



**SHERIFF APPEAL COURT**

**[2024] SAC (Civ) 28**

Sheriff Principal A Y Anwar  
Sheriff Principal S F Murphy KC  
Sheriff Principal C Dowdalls KC

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL A Y ANWAR

in an application for remit to the Court of Session

in terms of section 112(2) of the Courts (Reform) Scotland Act 2014

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Pursuer and Respondent

against

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Defender and Appellant

**Pursuer and Respondent: Smeaton; Bannerman Burke**  
**Defender and Appellant: Scott KC, Cartwright; Andrew Haddon and Crowe**

27 June 2024

**Introduction**

[1] The parties are the parents of three children aged between 9 and 3. They separated in October 2022. The present action was raised in October 2022.

[2] The respondent sought a shared care arrangement for the children. The appellant sought an order for residential contact during the week, with the children residing with the

respondent each alternate weekend. The parties agreed that the care of the children should be shared equally during school holidays.

[3] In December 2022 the respondent pled guilty to a breach of a non-harassment order which prohibited him from contacting the appellant. A community payback order was imposed. In June 2023, the respondent was convicted of a breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The appellant was the complainer. A further non-harassment order was imposed.

[4] In April 2023, in her answers to the respondent's minute of amendment, the appellant introduced averments that she had been raped by the respondent on two occasions; in February and April of 2022.

[5] Various interim orders for contact were made during these proceedings. In January 2023, the court ordered alternate weekly residential contact in favour of both parties, with more particular arrangements for the youngest child. That arrangement subsisted until the diet of proof commenced in November 2023.

[6] Having heard the evidence, on 13 March 2024, the sheriff made orders for a shared care arrangement broadly in line with the interim orders granted in January 2023 with additional orders relating to holiday contact. That decision is appealed.

[7] The appellant has lodged a motion for remit of the appeal to the Court of Session in terms of section 112(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). The motion was considered on the basis of written submissions.

### **The sheriff's judgment**

[8] The sheriff found that the children are happy and well cared for when residing with either parent. He noted that neither party had a fundamental concern regarding the other's

ability to care for the children. The parties' eldest daughter had expressed the view that she wished to continue with the interim shared care arrangements. He noted the parties' difficulties with communicating about care arrangements.

[9] The sheriff made the following finding in law:

“The [appellant's] allegations of rape/breach of section one of the Sexual Offences (Scotland) Act 2009 are not justiciable in the current proceedings”.

[10] In light of the appellant's concession that the respondent should have residential contact with the children, he expressed his confusion as to the purpose of the averments relating to the alleged rape. He noted that even if the allegations were true, the appellant did not seek to rely upon them as a basis upon which the court should refuse contact (see paragraph [47] of the sheriff's judgment).

### **Grounds of appeal**

[11] The appellant advances two grounds of appeal, namely: (i) that the sheriff erred in law by rejecting the appellant's allegations of rape as “not justiciable”; and (ii) that the sheriff erred in law by failing to analyse how the respondent's abuse of the appellant affected the children and failed to assess the impact of trauma arising from the continued repeated and regular indirect contact with the respondent, on the appellant's mental health and in turn, her capacity to carry out her parental responsibilities.

### **Submissions for the appellant**

[12] It was submitted that the complexity and novelty related principally to the sheriff's treatment of the appellant's allegation of rape (ground of appeal one). If the appellate court determined that the sheriff had erred in law in finding the allegation to be “not justiciable”,

judges and sheriffs would be left with difficulty in future cases. The sheriff had described the law in relation to rape as “complex”, particularly in relation to consent, corroboration and prior statements. He noted that an answer given by the respondent under oath would be admissible in criminal proceedings; that section 274 of the Criminal Procedure (Scotland) Act 1995 did not apply to civil proceedings; that an alleged perpetrator could not avoid answering questions in civil proceedings; and that where he was a pursuer, he would be cross-examined on the allegations before he had heard the evidence of the defender.

[13] The treatment of allegations of domestic abuse, including rape, in proceedings relating to parental rights and responsibilities was considered sufficiently complex and novel in England and Wales for the Court of Appeal to give guidance on “a number of overarching issues regarding the approach that should be taken in the family court” (*A v B & Anr* [2023] EWCA Civ 360, [2023] 1 WLR 2387). There was a need for similar guidance in Scotland. All courts should be alert to the issue of “rape myths” as discussed in *Lord Advocate’s Reference (No. 1 of 2023)* 2023 SLT 1115.

[14] In addition, there was a need for guidance on how trauma informed practice should bear on the outcome of an application of section 11(7A) – (7D) of the Children (Scotland) Act 1995. The sheriff had failed to apprehend and consider the impact of trauma against an admitted background of domestic abuse, leading to bail conditions and a non-harassment order. The evidence of impact on the appellant’s mental health had been perceived as “antipathy” by the sheriff, rather than a reaction to trauma. Recent research evidence raised concern about the impact of domestic abuse on child contact cases and recommends *inter alia* that courts should have full information about any alleged abuse.

**Submissions for the respondent**

[15] The appeal raised no issues of complexity or novelty. The sheriff understood the law in relation to rape. The allegation of rape was, however, collateral. It had no bearing on the question of the best interests of the children in this case. There had been no allegation of abuse of the children. There was no evidence that the children were aware of any allegation of rape. The appellant had conceded that it was in the children's best interests to continue to have direct contact with the respondent. The allegations of rape had no relevance to the issue of contact.

[16] The appellant led expert evidence in relation to her mental health and trauma. The sheriff was entitled to find that the appellant's attitude in relation to contact was one of antipathy rather than the result of a trauma.

**Decision**

[17] Section 112(2) of the 2014 Act provides as follows:

“(2) The Sheriff Appeal Court may—  
(a) on the application of a party to the appeal, and  
(b) if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session.”

[18] The question for this court is whether the appeal raises a complex or novel point of law. That issue is to be resolved by reference to the grounds of appeal. If the court is so satisfied, it requires to consider whether it is appropriate to exercise its discretion to remit the appeal to the Court of Session. Even if an appeal raises a complex or novel point of law, there is no necessity to remit it to the Court of Session (*Donnelly v Royal Bank of Scotland Plc* (No 2) 2016 SLT (Sh Ct) 333).

[19] We have not had the benefit of full submissions on the grounds of appeal at this stage. However, we have some difficulty with the sheriff's description of the allegations of rape as "not justiciable" and his finding in law to the same effect. Allegations of criminal conduct made in civil proceedings fall to be determined on a balance of probabilities. The alleged perpetrator must be given the customary warning against self-incrimination. While the "rape shield" legislation (ss. 274 & 275 of the Criminal Procedure (Scotland) Act 1995) applies to criminal proceedings, resolving issues of relevancy prior to a diet of proof is a central function of judicial case management; that is particularly important in family actions. As the Court of Appeal emphasised in *A v B & Anr* [2023] EWCA Civ 360 (at paragraphs [60] – [64]), a fact-finding hearing should only be carried out where it was necessary to do so to determine particular disputed issues regarding a child's welfare. Some allegations were so serious in that context that they required to be determined, but not every allegation of rape required to be determined: the court required to analyse the relevance of the allegations in the context of the specific application.

[20] The sheriff's decision on the allegations of rape might properly be understood to fall into the second category of cases identified by Sir Andrew MacFarlane in *A v B*; they were not relevant (rather than "not justiciable") in the context of these proceedings. The sheriff noted that the appellant did not seek to rely upon the allegations as a basis upon which the court should refuse contact.

[21] The question of whether this appeal should be remitted to the Inner House is a finely balanced one. We have our doubts as to whether this case is a suitable vehicle to advance the arguments the appellant wishes to make in light of the appellant's concession regarding contact, the relatively successful operation of the interim orders and the views expressed by the eldest child. We note that none of the finding in facts on these important matters are

challenged by the appellant. Nevertheless, should the appellant wish to insist upon the appeal, we accept the appellant's submissions that, to the extent that there may be confusion as to how allegations of rape or abuse require to be treated in the context of family proceedings, the issue is one which would warrant guidance from the Inner House, both in relation to the function of judicial case management when determining issues of relevancy prior to proof, and in relation to the correct approach to the evidence. We accept that these issues are not without their complexities; whether those complexities in fact exist in the present case will be determined after a hearing on the appeal. We are also mindful that cases involving children require to be dealt with expeditiously; it is in the interests of expediency that this appeal is heard by the Inner House to allow the children finality in the decisions about their care rather than face the prospect of a second appeal.

[22] For these reasons, on balance, we shall grant the motion to remit the appeal to the Inner House. Parties should attempt to agree any question of expenses and intimate the position to the Clerk's office within 7 days of the date hereof, failing which a hearing will be assigned.