APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 68
HCA/2015/003412/XC

Lord Menzies
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST CONVICTION

by

BK

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell; Beltrami & Co Solicitors, Glasgow
Respondent: Farquharson AD; Crown Agent

13 September 2017

Introduction

[1] On 5 October 2015 at Glasgow Sheriff Court the appellant was convicted after trial, by majority verdicts, of two charges of lewd, indecent and libidinous practices and behaviour and one of sexual assault. The appellant and his wife had been registered foster carers and had cared for over 30 children on short term placements over many years. The

complainers were sisters, SA and BJA, who were placed in a foster placement with the appellant and his wife. SA was born 6 July 1996 and BJA was born 3 June 1999. BJA was on a foster placement with the appellant and his wife from the age of 4 until she was 11. Initially SA was in the same foster placement, but left some years before BJA left.

[2] The substance of the charges of which the appellant was convicted was as follows:

> "(001) On various occasions between 6 July 2003 and 5 July 2008 at an address in Glasgow you BK did use lewd, indecent and libidinous practices and behaviour towards SA, then aged between 7 and 11 years of age and did repeatedly induce and demand that she expose her vagina and look at her vagina;
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> (002) On various occasions between 3 June 2003 and 30 November 2010, both dates inclusive, at the same address in Glasgow you BK did use lewd, indecent and libidinous practices and behaviour towards BJA, then aged between 4 and 11 years of age and did repeatedly place your hands inside her clothing, handle her vagina under her clothing, and cause her to touch your naked penis;
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> (003) On various occasions between 1 December 2010 and 2 June 2011, both dates inclusive, at the same address in Glasgow you BK did sexually assault BJA, a child who had not attained the age of 13 years, in that you did repeatedly place your hands inside her clothing and handle her vagina under her clothing, CONTRARY to section 20 of the Sexual Offences (Scotland) Act 2009."

[3] Having obtained a Criminal Justice Social Work Report and a Clyde Quay Assessment, on 26 October 2015 the sheriff sentenced the appellant to 1 year imprisonment on charge 1, 2 years imprisonment on charge 2 and 2 years imprisonment on charge 3. The periods imposed on charges 2 and 3 were ordered to be served concurrently to each other, but consecutively to the period imposed on charge 1.

[4] The appellant appealed against conviction and sentence on several grounds. These included the following:

> "1. The appellant's previous representatives failed to properly prepare his defence by failing to pursue a request made to the Crown to disclose medical and social work records in respect of the two complainers and social work records for the Appellant and his wife in respect of their work as foster carers for the complainers. The request to the Crown was made upon the Appellant's specific instructions to his previous representatives.

2. On 23 November 2014, in advance of the first diet, the previous solicitors wrote to the Procurator Fiscal requesting disclosure of the records. By letter dated 5 January 2015 solicitors were informed that the Crown did not have the records sought and did not intend to disclose same. The solicitors failed to take any further steps to secure the records that were, for a number of reasons, relevant and important for the proper preparation of the defence case. Reference is made to the draft Petition for the Recovery of Documents that the Appellant seeks to lodge in preparation for this appeal.

   The records ought to have been obtained by the representatives with a view to obtaining evidence that could be used at the trial to undermine the Crown case and to provide support for the Appellant's defence.

   The failure to obtain relevant records meant that various relevant factual matters were not confirmed before the jury. The failure also deprived the Appellant of any opportunity to show that either complainer had a relevant 'condition or predisposition' in terms of section 275(1)(a) of the 1994 Act. The application made by the previous representatives pursuant to section 275 was wholly inadequate and was inevitably refused by the Court.

3. That the Solicitor Advocate instructed by the Appellant's solicitor to represent him at the trial failed to lead material evidence in support of the Appellant's defence, namely that the Appellant and his family adhered to a strict protocol which meant that the Appellant would not be left alone with one of the complainers. This was a protocol that the family had observed when providing foster care to other children where concerns had been identified that false accusation might be made. The protocol was observed in relation to the two complainers because they displayed sexualised behaviour from when they were first placed with the family and in addition were known to be dishonest. Evidence of these concerns, including that one of the complainers was sexually abused by a family member before coming to the Appellant's home, is likely to be contained in the records, which the previous representatives failed to obtain. Various family members were on the defence witness list and were able to confirm the detail of the protocol. Apart from the Appellant only one defence witness was called and she was not asked about the protocol. The failure to present this evidence to the jury resulted in the Appellant's defence to the charges on the indictment not being properly before the jury.

   The failure to lead this evidence is without any obvious explanation and was despite specific requests from the Appellant and his family (a) to obtain the relevant records and (b) to lead this evidence before the jury."

[5] Leave to appeal was refused in respect of sentence and also in respect of other matters.

Leave to appeal was granted in respect of the ground set out in paragraph 3 of the Note of

Appeal which raised the issue of the "protocol" operated in the house of the appellant. Limited leave to appeal was granted in respect of the paragraphs raising the issue of the medical and social work reports. Leave in that respect was limited to the issue of sexualised behaviour which supports the use of the protocol.

Reports from the Trial Sheriff

[6] The trial sheriff provided two reports to this Court. In the first of these he summarised the evidence led at the trial. He also commented on the Note of Appeal, as follows:

> "[20] Confining my comments to matters arising from the evidence actually led I observe that by a majority the jury, bringing their common sense and experience of life to bear on their assessment of the evidence led, was satisfied of the guilt of the appellant beyond reasonable doubt. I had not expected such an outcome. The combination of certain matters placed before the jury in evidence and referred to in the defence speech left me anticipating a verdict of acquittal, perhaps with an emphasis reflected in a verdict of not proven. The appellant gave his evidence in a dignified and measured way. There had been a dramatic shift in BJA's position from the initial stance 'Mr K was a nice man. He never done anything like that to me.' around the time when her sister had initially made a disclosure to all that she later testified to on oath. Her account of having her vagina touched on an almost daily basis for some seven years and nearly always in the back living room, beside the kitchen of a home with other children and adults coming and going, with no-one ever bursting in upon the scene, might have seemed extraordinary. Her credibility and reliability were, of course, crucial to the edifice of a crown case built upon the application of the *Moorov* doctrine.
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> [21] No evidence was led regarding a protocol for any member of the K family not to be alone with certain children although when the appellant testified regarding BJA not being on her own with him he did not volunteer any information regarding an actual protocol.
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> [22] While I had anticipated other family members on the defence witness list giving evidence I concluded, when the defence case closed, that the view had been legitimately taken that the position regarding the comings and goings of residents into and in the vicinity of the rear living room had been adequately portrayed in evidence."

[7] At the request of this court the trial sheriff provided a supplementary report in which he commented on representation at the trial. His comments included the following:

> "[2] As I indicated at number paragraph [20] of my original Report the verdict of guilty was not one I had expected. I had judged that the solicitor advocate representing the appellant had so conducted his defence that the jury would be with a reasonable doubt as to the guilt of his client.
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> …
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> [6] As I indicated in paragraph [20] of my original Report there was a number of matters placed before the jury in evidence and referred to in the defence speech the aggregate of which might, it seemed to me, have left the jury with a reasonable doubt as to the appellant's guilt. In the event the jury were not left with a reasonable doubt. If beyond these matters, evidence had been led from a number of family members regarding a protocol that no-one should be on his or her own with either SA or BJA, given their apparent sexualised behaviour from the outset of their placement, then one cannot exclude the possibility that the combination of this evidence along with the other matters might have been sufficient to raise a reasonable doubt in the minds of the jury."

The Evidence Before this Court

[8] In the course of the appeal hearing, evidence was led from four witnesses, namely the appellant, his son PK, his son's partner CH, and the solicitor advocate who represented the appellant at trial, RM. We do not seek to set out the evidence of these witnesses in full, but the following is a summary of the salient points.

The Appellant

[9] The appellant was aged 62 and lived at an address in Glasgow with his wife. He and his wife had been registered foster carers for many years, and had looked after more than 30 children before SA and BJA came to live with them. His position with regard to the allegations contained in the charges was that nothing of the kind ever happened. There were two broad reasons why the events alleged could not have occurred. First, the household was

always busy, with people going in and out of rooms all the time. During the time that SA and BJA were living in the appellant's house, not only were the appellant and his wife living there, but three of their four children were living at home as well, and on occasions there was another foster child staying with them. The room in which the events were said to have occurred was the back living room, the door of which was separated from the kitchen door by only 6 inches. The kitchen door was never closed. The appellant's wife spent much of her time in the kitchen, and the family was always coming in and out of the back living room or passing the door to it. Second, the appellant and his wife had a protocol (or rule or practice – the word was not important) whereby the appellant was never alone in a room with either of the complainers. If one of the complainers left the room, the rule was that the other complainer had to do so as well. The appellant never went into the complainers' bedroom, and was simply never alone in the company of one girl without the other girl, or another member of the family, being present.

[10] The appellant had been advised to adopt such a protocol or practice having attended a course for foster carers organised by social services. His wife had previously attended such a course. At these courses they had been advised about safe caring, to protect them against the risk of allegations of harm towards the children. The appellant took it from this course that he should never be alone with the children. In order to protect him from any allegations of abuse, he and his wife fitted a CCTV camera in the girls' bedroom, which was unable to record but which provided a live link to a small monitor screen in the kitchen where the appellant's wife spent the majority of her time. Moreover, the complainers were not allowed in the main sitting room at the front of the house, nor in any of the other children's bedrooms, nor in the bedroom occupied by the appellant and his wife. These precautions were strictly enforced, and rendered the sort of incidents alleged in the charges impossible.

[11] The appellant and his wife worked closely with the social work department, the foster care unit and Families For Children, and gave prompt reports of any conduct on the part of the complainers which caused them concern. For example, SA reported that a male foster placement had urinated on her bed; this was reported, investigated and found to be without substance. On another occasion when she was very young BJA made a passing remark suggesting that the appellant had slept in a bed with her; again this was reported promptly, investigated and found to be without substance, but it caused the social workers to emphasise to the appellant how important it was, for his own protection, that he maintained safe caring precautions.

[12] Glasgow City Council Social Work Services Families For Children were aware that BJA in particular had displayed sexualised behaviour from a very early age, from before her placement with the appellant and his wife, and that this continued thereafter. The social work department records (which were recovered for the purposes of this appeal, but were not available for the trial) were put to the appellant in evidence, and he confirmed that these concerns and the precautions required were regularly discussed at foster carer reviews.

[13] The appellant was asked how he brought the protocol and precautions, and the particular problems associated with caring for these foster children, to the attention of his legal advisers before the trial. He was taken through the files of his former solicitors in considerable detail. He first consulted his solicitors on 23 April 2014, and he accepted that at that meeting and at the next meeting on 14 May 2014 he did not mention BJA's sexualised behaviour nor the protocol to his solicitor. He did however mention that the children were basically dishonest and there were many incidents of stealing. However, at about 21 May 2014 he gave a precognition, in which he stated that he would like his lawyer to obtain the following documents, namely social work records for the children, foster care social work records for the

children, Families for Children records, medical records for the children, psychiatric records for the children, foster care records for himself and his wife, and Families for Children records for himself and for his wife. The solicitor wrote to the procurator fiscal on 22 May 2014 requesting access to these documents, and repeatedly told the appellant that if they were not forthcoming they would be recovered by means of a court order in time for the trial. They were never recovered before the trial.

[14] The appellant was shown three letters from RM dated 6 May 2016 and 13 and 31 March 2017. There were several assertions in these letters with which the appellant disagreed. In particular, it was not true that RM explained that a "fishing expedition" through social work records was not appropriate and that it was not appropriate to petition the court for recovery of documents for the purpose of a fishing expedition hoping to find information to attack the character of the complainers. At the last consultation before the trial the appellant told RM that there was so much in the records that would assist his defence. Moreover, the appellant maintained that he had told RM on several occasions about the rule or system in the house whereby he would never be alone with one of the complainers; although he did not use the word "protocol", he talked about the system and the rules in the house, and other family members mentioned these rules in their statements. RM never told the appellant that he was not prepared to lead evidence about these rules because information about them came from PK and other members of the family. RM never asked the appellant to confirm the information about the system or protocol contained in PK's emails, nor did RM indicate that he did not find it credible that such a system or protocol was operated. The protocol was first mentioned by CH at the consultation on 6 February 2015 attended by CH, RM, the appellant and the instructing agent. PK mentioned it in his precognition, and also at a later consultation. It was the subject of general discussion at consultations in the period running up to the trial.

The appellant expected to be asked questions about the protocol in the course of his evidence at the trial, but he was not asked any such questions. This is why he did not mention it in the course of his evidence. He had expected the records mentioned earlier to be obtained and placed before the court, but they were not.

PK

[15] PK was the appellant's son, aged 39. He lived at an address in England, and was not resident in the family home during the time that SA and BJA were living there, but he visited the family home regularly and lived there for periods during the time that SA and BJA were living there. He spoke to his affidavit dated 28 March 2017. He gave a statement to the appellant's solicitor on 11 February 2015 in which he gave details of his parents' policy with regard to SA and BJA whereby both of the girls or none of the girls would be in the room, which would mean that one of the girls would not be in a room with the appellant unaccompanied. He stated that this policy was operated in the house very shortly after the placement of SA and BJA with his parents. He sent an email to the solicitor acting for the appellant on 31 May 2015 providing much fuller details of the system whereby the appellant would never be alone in a room with either of the girls on their own, and he asked that the solicitor and RM should consider this and discuss it at the consultation with the appellant and CH on 1 June 2015. PK attended a further consultation with the appellant, RM and the solicitor on 3 June 2015, at which PK raised the issue of the "set up", because he regarded it as very significant. He stated that RM did not feel comfortable with it and indicated that the jury would think it odd. PK was worried that the appellant would not perform well in court and would forget matters under the stress of giving evidence; he reiterated the importance of

recovering the social work records, because these would contain material relating to specific events involving the care of the children and not just general attacks on their character.

[16] At consultations, there was general discussion, with PK and the appellant each speaking. RM never suggested that he would not present evidence about the system because information about it was coming from PK.

[17] During the consultation on 3 June 2015 PK received an email on his mobile device from CH which reiterated how important the family felt it was to obtain the social work records, and the important material that these were expected to contain. PK showed this to RM, who read it, shook his head and said "there's nothing I can do".

[18] PK explained the set up in detail to RM at consultation, and emphasised that the appellant and his family wanted this brought out in his defence at trial, but RM thought it would raise awkward questions and it would not be a good idea to mention it.

[19] PK disagreed strongly with the contents of the letters from RM dated 6 May 2016, and 13 and 31 March 2017. RM was specifically instructed to seek to recover the social work records. Although RM stated in the letter dated 13 March 2017 that the appellant never told him about the strict rule that he would never be alone with one of the complainers, PK stated that he remembered that the appellant told RM this on more than one occasion at consultation. He also pointed out that he (PK) never attended a consultation with CH, so that RM's assertion that he explained the law about a fishing expedition to PK in the presence of CH was wrong.

[20] No formal statement was taken from the appellant at the consultation on 3 June 2015, nor was there any recording of the meeting made. RM told the appellant not to mention the set up/protocol at the trial, although the appellant confirmed at consultation that the system

existed. There was no discussion at consultation about the contents of the precognitions or statements from other members of the appellant's family.

CH

[21] CH was aged 39 and lived at an address in England. He was the partner of PK. He was a barrister practising in England, principally in the field of criminal law. He spoke to the terms of his affidavit dated 28 March 2017. He became aware through PK of the charges which the appellant faced, and although he made it clear that he had no expertise in Scots law, he agreed to give the appellant such support as he could. He attended the consultation with the appellant and his solicitor on 6 February 2015 (with the agreement of both). He was surprised that the social work records had not been obtained by that time, and expressed the view that it was important that they should be obtained. He was copied into PK's email to the solicitor dated 31 May 2015, and attended the consultation with the appellant, his solicitor and RM on 1 June 2015. There was a discussion between all four of them about the terms of PK's email dated 31 May 2015. CH observed that a case involving allegations such as this is always difficult for the defence – what can one say but "it didn't happen"? However, in the present case it could not have happened because of the protocol/rule. At the consultation CH expressed the view that the witness precognitions were really poor and did not cover the points which needed to be covered.

[22] At the consultation on 1 June CH expressed the view that it was important to recover the records, but RM indicated that the attempt to recover these had been unsuccessful and there was no point in trying further. CH observed that there was a difference between seeking to recover evidence of a complainer's bad character (which was not what was being suggested in this case) and seeking to recover material to explain about BJA's sexualised behaviour from

a very young age and to provide a factual explanation for the rules which were operated in the house. RM maintained that it was not open to the defence to simply go looking for mud to sling at these girls. RM observed that it would look really odd if he was not allowed to see his nephew on his own, and he thought that the jury would find the "protocol" or rules difficult to believe. CH confirmed that he had never attended a consultation with RM at which PK was present.

[23] CH disagreed with much of the content of the letters from RM dated 6 May 2016 and 13 and 31 March 2017. In particular, he disagreed with RM's statement in the last of these letters that prior to the trial it was only suggested by PK that such a protocol existed. PK's email of 31 May 2015 was discussed at the consultation of 1 June 2015; the appellant was present and agreed with the terms of the email. He was an active participant in the discussion, and gave no suggestion or indication that there was no such system, or that he did not know what was being referred to in the email. The discussion proceeded on the basis that the contents of the email were accurate. With regard to the social work and other records, there was a lengthy discussion in the course of which it was explained to RM that he was not being instructed to embark on a fishing expedition with the aim of attacking the character of the complainers, but rather to seek specific material which would support the existence of the protocol.

[24] CH's intention in sending the email to PK on 3 June was to restate his concern that the records had not been recovered, and that the records were necessary in order to provide a basis for the protocol. Without the records and evidence about the protocol, all that would remain was for the appellant to state that the events libelled did not happen. However, RM's position was that it was a very weak prosecution case, and it was not only futile but

unnecessary to seek to recover the records, nor was it necessary to lead evidence about the protocol.

RM

[25] RM was an experienced criminal practitioner, having practised criminal law since 1989. He had been a solicitor advocate for seven years and had conducted trials in the high court and in the sheriff court before a jury regularly. He had experience of defending on similar charges before the present case.

[26] He was asked about the statement in his letter dated 13 March 2017 that an explanation as to the inappropriateness of a fishing expedition was given to PK in the presence of CH. It was put to him that there was no consultation with PK at which CH was present; this did not accord with his recollection. He still remembered them being present at a consultation together. RM maintained the position which he had set out in his three letters to the court and to the Crown. He had read the defence witness statements before his first consultation with the appellant on 30 March 2015. He was aware that PK referred to the policy or rule, but he understood that the appellant had not confirmed this. There was an anomaly between PK and the other witnesses on this point. Although the appellant's wife in her statement referred to BJA showing sexualised behaviour when she first came to the house and that the appellant was never alone with the girls because they were aware of the exposure to risk, RM viewed this as close to, but not the same as, what PK was talking about. Only PK's statement used the word "protocol", and only he stated that if one girl left the room the other was required to do so as well. He thought this very unusual and wanted to explore this with the appellant. Although the statement from the appellant's daughter made reference to strict rules for the foster children, and that SA was a liar and manipulative, she did not make reference to a

protocol whereby if one complainer left the room the other complainer required to do so as well. The statement from the appellant's other son DK mentioned rules specific to BJA and SA, including that the appellant would not be in a room alone with the girls; however, RM considered that this fell short of what was being suggested by PK. He did not instruct that further precognitions from the family members should be obtained.

[27] RM was aware before his first meeting with the appellant that his instructing solicitors had requested that the Crown disclose the various records about the children and the appellant and his wife. He did not consider that it was appropriate to petition the court for recovery of these documents. He took this view for two reasons – (1) the reason for recovering these documents was, in his view, to provide ammunition for attacks on the characters of the complainers and their sexualised behaviour; there was no point in seeking this information, because he would not be allowed to use it at trial, it being collateral and also evidence of bad character; and (2) he was concerned that the records would contain information about the camera fitted in the complainer's bedroom, and he considered that if evidence of this was put before the jury it could be very damaging to the appellant's case and difficult to explain. This was discussed with the appellant, PK and CH, and all agreed that this was a potential problem which should not be introduced as evidence.

[28] At his first meeting with the appellant on 30 March 2015 RM spoke to the appellant about the protocol described by PK in his statement; the appellant's position was that he was rarely alone with the girls, and there was no policy or rule about this. He expressly denied the suggestion that if the appellant was in a room with both girls and one left, the other girl was required to leave too.

[29] RM reiterated that his recollection was that the appellant, PK and CH were all at the consultation on 1 June 2015, and he recalled PK having a lot to say at that meeting. There was

a discussion about recovery of the records, and RM expressed the view that they would not be allowed to recover them nor to use them at the trial. He remembered being shown at the consultation on 3 June 2015 the email from CH to PK expressing the view that it was important that the records should be recovered; however, he had already decided that these would be inadmissible and might contain dangerous material, and that he would not take further steps to recover these. He also remembered receiving and considering the email dated 31 May 2015 from PK, which was discussed at the consultation on the following day. However, he considered that there was a problem with this in respect of the allegation of the protocol, because this did not conform to the appellant's instructions. The appellant did not suggest that such a protocol existed. Moreover, RM thought that it would be a very strange thing if there were two girls in the room with the appellant, and when one left the other had to leave as well. This sounded very strange to him, and he expressed this view at the consultation on 1 June 2015. The appellant told him that it was wrong that he was never alone with one of the girls and it was wrong to suggest that if one left the other had to leave. His position was that there was no protocol in the way that PK described it, although he was rarely alone with one of the girls. This issue was discussed again at the consultation on 3 June 2015 with the appellant and PK, when RM pointed out that the appellant's position was different from that described by PK. RM could not remember any particular reaction to this. He did remember saying that it seemed like a very odd procedure, but the conversation always ended quickly because he was acting on the basis of the appellant's instructions, which were that no such procedure existed. The question of a rule or protocol was never mentioned again, because RM was proceeding on the appellant's instructions; he never considered that the protocol or rule was a material line of his defence.

[30] RM denied that he suggested to the appellant at consultation that he should not mention the protocol at the trial. Moreover, the appellant's daughter never attended a consultation, and she never mentioned any protocol or rule in her evidence at trial.

[31] RM did not go over the defence statements with the appellant; he had asked the appellant whether there was any system or rule, and he paraphrased the contents of PK's statement, but did not read it out. The appellant's position was that what was being put to him was not correct, although he was not often alone with one of the girls. He never suggested that there was any process or system to prevent him from being subject to allegations such as this. RM never asked the appellant what sort of training he had received from the social work department, such as was referred to in the appellant's wife's statement, nor did he ask him about exposure to risk of such allegations nor any steps taken to avoid such risk. RM did not record his questions to the appellant nor the appellant's answers but he took notes; he might still have these notes but nobody had ever asked him to produce them. The appellant's wife mentioned in her statement training which she and the appellant had received from the social work department, but RM did not ask the appellant about this. The appellant's daughter in her statement mentioned that there were rules in place for the foster children, but RM did not ask the appellant to explain what these rules were.

Submissions for the Parties

The Appellant

[32] Having adopted her written submissions and additional written submissions, counsel for the appellant drew our attention to the observations of the court in *Burzala* v *HM Advocate* 2008 SLT 61, particularly at paragraph [33] and to the passages from *Anderson* v *HM Advocate* 1996 JC 29 quoted at paragraph [23] and *Mills* v *HM Advocate* 1999 JC 216 quoted at

paragraph [28] of *Burzala*. In the present case, the appellant's instructions were clearly to the effect that the social work department and other records should be obtained, with a view to supporting the presentation of a defence that the allegations made by the complainers were unfounded because of the protocol or rules referred to. RM had reached a decision, on the basis of inadequate precognitions, that the line of defence based on the protocol or rules would not be admissible, and he decided not to use this line of defence. He failed to explore the issue of the risk of such allegations being made against the appellant, and the steps taken to reduce this risk and the training given to the appellant and his wife in this regard. Although there was reference to this training and the avoidance of such risks in the statement of the appellant's wife, and there was reference to the appellant's daughter's statement to the rules in place for the foster children, and there was reference in PK's statement to the "policy" with regard to SA and BJA, he did not explore any of these with the appellant nor put the statements to him, nor did he require more detailed precognitions to be obtained from the other members of the family. Although the precognitions were not in identical terms, each made reference to rules and procedures which were similar, and which ought to have been investigated. The statements raised more questions than they answered, and cried out for these questions to be answered. It was essential to find out in detail what the rules were.

[33] The decision not to present this line of defence was taken by RM before the matter had been properly clarified and investigated, on the basis that he considered that the policy or rules was an odd arrangement. It was on this basis that he decided not to pursue recovery of the social work and other records, on the basis that they were collateral and not admissible. However, the records now being available, it was clear that particular incidents and concerns had been reported by the appellant and his wife to the social work department, and there were passages in the records which supported the appellant's position that he was aware of the risk

of allegations being made by the complainers against him that he received advice and training from the social work department about measures to reduce this risk, and the existence of the protocol or rules and which could have been relied on at trial.

[34] Counsel submitted that, as a generality, it was an important element of preparation for a trial that witness statements were put to an accused; however, it was especially important in the particular and unusual circumstances of this case, involving young children with behavioural problems who were in foster care, to obtain the records, and to go through the witness statements and ask the appellant what was meant by the contents. The failure to do this meant that there was inadequate preparation of the defence case, and in turn an important line of defence was not presented at all at trial – see *Burzala* at paragraph [33] and *AJE* v *HM Advocate* 2002 JC 215 (particularly at paragraphs [22] to [29] of Lord McCluskey's Opinion). In the present case, there was a substantial line of defence, for which there was supporting evidence and a real prospect of obtaining further evidence to support it (in the form of social work records, and/or a witness being called from the social work department to speak to the circumstances in the appellant's home). This was of a character which could have led the jury to conclude that there was room for reasonable doubt. It was clear from the sheriff's report to this court that he thought that the appellant would be acquitted, and the jury's verdict came as a surprise. This court does not require to decide whether the line of defence would have resulted in acquittal, but only that it was a line of defence which did exist, which had evidence to support it, and which could have raised a reasonable doubt in the minds of the jury.

[35] RM himself took a precognition from the appellant, but it excluded those aspects of the defence which he had already decided not to use at trial. This was not a case in which a tactical decision had been taken not to recover the social work records – the decision not to recover them was taken before RM had found out in detail what the defence was going to be, on the

basis that he thought that it was odd. The appellant, PK and CH each urged RM to seek to recover the social work records; against the background of foster children who were sexualised, and references in the precognitions to training from the social work department, rules and reporting by the appellant and his wife of the children's behaviour to the social work department, it was essential to understand the appellant's position in detail, and to recover the records. The observations at paragraph [29] of Lord McCluskey's Opinion in *AJE* v *HM Advocate* were apposite in the present case. This was an important part of the preparation and investigation of the case. The social work records should have been obtained by those representing the appellant to show that the appellant and his wife had concerns about SA and BJA, that they had discussed these concerns with the social work department, and that mechanisms were in place to address these concerns. The defence at trial would have been significantly reinforced by this evidence, at least to the extent of creating a reasonable doubt.

[36] Under reference to paragraphs [7] and [8] of the Lord Justice Clerk's Opinion in *AJE* v *HM Advocate*, counsel submitted that, on the evidence before this court, the appellant had told RM about the existence of a protocol or rule. This was a fundamental part of his defence. It was not placed before the court. This was not simply a tactical decision, but amounted to a failure to present the defence that the accused had instructed to be presented. This resulted in the appellant not receiving a fair trial.

Submissions for the Crown

[37] The advocate depute adopted her written submissions and additional written submissions. She pointed out that there was no sexualised behaviour by SA which would have justified recovery of her records. The appellant's position to his advisors was that he was not going to give details of his defence until he had recovered all the information he wanted. The

protocol was not raised until quite shortly before the trial. His position was that PK was overstating the position regarding the protocol. The protocol only became important after the appellant's conviction.

[38] Most of the social work records now available were contrary to the appellant's interests – for example, the passage regarding the appellant sleeping in the same bed as BJA would have strengthened the Crown's case. It followed that RM's decision not to insist on recovery of the records was entirely reasonable. The issue of a protocol or rules was not focused in the appellant's instructions to RM, and was not a material line of defence, so the appeal falls at the first hurdle. In any event, RM did not shut his mind to this issue; he was an experienced trial practitioner, and stated in evidence that the strategy for the trial was discussed with the appellant, agreed and not challenged by him.

[39] The advocate depute observed that it was important to remember that, although the arguments on appeal were focused on the protocol or rules, this was to some extent artificial – there were many strands of evidence available to the defence at trial. In particular, there were two broad aspects to the defence – (1) collusion between the two complainers, and (2) the improbability of the offences happening. In his evidence to this court PK overstated the status of the protocol. In his email to RM of 17 September 2015, just days before the trial, his position was not that the events alleged in the indictment could not have happened because of the protocol, but that that would very rarely have happened and he thought very unlikely. Moreover, he acknowledged in evidence that he was giving information to RM and it was his decision what to use; the family did what RM advised, as "counsel knows better than me".

[40] Under reference to the tests set out at paragraph [33] of *Burzala*, there has been no miscarriage of justice. The appellant was not deprived of his right to a fair trial, because the issues to be raised at trial were discussed with him and agreed. His defence, as discussed and

agreed, was presented to the court. RM did not act contrary to the appellant's instructions; the issue of the protocol was discussed and a decision made which was not challenged. RM considered whether to seek disclosure of the complainers' records, but being mindful of the restrictions on leading evidence regarding sexual offences, and disregarding collateral issues, concluded that this should not be done; this decision cannot be categorised as being so absurd as to fly in the face of reason, nor as being contrary to the promptings of good reason and good sense. Criticism of RM's strategic or tactical decisions as to how the defence should be presented are not sufficient if these decisions were reasonably and responsibly made in accordance with RM's professional judgement. All decisions made by RM were reasonably and responsibly made, in accordance with his experience and knowledge of the law and practise in a trial court. Accordingly, the appeal should be refused.

Discussion and Decision

[41] The circumstances in which the conduct of the defence by the accused's counsel or solicitor will provide a Ground of Appeal are defined narrowly. The scope for an appeal on the ground of defective representation is limited, and the limitations are clearly established. There was no issue between the parties to this appeal as to the law applicable to this matter. We were referred to the observations of Lord Justice General Hope in *Anderson* v *HM Advocate* (at 1996 JC pages 43-44), Lord Justice General Rodger in *Mills* v *HM Advocate* (at 1999 JC page 221 f/h), *AJE* v *HM Advocate* per Lord Justice Clerk Gill at paragraphs [6] to [8] and Lord McCluskey at paragraphs [22] to [29], and *Burzala* v *HM Advocate*, particularly at paragraphs [23], [28] and [33]. We accept and adopt these statements of the law.

[42] The limitations on an appeal based on defective representation were helpfully summarised by Lord McFadyen, giving the Opinion of the Court, in *Burzala* v *HM Advocate* at paragraph [33] as follows:

> "Such an appeal, like any other, can only succeed if there has been a miscarriage of justice (Criminal Procedure (Scotland) Act 1995, s 106(3)). That can only be said to have occurred if the conduct of the defence has deprived the appellant of his right to a fair trial (*Anderson*, p 43 (p 163; p 131F; *Grant*, (p 209; p 565) para 21). That, in turn, can only be said to have occurred if the appellant's defence was not presented to the court (*Anderson*, p 43 (p 163; p 131G); *Grant*, (p 209; p 565) para 21). That may be so if the appellant's counsel or solicitor acted contrary to the instructions and did not lay before the court the defence which the appellant wished to put forward (*Anderson*, pp 43-44 (p 163; p 132A)). It may also be so if the defence was conducted in a way in which no competent counsel or solicitor could reasonably have conducted it (*Grant*, (p 209; p 565) para 21); and that has been illustrated by reference to counsel having made a decision that was 'so absurd as to fly in the face of reason' (*McBrearty*, (p 130; p 922) para 36), or 'contrary to the promptings of reason and good sense' (*McIntyre*, p 240H (p 379; p 388)). It is clear, however, that the way in which the defence is conducted is a matter for the professional judgment of counsel or the solicitor representing the accused person (*Anderson*, p 43 (p 163; p 131D)). Criticism of strategic or tactical decisions as to how the defence should be presented will not be sufficient to support an appeal on the ground of defective representation if these decisions were reasonably and responsibly made by counsel or the solicitor in accordance with his or her professional judgment (*Grant*, p 209; p 565) para 22)."

[43] Parties accepted these principles of law; what is in issue in the present appeal is the application of those principles to the facts of this case.

[44] Those facts were also in dispute. In particular, there was a difference between the evidence given to this court by the appellant, PK and CH on the one hand, and RM on the other, as to what the appellant's instructions were as to the existence of a protocol (or rule, practice or system) whereby the appellant would not be alone in a room with one of the complainers. The appellant and PK spoke to the existence of such a rule or system, and the appellant, PK and CH each stated in evidence that it was discussed at consultations with RM, and that the appellant himself confirmed to RM that the rule or system existed and that the appellant instructed RM that this line of defence should be advanced at trial. The appellant made this clear to RM at

their first consultation on 30 March 2015, and repeated this in the course of discussions at the consultations on 1 June and 3 June 2015. RM's evidence was that the appellant never confirmed the rule or system; indeed, he stated that the appellant's position was that there was no such policy at all, and that he expressly denied the suggestion that if the appellant was in a room with both girls and one left, the other girl was required to leave too.

[45] On this issue we prefer the evidence of the appellant, PK and CH to that of RM. The appellant, PK and CH each gave their evidence clearly, without apparent exaggeration, and with dignity. Their evidence was consistent with the documentary materials before us. The social work records recovered after the trial provide support for the claim that concerns about the children's behaviour were raised promptly by the appellant and his wife, and that steps were explained to them and taken by them to protect them from unfounded allegations. There are references to this, and to rules regarding the foster children, in the statements of the appellant, his wife, his daughter, PK and the appellant's other son. By contrast, RM's recollection of events was clearly mistaken on occasions. For example, he stated in his letter dated 13 March 2017 that he attended a consultation at which both PK and CH were present, and he stated in evidence that this remained his recollection, but PK and CH both denied attending any meeting with RM together, and the solicitor's file notes do not support the suggestion that such a meeting occurred. There were several respects in which we did not find RM's evidence to be entirely satisfactory. Having regard to all the materials before us we are satisfied that the appellant did explain to RM that such a rule or system existed, and that when this was discussed at consultations with RM at which PK or CH attended, the appellant's position was in all material respects the same as PK's position, and that RM was properly instructed to advance this line of defence.

[46] This was an important line of defence in this case. Without it, the appellant's position rested on the propositions (1) that the two complainers were lying and had colluded in giving their evidence, and that no such incidents had occurred, and (2) that it was unlikely that the incidents occurred in the back sitting room because it was close to the open kitchen door and there were always several people in the house. We consider that the appellant's case would have been strengthened by evidence of such a rule or system which was rigorously enforced; this might well have caused the jury to have a reasonable doubt, particularly in a case with the weaknesses to which the sheriff refers in his reports to us.

[47] On the basis of the evidence before us we consider that RM was instructed by the appellant to present this line of defence, and that the appellant has been deprived of his right to a fair trial by RM's failure to present it. This was not simply a judgement by RM as to the manner in which that defence was presented, but a failure to present it at all (see the comments by Lord Justice Clerk Gill at paragraphs [7] and [8] of his Opinion in *AJE* v *HM Advocate*). As Lord McCluskey put it (at paragraph [22] of his Opinion in *AJE* v *HM Advocate*):

> "In my opinion, the appellant's appeal must succeed on the ground that a substantial line of defence, for which there was supporting evidence and a real prospect of obtaining further evidence to support it, was not presented to the jury; and that line of defence was of such a character that it could have led the jury to conclude that there was room for reasonable doubt."

[48] We also agree with the criticisms made by counsel for the appellant about the preparations made for the trial. The precognitions obtained from the family members were wholly inadequate, yet there were references in each to matters which ought to have alerted RM to the need to carry out further investigations, including the obtaining of further more detailed precognitions and the recovery of the social work department records. The precognition of the appellant's wife contained material under the headings "we received training from social work department", "BJA was highly sexualised and the girls would lie" and "the social work were

aware of BJA's sexualised acts". Under the heading "my husband was never alone with the girls", she stated that "we always made a point of not having the kids alone with my husband, particularly female children, because we were aware of the exposure to risk." In PK's statement under the heading "my parents had a policy with SA and BJA":

> "My mother and father had a policy whereby both of the girls, or none of the girls would be in the room. This would mean that the girls would not be in a room, for example with my dad unaccompanied. The reason I mention that is because if you ever came across SA standing outside the room, she would often look quite livid that she would have to stand outside missing TV and she would want to be in the room. BJA would quite often stand outside and be a little bit more nonchalant about it. If I remember correctly I think it is only BJA and SA who my parents had that policy with because they did not ever feel secure with the two of them."

[49] In the statement of the appellant's daughter there was material under the headings "SA was a liar and manipulative" and "there were rules in place for the foster children". The appellant's other son stated that he remembered:

> "… stuff like my father would not go into the room with just them on their own. I remember specifically my father would be asked into the room by them to do something and my father refusing and he would actually stand in the doorway in clear sight of anybody else and speak to them from there. He would not actually enter the room with them. I do not remember specifically at that time being told things, I just remember him not going into rooms at certain points and being exposed to him being in the rooms alone with the girls. This was specific to BJA and SA."

[50] It was RM's position in evidence to this court that he considered that there were insufficient similarities between the position of the appellant and the positions of the other family members to justify this line of defence being advanced, and in particular that the protocol or rule mentioned by PK was not supported by the other family members or the appellant. However, we consider that there were sufficient similarities, even standing the poor quality of the precognitions, to make it necessary for RM to obtain much more detail as to precisely what each member of the family's position was regarding a rule or system concerning the appellant being left alone with one of the girls. He did not instruct or carry out such further

investigations. He appears to have formed the view at the outset that such a rule or system was very odd, and would not be believed by the jury. It does not appear to us that he attached sufficient weight to the fact that the arrangements in the appellant's household involved young children with behavioural problems, in foster placement with the appellant and his wife, and the references in the various statements about social work department training, the girls' sexualised behaviour at a very early age, and the steps take to protect the appellant from such allegations. The circumstances in the appellant's household were far from usual, and the appellant and his wife were accustomed to dealing with disturbed foster children. We consider that before taking any decision as to whether to advise the appellant that this line of defence should not be advanced at trial RM required to ascertain from the appellant and the family members exactly what rules were enforced in the household in these unusual circumstances.

[51] Having ascertained these details, we consider that RM ought to have made a formal application to the court for recovery of the social work and other records relating to the complainers and to the appellant and his wife. These have been recovered for the purposes of this appeal, and provided support for the assertions made by the appellant and his family that they had received advice from the social work department as to how to protect themselves from the risk of allegations being made against them, that they had raised promptly with the social work department their concerns about aspects of the complainers' behaviour, and that social workers investigated these. The records, and the evidence of an appropriate witness from the social work department, would have provided independent support for the assertion that there were rules in place which would have rendered it improbable that incidents such as those narrated in the indictment occurred.

[52] It was RM's position in his letters dated 6 May 2016 and 13 and 31 March 2017 that the court would not have required disclosure of these records because the exercise was a "fishing

diligence" designed only to find ammunition with which to attack the character of the complainers, and that in any event any attempt to adduce evidence at trial on the basis of the records would be refused because it was collateral. If this was indeed a fishing diligence, or if the evidence was collateral, there would be force in these concerns. However, we do not consider that an attempt to recover the social work records in this case can properly be described as a "fishing diligence". The purpose for which the records would have been sought was to provide independent support for the line of defence that there was a rule or protocol enforced in the appellant's household which would have made the occurrence of incidents such as those alleged improbable. This is a different purpose from simply hoping to find information to attack the character of two children. (Indeed, the fact that a child aged 4 was showing sexualised behaviour on arrival as a placement at the appellant's household can hardly be described as an attack on her character). Nor do we regard this evidence as collateral, in the peculiar circumstances of this case. It was central to the line of defence based on the rule or protocol, which was itself important in the assessment of the credibility and reliability of the complainers.

[53] It was the responsibility of the appellant's legal representatives to carry out adequate investigations and preparations before the trial to see that his defence was properly presented at trial. It does not appear to us that without more detailed precognitions as to the rules enforced in the household, and without a properly argued attempt to persuade the court to order disclosure of the social work records, the appellant's defence was properly investigated and prepared. As was observed in *Hemphill* v *HM Advocate* 2001 SCCR 361 (at 384):

> "We cannot now guess what would have been the consequence of leading such expert medical evidence before the jury… but that is beside the point. The appellant was entitled to have his defence properly investigated with a view to its proper presentation."

[54] There are similarities between the present case and *AJE* v *HM Advocate*, in which the allegation was that the representatives of the accused had failed properly to investigate and instruct expert medical evidence in preparation for the trial. As Lord Hamilton observed (at paragraph [3] of his Opinion, at 2002 JC 226):

> "An accused person is not only entitled to the presentation of his defence at his trial but also to due preparation of that defence in advance of the trial. As illustrated by *Garrow* v *HM Advocate* and *Hemphill* v *HM Advocate* inadequate pre-trial investigation and preparation may, at least in some circumstances, result in the denial of a fair trial."

In the same case Lord McCluskey observed (at paragraph [29] of his Opinion, at page 248):

> "Taking together the matters that I have discussed, and in the light of the guidance contained in the authorities referred to, I am satisfied that in this case the system broke down to such an extent that the appellant's defence was not properly presented to the jury. If the medical evidence had been fully investigated, if evidence had been sought and adduced to demonstrate how young children's evidence might be manipulated in sexual abuse cases, and if an attack, supported by evidence, had been made on the character of the child's mother, then the defence case might have been significantly reinforced by evidence to which the jury might have attached at least sufficient weight to create a reasonable doubt. More particularly, the line of defence would have provided a basis, distinct from, and in addition to, the appellant's own evidence, for holding that the children's evidence was not reliable. It is not possible of course to say had the defence case been properly presented the jury would necessarily have reached a different verdict but, in my opinion, the failure to explore the material supportive of that defence and the failure to advance that line of defence by cross-examination and otherwise was fundamental and affected the conduct of the appellant's defence to such an extent that he did not have the fair trial to which he was entitled. In my view, there was a miscarriage of justice."

[55] These remarks might equally have been made in the circumstances of the present case. We consider that the tests set out in paragraph [33] of *Burzala* v *HM Advocate*, quoted above, have been met in the present case. The conduct of the defence has deprived the appellant of his right to a fair trial, and there has accordingly been a miscarriage of justice. We shall allow this appeal and quash the appellant's conviction.