erred in law in respect of both or either of his decisions.

[2] With regard to MO, the answer is straightforward. The sheriff correctly held that a decision to defer a review of a CSO is not an appealable decision. In terms of section 138(2) of the Act, a children's hearing is empowered to defer a decision on a CSO to a subsequent hearing. Section 154(1) provides that an appeal can be made to the sheriff in respect of "a relevant decision". "Relevant decisions" are specified in section 154(3). They do not include a deferral of a decision. This is understandable in that there would be no substantive decision for the sheriff to assess, and nothing which has any practical impact upon an existing CSO. It follows that the sheriff did not err in law when deciding that the appeal in respect of MO was incompetent.

[3] With regard to NO and EO, the sheriff noted that the established grounds for referral were that they had or were likely to have a close connection with a person who had committed a schedule 1 offence in terms of section 67(2)(c) of the Act. The background is that in March 2018, after 13 days of evidence, a different sheriff decided that it had been proved that on a number of occasions both parents had assaulted MO and his older brother, P. (NO and EO are the youngest of the four siblings.) The 20 January 2019 hearing was convened at the request of the parents because, in the meantime, a criminal trial resulted in their acquittal. P, who had previously spoken to the assaults, retracted his evidence. The prosecutor decided not to lead any further evidence. MO, who, unlike his older brother, remains in care, is represented in the stated case proceedings. He has said that he would not

feel safe with his parents. He does not want contact with them. He moved the court to refuse his parents' appeal.

[4] The parents' contention was that the finding of not guilty meant that the established grounds for referral were no longer extant, and the children should be returned to their parents. It was submitted to the sheriff that the children's hearing had erred in taking the view that the decision in the criminal court did not disturb the established grounds for referral. The hearing's approach was that until the parents agreed to engage with the parenting assessment, and given the serious nature of the grounds upheld by the sheriff, the children remained in need of compulsory measures of care and protection. The sheriff held that the children's hearing's decision was justified. The parents' acquittal had been considered and taken into account. There was no basis upon which he could or should interfere with the decision in respect of NO and EO.

[5] A number of issues have been raised by the parties, however, aside from the competency of the decision regarding MO, the only question before this court is whether the sheriff erred in declining to uphold the contention that the parents' acquittal must result in a successful appeal. The court has no difficulty in answering this in the negative. It is well established that when a ground of referral to a children's hearing relies upon the committal of a schedule 1 offence, a criminal conviction is not a prerequisite, and that a ground might be established even if a prosecution results in an acquittal. Reference can be made to *Kennedy* v *B* 1991 SC 394. A sheriff had held that a schedule 1 offence ground for referral was established, and remitted the case so that a children's hearing could be arranged. In due course the three children involved were made the subject of home supervision requirements with conditions that they did not live with their father and should not be left alone with him. Subsequently the father was found not guilty of the offence which

prompted the grounds for referral. A children's hearing then reviewed the supervision requirements, deciding to vary them to non-residential with no conditions. That decision was appealed to the sheriff. Amongst other things it was argued that, in light of the acquittal, the supervision requirements should be terminated. The reporter drew attention to the dilemma arising from the different outcomes of the jury trial and the referral. Social workers remained concerned for the children. Supervision was a safeguard, giving them access to the children and a monitoring role.

[6] The sheriff decided that the children's hearing's decision was not justified. Insufficient weight had been given to the outcome of the jury trial. He allowed the appeal and remitted the case for reconsideration, observing that the allegations were now based on "discredited and worthless testimony". Delivering the opinion of the Second Division, the Lord Justice Clerk, Lord Ross, observed (page 401) that the unanimous finding of not guilty did not necessarily mean that the complainer was rejected as incredible or unreliable. Criminal responsibility would need to be established by proof beyond reasonable doubt (the grounds for referral require only proof on a balance of probabilities). It was possible that the problem was an absence of satisfactory corroboration. The acquittal was a relevant factor for the children's hearing, but each case depended upon its own circumstances. The reporter's appeal was upheld on the basis that the not guilty outcome was not conclusive in favour of the termination of the supervision requirements.

[7] In the light of this guidance it cannot be said that the sheriff erred in refusing the parents' appeal. We would add that we can understand why the children's hearing decided as it did. The sheriff who upheld the grounds of referral said (page 18 of her judgment):

> "I heard what can only be described as overwhelming evidence from each of the boys. It was striking that both boys have consistently (given) clear evidence that they

> had suffered violence at the hands of both of their parents, and each boy referred to incidents involving their sibling…"

As the Second Division confirmed in *Kennedy*, every case will depend upon its own facts and circumstances. At the criminal trial one of the boys did not repeat his evidence as to the assaults, but this does not remove the earlier establishment of the grounds for referral, nor take away any cause for concern in respect of the children's welfare. P's retraction meant that the evidence of MO would be uncorroborated and this resulted in the acquittal. It is relevant that MO remains fearful of his parents and does not wish to return to them. The children's hearing retained a jurisdiction and a responsibility to consider and keep the children's welfare in the forefront. Notwithstanding the parents' acquittal it was entitled to reach the view that compulsory protective measures were still required.

[8] The parties have raised a number of other issues, but the parameters of the court's jurisdiction are circumscribed by the stated cases. Thus, for example, it is not open to this court to review the decision of the sheriff in 2018 upholding the grounds for referral and pronounce new findings in fact. Nor can we offer views on whether the children's hearing had jurisdiction on the basis of the habitual residence of the children in Scotland at the time of the first referral, though we note that the children's hearing is in the course of addressing that matter. In an eloquent oral presentation to the court on behalf of herself and her husband, the children's mother raised a number of alleged flaws in the procedures and the decision-making in respect of her children. Some of this was foreshadowed in a four page note lodged in advance of the hearing. None of this was relevant to the issues before the sheriff or to the questions posed in the stated cases. Nonetheless, the court observes that it has found nothing of merit in the complaints. By way of illustration, it was submitted that a children's hearing will only have jurisdiction in respect of alleged schedule 1 offences which

have been the subject of a criminal conviction. As part 6 of the Act and the decision in *Kennedy* clearly demonstrate, this contention is unfounded. Similarly it is not correct that the children's hearing was obliged to listen to evidence from the children. Reference was made to section 125 of the Act, but it has no relevance to the present case, and likewise in respect of the time limit set down in section 157.

[9] It was suggested that it was unreasonable for the children's hearing to postpone any parenting assessment until the parents accept their guilt. This was not a matter raised before the sheriff in the appeals with which we are concerned, though we note the parents have enjoyed a measure of success in respect of it before another sheriff in a subsequent appeal. Indeed, as one would expect, matters have moved on in that there have been children's hearings addressing the CSOs since the appeals with which the stated cases are concerned. In these circumstances, all that the court requires to do is remit the stated cases to the sheriff who signed them, with directions that he need do nothing more than note that the decision of the court is that in refusing the appeals he did not err in law. The questions posed in the stated cases are answered in the negative.