



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 19
XA4/25

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD BECKETT, THE LORD JUSTICE CLERK

in the appeal by stated case

by

UV

Appellant

against

THE LOCALITY REPORTER MANAGER OF THE SCOTTISH CHILDREN'S REPORTER
ADMINISTRATION

and

WX

Respondents

Appellant: Reid KC, Oliver; Drummond Miller LPP
First Respondent: Scullion; Anderson Strathern LLP
Second Respondent: Scott KC, Bradbury; Balfour + Manson LLP

8 July 2025

Introduction

[1] In this appeal by stated case under the Children's Hearings (Scotland) Act 2011 section 163, the appellant UV (father) challenges the sheriff's decision, after proof, to find grounds for referral under section 67(2)(b) established in respect of his daughter YZ. He

does so on the ground that the sheriff failed to pay attention during parts of his counsel's cross-examination of the first of 12 witness on the first day of the proof, constituting a procedural irregularity and unfairness at common law. The child's mother, WX, did not appeal but she supports UV's contention. The Locality Reporter Manager opposes the appeal.

[2] Whilst in her stated case the sheriff posed questions on seven grounds of appeal, counsel for the appellant did not insist on questions 2-7. Question 2 made the same complaint as question 1 but presented the issue as apparent bias. Questions 3-7 challenged the sheriff's treatment of the evidence. Question 1 remains:

“Did my conduct on 16 January 2024 (day 1 of proof), in:-

- (i) Failing to give the evidence my full attention during cross-examination of [ST]; and
- (ii) Consequently (or separately) failing to record significant and material parts of the evidence of [ST] render the proceedings unfair to the appellant at common law, [or, in terms of s.6 of the Human Rights Act 1998 and Article 6 (1) of the European Convention of Human Rights?]

Senior counsel for the appellant conceded that since there is no material difference between Scots law and the Convention the question should be read as ending after the word “law”.

[3] The sheriff does not accept that she failed in either respect. In support of his appeal, the appellant provided unsworn statements from counsel who appeared before the sheriff; Mr Mark Allison, Advocate dated 26 February 2025 and Ms Emily Bradbury, Advocate for the second respondent, 2 March 2025.

Background

[4] YZ was born in 2016. The ground of referral was that an offence specified in schedule 1 of the Criminal Procedure (Scotland) Act 1995 was committed against her, namely a sexual offence. Supporting facts 3 and 4 alleged, respectively, sexual assault of a

young child, Sexual Offences (Scotland) Act 2009 section 20 by digital penetration of her vagina and anus, and vaginal rape of a young child contrary to section 18 of that Act, occurring at the family home. The allegations related to a period prior to 12 May 2023 when YZ informed her great-grandmother, ST, that the appellant had done these things. Supporting facts 1 and 2 were not in dispute. They averred YZ's date of birth, that her parents are UV and WX and specified the address where she ordinarily resided with them.

Proof before the sheriff

[5] The first of eight days of proof called on 16 January 2024 when the Sheriff Court at Ayr was experiencing IT difficulties that delayed the start of the proof. The sheriff was unable to access documents electronically on the court's Integrated Case Management System. Despite having no access to ICMS, Microsoft Outlook, MS Word, the SCTS network or her preparatory notes, she resolved to proceed with the proof. Since she lacked normal means of communication with court staff via her laptop computer, the sheriff had her mobile phone on the bench. She used paper documents instead of accessing productions electronically as she would normally do. Her court officer provided them when required, as they frequently were.

[6] The evidence proceeded over eight days in instalments after 17 January 2024, the last on 15 May 2024. The reporter called eight witnesses, the appellant three and the safeguarder one. The appellant did not give evidence.

The evidence

[7] The first witness was ST, the child's great-grandmother, who adopted as her evidence in chief her witness statement made to the reporter on 12 December 2023. She

described YZ's family background, her role in caring for her and the circumstances of YZ disclosing sexual abuse on 12 May 2023. YZ was accommodated, initially with ST, on a voluntary basis as a looked after child from 13 May 2023. Either ST or her relative QR would supervise when YZ attended for contact. YZ had a history of urine infections and at least once this had led to the GP prescribing antibiotics. Amongst the passages ST adopted were:

"On Friday 12 May 2023 I was putting cream on [YZ's] bottom before bed as she told me she was sore and she asked for some on her belly button because that was sore too. I laughed and called her a wee monkey as I thought she was joking and trying to put off going to bed. I asked her why her belly button was sore and she said 'because daddy put his finger in it.' I was horrified and asked her if he touched her anywhere else and she said 'yes here and here' and pointed to her vagina and bottom. I asked [YZ] which fingers he used and she showed me her hand with her 3 middle fingers and her thumb up and said he pressed his thumb into her vagina.

I asked if she knew where her dad pees from and she said she did and then I asked if he had ever touched her with that and she said yes and touched her chest area and said "here" and then pointed to her vagina and bottom again and said 'and my vagina and bottom.' She then said 'he put it right inside me and he peed inside me.' I told her that was not nice and he shouldn't do that. I asked her if he cleaned her after and she said 'no it was disgusting.' I asked her if anything else happened and she told me 'Sometimes in the night he gets into bed with me' and I think she said something about her bum but I don't remember her exact words. I snuggled up to her in bed and gave her a cuddle until she fell asleep."

[8] Mr Allison, for the appellant, cross-examined ST over two days albeit not full days. He focussed particularly on exploring proposed inconsistencies between what ST said to the reporter in December 2023, what she had told the police in giving her statement seven months earlier on 13 May 2023, and in evidence. She rejected counsel's suggestion that she had prompted YZ to make false allegations because she did not like the appellant and wanted more access to her. There was no re-examination by the reporter.

[9] Other witnesses spoke to YZ making other statements. On 14 May 2023, DS Fiona Lawrie and a social worker jointly interviewed YZ. The sheriff viewed the video recording

during the evidence of DS Lawrie. YZ said her father put his finger in her belly button, vagina and bottom. He would do it in her bed and any room in the house he wanted to. He put his penis in and connects it to her vagina and “it goes into her body”. DS Lawrie acknowledged that at times YZ would answer a question with, “I can’t remember” but had the impression that she was bored and was trying to close down the conversation. The sheriff considered all of the criticisms made of this evidence, and DS Lawrie’s concession of certain departures from good practice, but accepted YZ’s evidence of what the appellant did to her; paras 26-28 of the stated case and findings in fact 28 and 29.

[10] Patricia Thomson, senior practitioner in the Children and Initial Family Response Team, spoke to YZ on 17 May 2023 when she said that her father had digitally penetrated her “bum, vagina and belly button”. YZ said this as Ms Thomson performed the “three house exercise” and made the comment regarding her “house of worries”. Her experience was that YZ would say, “I can’t remember” when she wished to shut down a conversation.

[11] Ms Thomson also spoke to a conversation she had recorded in social work records. WX told Ms Thomson that YZ had asked her to make a video recording. WX said she did so and recorded YZ retracting her allegations. WX also told Ms Thomson she asked Sam McLelland to record her doing so. The sheriff preferred the evidence of Ms Thomson about this to evidence later given by WX (para [26] below).

[12] QR explained that ST had told her about what YZ had said and provided some detail of how matters came to be reported to the police. YZ mostly stayed with QR from late May 2023 until she was returned to her mother’s care. YZ repeated her account to QR who also spoke to incidents when WX was having contact on 1 and 2 June 2023. QR saw WX whispering to YZ one day and on the next was aware that mother and child were in another room, being unusually quiet. When QR entered YZ was looking very puzzled and said, “so

gran made a mistake,” and WX replied, “we all make mistakes sometimes”. QR reported this incident to the police the next day. QR described YZ as being happy and healthy when living with her. The sheriff accepted QR’s evidence and found no indication of her bearing animosity towards the appellant and WX.

[13] OP is a primary school assistant at YZ’s school who had worked with her from primary 1 and would support her throughout the school day. During primary 2, YZ’s behaviour changed, she became difficult and could lash out. In the course of the school year toileting incidents increased to the extent that by February/March 2023 YZ would wet or soil herself up to 3 or 4 times each day and would not immediately disclose that. OP became concerned that YZ may have an infection when she reported that her flower was sore and her pee was sore.

[14] On 17 May, YZ said, “daddy is bad, the doctor had to look at my vagina” and, “daddy’s put his finger in there”. YZ continued to make similar comments including, “my daddy put his penis down there” until the end of June 2023. YZ was more settled when living with ST and QR than when she returned to her mother.

[15] In August 2023, YZ started to speak about lying and took to calling people liars. This was new behaviour. YZ said to OP, “I told lies but I’ve learned my lesson and now I have had my hands burned”. OP was surprised at her use of such of adult-sounding language. She did not think they were YZ’s own words. The sheriff accepted OP’s evidence.

[16] Lorna Gilliland is a family care worker who had three “focus sessions” with YZ. She learned that YZ used both flower and vagina to describe her private parts. Her use of the word vagina was not surprising as YZ had an anatomically correct doll and was “quite anatomically correct” for a child of her age. On 25 August 2023, during her own session with her, YZ said: “Daddy was hurting my private parts, my bum and my flower,” said

something about flower and penis adding, "he peed into my flower but it's a secret. It's a secret, I'm keeping it a secret." YZ then moved closer and whispered, "Don't tell any social workers what Daddy did. I told Mummy and told her to keep it a secret." The sheriff accepted this evidence.

[17] Rebecca Wilson was YZ's social worker from 8 June 2023. There were already concerns that WX was influencing YZ while complaining that it was ST who had influenced her. She found that if YZ did not want to talk about something she would try to shut the conversation down by saying that she could not remember. YZ's attention span could vary. Ms Wilson was not aware of any further disclosures after YZ's comments to Ms Gilliland.

[18] Dr Amgaad Faltaous is a consultant paediatrician and forensic medical examiner for children. She examined YZ on 16 May 2023. The sheriff does not explain what her findings were but it is apparent they were to the effect that there was no clear sign of injury and that a superficial notch of the hymen at the 5 o'clock position was likely to represent a normal anatomical variant rather than an indication of trauma. It could have resulted from normal variation from a non-abused child and neither supported nor refuted the occurrence of sexual abuse. She explained that it is very common to find no physical signs of penetrative child abuse in an abused child.

[19] In due course, the appellant adduced Professor Busuttil (retired pathologist and FME) who proposed that it was more likely than not that there would be clear signs if the child had suffered penetrative abuse on a hypothesis of three fingers and a thumb penetrating as one. The sheriff did not take from YZ's gestures in the JII video recording that she was saying that this was how digital penetration had occurred.

[20] Professor Busuttill conceded that an increase in soiling in March 2023 and marked deterioration of the child's behaviour was evidence in favour of the occurrence of the sexual crimes alleged.

[21] The appellant adduced Olivia Thornton, an advocacy worker for Barnado's. She met with YZ five times, the first occasion being 6 June 2023 when the child said to her:

"I am worried because my granny said my dad is a bad man because he put his fingers into my vagina, bum and bellybutton but that isn't right. It didn't happen. Granny said it because she is old and clumsy."

On 14 June 2023, YZ said: "Gran puts words into my mouth like daddy done this, daddy done that. That's not right, is it?" She found this to be odd language for a child.

[22] The appellant also led Olivia Gomes-Bell, a consultant forensic psychologist. She was instructed to review the JII and gave evidence, apparently without objection from anyone. Her understanding from all of the material available was that the child had no intellectual impairment but there was a possibility of autism and she did have some speech and language issues. One report said the child had no developmental delay and did not meet the criteria for ASD. There should have been adjustments to the JII process. She had never met or assessed the child.

[23] Ms Gomes-Bell was critical of the JII in a number of respects, noting particularly that the initial disclosure followed a "risky" leading prompt. That was also a characteristic of ST's account of the conversation when YZ first disclosed. There was a risk that suggestion had compromised her disclosures. The witness said, apparently without objection, that increased toileting disclosures can be indicative of abuse and that the prompts used in the video-recording cast doubt on the reliability of YZ's recorded retraction. The sheriff accepted Ms Gomes-Bell's evidence generally and took it into account in evaluating the weight to give YZ's disclosures.

[24] The mother of another girl, who was a friend of YZ, had given a statement. The other child had been abused by her father. The point of the appellant adducing this statement was to suggest that YZ may have been influenced by the other girl. WX had said that her daughter would “parrot” the other girl. All that the statement disclosed was that the other girl’s mother had heard her daughter say in the presence of YZ words to the effect that her dad was a bad man who hurt her when she was younger. The sheriff did not find this to be an explanation for the evidence suggesting that UV had sexually abused his daughter.

[25] The child’s safeguarder adduced evidence from WX. She has a brain injury and parties agreed that counsel should take her evidence in chief with leading questions. WX said that only she, and not the appellant, would treat YZ’s bottom when it was sore as she had nursing experience. She did not think YZ would use the term vagina about herself and contested Patricia Thomson’s evidence that she had heard YZ use it. It was YZ who volunteered that she thought gran (ST) had made a mistake in thinking that her father had done bad things. When YZ said this, WX repeated back the phrase to YZ who repeated it. This was what QR had overheard.

[26] On 5 June 2023, WX had contact with YZ at ST’s home. YZ was cycling in the street when she said that she wanted to tell someone that daddy was not a bad man but was not sure if she was brave enough to say so. WX suggested she could video YZ saying this to show the social worker and school. The child thought she would be brave enough to say it on film. WX made the recording as soon as she got space from ST to do so on an occasion when Sam McLelland had accompanied her to contact. It was only later that she learned that Mr McLelland had recorded her recording her child. WX denied telling Ms Thomson that she had asked him to do so. Since this was the only time that WX took anyone else to

contact, the sheriff did not accept that the recording was taken opportunistically as she had maintained. The sheriff saw and heard the recordings. YZ said ST had made a mistake. The sheriff's impression was that WX was pressurising YZ and prompting her to say that gran had made a mistake. She did not consider the retraction reliable.

[27] The sheriff also rejected WX's evidence that the reason for YZ using the expression "and now I've had my hands burned," after saying to OP that she had told her lies but learned her lesson, was that the child had burned her hands on bath taps.

The sheriff's reasoning

[28] The sheriff reports that she considered the evidence very carefully given the gravity of the allegations. Despite apparent departures from interview guidelines, she accepted YZ's JII evidence as credible and reliable when she said that her father put his fingers in her vagina and bottom and connected his penis to her vagina and that it went into her body. She accepted ST's evidence that YZ said on 12 May 2023 that UV put his fingers in her belly button, vagina and bottom and touched her chest, vagina and bottom with his penis, and put his penis inside her and peed inside her. She found the reported retractions unreliable. In reaching these conclusions, she found support in evidence of the child having redness and soreness in her bottom, complaining that urinating was sore and that she had had at least one urinary tract infection. Patterns of deteriorating behaviour and changes in toileting were also supportive of the reporter's case. She also found in fact (21-22) that it was on 6 June 2023 when WX withdrew voluntary consent, leading to a CPO with a condition of no contact with UV, that Ms Thornton heard the child's apparent retraction.

[29] The sheriff made detailed findings in fact and found that the supporting facts 1-4 of the grounds were established. It was a matter of law that supporting facts 3 and 4 were sexual offences. Accordingly, the grounds of referral were established.

Statements by counsel who represented UV and WX at proof

Mr Allison

[30] Mr Allison viewed ST as an important witness and commenced cross-examination at about 12.30pm on the first day of the proof. It emerged that ST had impaired hearing. Counsel took up a position where he had a direct view of both witness and sheriff. He could see on the bench the sheriff's laptop, mobile phone, pen and paper. He sought to draw out the detail of ST's account and, on resuming at 2.30pm, began to explore inconsistencies to challenge the credibility and reliability of her evidence.

[31] Whilst he does not expect a sheriff to note everything and knows that a judge may wait for a theme to develop before noting, it appeared to him that the sheriff made no note for several questions/answers at this stage. He thought the sheriff was looking at her laptop or to the side rather than at him or the witness. He recalled that he had earlier confirmed with ST who was emphatic in stating that YZ spoke the word vagina when asked where else her father had touched her. When he asked her about her police statement (to the effect that YZ pointed at her body) and suggested it was inconsistent, ST stated, "words might be important to you, they don't matter to me".

[32] Mr Allison asked about YZ gesturing with her fingers and ST denying in her parole evidence that she asked the child which fingers were used, saying the idea that they had discussed that was disgusting. He then put to her a passage in ST's police statement to

different effect where she had said that in response to the question if daddy touched her anywhere else the child:

“...replied saying ‘on my vagina my bottom and my belly button.’ I asked her which fingers and [YZ] showed me her hand and said “these three and this one, showing me her middle fingers and thumb.”

[33] ST denied having said this and counsel then asked about something similar recorded in her statement to the reporter. “I asked [YZ] which fingers he used and she showed me her hand with her 3 middle fingers and her thumb up and she said he pressed his thumb into her vagina.” When asked if she had said this to the reporter and signed her statement, she said she had told the reporter she did not remember that and the reporter said to leave it in the statement anyway. The witness insisted she had not said this to the reporter and would not have said it to a child. In due course the statement was produced and a joint minute introduced establishing what had occurred between reporter and witness.

[34] During the first 25 minutes or so of Mr Allison’s afternoon cross-examination, the sheriff intervened to clarify when he was asking about prior inconsistent statements.

[35] The first subject related to whether the witness was ill-disposed towards the appellant. In evidence she said she had no concerns about him and was happy when the couple got together, whilst she had told the reporter she had some reservations about him. The sheriff challenged counsel for suggesting ST used the word “unhappy” to describe how she felt about the appellant when she had not used that word. He felt the sheriff had not followed the course of questioning and was referring back to an earlier answer.

[36] The second issue involved revisiting what had or had not been said about fingers. The sheriff interrupted to clarify that the witness had said that the child had pointed to her private parts, saying “you were getting to where, not with what”. Mr Allison thought the sheriff was not keeping up as the questioning had moved on to who introduced reference to

fingers. He read back from his notes several questions and answers. He felt that the sheriff must have missed those questions and answers.

[37] Later, about midway through the afternoon, the sheriff was using her mobile phone. Mr Allison does not specify what he was asking about then. He thought this continued for 2 or 3 further questions and answers without her resuming typing. A few minutes later he saw her write a note and pass it to her court officer. Perhaps 10-15 minutes later he again saw her focus on her phone for a number of questions and answers when she did not look up or note the evidence. The sheriff did not pause proceedings. His impression was that the sheriff's focus was on what she was doing on her phone and he asked for an adjournment. Ms Bradbury told him she did not think the sheriff was noting the evidence and appeared to be distracted, and had appeared from her interventions to be behind in following the line of questioning. The reporter then said he wished to consider his position in light of the evidence given that afternoon and the court adjourned at 3.45pm.

[38] The following morning, Mr Allison and Ms Bradbury spoke to the sheriff in chambers. He told her there was a concern that she was not noting all of the evidence and at times failing to note significant passages. The sheriff replied that it was offensive to suggest she was not giving the evidence her full attention. Ms Bradbury told the sheriff that she had twice seemed to be several questions behind when she intervened. Mr Allison raised her use of her mobile phone. The sheriff said she had used it for other urgent judicial business. Towards the end of the meeting, the sheriff said she did not require to note all of the evidence, she would note what she considered important. Mr Allison indicated that when the case resumed he would invite the sheriff to authorise digital recording of the remaining evidence. Thereafter the evidence was transcribed. He did not ask the sheriff to recuse herself.

[39] On the second day of cross-examination of ST, the sheriff appeared to be noting more fully. Her phone was not on the bench. Mr Allison says he did not repeat the previous day's cross-examination with only limited reference back to what the witness had said earlier.

[40] On reading the sheriff's judgment, he became concerned that she placed heavy reliance on ST's prior statements and had not engaged in inconsistencies on which both he and Ms Bradbury had made detailed submissions.

[41] We note that a ground of appeal asserting that inconsistencies materially undermined the evidence of ST, prompting question 4 in the stated case, was not insisted on.

Ms Bradbury

[42] Ms Bradbury recalled the sheriff interacting with a court officer during ST's evidence after lunch. She did not know exactly when but did not recall it occurring during a gap or accompanied by the sheriff requesting a pause in proceedings. She regarded ST as the reporter's key witness and was surprised that the sheriff did not appear to be noting Mr Allison's cross-examination. At what she says was a key point in questioning apt to undermine ST's evidence, but does not specify what it was, the sheriff did not appear to be noting perhaps 4 or 5 questions/answers. She appeared to be looking down and to have her arms folded. At times she appeared to be looking around the court. The sheriff twice interjected to query the factual accuracy of Mr Allison's propositions, suggesting to Ms Bradbury that the sheriff had missed part of the dialogue. The first time the sheriff appeared confused about the question, Ms Bradbury read from her notes to the sheriff. The second shrieval intervention suggested the sheriff had missed 3 or 4 questions/answers.

[43] On 17 January, during the discussion in chambers, Ms Bradbury gave the sheriff, who had queried Mr Allison's propositions, two examples of apparent inattention.

Mr Allison told the sheriff he had seen her using her phone. The sheriff was angry and said she was certainly not playing with her phone but reading and responding to messages relating to her court diary and hearings being fixed.

The sheriff's response

[44] At pages 33-35 of her stated case, the sheriff explains the IT difficulties on 16 January 2024. She also responds to a proposed adjustment to her stated case. It comprises a long narrative based on the statements of Mr Allison and Ms Bradbury. The sheriff refused the adjustment but appended it to her report. She comments that she does not entirely accept its tone. She reports:

"Counsel for the Appellant began cross-examining [ST] before lunch and continued after the lunchbreak. Unusually, due to the earlier IT issues, my mobile phone was on the bench. During the course of the afternoon, I saw a message notification flash up – it was an urgent message about Court programming and my availability as a floating Sheriff. I ignored the message at that time. During a hiatus in the evidence, I asked my bar officer to take a note to the Sheriff Clerk Depute to check my availability on a particular day. Upon their return, at another hiatus, I sent a brief response to the message, no more than a couple of words. At no time did I fail to hear the evidence or give it my full attention. Ordinarily, such a message would arrive and be responded to at a suitable time on Jabber and parties would not be aware of it.

During cross-examination of the witness [ST] Counsel for the Appellant asked a number of similar questions. It was apparent to me that the witness was becoming confused. I asked counsel to clarify – he challenged me stating that the matter was perfectly clear. Mindful of the needs of an elderly, vulnerable witness who had been giving evidence for some time and in an effort to deflect any perception they may have that they were being criticised, I indicated that it was not clear to me and asked for him to clarify and proceed. This appears to be where the misapprehension of my note taking arises from."

[45] The sheriff then narrates what happened when the court adjourned on 16 January and describes her interaction with counsel in chambers the following morning as “quite a tense discussion”. She told counsel she found offensive their suggestion that she had not been paying attention or noting evidence. She concludes:

“I do not accept that I was not paying attention and failing to record significant and material parts of the evidence.”

Submissions

Appellant

[46] The sheriff’s conduct constituted a procedural irregularity and so a ground of appeal under section 163(9)(b) of the 2011 Act. A fact-finding judge must devote all of her attention to all of the evidence of all witnesses and be seen to do so if a hearing is to be fair. The sheriff’s conduct in attending to and passing messages about court administration whilst an important witness was under cross-examination vitiated the fairness of the hearing.

[47] The court should adopt the approach of the Court of Appeal in *Stansbury v Datapulse plc and another* [2004] ICR 523 and evaluate the situation by analogy with the test for apparent bias. If a judge does not appear, to a fair-minded and informed observer, to be alert to what is being said it may cause the hearing to be unfair. Accordingly the court should, with reference to the approach to apparent bias proposed in *Porter v Magill* [2002] 2 AC 357 at para 103, consider whether the fair-minded and informed observer would have a reasonable apprehension that the fairness of the proceedings was compromised. Applying the approach in another apparent bias case, *Helow v Secretary of State for the Home Department* 2009 SC (HL) 1 at paras 2-3, a fair-minded and informed observer is not unduly suspicious and does not rush to judgment but will consider things in context and not shrink from concluding that proceedings have been unfair if that conclusion is justified.

[48] The rule of law necessarily requires public confidence in the administration of justice and public expectations are higher than they used to be; *Lawal v Northern Spirit Ltd* [2003] ICR 856 at para.22. It may be necessary to treat reasons provided after intimation of a challenge with caution; *Chief Constable of Lothian and Borders v Lothian and Borders Police Board* 2005 SLT 315 at para 70.

[49] Whilst ST was in the witness box for the purpose of cross-examination, it is undisputed that without pausing proceedings the sheriff read at least one text message on her mobile phone and sent and received messages about court programming. The sheriff should not have had a mobile phone on the bench. The proper course was to wait until the end of the court day before attending to administrative matters. If there was a truly pressing need to respond to an important message, the sheriff should have paused proceedings to do so.

[50] Although the sheriff does not accept a further proposed adjustment, it is supported by statements of counsel to which the sheriff referred. It is open to the court to proceed on that extraneous material.

[51] Counsel's actions in response to the sheriff's conduct permit an objective assessment of the significance of what occurred. They sought an adjournment and sought advice from the Dean of the Faculty of Advocates. Having done so they asked to see the sheriff in chambers to express their concern that she had not paid attention during part of cross-examination. They invited her, and she agreed, to record digitally the remainder of cross-examination. The context of the evidence is significant. The witness was giving important evidence in respect of very grave allegations. The problem emerged during a key passage of unrecorded cross-examination and the sheriff's factual findings are not susceptible to review. There is an obvious potential for error if a judge is not fully concentrating on the

evidence. Accordingly, the fair-minded and informed observer would have a reasonable apprehension that the events of 16 January 2024 rendered the hearing unfair. The appellant did not receive a fair hearing and it would undermine public confidence to sustain the sheriff's decision to find the grounds of referral established. The court should answer the question in the affirmative, allow the appeal and refer the case back to be reheard by a different sheriff.

First respondent (Reporter)

[52] Neither of the reporters who were present saw the sheriff use her phone and neither considered that she was not paying attention. Neither of the reporters considered there to be anything unusual about the sheriff's interventions. One of the reporters had been confused by a part of Mr Allison's questioning that prompted the sheriff to intervene. During questioning about ST's feelings towards the appellant, the reporter considered that the sheriff was correct in her intervention and that counsel was mistaken.

[53] The sheriff had agreed that proceedings would be recorded. If counsel felt the sheriff missed something material, the appellant's (and the second respondent's) submissions offered an opportunity to identify the relevant material to her. The appellant accepts there was some repetition of cross-examination. The appellant does not specify what the sheriff may have missed. On neither the sheriff's report of what occurred, nor as suggested in counsel's statements, were proceedings unfair.

[54] The appellant could only succeed on a procedural irregularity. It is not enough to say that the sheriff used her phone or appeared inattentive at some point during the evidence. He must demonstrate that what occurred damaged the justice of the proceedings viewed as a whole; *C v Miller* 2003 SLT 1379 at para 71. The issue must be whether the

hearing was fair and it was. In making this assessment, the court ought not to focus only on one particular defect but should have regard to every aspect of the proceedings: *JS v Children's Reporter* 2017 SC 31 at para 34.

[55] In evaluating the fairness of the hearing and the issues raised, the court should have regard to the detailed information provided by the sheriff in her stated case demonstrating her understanding of the evidence and engagement in her task. She had offered a helpful narrative of the material evidence giving reasons why she did or did not accept it at pages 7-30. She made 29 detailed findings in fact. At pages 30-33 she set out her reasoning and conclusions on the crucial issues before her, demonstrating a clear and correct understanding of her task and applying the law correctly. She was entitled to reach the conclusions she did and, ultimately, the appellant did not maintain that she had erred in doing so. Her approach was consistent with the proper approach to evaluating evidence as explained by Sheriff Principal Stephen at para 80 of an unreported appeal decision, *JB v Authority Reporter* 26 March 2014.

[56] It is not necessary to invoke the fair minded and informed observer, the question is a matter for the court's objective judicial assessment: *CD v ND* [2025] CSIH 12. In *CD*, the allegation was that the judge had descended into the arena, tainting his assessment of the evidence and rendering the proceedings unfair. His numerous interventions were said to have been favourable to one party and unfavourable to the other. On an objective judicial assessment the court concluded that the judge's conduct, whilst at times inappropriate, did not render the hearing unfair.

[57] It is an unavoidable feature of stated case procedure, and other appeal mechanisms, that a judge will know of a challenge before responding. In this case there was no material difference in the reasons for the sheriff's decision to find the grounds established between a

written decision intimated to parties after the proof before a stated case was sought and the final version of the stated case after adjustment. Lord Reed's observations on the particular circumstances of *Chief Constable of Lothian and Borders* have little or no traction in this case.

Second respondent

[58] The decision in this case was highly significant with profound implications for the child and her parents. Since evidence is not recorded in a referral hearing, it is all the more essential that a sheriff attends closely to the evidence. Evidence is not just the words of a witness. It must be considered alongside demeanour, its effect on parties and all of the intangible impressions a judge can form when a witness testifies: *In Re B (A Child) (Care Proceedings: the Threshold Criteria* [2013] 1 WLR 1911 Lord Wilson at 41 and 42. A sheriff is entrusted to take account of all of this in a referral hearing.

[59] The implication of the decision in *Stansbury* is that it is axiomatic that a sheriff engaged in fact-finding must hear all of the evidence. If she stops listening, even for a short time, then justice cannot be seen to be done. The responses of counsel were eloquent of how far the sheriff's attentiveness had fallen short during the evidence of the most important witness. It occurred while the evidence was ongoing. Whilst the sheriff reports that she used her phone to receive a message and communicated through her bar officer during a hiatus, she does not explain what it was. Whilst there was no obligation on her to note every word, she gave the impression she was not following the evidence and not taking notes.

[60] The harm done on the first day of the proof could not be cured thereafter by further cross-examination when the evidence had been so disastrous. ST had disputed that she made a statement to the reporter. This was a vital part of the challenge to the quality of her crucial testimony. As in *Stansbury*, the court can readily reach a conclusion that she was

inattentive despite competing accounts of events. The flaw in the fairness of the hearing was such that it cannot be cured no matter how strong the evidence may have been.

Decision

[61] It is clear that the sheriff had her mobile phone on the bench and, at some point, saw a message from court administration and at another point responded to it. She interacted with the court officer to do so. This occurred whilst a witness was in the witness box. The sheriff had her phone on the bench because IT difficulties were depriving her of normal means of communicating with court staff as she might need to do. Unsurprisingly, her obvious focus on her mobile phone, and her responses thereafter, caught the attention of Mr Allison.

[62] So long as she could do so without losing focus on the evidence, we do not consider there would have been any difficulty if the sheriff took an opportunity, between questions or during another gap or gaps, to read a message on her laptop and take necessary steps to respond to it either by email or via a court officer. She could not communicate on her laptop and, instead, made some use of her mobile phone.

[63] The sheriff engaging with a mobile phone was discourteous to the witness and to parties. The sheriff could not have been criticised if she had paused the court or adjourned for a minute or two in order to take these steps. Whilst in light of what has developed that may have been the better course, had she adopted it she may have caused the witness consternation. The sheriff was presiding over an anxious proof, after a delayed start, and hearing from a woman of 84 giving evidence about a very distressing situation. We can understand why it may have seemed desirable not to disrupt proceedings. Nevertheless, the sheriff's use of the phone aroused suspicion, on the part of some representatives, that she

was not paying due attention to the evidence. It prompted counsel to seek advice from the Dean of the Faculty of Advocates and then to speak with the sheriff in chambers. Counsel did not suggest she recuse herself and discharge the proof but did suggest that she should, as she did, ensure the remainder of the evidence was recorded.

[64] Section 163(9)(b) of the 2011 Act provides that an appeal may be made in respect of any procedural irregularity. It does not follow that any and every procedural irregularity will found a successful appeal. It must be damaging to the justice of the proceedings: *C v Miller* at para 71.

[65] We agree with what was said by Lord Brodie in delivering the opinion of the court in *JS*, at para 34. He cited *Schatschaschwili v Germany* (2016) 63 EHRR 14 at para 101, a criminal case, noting its applicability also to civil cases:

“[34] In determining whether a party has had a fair hearing:

‘[T]he Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims ... and, where necessary the rights of witnesses’ (*Schatschaschwili*, para 101).

That means not only that one particular defect in procedure will not necessarily render the trial unfair, but also that it is necessary to have regard to every aspect of the proceedings before concluding that the trial was in fact fair...”

[66] As noted in *CD* at para 38, careful scrutiny is required. In that case, the court considered that one of the judge’s interruptions of cross-examination in a proof was wholly inappropriate. At another stage the judge had improperly taken on the role of cross-examining a witness. He also stepped in again, making inappropriate remarks in a manner capable of giving the impression he was doing so in order to assist a witness during cross-examination. He made a further unnecessary remark with potential to give the impression he had already formed a view of credibility. Nevertheless, in the context of a

9-day proof, the boundary between legitimate questioning and unfair conduct was not quite crossed. His conduct was not such as to vitiate the proceedings through unfairness.

[67] The particular facts of *Stansbury* merit examination. The appellant lost an employment tribunal against his employer. He then appealed on the ground that a member of the tribunal had drunk alcohol and fallen asleep during the hearing. All points relating to the merits of the decision were rejected at a preliminary hearing but his ground of appeal that the hearing was unfair, because of the alleged conduct of the tribunal member, was allowed to proceed. A three-member Employment Appeal Tribunal dismissed his appeal. In sustaining his appeal, the Court of Appeal noted that the appellant maintained that one of the members fell asleep during a hearing on 25 May 2001 and then, during a break in the hearing on 20 July 2001, the same member expressed his disapproval of the chairman, accompanied by a strong smell of alcohol on his breath. There were conflicting reports from those present at hearings. Some saw and heard nothing amiss, others saw indications that the member may have taken alcohol and was affected by it. Some had seen him close his eyes in the hearing, as the member conceded with the explanation he did so to concentrate and remained awake, and others said he had been asleep. The EAT had proceeded on the assumption that he had taken alcohol, had closed his eyes and may have fallen asleep.

[68] The Court of Appeal considered that the EAT could have made a judgement on the facts of the case but it was also open to them to proceed on the basis that the allegations were correct and determine what their effect would be. They had accepted the member had consumed alcohol and that it may be that when he closed his eyes he fell asleep. The court considered that a hearing may be unfair by reason of one tribunal member not being able, through the consumption of alcohol or falling asleep, to give the hearing his full attention. On the material before it, the court considered that, on the balance of probabilities, the

member was affected by alcohol and had fallen asleep. This did not give the appearance of a fair hearing to which every party is entitled and it would damage public confidence in the administration of justice to suggest it did not matter. It was necessary to state that the member's conduct was wholly inappropriate. The appeal was allowed with remittal to a re-hearing before a different tribunal.

[69] That case turns on its particular facts, which were markedly different to those before us. Giving the judgment of the court Peter Gibson LJ offered a general assessment of the law, at para 28:

“...It seems to me that an analogy with cases of bias is appropriate. In cases of bias the appearance of bias, as observed through the eyes and ears of a fair-minded and informed observer, will vitiate a hearing: see, for example, *Porter v Magill* [2002] AC 357, 494 per Lord Hope of Craighead. A member of a tribunal who does not appear to be alert to what is being said in the course of the hearing *may* cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights. It is reinforced by article 6(1) of the Convention.”
[Emphasis added]

[70] We are not entirely convinced that alleged unfairness in proceedings should always be considered as if it was apparent bias although considerations may overlap. When there is actual, or apparent, bias, the court itself is flawed and it would not matter if the process it followed was fair. An allegation of procedural irregularity in the context of fairness will require consideration of all of the circumstances. Nevertheless, Scots law requires that justice must both be done and seen to be done.

[71] Counsel for the reporter referred us to an illustration in a criminal case, *Frew v Brown* 1996 SLT 282. During cross-examination of a prosecution witness in a summary trial for dangerous driving, the presiding sheriff fell asleep on the bench and was snoring loudly as everyone in court observed. A court officer made several loud noises to waken him. When

he did wake up, the sheriff asked the prosecutor to re-examine, unaware that cross-examination had not concluded. The questions he had missed were repeated to the witness. The appellant was convicted. The sheriff did not dispute that he had fallen asleep and the court proceeded on the basis that he had been asleep for a substantial period. Accordingly, justice was not seen to be done and the conviction was suspended.

[72] The court referred to only one authority, *Bradford v McLeod* 1986 SLT 244, in support of it being a requirement of natural justice that justice is not just done but also seen to be done. In *Bradford*, the problem was apparent bias arising in a 1984 miners' strike related prosecution. The appellant's solicitor had attended a social function and heard the sheriff say that he would not grant legal aid to miners. When the appellant appeared before him in a summary prosecution for breach of the peace occurring on a picket line, the appellant's solicitor asked the sheriff to recuse himself. He refused, indicating that he would comply with his judicial oath. The miner's conviction was quashed on appeal not because the trial was unfair but because justice was not seen to be done.

[73] The reporter referred us to an unreported criminal appeal opinion delivered by the Lord Justice General (Hope), *Morrison v PF Paisley* 21 July 1994. The sheriff had looked at papers during the appellant's evidence; a social work report and a letter pleading guilty. There was a dispute between the sheriff and the appellant's solicitor about what he had said, the solicitor maintaining that the sheriff said he had read the letter but could not make out the handwriting. The sheriff reported that he flicked through the minutes during a lull in the evidence, then realised what certain attached papers were, put them down and read no further. The appellant founded on access to documents the sheriff should not have seen at this stage, not inattention to evidence. The court considered it unfortunate the sheriff had laid himself open to accusations that he was not paying attention and may have prejudged

the case. That said, on the sheriff's account his transitory action did not give rise to any reasonable suspicion that he had prejudged the case or was not paying proper attention to the evidence. Given the sheriff's explanation, and lack of support for the appellant's assertions from the prosecutor, it was not a case where justice was not seen to be done.

[74] We consider there is a vital difference between a judge falling asleep during evidence and a judge who remains awake but briefly performs other functions whilst listening to the evidence. The former cannot absorb the evidence, the latter can.

[75] In practice it may often make little difference whether this court examines the matter on the basis that justice must be seen to be done and evaluate it on the basis of a well-informed reasonable observer having regard to all of the circumstances, or whether we make our own objective judicial assessment of the whole circumstances. On either analysis, we would need to consider modern judicial practices and the implications of increasing use of technology and take a realistic view of what actually happens during court proceedings. In the context of this case, if proceeding only on the apparent bias approach, we would need to impute to the reasonable observer a great deal of knowledge of evidence, procedure and of how judges go about their various tasks. We would also need to impute judicial experience of the pertinence and impact, or otherwise, of inconsistencies between evidence and prior statements.

[76] We have seen many witnesses finding questioning on prior statements a deeply confusing exercise. The sheriff's attempt to intervene in a manner that did not embarrass the witness, as described in the second paragraph we quoted at para [44] above, was laudable.

[77] Many judges take a laptop on the bench in all kinds of proceedings. Some make notes of proceedings and evidence in a Word document; access case reports and legislation online; access electronic documents such as productions (including statements), process and

any written submissions. A judge may also receive and send communications from or to court staff, not least the clerk of court, discreetly monitoring and learning of any relevant issues relating to the progress of the case, the behaviour of persons present in the court room and the wellbeing and alertness of witnesses, parties and their representatives. All the while, a judge must pay attention to the evidence, absorb and understand it. It is not necessary to note every word, but a judge should note evidence that seems to be significant and should endeavour to either note or absorb all of the evidence because that which appears insignificant may later assume greater importance.

[78] Each sheriffdom has a court liaison officer with delegated responsibility from the sheriff principal, bound by statute to ensure the efficient administration of justice in the sheriffdom, to ensure that there is a sheriff available to preside in each court scheduled to hear business. Experience shows that the situation in every court constantly changes. The CLO has to keep on top of developments in each court and make plans and contingencies in light of what may develop. Administrative staff often need to know of the progress of a case, when it may finish and whether the presiding sheriff will, or will not, be available to perform other duties. Such considerations are important for the administration of justice. They have a potential impact on many other people including litigants, witnesses, solicitors, counsel, court staff and other sheriffs, not all of whom will work full-time. There is nothing wrong in a sheriff communicating about such matters, whether on a laptop or via a court officer, so long as her doing so does not interfere with her primary responsibility to attend to the case before her. That may be done in an adjournment but it can also properly be done between witnesses, whilst there is a pause while a lawyer is looking for a production or case-report, or even between the finish of an answer and the start of the next question if the gap is long enough.

[79] With or without a computer, it is part of a judge's function to monitor what is going on in her court. Judges are human beings with human imperfections but they also have human capabilities, enhanced by education, training and practice in exercising them in what can often be prolonged court hearings. Judges can absorb and evaluate the evidence whilst looking around the court although doing so may prevent them from looking directly at a witness, as may the process of writing or typing and retrieving a document relevant to the questioning, or checking a summons or indictment in order to consider the relevance and admissibility of questioning.

[80] In this case, the sheriff repeatedly had to wait for her court officer to provide paper copy productions as required. She also reports that her attention was drawn to the restless behaviour of both the second respondent and the actions of the appellant who was repeatedly getting up and down and passing notes to his solicitor. In response to the suggestion that she had her arms folded at times during cross-examination, she accepts that she may have done. She explains that she has a medical condition affecting her circulation that can cause her, intermittently, to appear to fold her arms when she uses body heat to try to warm her fingers.

[81] The sheriff reports that looking at her telephone and communicating messages occurred during a hiatus in the evidence. We find no mystery in the meaning of hiatus. We take it to mean a gap or pause. We note that one of a number of meanings in the Oxford English Dictionary is 2.a: "A gap or interruption of continuity in a chronological or other series".

[82] The appellant maintains that there was no hiatus but that seems very improbable. There are nearly always gaps when a witness is questioned with reference to documents such as prior statements. The sheriff reports that there were pauses whilst she was supplied

with paper documents by her bar officer on a number of occasions during cross-examination on 16 January 2024. That cannot be disputed. Both the appellant's and his partner's counsel instructed at the proof gained the impression that the sheriff failed to absorb evidence at certain times. They cannot say that this was in fact the case.

[83] On the assumption that the sheriff did not note some of cross-examination, where does that lead? Judges do not have to note everything. If questioning is about prior inconsistencies, the sheriff is likely to be able to see and, if so advised, to mark up the passages put where, as here, she had paper copy statements. It does not require noting of each passage and it would not be feasible to note every word unless questioning was slowed down. Even when there are inconsistencies, they are not necessarily destructive of the credibility or reliability of a witness's evidence. A fact finder is entitled to evaluate the way the questions are asked, the effect of the answers, the nature of any discrepancy and any explanations for it given by the witness. A sheriff can exercise a provisional judgement based on experience. It may or may not merit noting. It may be appropriate to allow the questioning to flow to see where it goes. It may be very much a matter of impression whether apparent discrepancies are of any material significance. During the evidence, the sheriff will not finally resolve her impression of the quality of a witness's evidence. She should at most form a provisional view. The time for resolution comes at the end of the proof when she has heard all of the evidence, submissions on it and has considered the effect when viewing all of the evidence together.

[84] Assuming that proof counsel are correct in stating what they report happened, and considering the nature of the exercise undertaken in cross-examination, we are not persuaded that the sheriff did fail to absorb any material evidence.

[85] We note that ST's evidence-in-chief largely comprised an adopted statement made in December 2023. The principal attack in cross-examination was based on a statement taken by a different person in different circumstances in May 2023 and proposed inconsistencies between her adopted statement and what ST said in the witness box during the lengthy period she attended court. To testify about such distressing events would be a difficult experience for any witness, all the more so for someone aged 84. Any judge would bear these circumstances in mind in evaluating the significance, or otherwise, of apparent inconsistencies.

[86] Counsel made detailed submissions to the sheriff based on his cross-examination. He also provided them in writing. We have a copy of his, and the reporter's, submissions to the sheriff. At para 20-23 of his written submissions, Mr Allison offered his detailed analysis of what he considered to be significant weaknesses in the statements and evidence of ST and implications of her words and actions. In particular, he identified what he suggests are seven material discrepancies at para 20 (1-6 and the final paragraph). These points were before the sheriff who considered them. They did not deflect her from rejecting the suggestion that ST, motivated by dislike for the appellant, induced YZ to make false statements and accepting both the evidence of ST and that of the child when she described what her father did at JII and by way of her statements to ST and others. The appellant does not maintain that the sheriff was not entitled to reach the conclusions she did on the evidence.

[87] The general tenor of the argument is that there were indications of inattentiveness during cross-examination on prior inconsistent statements that the appellant's counsel considered of the first importance. A questioner may often think that. Judges (and juries) do not always share that view. As an illustration, we note that some suggested

inconsistencies were put on the second day when there is no suggestion that there was any deficit in the sheriff's attention to the evidence. At page 9 of the transcript Mr Allison was asking ST about what he suggested was a discrepancy between para 16 of her statement to the reporter and her parole evidence. ST explained that she did not see any real difference between the child verbally reporting where the appellant touched her and a visual representation by pointing to her body parts. This was why she had been content to sign the statement. We consider it very unlikely that such questioning would undermine the witness's testimony. The sheriff found that it did not.

[88] Since the sheriff had a paper copy of the statements, differences between the two statements and between testimony and a prior statement would be readily apparent. There is no suggestion that she did not absorb ST's evidence in chief on 16 January or the remainder of cross-examination on 17 January 2024. In any event, as we have noted above, parties presented detailed written submissions before she reached her decision.

[89] We find support for the sheriff's insistence that she did follow the evidence at page 39 of the transcript for 17 January. The sheriff responded to Ms Bradbury by showing a clear understanding of the evidence given by ST about video recordings and, at page 43, pointed out what was put to the witness the day before about the existence of two videos.

[90] We note that at pages 7 to 13 of the stated case, the sheriff provides considerable detail of ST's evidence. She addresses various points raised in cross-examination, mainly suggested inconsistencies, and ST's responses. ST said she had been in an awful state when a police officer read her statement back to her. It is readily apparent that the sheriff grasped and evaluated the points made about inconsistencies before giving intelligible reasons for determining that they did not fatally undermine ST's evidence.

[91] Whilst the reporter may have regarded ST as a vital witness, and she was an important witness as the first person to whom the child divulged what had happened, there were several legitimate routes to the conclusion reached by the presiding sheriff. It is clear that the sheriff considered the effect of all of the evidence together. Parties, for legitimate forensic and tactical reasons, will often focus on particular pieces of evidence in isolation. A judge can consider the effect of impugned evidence when viewing all of the evidence together and will be wise to do so. Judges frequently find that disputed and challenged evidence is acceptable when viewed in the context of the totality of the evidence.

[92] In the unreported decision *JB*, the subject matter was sexual abuse of very young children that the reporter referred to a children's hearing in turn leading to a referral proof. The Sheriff Principal, on appeal, correctly explained how a court evaluates evidence, stating at para 80:

“...Individual pieces of evidence in cases of sexual abuse cannot be viewed in isolation. The individual piece of evidence has to be weighed and evaluated and assessed in the context of the other evidence making up the entire body of evidence...”

At para 83, the judgment continued:

“...The Sheriff fulfils his necessary and important function of evaluating that interview evidence by exercising caution - the caution urged on him by [a psychologist adduced as a witness to evaluate interviewing techniques]. He assesses the interview in the light of that evidence and the other evidence including the evidence of disclosure and behaviour and other evidence capable of shedding light on the credibility and reliability of that interview and child D's hearsay evidence...”

[93] Similar observations are made in *Al-Megrahi v HM Advocate* (No 3) 2021 SLT 73, an appeal against the verdict, and reasons, of a panel of three judges where, at para 69, a full bench of five judges stressed that it was not appropriate to isolate a witness's challenged evidence of identification from other elements in the evidence. The evidence must be looked at overall. The court also explained, at paras 60-63, some of the reasons why apparent

inconsistencies between statements and testimony may not have the significance parties attach to them.

[94] For all of these reasons, we are not persuaded that the sheriff's conduct during the proof leading to the grounds being established made it an unfair hearing. We do not consider that there was a failure of justice being seen to be done. We would reach the same conclusion by considering how a reasonable, and sufficiently informed, observer would view matters. We answer the question posed in the negative. The appeal is refused.

Post-script

[95] The sheriff reports that cross-examination of ST, then aged 84, extended over two days. It was robust and she became distressed at times. ST's evidence in chief substantially comprised adoption of her statement. The import of her evidence was what YZ communicated about the actions of the appellant. Several other witnesses also spoke to YZ's disclosures and there was a video recording on 14 May 2023 of her describing events. Cross-examination about inconsistencies between ST's statements of the kind pursued, were far from certain to be productive when an elderly woman gave her first statement to one person (a police officer) on 13 May 2023 and the other on 12 December 2023 to another person and testified over the course of two days in January 2024. It is surprising that responsible counsel judged it appropriate to question an elderly witness, rightly considered by the sheriff to be vulnerable, so robustly and for as long as he did. It is also surprising that the sheriff allowed it. A judge is in control of proceedings and is entitled and, where necessary, obliged to place a limit on the time allowed for questioning and the manner in which it is done: *Inch v Inch* (1856) 18D 997, LJC Hope at 998; *Begg v HM Advocate* 2015 SLT 602, LJC Carloway at para 40.