APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 61
HCA/2019/283/XC and HCA/2018/494/XC

Lord Justice General
Lord Brodie
Lord Malcom

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

THE APPEALS (FIRST) UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 AND (SECOND) AGAINST CONVICTION

by

(FIRST) JOHN QUINN and (SECOND) MARK SUTHERLAND

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (Quinn): Bovey QC, Barr; Gilfedder & McInnes
Appellant (Sutherland): Dean of Faculty (Jackson QC), MacKintosh; PDSO, Glasgow
Respondent: P Kearney AD (sol adv); the Crown Agent

20 September 2019

Introduction

[1] These two appeals concern the activities of paedophile hunter groups. These groups set up online profiles of children as a form of net into which unsuspecting persons, who are inclined to engage in sexual communication with children, may become enmeshed. The

groups will then attempt to arrange a meeting between the person, whom they have potentially ensnared, and the child with whom he thinks he has been in communication. The meeting will be streamed live on social media and the recorded communications handed over to the police for potential prosecution.

[2] The first appellant presented an argument that the actings of the paedophile hunter groups were an "affront to justice" such that a plea in bar of trial based on oppression ought to be sustained. Alternatively, the evidence provided by the groups had been unfairly obtained and ought not to be allowed on that basis. The evidence had been a consequence of entrapment and in breach of the appellant's rights under Article 8 of the European Convention on Human Rights. The second appellant also argued that his Article 8 rights had been infringed. His principal argument was that the groups' actions, which were known to the police as a generality, required authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA). Without that authorisation, the evidence was unlawfully obtained and the appellant's objection to it ought to have been sustained.

Facts

Mr Quinn

[3] This appellant was indicted to a First Diet on 7 February 2019 at Paisley Sheriff Court on two charges. The first is that between 24 April and 7 May 2018 he "intentionally attempted" to communicate with Kerry Johnston, who was known to him as Mel Howard, a person whom he believed to be under 16, for the purposes of obtaining sexual gratification and sent her messages of a sexual and indecent nature together with indecent photographs and videos, all contrary to sections 33 and 34(1) of the Sexual Offences (Scotland) Act 2009. The second was that on 7 May 2018, having communicated with a person whom he believed

was under 16, namely Mel Howard, he made arrangements to travel, with the intention of meeting her and intending to engage in unlawful sexual activity, contrary to section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

[4] The appellant lodged six minutes which raised preliminary pleas and issues in terms of section 79 of the Criminal Procedure (Scotland) Act 1995. Two of these were ultimately argued. The first was a plea in bar of trial based upon oppression, "abuse of process" and an "affront to justice". The second raised a compatibility issue which contended that the prosecution of the appellant was contrary to Articles 6 and 8 of the European Convention.

[5] Evidence of the circumstances was led. Kerry Johnston, who was aged 30, was a member of an organisation called Child Protectors Scotland, whose express purpose was to "expose and convict" adults who solicit and groom children on the internet. She gave the (obviously made-up) names of the persons in charge of CPS as Chase and Hunt. She had been given background information and training which included role playing. She was not to engage in sexual chat or to send sexual pictures. She described her role as being that of a decoy. She set up a profile as a child on an online chat site and awaited contact from potential predators. This was via an App. called "Tagged", which purports to have an age restriction of 18 years and is designed to promote sexual/adult conversation. The profile was that of "Mel H 18". It was accompanied by a picture of a young female.

[6] At the outset of the chat with the appellant, Ms Johnston made it clear that she was aged only 13. The chat quickly became highly sexual in content at the appellant's instance. It moved to the encrypted WhatsApp when the conversation was blocked by Tagged. CPS decided to set up a meeting at Paisley Cross on 7 May 2018; the purpose being to expose the person live on Facebook and to arrange for his arrest by the police. The police were first informed of what was happening only on the day of the meeting, when they were given a

disc containing the online chat. The relevant Facebook page has thousands of followers, who are alerted when a live stream is to commence. These followers take advantage of their ability to post comments, many of which are abusive or threatening, to the alleged predator. At the meeting, the appellant was met by 5 or 6 persons, some of whom were masked. He was detained pending the arrival of the police. A police officer spoke to receiving the disc and reviewing the evidence. The officer had had no prior involvement with Ms Johnston, although he had dealt with other paedophile hunter groups over the years.

[7] The appellant gave evidence about the adverse effects which the incident had had on him in terms of his private life and his employment. John Butler, an expert in Information Technology, spoke to a report about his research into paedophile hunter groups, which numbered between 30 and 80. Some 36 published articles about these groups were made available to the sheriff. Some 5,000 comments had been posted in relation to the appellant's exposure, the video of which had been viewed over 223,000 times. Similar circumstances had led to other alleged predators being assaulted or committing suicide. Mr Butler referred to members of the public in court who were wearing CPS endorsed shell suits.

[8] The sheriff carried out an extensive review of the authorities. He distinguished the appellant's case from those, in Scotland and elsewhere, involving police officers. He was not persuaded that the same principles applied to non-state actors. The exception was *Council for the Regulation of Health Care Professionals* v *General Medical Council* [2007] 1 WLR 3094, in which it had been said that, while misconduct by a non-state agent could amount to an abuse of process, it would require to amount to "commercial lawlessness" (*R* v *Hardwicke and Thwaites*, unreported, Court of Appeal, 10 November 2000 (see [2001] Crim LR 220) Kennedy LJ at para 12). The facts in the appellant's case were extremely similar to those in *R* v *L(T)* [2018] 1 WLR 6037, but not to those in *Procurator Fiscal, Dundee* v *PHP* [2019] SC

DUN 39, which had involved "wheedling" the accused. Ultimately, the sheriff held that the conduct was not sufficiently gross as to constitute circumstances amounting to an abuse of process and thus oppression. Although he was uneasy about those behind CPS, the issues arising from that were for "consideration elsewhere". On the evidence, the sheriff was satisfied that there had been no involvement of the police in the instigation of the conduct libelled. RIPSA did not apply to Ms Johnston. The argument based on Article 8, but not that based on Article 6, had been departed from.

Mr Sutherland

[9] On 30 August 2018, at Glasgow Sheriff Court, this appellant was convicted of similar charges to those which Mr Quinn faces, *viz.* contraventions of sections 33 and 34(1) of the 2009 Act and of section 1 of the 2005 Act. He was sentenced to 12 months on each charge, to be served consecutively. Prior to the trial, the appellant had lodged two preliminary issue minutes. The first objected to the evidence of Paul Devine, who was a volunteer with Groom Registers Scotland, an organisation with a stated aim of protecting children by catching online predators. The second was a compatibility minute which maintained that the covert monitoring and recording of Mr Devine's communications with the appellant had breached the appellant's Article 8 rights.

[10] GRS are one of several organisations who deploy similar methods to CPS in Scotland and other parts of the United Kingdom. The police were aware of their activities. The evidence produced by them had led to a number of prosecutions. The narrative of the prospective evidence, which had been provided at a preliminary stage, was that Mr Devine was a decoy who created, and maintained, an online persona of a boy aged about 13 on an App. called "Grindr". This App. is a forum in which males can arrange to meet for sexual

purposes. It purports to have a minimum age limit of 18. The communication involved the appellant sending Mr Devine, who remained in character as a 13 year old, sexual images and text. The Grindr account was blocked, but communication continued on WhatsApp. Arrangements were made for the appellant to meet the person, with whom he thought he was communicating on 31 January 2018 at Partick train/bus station. When the meeting took place, the appellant was confronted and videoed. The video was streamed live on Facebook. The police were called and arrived at the meeting point. GRS provided the police with the recorded communications.

[11] The appellant did not make a submission based upon entrapment. His argument was that the evidence of Mr Devine was inadmissible because he was a covert human intelligence source (CHIS) in terms of RIPSA. He was being used by the police in terms of section 1(6) of RIPSA without authorisation. The resultant evidence had been illegally obtained. Reference was made to the RIPSA Code of Practice. There had been no reasonable suspicion of criminality on the appellant's part in advance of the use of the CHIS. The appellant's Article 8 rights had been breached.

[12] The sheriff rejected the contention that the police had induced any individual to act as a CHIS or any organisation to facilitate such an act. The police had only become involved after the confrontation. The police had had no advance knowledge of Mr Devine's activities. Section 7 of RIPSA provided that the relevant investigating authority was the public authority for whose benefit the activities of the individual who was used as a source were to take place. The statutory scheme was one which authorised future acts. RIPSA was not, on the facts, engaged. Mr Devine did not act as a CHIS. Neither GRS nor Mr Devine had acted as a public authority (*R* v *L (T)* [2018] 1 WLR 6037; cf *MM* v *Netherlands* (2004) 39 EHRR 19). If Article 8 had been engaged, the interference would have been in accordance with the law

and necessary for the prevention of crime and the protection of the rights and freedoms of others.

Submissions

Mr Quinn

[13] The appellant Quinn maintained, as he had before the sheriff, that the prosecution of the appellant was oppressive, an abuse of process and an affront to justice. He had been entrapped by CPS in a manner which meant that a fair trial could not take place. The appellant's plea of bar of trial ought therefore to have been sustained. In addition, the appellant contended that the evidence was inadmissible. By proceeding against the appellant, the respondent was acting incompatibly with the appellant's Article 6 and 8 rights.

[14] The Crown case was based on the actings of CPS, which accorded with their purpose of exposing and convicting adults who solicited and groomed minors on the internet. CPS was part of a wider movement of organisations. The sheriff was correct in accepting that, in particular circumstances, non-state agents could act in a manner which rendered evidence inadmissible. Although, in general, entrapment could only arise in relation to the actions of police officers, the situation of a person who had been induced to commit an offence by a private individual was similar to that involving entrapment by the police where the persons obtaining the evidence had taken it upon themselves to act as a "law enforcement agency" (*Jones* v *HM Advocate* 2010 JC 255 at para [12]). It had been CPS who had set in motion the charge against the appellant (*McKie* v *Strathclyde Joint Police Board* 2004 SLT 982 at para [21]). The fundamental issue was the fairness of the trial. The conduct of CPS came to be of relevance when the Crown proposed to lead evidence of their actings. Non-state actors fell

to be judged in a like manner to state actors when they undertook a role normally performed by the state. To hold otherwise would allow the state to avoid the proper scrutiny of its conduct by allowing it to delegate its duties to the non-state actors (*MM* v *Netherlands* (*supra*) at para 40). The test applied by the Court of Appeal in England (*R* v *L (T)* (*supra*)) was not supported by authority, nor was it correct in principle.

[15] The use of a CHIS and the monitoring of the appellant's internet and social media use were functions which, if carried out by the state, would engage Article 8. One concern was the unvetted, unmonitored and unsupervised nature of CPS. *Halford* v *United Kingdom* (1997) 24 EHRR 523 had prompted the passing of RIPSA. In *Shannon* v *United Kingdom* (App no. 67537/01), unreported, 6 April 2004 (see [2005] Crim LR 133), a complaint that Article 6 had been violated by reason of entrapment by a journalist had been rejected. The Court of Appeal ([2001] 1 WLR 51) had noted that the trial judge had erred in accepting that "commercial lawlessness" and "executive lawlessness" should be treated in the same way. Subsequent European Court of Human Rights cases had demonstrated that the approach to state and non-state actors was the same. Trial courts should address the effect of incitement on the fairness of the trial (*Tchokhonelidze* v *Georgia* (2018) ECHR 553 at paras 44-46). When the prosecutor made use of the actions of a paedophile hunter group acting as a law enforcement agency, the group became agents of the state in a similar manner to law enforcement officers or controlled informers.

[16] The actions of the Crown in adopting the evidence produced by CPS was inconsistent with our notions of justice. The court should maintain the same standards, whether the evidence was ingathered by the state or by a non-state operator and adopted by the state. The actions of CPS had been prompted by an ulterior motive involving the

carrying out of a "sting", which remained viewable on the internet. The appellant had been harangued and abused.

[17] Emails were protected under Article 8 as "correspondence" and part of a person's private life. The monitoring and recording of the appellant's internet conversations, and the retention of recordings by CPS, constituted an interference with the appellant's Article 8 rights. Although the purpose of Article 8 was to protect an individual against arbitrary interference by public authorities, in addition to compelling the state to abstain from such interference, there was a positive obligation on the state to ensure respect for an individual's private life (*Ribalda* v *Spain* (2018) ECHR 14 at para 60).

[18] The sheriff had erred in rejecting the entrapment plea on the basis that the police had not been involved. The test for entrapment was satisfied when the appellant would not have done what he is alleged to have done had the decoy told him her true age of 34. There had been no information suggesting that the website concerned had been used by paedophiles or online groomers of children. There had been no information to suggest that the appellant was such a person. It was a fundamental principle that prosecutions should be brought in good faith (*Robertson* v *Keith* 1936 SC 29 at 45; *Whitehouse* v *Gormley* [2018] CSOH 93 at para [161]; *N* v *HM Advocate* 2003 JC 140 at paras [35] and [36]).

[19] In determining fairness and whether the appellant's Convention rights had been breached, the court was entitled to have regard to the wider activities of CPS and other paedophile hunter groups at both a Scottish and UK-wide level, as demonstrated by the evidence available. The sheriff had erred in refusing to admit evidence of three video recordings of other similar operations. He should have had regard to the expert testimony contained in the report by Mr Butler. The approach in *Procurator Fiscal, Dundee* v *PHP* (*supra*) had been correct in so far it classified the conduct of CPS as fraud.

Mr Sutherland

[20] This appellant maintained that the sheriff erred in repelling the objection taken to the evidence ingathered by GRS as unfairly obtained and contrary to Article 8. In terms of section 1(7) of RIPSA, a person was a CHIS if he had established or maintained a personal or other relationship with another person for the covert purpose of obtaining information, or providing access to any information to another person, or to disclose information obtained by the use of that relationship. The volunteer with GRS, namely Mr Devine, was a CHIS. In obtaining information from him, the police had been using him in terms of the legislation and required to obtain authorisation under the Act. The police were inducing the CHIS in that they were aware of the operation of paedophile hunter groups such as GRS and the methods which they used. On being passed information from the CHIS, the police encouraged and emboldened the hunter groups to operate in the way which they did. The sheriff erred in holding that, in the absence of awareness of the specific CHIS operation, RIPSA was not engaged. RIPSA did not require knowledge on the part of the authorities. It simply set out a regime that had to be complied with for certain covert information gathering methods. Since there was no authorisation, the conduct was unlawful (cf RIPSA, s 5).

[21] For authorisation to be given under RIPSA, the use of the CHIS had to be regarded as necessary for the purpose of preventing or detecting crime or preventing disorder. Its use had to be proportionate to what was sought to be achieved. The test of necessity, proportionality and compliance with the statutory requirements were in contrast to the position in this case. The Codes of Practice, which the police had to take into account, confirmed that the use of a CHIS could involve Article 6 and 8 rights. Paragraph 2.25 of the

Scottish Code of Practice stated that inducing someone to act as a CHIS should not be done without authorisation. Paragraph 2.26 stressed that authorisation should be considered where the public authority was aware that a third party was independently maintaining a relationship (ie "self-tasking") in order to obtain evidence of criminal activity and the public authority intended to make use of that material for its own investigative purposes.

[22] The maintaining of a false pretence by GRS, and the keeping of a record of private conversations and providing records of communications to the police, represented an interference with Article 8(2). The existence of a statutory regime, which allowed secret surveillance of communications, was itself an interference (*Malone* v *United Kingdom* (1985) 7 EHRR 14; *Szabo* v *Hungary* (2016) 63 EHRR 3 at para 53). Although the actual communication had been with a private individual, he had represented a public authority for the purposes of Article 8(2). Actions carried out by private individuals may represent actions by a public authority (*MM* v *Netherlands* (*supra*)). By operating an unregulated system of surveillance, the police were using the paedophile hunter groups as a means of circumventing RIPSA. The police were turning a blind eye.

[23] The use of the CHIS was not in compliance with the national law; that being RIPSA (*Malone* v *United Kingdom* (*supra* at para 66); *Kennedy* v *United Kingdom* (2011) 52 EHRR 4 at para 169). The interference was not, in terms of Article 8(2), necessary for the prevention of disorder or crime (*Malone* v *United Kingdom* (*supra* at para 81); *Kennedy* v *United Kingdom* (*supra* at para 153)). Reliance on the material, which had been obtained in breach of Article 8, represented a breach of Article 6 (*Khan* v *United Kingdom* (2001) 31 EHRR 45 at paras 29 and 34). The present case, and many cases like it, were not simply instances of members of the public discovering and reporting an offence. The intention of the decoy was deliberately to deceive the public, to create crime by providing an opportunity and to expose

that crime to boost the group's public profile. None of the safeguards in RIPSA, which had been created in response to the European jurisprudence, had been complied with. Had the police, without appropriate authorisation, created the profile of a 13 year old, and used that profile to deceive members of the public, the court would have little hesitation in holding that such evidence was unfairly obtained.

[14] *R* v *L (T)* (*supra*) had little relevance, because it concerned entrapment and the English concept of staying proceedings. The arguments, with which this appeal was concerned, were specifically disavowed in *R* v *L (T)* (para 11). The sheriff in *HM Advocate* v *Raeburn*, unreported, Edinburgh Sheriff Court, 24 August 2018, had erred in holding that the person was not a CHIS (see also *R* v *Walters*, unreported, Newcastle Crown Court (Langstaff J), 6 April 2017).

Crown

Mr Quinn

[25] The appellant Quinn's first minute fell to be considered as a plea of oppression in bar of trial at common law (*Potts* v *Gibson* 2017 JC 194 at para [17]). The test was whether the risk of prejudice from the events alleged to have taken place was so grave that no direction to the jury could remove it (*Stuurman* v *HM Advocate* 1980 JC 111 at 122). There was no distinction between cases where a fair trial could not take place and those where holding the trial would be, as it is put in England and Wales, an "affront to justice" (*HM Advocate* v *Withey* 2017 JC 249 at para [39]). Whether oppression was established depended on the particular facts and circumstances, including the Crown's conduct, the seriousness of the charge and the public interest in ensuring that crime was prosecuted (*Potts* v *Gibson* (*supra* at para [16])). A balancing exercise required to be carried out primarily by the court of first

instance, whose judgment should be afforded not inconsiderable weight (*ibid* para [18]). It was only if the trial as a whole would inevitably or necessarily be unfair that a plea in bar would be sustained (*HM Advocate* v *ARK* 2013 SCCR 549 at paras [19] and [20]).

[26] The law on entrapment was well-settled. The basis of the plea was that the conduct of the police was such that a prosecution would be oppressive in that it would offend the public conscience and be an affront to the justice system (*R* v *Looseley* [2001] 1 WLR 2060; *Jones* v *HM Advocate* (*supra*); *HM Advocate* v *IP* 2017 SCCR 447). The court was looking to see whether or not an unfair trick had been played upon the particular accused, whereby he was deceived and pressured, encourage or induced into committing an offence that he would never otherwise have committed (*Jones* v *HM Advocate* (*supra* at para [88])). Entrapment was confined to acts of the state in creating a crime with a view to prosecuting it (*Jones* v *HM Advocate* (*supra)* at para [30]). The acts of private individuals could not result in a plea of entrapment (*ibid* at para [12]). It was not a defence for an individual to say that he had been tricked into committing a crime. The repugnance lay in the state creating a crime for the purposes of prosecuting it. Even when the state was involved, deception alone was not enough. The accused must demonstrate that there was some undue pressure or persuasion which made him commit the crime (*Jones* v *HM Advocate* (*supra)* at para [79], citing *Weir* v *Jessop* 1991 JC 146 at 154-155).

[27] In *Council for the Regulation of Health Care Professionals* v *General Medical Council* (*supra*), the Court of Appeal in England recognised that there could be circumstances where gross misconduct on the part of an individual might be such as to require a stay of proceedings. There was a difference between the actions of the police and those of a journalist. The same rules did not apply (see *R* v *Shannon* (*supra* at para 39); *Shannon* v *United Kingdom* (*supra*); *R* v *Marriner* [2002] EWCA Crim 2855 at para 40; *R* v *Hardwicke and*

Thwaites, (supra) at para 24). It was not enough to support a plea of private or commercial entrapment that the decoy merely set up circumstances which provided a person with the opportunity to commit a crime, or that the motivation was something which the court, or society, might frown upon.

[28] In terms of *R* v *L (T)* (*supra* at paras 32-34), although it was recognised that the actions of a private citizen may in theory found a stay of proceedings, no question of the state seeking to rely upon evidence which flowed from its own misuse of power arose, and therefore the underlying purpose of the English doctrine of abuse of process was not present. The issue remained whether the prosecution was deeply offensive to ordinary notions of fairness, an affront to the public conscience or so seriously improper to bring the administration of justice into disrepute (see also *Williams* v *Director of Public Prosecutions* [1993] 3 All ER 365).

[29] The sheriff correctly found no factual basis for a contention that there had been gross misconduct on the part of a private citizen. He correctly held that there was no basis upon which he could hold that this was one of the rare cases where there were special circumstances such as would render a prosecution oppressive. The decoy had not committed any criminal offence. Fraud involved inducing a person to do some act which he would not otherwise have done (*Adcock* v *Archibald* 1925 JC 58). A deception contained within an online profile did not constitute fraud. It would only do so if the deception had induced the appellant to do something which he would not otherwise have done. There had been no inducement to converse online about sexual matters. There had simply been an opportunity to have a conversation with someone who presented as a child. It was the appellant who had intentionally engaged in sexual conversations with someone who represented herself to be a child. He had required no inducement to do so. There was no

causal link between the deception and the appellant's actions. A person who voluntarily, and with the necessary intent, committed all of the objective elements of a criminal offence was guilty of that offence, regardless of whether he was induced to commit them by another person (*Jones* v *HM Advocate* (*supra* at para [9])). An element of deceit was inherent in any undercover activity. This did not render the conduct or the evidence unfair (*Williams* v *Director of Public Prosecutions* (*supra*)). Criminal activity was not sufficient *per se* to support a plea of entrapment (*R* v *Looseley (supra* at para 70); *R* v *Latif* [1996] 1 WLR 104; *R* v *Hardwicke and Thwaites* (*supra*); *R* v *Marriner* (*supra*); and *R* v *Shannon* (*supra*)).

[30] Post-crime activity had no bearing on entrapment. The images of the confrontation revealed no violent act or abusive conduct constituting a crime. The reference to the post-crime activity by the appellant was no more than a contention that some unofficial punishment had already been meted out to the appellant. Such activity did not support a contention that it would be oppressive for the prosecution to proceed or that the trial would inevitably be unfair.

[31] The sheriff was correct to give no or little weight to the wider activities of CPS and other similar groups at a national or UK level. These were matters for consideration elsewhere. The motivation and intent of a witness in a particular case may provide a focus for a challenge to his or her credibility and reliability, but that was another matter. The evidence which the appellant sought to lead about other incidents involving different accused was collateral and irrelevant (*R* v *Hardwike and Thwaites*; *R* v *L (T)* (*supra* at para 39)).

[32] It was inappropriate to equiparate the position of the police with a private individual. There had been no payment, management, direction or instruction from the state. The private citizen decoy had no powers of investigation or immunity from prosecution. Upon receipt of the information from CPS, the police were obliged to

investigate the alleged crime. The police obtained information from many sources, including those from people of general bad character. The police could not ignore or discount evidence from persons of bad character. There was no basis for the assertion that the police had effectively out-sourced work to volunteer groups. The police had no power to stop paedophile hunter groups from doing what they do. General awareness, that there were groups acting in the manner described, did not amount to authorisation. The actions of a non-state actor could be so egregiously morally wrong that the evidence could be excluded. Torture was an example of this.

Mr Sutherland

[33] RIPSA provided a scheme whereby authorisation could be sought before public authorities embarked upon a covert investigative activity which might interfere with a person's rights under Article 8. Where authorisation had been obtained, the conduct in question would be deemed lawful "for all purposes" (s 5). The converse was not true. The Act did not operate to render all covert activity carried out without such an authorisation unlawful (s 30). It was not correct that covert investigative activity in the absence of authorisation was unlawful *per se*, even when an authorisation could have been obtained. It was a matter for the court to decide whether the covert activity breached the accused's Article 8 rights and whether he was entitled to have the evidence thereby obtained excluded.

[34] The decoy, Mr Devine, had not been used as a CHIS by any public authority. It followed that the provisions of RIPSA were not engaged. His covert activities could be interpreted as falling within the definition of conduct of a CHIS but, in terms of RIPSA and the Code of Practice, it was only when a person was to be used for such purposes by a public authority, or at the very least when the public authority became aware of such activity

before it was completed, that RIPSA was engaged. Section 7 of RIPSA made it clear that authorisation had to be applied for in advance. Section 31(5) defined actions as being "for the benefit of a public authority" if the conduct was "in response to inducements or requests made by or on behalf of that authority". Many sources merely volunteered or provided information to the police without being induced, asked or tasked to do so. Where they became aware that an individual was undertaking covert activity, in terms of para 2.26 of the Code of Practice, consideration would have to be given to applying for a RIPSA authorisation. Where, as here, the police were completely unaware of the activity until it had been concluded, RIPSA was not engaged. The police had no knowledge of the conduct of Mr Devine prior to the confrontation with the appellant. There was no working arrangement between the police and the group whereby the police induced that group's activities.

[35] In order to establish that an individual's Article 8 rights had been interfered with, it had to be demonstrated that: there had been interference; the interference had been committed by a public authority; it was not in accordance with the law; and it was not necessary for the prevention of crime etc. Communications sent between private individuals through social media were private matters which could attract the protection of Article 8(1) (*Copland* v *United Kingdom* (2007) 45 EHRR 37). Where a message had been sent to a private individual, there was no interference with that message where the individual, to whom it had been sent, shared that content with others. There was, in that situation, no interception, monitoring, seizure or other type of interference (*G, S and M* v *Austria* (App no. 9614/81), unreported, European Commission on Human Rights, 12 October 1983) and *AD* v *Netherlands* (App no. 21962/93), unreported, European Commission on Human Rights,

11 January 1994). There had thus been no interference with the appellant's right to a private life.

[36] Even if such interference had occurred, it had not been committed by a public authority. Article 8 was not concerned with the acts of one private individual in relation to the other. For Mr Devine's activities to be imputed to a public authority, that authority would require to have been responsible for the inception of his actions, or to have made some crucial contribution towards them (*MM* v *Netherlands* ((*supra* at para 39)). *Malone* v *United Kingdom* (*supra*) and *Szabo* v *Hungary* (*supra*) were concerned with the acts of the police rather than those of a private individual. Reliance on the evidence produced by a covert activity did not make that act retrospectively that of the respondent (*McGibbon* v *HM Advocate* 2004 JC 60).

Decision

Entrapment

[37] In *Jones* v *HM Advocate* 2010 JC 255 it was explained (Lord Carloway at paras [76] and [83]) that, in line with the academic discussion in Chalmers and Leverick: *Criminal Defences an Pleas in Bar of Trial* (ch 20), traditionally the Scottish courts have treated the consequences of entrapment as evidence unfairly obtained. Where an accused has committed an offence, which he would not otherwise have committed, as a result of pressure from, or a trick perpetrated by, the police, the evidence would be excluded (*Marsh* v *Johnston* 1959 SLT (notes) 28) because the conduct of the police would be regarded as "grossly unfair". A trick which "involved positive deception and pressure, encouragement or inducement to commit an offence which, but for that pressure, encouragement or inducement, would never have been committed at all" (*Cook* v *Skinner* 1977 JC 9, LJG (Emslie), delivering the opinion of the

court, at 13) crossed the boundary of fairness. An amount of deception, in relation for example to the identity of the police officer, may be permissible, provided that there was no pressure, encouragement or inducement (*Weir* v *Jessop* 1991 JC 146, LJC (Ross) at 154). The court is simply looking to see whether an unfair trick had been played on the accused whereby he was pressured, encouraged or induced into committing an offence which he would not otherwise have committed. That depended on the particular circumstances of the individual case (*Jones* v *HM Advocate* (*supra*, Lord Carloway at para [88])).

[38] In *Brown* v *HM Advocate* 2002 SCCR 684, the court had been prepared to treat entrapment as justifying a plea in bar based upon oppression. That approach was accepted by the majority in *Jones* v *HM Advocate* (*supra*), who adopted the abuse of process concept from the law of England and Wales (*R* v *Looseley* [2001] 1 WLR 2060). However, as was explained in *R* v *L (T)* [2018] 1 WLR 6037 (Lord Burnett LCJ at para 31) that jurisdiction is in the context of entrapment by state actors (see *R* v *Shannon* [2001] 1 WLR 51; *Shannon* v *United Kingdom* (App no. 67537/01) unreported, 6 April 2004 ([2005] Crim LR 133)). It remains unnecessary to rely, in the Scottish context, on a plea in bar, which is based upon oppression, in the context of the modern system which allows objections to the admissibility of evidence to be determined as a preliminary issue in solemn proceedings (Criminal Procedure (Scotland) Act 1995, s 71 (sheriff court); *cf* summary proceedings: *Procurator Fiscal, Dundee* v *PHP* [2019] SAC (Crim) 7).

[39] The context of *Jones* v *HM Advocate* (*supra*) was that of state actors; that is an undercover police officer pretending to be a loss adjuster seeking the return of a stolen painting. The classic cases on entrapment in Scotland have all involved state actors (see now *HM Advocate* v *IP* 2017 SCCR 447). That is simply because "the essential vice of entrapment is the creation of crime by the state for the purpose of prosecuting it" (*Jones* v *HM Advocate*

(*supra*, Lord Reed at para [30])). It has no relevance to the actings of non-state actors. A person who is tricked, pressured or persuaded to commit a crime by a private individual will still be guilty of that crime (*ibid* at para [12]), at least in the absence of the standard defences of, for example, necessity or coercion.

[40] It could be different if, as was both hinted at and asserted during submissions, it was demonstrated that the police, or other agency of the state, was in cahoots with the paedophile hunter organisation whose member acted as the decoy. There is no evidential base for any such hint or assertion in these cases. Similarly, it could be different if the decoy had been acting under the directions of the police (eg *MM* v *Netherlands* (2004) 39 EHRR 19; *Tchokhonelidze* v *Georgia* (2018) ECHR) 553). That is not what happened. The police were unaware of Ms Johnston's or Mr Devine's actions until the chats had concluded and the confrontation meeting had been fixed.

[41] The fact that paedophile hunter groups are not regulated is of no relevance. The police, and other organs of the state, are regulated because of the extensive powers which they have. The private individual has no such powers and stands in the same position as any other member of the public. He has no immunity from prosecution or civil suit. If the decoy or the group transgress the bounds of the civil or criminal law, they too could be sued or prosecuted, but the evidence in these appeals does not amount to that.

[42] Some may disapprove of the activities of paedophile hunter organisations. They may consider that they should be banned or regulated. As matters stand, they are free to carry out their own investigations into criminal behaviour and to report it to the police or directly to the Crown. They are far from being alone in such activity. Security firms, shops, gamekeepers, neighbourhood watch schemes all do so, even if the results of their activities are not normally published on social media. Journalists do so too, with more publicity being

given to any successful fishing expedition (eg *R* v *Hardwicke and Thwaites*, unreported, Court of Appeal, 10 November 2000 (see [2001] Crim LR 220); *R* v *Shannon* [2001] 1 WLR 51; *Shannon* v *United Kingdom* (App no. 67537/01) unreported, 6 April 2004 (see [2005] Crim LR 133), "the fake sheikhs"; *R* v *Marriner* [2002] EWCA Crim 2855) .

[43] The character or motive of the reporter of a criminal act is collateral to whether the act was committed, albeit that they may in some situations have a bearing on the credibility or reliability of the reporter who testifies. The actions of the groups, after the completion of the criminal act by the accused person, are also collateral to the issue of whether that act was committed. Such actions, even if evidence of them was admitted, could at the most only have a bearing on credibility and reliability. It is not easy to see how credibility or reliability would be an issue in cases such as the present, when the evidence was and is in the form of recorded chats which, so far as the court was informed, were not denied. In such circumstances, this type of evidence is almost always properly excluded because of its collateral nature.

[44] The common law principle which excludes evidence unfairly obtained may apply to evidence which has been made available by a private individual. This has been expressly acknowledged recently in England and Wales in *R* v *L (T)* (*supra*, Lord Burnett LCJ at para 32, citing *Council for the Regulation of Health Care Professionals* v *General Medical Council* [2007] 1 WLR 3094, Goldring J at para 81), albeit that the exclusion of such evidence would occur only in "rare" circumstances. It would, it was said (*ibid*), be a breach of Article 6 for the state to rely upon the product of "gross misconduct" such as would compromise the court's integrity. Whilst the phraseology is from English jurisprudence, the principle is equally applicable in Scots law. Evidence which is recovered by means of gross misconduct may be regarded as unfairly obtained and hence excluded. An obvious illustration is an

admission by an accused which was extracted under torture by a private individual. *Lawrie* v *Muir* 1950 JC 19 is a concrete early example where evidence, which had been recovered by private inspectors during an illegal search brought about by a misrepresentation, was excluded as unfairly obtained (see LJG (Cooper), delivering the Opinion of the Full Bench, at 28). No doubt there may be other rare circumstances.

[45] If the circumstances are such as would not result in the exclusion of evidence had a police officer been involved, it is difficult to envisage a situation whereby similar evidence would be excluded when a private individual had been involved. The circumstances in *R* v *L (T)* (*supra*) are similar to those in Mr Quinn's case. The appellant in *R* v *L (T)* had involved a person posing initially as an 18 year old girl, but then promptly stating that she was 13 and sexually inexperienced. There was no encouragement or badgering of the appellant to commit the offence which he would otherwise not have committed. These circumstances were likened to the situation in which the police had left valuable goods in an unlocked van when investigating thefts from vehicles in a particular vicinity (*ibid* at para 34, citing *Williams* v *Director of Public Prosecutions* [1993] 3 All ER 365). In the Scottish experience, the analogy would be the plain clothed policeman posing as a buyer of alcohol after closing time or as a purchaser of proscribed drugs (*Cook* v *Skinner* (*supra*); *Weir* v *Jessop* (*supra*)).

[46] In the absence of evidence that at least an unfair trick was played on the appellant whereby he was deceived and pressured, encouraged or induced into committing the offences charged, being ones which he would not otherwise have committed (eg *HM Advocate* v *IP* (*supra*)), Mr Quinn's appeal must fail. On the facts as narrated by the sheriff, although there was a degree of deception, as there is in every covert situation, there was no pressure, encouragement or inducement into committing the offences libelled. All that was done was the provision of an opportunity in which a person, who was already inclined to

commit the offences, did so. The decoy's deception about her age did not cause the appellant to commit a criminal act. Had the decoy been under age (ie had there been no deception), the appellant's actions would have been the same. No fraud was committed, nor was there any wheedling (cf *Procurator Fiscal, Dundee* v *PHP* [2019] SC DUN 39 at para [5]).

Article 8

[47] The European Convention on Human Rights is primarily concerned with the protection of the rights of the individual from interference from the state. Article 8(2) is expressly about interference by a public authority with an individual's right to respect for his private and family life, his home and his correspondence. In addition to its prohibitive aspect, Article 8 does impose a positive obligation on the state to provide a suitable framework within which an individual's Article 8(1) rights (including that of privacy) are protected from interference by other private individuals, including employers (eg *Köpke* v *Germany* (2011) 53 EHRR SE 26 (p 249) at para 41; *Ribalda* v *Spain* (2018) ECHR 14 at para 54).

[48] There was no interference by a public authority with the appellants' correspondence. The appellants had sent their messages to the decoys, who had received them and passed them onto the police. There was no surveillance or interception (*AD* v *Netherlands* (App no. 21961/93) unreported, European Commission on Human Rights, 11 January 1994 "THE LAW" at para 2 citing *G, S and M* v *Austria* (App no. 9614/81), unreported, European Commission on Human Rights, 12 October 1983). The appellants were fully participating in the communications and were aware that they were reaching the intended recipients. The messages had reached their destination and in due course they were handed to the police for the purposes of prosecuting a crime.

[49] So far as the appellants' private lives were concerned, it may be that, at a general level, a person's internet chats fall within the broad ambit of Article 8(1) (*Garamukanwa* v *United Kingdom*, App no 76639/11, unreported, 6 June 2019, at para 22). However, given the lack of any longstanding pre-existing relationship between the appellants and those with whom they thought they were communicating, they had no reasonable expectation that these communications would remain confidential or private (*Halford* v *United Kingdom* (1997) 24 EHRR 523 at para 45; *Ribalda* v *Spain (supra)* at para 57; *Garamukanwa* v *United Kingdom (supra)* at para 23). The appellants voluntarily entered into the chat rooms, and subsequently participated on WhatsApp, with persons whom they thought were children, for sexual purposes. The paedophile hunter groups were targeting particular Apps used by persons for sexual purposes, in circumstances in which it seems to have been known that some persons using those Apps do target or groom those under-age. Significantly, for Article 8 purposes, by the time at which the police were informed, the criminal activity had already been carried out (*Tchokhonelidze* v *Georgia (supra)* at para 45).

[50] Even if there had been a reasonable expectation of privacy or confidentiality in the case of either appellant, where: (a) there is no involvement of the state prior to the evidence being recovered; (b) any evidence recovered would be subject to the common law rules of fairness before being admitted to proof; and (c) the evidence is delivered to the police for the purposes of prosecuting significant criminal activities, any interference with the appellants' private lives would fall short of one that could not be justified in terms of Article 8.2 (*Köpke* v *Germany (supra)*). First, the decoys' actings, being those of a private individual, are subject to the common law. If they stray into criminality, the decoy, or any other member of the paedophile hunter group involved in the episode, may be arrested and prosecuted. They have no immunity from prosecution, for example for breach of the peace

or assault, or civil suit. Secondly, their actions are readily justifiable as being in the interests of public safety for the prevention of crime and the protection of the rights and freedoms of others.

[51] Whether or not there was an interference with the appellants' Article 8 right to a private life, the question of whether there was, or will inevitably be, a breach of Article 6 will depend upon a consideration of all the circumstances in order to determine whether the proceedings as a whole have been, or will be, fair (*HM Advocate* v *ARK* 2012 SCCR 549, Lord Carloway, delivering the opinion of the court, at para [20]; *Ribalda* v *Spain (supra)* at para 83). This will depend, for example, on the ability of the appellants to challenge the evidence's authenticity and its reliability. In the appellants' cases, there was an opportunity to object to the evidence as unfairly obtained according to the domestic law (as in *Lawrie* v *Muir (supra)*) and to question its provenance. Given the protections available in the domestic rules of evidence, there was and is no unfairness in the proceedings in Article 6 terms.

RIPSA

[52] The Regulation of Investigatory Powers (Scotland) Act 2000 is intended to achieve what its short title suggests. It is designed to regulate investigatory powers, ie those organs of the state which have such powers. It was introduced in the wake of *dicta* from the European Court of Human Rights, notably in *Malone* v *United Kingdom* (1985) 7 EHRR 14 (at para 66) and *Halford* v *United Kingdom* (1997) 24 EHRR 523 (at para 49), that investigatory powers which were employed by the police or the security services must have a clear basis in law which allow them to be used and define the circumstances of that use and its scope (see *Khan* v *United Kingdom* (2001) 31 EHRR 45 at para 26). Thus RIPSA (ss 6 and 7) creates a

scheme under which certain persons within designated public authorities have the power to authorise directed surveillance and the use of covert human intelligence sources for investigations in which their particular authority is engaged (Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 as amended). If conduct is authorised, it becomes lawful "for all purposes". The authorisation will protect the relevant person from civil liability (RIPSA, s5). That is not to say that conduct which is not authorised is thereby unlawful (*ibid* s 30). Depending upon the circumstances, there may or may not be a contravention of Article 8 and the common law principle of fairness if an activity, which required authorisation, was not authorised or the conduct fell outside the terms of the authorisation.

[53] RIPSA may apply where a private individual is being directed or has been engaged by a public authority (eg the circumstances in *MM* v *Netherlands* (*supra*) or *Tchokhonelidze* v *Georgia (supra)*). There was no element of direction or engagement of either Ms Johnson or Mr Devine in the appellants' situations. No RIPSA authorisation was required nor was a scheme of regulation required where private individuals, who are subject to the common law, were involved (*Köpke* v Germany *(supra)*, cf *Ribalda* v *Spain (supra)*). There could have been no application for authorisation because the police were unaware of their decoys' activities until after the appellants' allegedly criminal activities had been, to all intents and purposes, completed and recorded. Even if the police had been aware, they were not in a position to control these activities. The paedophile hunter groups are not "law enforcement agencies" or agents whose activities, for the purposes of RIPSA, fall to be regarded as those of a public authority. On the contrary, they are private enterprises with no investigatory powers whatsoever. The court accordingly agrees with the analysis in *HM Advocate* v

Raeburn, unreported, Edinburgh Sheriff Court, 24 August 2018, following *R* v *Walters*, unreported, Newcastle Crown Court (Langstaff J), 6 April 2017.

Conclusion

[54] The appeals are refused.