FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 33
XA41/24

Lord President
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the Appeal under Section 112(3) of the Courts Reform (Scotland) Act 2014

in the cause

SN (Father)

Pursuer and Respondent

against

JN (Mother)

Defender and Appellant

Pursuer and Respondent: Clark, Smeaton; Balfour & Manson LLP for Bannerman Burke Law
Defender and Appellant: Scott KC, Cartwright; SKO Family Law for Andrew Haddon & Crowe

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17 October 2024

Introduction

[1] This appeal raises questions about how the courts should approach allegations of rape and separately of domestic abuse in the context of family proceedings concerning children. It was remitted to this court by the Sheriff Appeal Court given the potential complexities involved.

Background

[2] The parties married in 2016 and have three children; LN who will attain the age of 10 in November this year, PN aged 4½ and ON aged 3. The mother has an older child C, who is now a young adult from an earlier relationship. The parties lived together as husband and wife until 3 October 2022 when the father moved out of the family home.

[3] Shortly after the parties separated the father was charged in connection with an allegation of assault. He was released on bail, subject to a special condition that he was not to approach or contact his wife. He breached that bail condition and was made subject to a non-harassment order made in November 2022, prohibiting him from contacting his wife by email, phone or text except in relation to the children. On 19 December 2022 the father pled guilty to a breach of that NHO by attempting to approach and contact the mother and a community payback order was imposed upon him. After trial in June 2023, he was convicted of a breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 for behaving in a threatening and abusive manner towards JN. The relevant behaviour included shouting, swearing, uttering offensive remarks and behaving aggressively. A further NHO was imposed on SN, which prohibited him from attempting to approach or contact his wife at all.

[4] The present action was raised by the father on 25 October 2022 in the sheriff court. In January 2023 the sheriff made *interim* orders for shared residence. In essence, the order provided that the children would spend alternative weeks with each parent, with more detailed arrangements for the youngest child ON. Minor modifications aside, those care arrangements have been in place since the making of that order.

[5] A diet of proof (evidential hearing) was fixed and due to take place on 14 August 2023. However, in answers to a minute of amendment by the father, the mother, introduced

averments alleging that she had been raped by him twice, in February and then in April, both 2022. This delayed the proof which ultimately commenced in November 2023 and concluded in January 2024. On 13 March 2024 the sheriff issued a judgment and determined that the care arrangements which had been in place since January 2023 would continue, with additional contact arrangements during school holidays.

[6] In the sheriff's view, the allegations of rape were not justiciable in the context of a residence and contact action. In effect, he considered that the allegations could not be the subject of a decision by him. The mother appealed to the Sheriff Appeal Court contending that (1) the sheriff had erred in law by rejecting the allegations as not justiciable and (2) he had erred by failing to analyse how the father's abuse of the mother affected the children and had failed to assess the impact of trauma on the mother's mental health and consequently her capacity to carry out her parental responsibilities given the continued and regular indirect contact with the father.

The sheriff's judgment

[7] The sheriff recorded that neither party had a fundamental concern about the ability of the other to care for the children. However, questions of credibility and reliability remained relevant. The mother had raised the issue of the parties' inability to co-operate. If established, that would have a bearing on the parties' ability to co-parent. While the father's evidence had been coloured by his anger towards the mother and lacked objectivity, he had been essentially honest. Some aspects of his evidence had been influenced by his sense of injustice, but he had done his best to tell the truth. It was notable that he had a very good relationship with his stepson C, who came to stay with him on a regular basis. That informed the court about his qualities as a parent. While the father had made a number of

allegations about his wife in his evidence, these were of limited assistance in deciding the narrow question before the court but in general his evidence was to be preferred to that of the mother. Her evidence was not satisfactory. She came across as someone unable to face up to the truth and who would rather lie than admit to something she found embarrassing. Examples included a lie the sheriff found she had made about a particular incident, when her son had encountered her entertaining a man in her home. Many of the mother's complaints about the father were undermined by messages that had been produced or things that she had said to him and others since the separation. For example, in an email at the end of October 2022, she had recorded that she and the father were working towards shared contact, which flew in the face of her evidence at proof. Her evidence was generally inconsistent with other adminicles of evidence.

[8] Against a backdrop of the mother accepting that the father should have residential contact, the parties' complaints about one another were of doubtful relevance. The mother implicitly accepted that the father was capable of providing adequate care and the father sought shared care. The most serious complaint however was the mother's allegation of rape against the father. This was not justiciable. As the mother had conceded that the father should have residential contact with the children, the purpose of the allegation was unclear. It had already been the subject of a police investigation and the indication was that the father would not be charged. The matter was complicated by these being civil proceedings in terms of which the court would not be bound by the evidential restrictions of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. In civil proceedings an alleged perpetrator could not avoid questioning on the matter and any answer given under oath would be admissible in subsequent criminal proceedings. The father had been cross-examined at proof on the allegations but had been given a warning against incrimination.

He had been entitled to take the approach he did, which was to give a no comment reply. The result was that the court did not know his position on the allegations. It would be unjust in those circumstances to make findings in fact about them. While many family cases involved allegations that amounted to criminal activity, and these were routinely decided as matters of fact, these were commonly made where it was the pursuer who was making the allegations. They did not normally involve the legal complexities of a charge of rape. Had the father made certain admissions, the police might have revisited the matter. Even if the allegations were true, the mother did not regard them as a ground for refusing contact.

[9] The father's convictions for abusive behaviour and breach of the NHO were beyond dispute (section 10, Law Reform (Miscellaneous Provisions) (Scotland) Act 1968). He had abused the mother in accordance with the definition in section 11(7C) of the Children (Scotland) Act 1995. The NHO prohibiting the father from contacting the mother was relevant to the parties' ability to co-operate. The mother had complained about the father's cannabis usage, but his evidence that he was now using a substitute was accepted. A further complaint about the father's conduct toward the children's childminder was unclear and the childminder had not given evidence. None of the other complaints each party had about the other were relevant. There was no doubt that the mother had struggled with her mental health but she had recognised this and was prepared to make use of the support available to her. It was not suggested that she was incapable of looking after the children, notwithstanding the father's allegations about her use of prescription drugs, her drinking and those mental health difficulties. Accordingly he must have accepted that she was able to look after the children safely.

[10] The evidence about lack of co-operation between the parties, the possible difficulties with the development of the younger two children and the views of the eldest child LN were

all relevant. The issue of co-operation was important. Any attempts to find routes of communication between the parties had ended in recrimination. However, difficulty with communication was not the same as co-operation. Indisputably the parties had managed to agree about matters such as health, school and nursery arrangements and religion in respect of the children.

[11] The children's best interests were served by maintaining the *status quo*. While there were concerns about PN's development, he was progressing as well as could be expected. The other children were developing well and were happy and well cared for under the current arrangements. The oldest child LN had been clear in three separate child welfare reports that she wished the present arrangement to continue. Weight required to be given to her views. The mother's claim that the context of LN's interviews was that she was scared to upset her father was inconsistent with other evidence about LN's behaviour in her father's home as compared with deteriorating behaviour with her mother. While LN's views related only to her, there could be no question of splitting up the children, which neither party suggested.

[12] There was acceptable evidence that a factor that would assist PN with his possible developmental difficulties was consistent parenting. The mother's proposal that the children would spend week days with her and alternate weekends with their father left considerable opportunity for inconsistent parenting given the level of contact involved. Her proposal did not seem thought through, and would result of the children being in the care of relatives for significant periods. The father's proposals would require such third party care to a significantly lesser extent.

Justiciability

[13] At the outset of the hearing we advised counsel that having considered the notes of arguments and relevant authorities (eg *Shergill* v *Khaira* [2015] AC 359, per Lord Neuberger at paras 41-43) we were tentatively of the view that allegations of rape were justiciable in civil (including family) proceedings. There are examples of family cases in which such allegations have been determined both in the Court of Session and the sheriff court– *M* v *A* [2024] CSOH 38; *X* v *Y* [2018] SC DUM 54. Counsel were content to proceed on the basis that the allegations of rape had been justiciable and to focus on whether, in the particular context of the dispute between these parties, the allegations had been germane to the central issues for determination.

The parties' submissions

Appellant

[14] The statutory context in which the sheriff was making decisions in this case was contained in section 11 of the 1995 Act. It was clear from section 11(7A-E) that the court required to consider all allegations of abuse and the effect of them on the mother when reaching decisions. Failure to do so was a clear error – *LRK* v *AG* 2021 SLT (Sh. Ct.) 107. The effect of past abuse on a party's capacity to co-operate in the sense of acting or working together was clearly relevant. The challenge to the sheriff's decision was the intensity with which he expected the parties to exchange the children. The history of the case should have led to a conclusion that such intensity would expose them to a toxic relationship. The number of handovers of the children that would be involved if effect was given to the sheriff's decision was considerable – senior counsel had counted 17 such handovers every four weeks. The more intense co-operation that was required, the greater the risk to the

mother and the NHO currently protecting her will come to an end in June 2025. Consistency of parenting was particularly important for PN standing the health visitor's evidence of his developmental delay which had been accepted by the sheriff.

[15] The sheriff's judgment illustrated that he had failed to grapple with questions of whether there had been abuse such as might cause risk in a case of this sort and whether such abuse affected the children in a way that required fresh decision making in the case. The sheriff had recorded (at paragraph [4] of his note) that the parties' inability to co-operate might have a bearing on whether they could co-parent but he had then failed to address the root of the problem, namely the abuse of the mother by the father. A solution that reinforced the trauma that was a symptom of that abuse, by frequent exposure to re-traumatisation would disempower the mother as a parent from responding to the needs of the children. The impact of rape, and in particular marital rape, in relation to displays of entitlement and subordination was well-known. It was difficult to see how in the circumstances intense co-operation could be justified. The situation of the parties was not one of "antipathy that requires to be put aside" as the sheriff put it, but of a situation of domestic abuse.

[16] On the basis that the sheriff was wrong to regard the rape allegation as a question of competency, the issue was a relevant one given that the father sought a shared parenting arrangement. The mother had given evidence of the details of the allegation and she had prior to separation already sought help from the relevant agency in connection with the general domestic abuse. The sheriff ought to have asked himself whether this was an abusive relationship and answered that question in the affirmative. The allegation was not a historic one. The context was an abusive relationship alleged to have caused fear and

trauma. The allegations were material and current and the sheriff ought to have considered whether they were an impediment to intense co-parenting.

[17] It was accepted that the issue of the materiality or otherwise of the rape allegations in the context of a dispute about shared parenting versus residence with one party and extensive contact with the other should have been addressed at the case management stage. There had been case management hearings in the present proceedings. However the main focus of the pleadings had been the father's allegation that the mother could not cope with the children due to her mental health problems although there were references to the father's behaviour generally. Against a background of all judges and sheriffs being trained in trauma informed practice and having an understanding about rape myths, the sheriff ought to have avoided stereotypes about marital rape. While an allegation of rape would not always have to be decided in every case involving children, it should have been addressed in the present case.

[18] The issue of the mother's trauma had been squarely before the court. Special arrangements had been made for her to be present in court as she could not bear to look at the father. She had sat in the jury box behind a screen when giving evidence. The sheriff had omitted to mention that in his note notwithstanding that he ought to have been alerted by the existence of special measures to the issue of trauma. There was clear undisputed evidence from the psychiatrist Dr Bett that the mother had suffered trauma in her childhood, in her first main adult relationship and during her relationship with the father in this case. While SN was not to blame for all of her trauma, the mother's experience was relevant as she was vulnerable and there was stress surrounding contact arrangements. While Dr Bett was not a child psychologist, she had seen the effect on adults of trauma sustained while they were children. The critical issues that had been overlooked were the importance of

preventing re-traumatisation and the issue of empowerment. In cases of this sort, judges must not just sit as impassive arbiters. The sheriff in this case had not questioned whether the regime imposed risked exposing the children to abuse and so he had perpetuated an already difficult situation. Reference was made to the case of *Luca* v *Moldova* (55351/17) (2024) 79 EHRR 2 where a failure to take into account incidents of domestic violence in the determination of child contact rights and to undertake an autonomous, proactive and comprehensive risk assessment led to findings of violations of Articles 3 and 8 ECHR.

[19] The decision of the Court of Appeal in *A v B and another* [2023] 1 WLR 2387 was instructive. There, McFarlane P emphasised that the Family Court should be concerned to determine how parties behaved and what they did with respect to each other and their children, rather than whether that behaviour came within the strict definition of a crime such as rape. In a Scottish context the Lord Ordinary in *M* v *A* [2024] CSOH 38 emphasised, under reference to *A* v *B and another* that not every case required a fact finding exercise. There should be an early focus in case management as to what allegations, if any, require judicial determination in order to allow a proper assessment of what will serve the welfare of the children and how any evidential difficulties should be addressed.

[20] Effective case management in a case such as this could resolve issues such as who should lead at proof and clarify that all that was required in relation to the sexual allegations was proof on a balance of probabilities of what happened. It could not be said that the allegation was irrelevant to the issue before the sheriff.

[21] There were "red flag" issues in relation to the children; even the Child Welfare Reporter had approved the shared care arrangement only as a short term solution. The issues with the father's behaviour to the mother could not be ignored. There had been evidence at proof that the parties' daughter had been exposed to the incident that led to the

father's conviction. She had been taken out of her father's arms and given to her mother by the police.

[22] The children in this case are vulnerable. There was no dispute that the eldest child has been referred to an appropriate facility for support, the middle child is probably on the autistic spectrum and the youngest child, who is very small, has some speech delay. These are not robust children and the background of domestic abuse had to be considered in that context. The health visitor had given evidence at proof that the mother had become overwhelmed with the situation which reduced her capacity to act as a protective factor for her children. In short, this was a case where the impact of the mother's complex trauma had not been recognised. The sheriff had failed to apply section 11(7A-E) of the 1995 Act. The case should be remitted for a fresh hearing by a different sheriff to assess the evidence, including in relation to the allegations of rape and decide whether a co-parenting arrangement was appropriate.

Respondent

[23] The allegations of rape did not have to be determined in the particular circumstances of this case. Dr Bett's evidence had been that the symptoms of complex trauma from which the mother suffers will not affect her ability to care for the children on either a full time or a part time basis. The focus in the submissions for the appellant on the mother's vulnerability was not justified. She had been functioning at a high level during the whole period that the shared care regime had been in place. In the absence of a focus in Dr Bett's report and evidence of any detriment to the mother were the shared care regime to continue, there was nothing to support the appellant's submissions. While it could now be accepted that in

principle rape was a justiciable issue in a family case, the sheriff's refusal to determine it given the context was proper and correct.

[24] An interesting point arose about when and how during such proceedings the court required to make a definitive assessment of relevance. In this case, there had been no detriment to the mother in being allowed, as she had sought, to lead evidence of the alleged rapes, with the relevance of that being determined later. The father had been given an appropriate warning against incrimination. Having heard the evidence the sheriff determined that a decision on that particular issue was not appropriate or required. It had not been sufficiently well focused to be dealt with at the case management stage. The mother had not established a requirement for a factual determination on the matter. In any event, it could not be wrong to hear the evidence before deciding whether findings were required. Had the sheriff considered it necessary to make a finding on the issue of the alleged rapes he could have done so, notwithstanding the lack of evidence from the father.

[25] The sheriff had been correct in identifying (at paragraph [43] of his note) that it was key that the mother did not consider the behaviour she alleged as a ground for refusing contact. Any nexus between the allegations, whether true or not, and the outcome in terms of the level of shared care, was absent from the evidence. On appeal the mother was now focusing on other issues that had not been highlighted in the same way to the sheriff. This case differed from that before the Lord Ordinary in *M* v *A supra* where the parties had agreed that findings in fact on the allegations made were required. In the present case the evidence did not support an argument the allegations were material to the outcome. There was no indication that there was a risk of abuse of the children. It was not in dispute that the mother has suffered from poor mental health throughout her life, from long before her relationship with the respondent. The sheriff had acknowledged that appropriately. There

was no merit in the criticism that he ignored the mother's complex trauma; further findings would not have changed his conclusion.

[26] The appellant's claim of 17 handovers in each cycle within the shared care arrangement was wrong; it was between 10 and 12. In any event, third party involvement with this should negate any risk of conflict. It could not be ignored that the same arrangement ordered by the sheriff has now persisted for over 18 months. It was also incorrect for it to have been stated that PN has been assessed as on the autistic spectrum, he is not and a report to that effect has been issued to both parties. Further, the current Health Visitor does not assess ON as having developmental delay and a nursery place is available for him. LN has attended a horse therapy programme and is keen to do so. It was not accepted that the children are vulnerable in the way suggested by the mother. The Child Welfare Reporter had stated in terms that the difficulties between the parties have not permeated down to the children. All three children were doing well in a regime that has persisted for quite some time. It was noteworthy that LN wanted the shared care arrangement to continue despite having to travel further to school and missing gymnastics class when with her father. In any event the sheriff had sought to regulate the care arrangements in a way that would reduce the parties' contact to a minimum. The mother's plan, which he had found was not well thought through, would not have been better for the children.

[27] There was no basis for a suggestion that the sheriff was guilty of holding or adhering to rape myths. A trauma informed approach does not require elevating a party's evidence to a level that it is incapable of scrutiny or criticism. A re-hearing would not assist the parties or their children.

Decision

[28] As indicated, we are satisfied that the sheriff was wrong to state that allegations of rape in a family action relating to children are not justiciable. Family cases are in principle no different to other civil actions where proof of criminal behaviour might be required as a basis for the civil claim, such as one for damages. The central issue is whether, given the narrow parameters of the dispute between the parties, the sheriff erred in deciding not to make findings about the alleged rapes. There is a subsidiary point about the lack of detailed findings about the complex trauma suffered by the appellant and any connection between that and the respondent's behaviour, insofar as it had a bearing on the children's welfare

[29] Rape is a most serious crime, currently prosecuted only in the High Court. Whenever it is alleged, it must be considered carefully and sensitively. In the criminal context the critical decision is whether there is sufficient evidence to prosecute an allegation of rape. In civil proceedings, considerations of the materiality of the allegation to the specific issue to be determined by the court will arise. The circumstances of each allegation will require to be examined carefully before deciding whether a determination on any of them is necessary for disposal of the case.

[30] The starting point in this case in relation to the dispute was that both parties hold full parental responsibilities and rights (as specified in sections 1 and 2 of the Children (Scotland) Act 1995) in relation to all three children. Importantly, both had and will continue to have the right to have the children reside with them or otherwise regulate their residence (1995 Act, s 2(1)(a)). Neither party sought to deprive the other of any parental responsibility or right. The scope of the dispute was restricted to the mode of exercise of the rights each party has, either by an order for shared residence or the regulation of residence and contact.

[31] In the family law context, there are specific case management rules in this jurisdiction, designed to focus the issues in dispute at an early stage and well in advance of the proof diet. These rules have been in place in the Court of Session since 2017 (RCS 49.32A and 49.32B) and were introduced formally into sheriff court procedure from 25 September 2023 (OCR 33.36 J-Q inclusive). While the current proceedings were raised before the formal procedure of case management was codified in the sheriff court, we note from the interlocutors that the sheriff held a number of case management hearings. This commendable practice was, we understand, well utilised in the sheriff court prior to its codification in rules. Unfortunately, in the present case, when the allegations of rape were introduced by late amendment, there seems to have been no attempt to analyse these and consider whether they were germane to the issues for proof. Neither side highlighted any issue of whether proof of the averments was necessary; the issue was raised ultimately by the sheriff during the proof, albeit by reference to justiciability.

[32] Had the issue of the connection between the rape allegations and the scope of the dispute been analysed at the case management stage of the case, a number of factors would have been taken into account, including that; the allegations predated the parties' final separation and had not been raised as an issue material to the issue of arrangements for the children at any previous stage; there was no suggestion that the children were aware of the allegations or the circumstances giving rise to them; it was not contended that the father should have either no contact or minimal non-residential contact as a result of the behaviour alleged and there was no application to alter the *interim* arrangements in conjunction with the introduction of the allegations. Had those factors been identified and considered at the case management stage, it would have become apparent that proof or otherwise of the rape allegations was not essential to determine the narrow issue between the parties,

notwithstanding that those allegations were of the utmost seriousness. The case had always been restricted to the single issue of whether the shared care arrangement should continue on the basis already in place or be altered but with the father continuing to have the children with him residentially for lengthy periods.

[33] As the absence of a direct connection between the fresh allegations and the scope of the proof was not addressed prior to proof, the sheriff appears to have attempted to remedy the situation after evidence was led about them by declaring them to be inept for determination in a family case involving children. While that was erroneous, it did not impact on the outcome as we have concluded that findings of fact on the allegations were not required in the particular circumstances outlined. We are satisfied that, had the parties and the sheriff analysed the new averments introduced by amendment at a case management hearing, a conclusion that proof of them was not necessary to determine the time the children would spend with each parent would have been inevitable. The considerable benefit of taking that approach would have been to avoid the mother having to give evidence about this sensitive matter at all in the civil proceedings.

[34] Turning to the issue of whether the sheriff should have made more detailed findings about the impact of the complex trauma suffered by the mother, this was not an argument characterised at proof as having an impact on the arrangements for the children. The mother's mental health challenges had been put in issue as having an impact on her ability to care for the children more of the time than they would spend with their father. The arguments advanced by the father in that respect were rejected and the evidence of Dr Bett that the mother was capable of either full time or part time care of the children accepted. No independent evidence was led to support a conclusion that the children were adversely affected, or at risk of being adversely affected, by the complex trauma from which the

mother suffered. The mother's pleadings referred to the "level of animus" directed at her by the father and whether he was "in denial" about the impact of his abusive behaviour, but there was no offer to prove that the children had been adversely affected or that any such impact could be ameliorated by a change in the shared care arrangement.

[35] The inability of the parties to communicate was accepted, but the sheriff found that they could at least co-operate as parents and had done so for at least 14 months. It is difficult to understand the purpose that would have been served by any further analysis of the sources of the mother's difficulties.

[36] Indisputably the father had behaved appallingly at the time of the parties separation and had relevant criminal convictions that were acknowledged by the sheriff, who made a specific finding of abuse within the definition of section 11(7C) of the 1995 Act. To balance against that was the evidence of an established *status quo* of shared care that seemed to serve the children's interests well and which coincided with the views expressed by the eldest child and the mother's oldest son. The sheriff's approach was to consider the relevant statutory provisions on risk of abuse (s 11(7B(a-d)), but to do so against the backdrop of the narrow scope of the dispute, the father's proven track record of parenting and the assessment he had made of credibility and reliability. He was concerned to minimise the direct communication between the parties and to reinforce an arrangement that was necessarily inflexible but was operating effectively. His analysis was succinct and pragmatic. In the particular circumstances of this case, we do not consider that he erred in taking that approach.

[37] As the comprehensive rules on case management for family actions are now firmly embedded in the sheriff court, we trust that the opportunity will be taken in future cases to

restrict evidence led at proof to that required to determine the core dispute between parties.

The appeal is refused.