SHERIFF APPEAL COURT

[2018] SAC (Civ) 30
STI-B39-18

Sheriff Principal Pyle
Appeal Sheriff A L MacFadyen
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF A L MACFADYEN

in the appeal by

LOCALITY REPORTER, STIRLING

Appellant

against

KR

Respondent

in the Children's Referral for the case of the child S (17 December 2013)

Appellant: J Guy; Anderson Strathern
Respondent: J Aitken, advocate; Hill & Robb
Safeguarder: J Savage; Russel + Aitken

19 November 2018

Introduction

[1] This is an appeal by stated case from a decision of the summary sheriff after proof in respect of a disputed statement of grounds of referral to a children's hearing.

[2] The appeal raises two issues: first, as a matter of principle, the circumstances in which parties, in this case the Reporter and the safeguarder, can appeal a sheriff's decision

not to find as established one of the supporting facts to a ground of referral; secondly, on the facts whether the summary sheriff was entitled not to find the facts as established.

Background Circumstances

[3] In the original statement of grounds the Reporter set out three grounds.

[4] Ground 1 was that in terms of section 67(2)(a) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") the child S, who is now four years of age, was likely to suffer unnecessarily or her health or development was likely to be seriously impaired, due to lack of parental care. In support of that ground the Reporter stated that S's mother, KR, and S's father, RL, were unwilling or unable to provide consistent social, emotional and physical care of S which had had a detrimental impact upon her. Examples were given of lack of safety or hygiene in the family home, a failure to provide S with consistent routines, boundaries, appropriate stimulation or appropriate supervision and a lack of appropriate food in the family home. Before the summary sheriff, the parents intimated that this ground was not opposed, which allowed him to find it to be established.

[5] We shall return to Ground 2. Ground 3 was that in terms of section 67(2)(c) of the 2011 Act S had, or was likely to have had, a close connection with a person who had committed a schedule 1 offence. In support of that ground the Reporter stated that in January 2005 KR had assaulted her daughter, C, then aged three, by pulling her forcibly along the ground by her arm. This, said the Reporter, demonstrated an offence against C in that KR had wilfully ill-treated her in a manner likely to cause her unnecessary suffering or injury to health, being an offence mentioned in schedule 1(2) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), namely section 12 of the Children and Young Persons

(Scotland) Act 1937. Before the summary sheriff, the parents intimated that this ground was not opposed, which allowed him to find it to be established.

[6] Ground 2 was that in terms of section 67(2)(b) of the 2011 Act a schedule 1 offence had been committed in respect of S. In support of that ground the Reporter relied on two supporting facts: first, that on 7 November 2017 in a pharmacy shop KR struck S to the head, which said the Reporter demonstrated an offence against S on the same statutory basis as for ground 3; secondly, that on 8 November 2017 the family home was found to be cluttered, unhygienic and unsafe. Various examples of that were set out, all of which said the Reporter demonstrated an offence against S on the same statutory basis as ground 3. Before the summary sheriff, the parents intimated that they accepted the second fact. KR did not however accept the first fact. RL's position was that he had no view on the first fact although after the evidence was heard his solicitor invited the summary sheriff to hold the ground as established, presumably on the basis of both facts although that is not immediately clear from the stated case (para [32]).

[7] Evidence was led in respect of this one disputed matter. The summary sheriff made the following findings in fact:

> "1. That on 7 November at [the locus]… KR struck the child S to the side of her head with her open hand once, using moderate force, causing the child's head to move in the same direction as she had been struck.
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> 2. That the child was neither injured by being struck as described above, nor was she distressed.
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> 3. That, immediately prior to the strike mentioned above, the child had bitten KR on the arm.
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> 4. That the strike happened instantly after the bite had occurred. It was a momentary fleeting contact."

The summary sheriff found in law, *inter alia*, that the action of KR was deliberate conduct that amounted to ill-treatment, but that it was not one that was likely to cause S unnecessary suffering or injury to health and accordingly that the findings in fact did not amount to a contravention of section 12 of the 1937 Act. He concluded that ground 2 was not established, despite there being no dispute about the other (undisputed) fact about the state of the family home. Parties were agreed before this court that the summary sheriff was plainly wrong not to have found the ground established on that fact.

[8] On the question of likelihood of unnecessary suffering or injury to health, the summary sheriff set out his reasoning in some detail. At paragraph [71] of his stated case he wrote:

> "The likelihood test within section 12 does not merely require the existence of a risk. That would be the 'bare possibility' referred to by the Court in *H* v *Lees* [1993 JC 238]. Rather the section requires a quantitative assessment of the level of risk. Such an assessment in my judgment requires evidence. This need not necessarily be from medical professionals, but should nevertheless provide the Court with an evidential basis upon which conclusions may legitimately be drawn. It may fall within judicial knowledge that a blow to the head may convey a risk of injury, but I concluded that I could not and should not assess how likely that risk of injury may be without some evidence to show what the nature and extent of such an injury would be, especially to a child of four years of age."

At paragraph [75] he wrote:

> "Without an evidential basis as to the potential medical consequences of the conduct referred to in the findings in fact, no determination of the likelihood of injury to health could be embarked upon. The offence referred to in paragraph 4 of the statement of supporting facts could not accordingly be said to have been committed by KR. Ground of Referral 2 therefore had not been established."

He considered that the Reporter, supported by the safeguarder and ultimately the father, was inviting him to find the likelihood test established by assumption or speculation. He declined to do so. Further his view was that there was no finding in fact which he could make providing a basis for establishing likelihood of unnecessary suffering or injury to

health. His opinion was that there was no evidential basis whatsoever in this case to establish the likelihood test. He noted that after the blow at the pharmacy the child, S, had displayed no sign of distress; indeed the evidence was to the contrary: S was, in his words, "unaffected by the action taken by her mother." He considered that the safeguarder's submission (that if a four year old child was struck with force to the side of the head the court can take it that the act was necessarily harmful or likely to be injurious to her health) was close to what the Inner House, in *H* v *Lees* had specifically ruled cannot be done, namely for the court to assume the likelihood from the mere fact of the conduct *per se*. His position could therefore be summarised thus: to establish likelihood of unnecessary suffering or injury to health there must be present evidence on which that could be based and that there was no such evidence led before him.

[9] The Reporter requested the summary sheriff to state a case for the opinion of this court on two questions:

> 1. Having found that [KR] deliberately struck the child on the side of her head with moderate force, and that this amounted to ill-treatment of the child, did [the summary sheriff] err in holding that this was not likely to cause the child unnecessary suffering, in terms of section 12 of the Children and Young Persons (Scotland) Act 1937, and that an offence in Schedule 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 had not been committed in respect of the child?; and
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> 2. Did [the summary sheriff] err in holding that the ground in section 67(2)(b) of the Children's Hearings (Scotland) Act 2011 did not apply to the child?

[10] Before this court, counsel for KR raised certain preliminary issues before the substantive questions should be considered.

Preliminary Issues

[11] The respondent raised three preliminary issues:

1. that the appeal was incompetent;

2. that an appeal court should not engage in an exercise of adjustment of the supporting facts to the statement of grounds; and

3. that the appeal was academic.

[12] The respondent submitted that the appeal was incompetent because all that could be brought under competent appeal to this court (or the Court of Session) was whether a section 67 *ground* had been established. In the particular circumstances of this case the summary sheriff had in fact found that ground 2 had been established in respect that the appellant and the father had on 8 November 2017 wilfully neglected S in a manner likely to cause her unnecessary suffering or injury to health. That being the case, it was not competent to appeal a decision that the summary sheriff had refused to find that the ground was established for a second reason. This appeal amounted to nothing more than an invitation to this court to engage in an exercise of adjustment of the supporting facts, as opposed to addressing a finding concerning the establishment or otherwise of the ground itself. Such an exercise was neither necessary nor appropriate (*JM* v *Brechin* 2016 SC 98). In any event, the appeal was academic. Ground 2 had been established (albeit supported by the facts of the neglect) and, further, the summary sheriff had found as a matter of fact what were the acts and reactions of the respondent and the child at the pharmacy. In those circumstances, the hearing's decision on disposal would be on the basis that the child had been a victim of a schedule 1 offence.

[13] In reply, the appellant submitted that the appeal was competent. Section 163(1)(a) of the 2011 Act allows the persons mentioned in subsection (3) to appeal against the sheriff's determination in respect of 'an application'. The application contains both the grounds and supporting facts which the Reporter seeks to establish. The respondent's proposed construction of section 163(1)(a)(i) was absurd and inconsistent with the requirement of the court to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration. If the respondent's construction of section 163 were correct, a decision by the sheriff, such as the one under consideration in this case, even if plainly wrong, could not competently be appealed. In that situation the children's hearing would be prevented from considering facts that might well be material to its decision in respect of a child. The incident in the pharmacy was not trivial and if established, it could and should be considered by the hearing.

[14] The safeguarder adopted the appellant's submissions.

Decision on preliminary issues

[15] In our opinion, this appeal is competent. Section 163 of the 2011 Act provides for appeal by stated case against a determination by the sheriff of "an application to determine whether a section 67 ground… is established." "Application" can be taken only to mean the entire contents of an application, namely the grounds of referral and the supporting facts. The decision by the Reporter to support ground 2 by reference to two discrete incidents was in our view only a matter of form. He could equally have included two separate section 67(2)(b) grounds supported by two separate sets of statements of supporting facts. Had the Reporter proceeded in that manner, then the respondent's argument on competency would not have arisen. That demonstrates the weakness of the competency argument.

[16] Section 90 of the 2011 Act is instructive. That section (as amended by the Children and Young People (Scotland) Act 2014) sets out the responsibility and powers of the hearing at the start of a grounds hearing. Section 90(1) requires the chairing member to explain each ground of referral and the relevant supporting facts and ask the child (where that is appropriate) and each relevant person if they accept that each ground of referral applies in relation to the child. However, section 90(1A) goes on to provide that the chairing member must also ask each person who accepts a ground whether that person accepts each of the supporting facts and, where any person does not accept all of the supporting facts in relation to a ground, in terms of section 90(1B) the ground is taken to be accepted only if the hearing considers that

> "(a) the person has accepted sufficient of the supporting facts to support the conclusion that the ground applies in relation to the child, and
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> (b) it is appropriate to proceed in relation to the ground on the basis of only those supporting facts which are accepted by the child and each relevant person".

It is clear that the purpose of section 90 is to ensure that it is for the hearing to determine whether it is appropriate to proceed on the basis of a partial acceptance of supporting facts. Section 93 provides, so far as relevant:

> "(1) This section applies where—
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> (a) at least one of the grounds specified in the statement of grounds is accepted but the grounds hearing does not consider that it is appropriate to make a decision on whether to make a compulsory supervision order on the basis of the ground or grounds that have been accepted, or
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> (b) none of the grounds specified in the statement of grounds is accepted.
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> (2) The grounds hearing must—
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> (a) direct the Principal Reporter to make an application to the sheriff for a determination on whether each ground that is not accepted by the child and (subject to sections 74 and 75) each relevant person in relation to the child is established, or

(b) discharge the referral".

Accordingly, if the hearing is not satisfied that it is appropriate to proceed on the basis of a partial acceptance of supporting facts, it must direct the Principal Reporter to apply to the sheriff for a determination on whether each ground that is not accepted by the child and each relevant person in relation to the child is established. The sheriff's powers in determining an application are set out in section 108, which so far as relevant provides:

> "(2) If subsection (4) applies, the sheriff must direct the Principal Reporter to arrange a children's hearing to decide whether to make a compulsory supervision order in relation to the child.
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> (3) In any other case, the sheriff must—
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> (a) dismiss the application, and
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> (b) discharge the referral to the children's hearing.
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> (4) This subsection applies if—
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> (a) the sheriff determines that one or more grounds to which the application relates are established, or
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> (b) one or more other grounds were accepted at the grounds hearing which directed the Principal Reporter to make the application."

Both section 93(2)(a) and section 108(4)(b) refer only to grounds and not the supporting facts, but since it is clear from section 93(1)(a) that an application to the sheriff can be based entirely on a disputed supporting fact, in such a case the sheriff would require to determine whether any disputed supporting facts were established; otherwise there would be no point in the requirement to make the application to the sheriff and the sheriff would simply require to return the case to the Principal Reporter, which would be absurd. If the sheriff plainly errs in his determination of whether the ground should be established on the basis of

disputed as well as undisputed facts, there must surely be an avenue to correct such an error. That would be a section 163 appeal.

[17] The respondent's interpretation of section 163 so as to exclude the appellate jurisdiction of this court is absurd. Extreme examples of the consequence of that absurdity were canvassed during submissions before us. There is no need to refer to those. The facts of the instant case suffice to illustrate the point. The character of, read short, neglect, as accepted by the respondent as amounting to a contravention of section 12 of the 1937 Act, is quite different to positive ill treatment. If this appeal is incompetent, the hearing would thereby be deprived of considering ill treatment by a parent likely to cause unnecessary suffering or injury to health to her child when determining disposal. Different considerations might apply, depending on whether the child had suffered both neglect and ill treatment. It may be considered appropriate that different or additional requirements or conditions be attached to any compulsory supervision order. A different outcome altogether might occur. The respondent's argument that it was not necessary or appropriate to adjust supporting facts was based on a passage, quoted below, in the opinion of the Lord Justice Clerk in *JM* v *Brechin* (*supra*). In that case, as a secondary issue to the principal appeal, the Second Division was invited to hold that the sheriff had erred in failing to delete from the supporting facts to the grounds of referral certain matters which after proof he had determined to be irrelevant to the grounds (which he did find established). Dealing with that argument the Lord Justice Clerk, at paragraph 56 said:

> "Finally, in relation to the relevance of the statement of supporting facts, the grounds of referral having been established and the sheriff having remitted the case to the respondent to arrange a children's hearing, the findings in fact have fulfilled their function. Thereafter, it was for the children's hearing to consider the welfare of the children, taking account of such matters as they saw fit in determining whether measures of compulsory supervision were required. It is neither necessary nor

> appropriate for this court to engage in an exercise of adjustment of the supporting statement."

The situation in the instant case is different. That passage is authority for the proposition that once the grounds of referral have been established, it is not necessary nor appropriate for the appeal court to engage in an exercise of adjustment of the supporting statement. If, as in the instant case, the issue is whether the ground of referral should be established at all on the basis of the supporting facts in question, then it is not a question of adjustment. Rather, the question for us is whether the summary sheriff was correct in law to delete those facts from the supporting statement. Far from being adjustment, it is the exercise of addressing the principal question raised in the determination of the application to the summary sheriff and in this appeal. It is true that section 163 does not refer explicitly to supporting facts, rather only to a section 67 ground, but, as has been seen, neither of the statutory provisions directly referable to application to the summary sheriff (sections 93(2)(a) and section 108(4)(b)) refers to supporting facts. Yet it cannot be doubted that the summary sheriff required to determine whether supporting facts had been proved. Nor should it be in doubt that this court is entitled to test the soundness of that determination.

[18] This appeal is not academic. Our decision on the competency of the appeal foreshadows our opinion of this issue. Two competing accounts of how the children's hearing might deal with the ill-treatment incident at the pharmacy were presented to us. The appellant submitted that it would be inappropriate for the hearing to take into account facts which the summary sheriff had decided had not been established (*M* v *Kennedy* 1993 SLT 431) and if it did so, a likely successful appeal would lie from its decision. The respondent submitted that the hearing could have regard to the facts found established by the summary sheriff. Those included his finding that the respondent wilfully ill-treated S on

7 November 2017 (although not of course in such a manner as to be likely to cause unnecessary suffering or injury to health). How, and whether, that information might come to the hearing was not clear. As the grounds of referral stood after the proof before the summary sheriff, the relevant supporting facts had been deleted. In our view it would be hazardous for a children's hearing to take into account the facts said in the original application to amount to a crime, which the summary sheriff had declared not to be so.

[19] While it is correct to say that the children's hearing will have before it a finding that S has been the victim of a schedule 1 offence, the discussion and decision at the hearing might be different depending on the nature of that offence. It would be far from academic if, as is alleged here, there were in fact two offences committed one day after the other by the mother against the child, and the hearing were prevented from taking account of the first of those because this court decided that the appeal had been academic.

[20] We now turn to the merits of the appeal.

Submissions on the grounds of appeal

[21] The appellant submitted that the summary sheriff had erred in law by misapplying the test in section 12 of the 1937 Act, which required him to determine the likelihood of the child being injured, distressed or suffering as a result of the respondent's actions in the pharmacy. Instead the summary sheriff had focused on the apparent actual result of her actions. He had been incorrect to decide that it would be speculative for him to hold that the blow was likely to cause unnecessary suffering or injury to health. The summary sheriff appeared to be founding on the absence of evidence of the consequences of the actions. That was to misapply the test, which was to determine the likelihood of such consequences. The summary sheriff should have concluded that a blow to the head of a three year old child,

which could easily be characterised as an assault, was likely to result in unnecessary suffering without hearing evidence of "potential medical consequences".

[22] The safeguarder adopted those submissions. Moreover support was to be found in section 51 of the Criminal Justice (Scotland) Act 2003 whereby parents are not permitted to physically punish children by means of a blow to the head, and the observation by the Lord President in *Peebles* v *MacPhail* 1990 SLT 245 that "to slap a child of two years old on the face knocking him over, is an act as remote from reasonable chastisement as one could possibly imagine".

[23] The respondent submitted that section 12 of the 1937 Act was concerned with criminal conduct towards children which met the standard of "cruelty". That was the focus of the summary sheriff's decision: no issue arose or was taken by the respondent with the findings that the action by the respondent had been wilful or that it had amounted to ill treatment. What the summary sheriff had decided was that the "third element" of the section 12 definition was missing, in that the Reporter had failed to prove that the wilful ill treatment was "in a manner likely to cause (the child) unnecessary suffering or injury to health". The summary sheriff's decision could only be considered on its own terms, that is by reference to the facts which he found established. It was not suggested by the appellant that there had been any error in law in the making of those findings and it was not open to this court to reconsider them. The summary sheriff was correct to reject the proposition that the act of striking a child to the head, irrespective of whether this was momentary or fleeting (as was the case here), causing no injury and no distress, will always be likely to cause unnecessary suffering or injury to health. There must be a "real and substantial risk of occurrence" (*H* v *Lees, supra*).

Decision

[24] On any view the issue of whether S should be the subject of a compulsory supervision order will be considered by the children's hearing. That hearing will take account of the fact that a ground under section 67(2)(b) has been established in the form of a contravention of section 12 of the 1937 Act (the facts of neglect as proved). However, it is not only competent but, in our view, appropriate that if S has been the victim of a separate offence under section 12, account should also be taken of that by the hearing.

[25] Proof of the commission of a contravention of section 12 of the 1937 Act requires the third test of likelihood of causing unnecessary suffering or injury to health had to be satisfied. In deciding that it had not, the summary sheriff places much reliance on *H* v *Lees*. That case, which was in fact two separate appeals by different parties, was concerned with what might amount to "neglect", while the instant case of course deals with ill treatment. In addition, when dealing with the question of whether evidence is required in order to satisfy the third element, the likelihood of suffering or injury to health, the focus of the discussion in that case was on the likely consequences of "neglect" in the form of a child being in the care of an intoxicated person or a child of thirteen being left in the care of an intoxicated person or alone at home for a number of hours. The Lord Justice General said, at page 246, that the absence of findings that in any specific and substantial respect the child was likely to be caused unnecessary suffering or injury to his health persuaded the court that it was not proved that there was a contravention of section 12(1) of the 1937 Act. The question was whether the neglect itself was likely to lead to injury to health or unnecessary suffering. In *H* v *Lees* the absence of any apparent actual harm coming to the children played a part in the decision that the likelihood of unnecessary suffering had not been established. The situation in the present case is quite different. The fact that this case involved positive ill treatment is

relevant. The nature of the action, the blow, and the reaction of the child, the movement of the head, are relevant. Those facts, combined with the shock felt by the pharmacy assistant, who witnessed the incident, clearly point towards the establishment of likelihood of suffering.

[26] It seems to us that the summary sheriff fell into error by attaching too much weight to the actual apparent absence of immediate ill effect on S as determinative of the issue of likelihood. If Parliament had required, for proof of contravention of section 12, a consequence of injury to health or suffering, then it could have said so in its definition of the crime. However, all that is required by the section is likelihood of those consequences.

[27] At para [74] of the stated case the summary sheriff wrote:

> "In the present case there was no evidence to show any suffering on the part of the child. There accordingly could be no finding of a likelihood of causing unnecessary suffering."

That demonstrates the error into which the summary sheriff has fallen. Simply because the child did not demonstrate any suffering does not mean that there was no likelihood of suffering. The question of whether there was likelihood of suffering is one for the court to determine on the basis of the evidence. There is no need for there to be expert, medical or other evidence of suffering (*Kerr* v *HMA* 1986 SCCR 91, *HMA* v *Thom* (1876) 3 Couper 332). All that is required is an assessment of likelihood. In our view the evidence of the blow, the movement of the child's head and the shocked reaction of the pharmacy assistant, a mature individual, when considered together ought to have persuaded the summary sheriff to conclude that there was a likelihood of S suffering as a result of the blow. That is an inference which the summary sheriff ought to have drawn from that evidence. Indeed that was the only inference which could have been drawn from the evidence.

Conclusion

[28] We do not require to interfere with the summary sheriff's findings-in-fact or to add our own. We simply answer both questions in the stated case in the affirmative, remit the case to the summary sheriff with the instruction to find supporting fact number 4 and all three grounds of referral established and to direct the Principal Reporter to arrange a children's hearing to determine if there should be a compulsory supervision order in respect of S.