SHERIFF APPEAL COURT

[2023] SAC (Crim) 5
SAC/2023/000226/AP

Sheriff Principal D C W Pyle
Sheriff Principal G Wade KC
Appeal Sheriff A Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF A CUBIE

in

Appeal by Stated Case against Conviction

by

AB

Appellant

against

PROCURATOR FISCAL, HAMILTON

Respondent

Appellant: Culross; John Pryde & Co. SSC
Respondent: Glancy KC, Advocate Depute, Crown Agent

1 September 2023

Introduction

[1] This appeal primarily concerns whether evidence obtained by police officers from electronic devices owned by the appellant was unlawfully obtained and whether a statement made by the appellant to police officers was unfairly obtained. An appeal is also taken by the appellant against his conviction for breach of the peace and his being made subject to the

notification requirements under paragraph 60 of Schedule 3 of the Sexual Offences Act 2003 ("the 2003 Act").

[2] The appellant was convicted in the following terms:

> "(001) on various occasions between 1st January 2013 and 17th February 2021 both dates inclusive at [a Primary School] and elsewhere you [AB] did conduct yourself in a disorderly manner and you did photograph said pupils and did retain the images of said pupils on your own personal electronic devices for your sexual gratification and commit a breach of the peace;
>
> (002) on various occasions between 1st January 2013 and 17th February 2021 both dates inclusive at [a Primary School] and elsewhere you [AB] did knowingly or recklessly retain personal data without the consent of the data controller, as defined in the aftermentioned Act, in that you did take and create images of your pupils at [a Primary School] and you did retain said images on your own personal electronic devices;
>
> CONTRARY to the Data Protection Act 2018, Section 170(1)"

[3] The summary sheriff in her stated case poses the following questions:

i. Did I err in law in repelling the objection that the evidence recovered from the appellant's devices was unlawfully obtained?

ii. Did I err in law in repelling the objection that the statement obtained by the police from the appellant was unfairly obtained?

iii. Did I err in repelling the submission of no case to answer?

iv. Did I err in determining that the appellant took photographs of pupils and retained the images for the purpose of sexual gratification?

v. Was I entitled to find that the conduct of the appellant constituted a breach of the peace?

vi. Was I entitled to convict the appellant?

vii. Was I entitled to find that the appellant's conduct had a "significant sexual aspect"?

Facts

[4] The relevant proven facts insofar as based on the evidence led during the prosecution case, are stated as follows.

[5] The police received a "Suspicious Activity Report" that the appellant had sent money to a South African based website which had been flagged by cybercrime colleagues as a website of interest due to concern that had been raised that the website was connected to child exploitation albeit no illegality had been established in relation to the website following an investigation by the South African authorities.

[6] Thereafter, the police submitted a search warrant request to the Procurator Fiscal on 17 February 2021. The request was refused by the Procurator Fiscal on the basis that there was no reasonable cause to suspect criminality on the part of the appellant. Notwithstanding that, the police attended at the appellant's home address later that day to ask about his interactions with the website and to confirm what he had bought.

[7] Two police officers, TPI Watson and PC Shevill, attended and asked the appellant if it was "okay to come in and have a word." The appellant allowed entry. They advised the appellant that a "Suspicious Activity Report" had been received about a monetary transfer to the South African website made by the appellant. They told the appellant that they were there to ask about his interactions with the site.

[8] The appellant advised that he had purchased videos and photographs. He did not consider that there was anything indecent on the videos. TPI Watson asked if he could see the videos to check "that there was nothing untoward" on them. The appellant agreed to show them one of the videos on his iPad. The appellant showed them a video depicting two boys, of an estimated age of around 12 or 13 years, wearing only shorts engaging in what appeared to be "staged wrestling".

[9] TPI Watson asked the appellant if he would be willing to give the police his devices to enable them to be examined. The appellant was not advised by either officer that he did not require to do so. The appellant repeatedly stated that there was nothing of an indecent nature on the devices. Nonetheless, he agreed to hand them over for examination. The appellant gave them a mobile phone, laptop, iPad, Samsung tablet and external hard drive. TPI Watson explained to the appellant the procedures that would be followed if evidence of a crime was identified.

[10] The appellant was then asked by the officers "if it was okay that they took a statement" to confirm that he was voluntarily handing over the devices for examination. The appellant was not specifically told that he did not require to provide a statement. He was told that the statement would be read back and would be signed by him. During the noting of the statement the appellant spontaneously stated that he also had videos of a similar nature "of kids from my school from gym lessons," but that the school were aware that the gym lessons were recorded. He advised the police officers that he had "a fetish specifically for kids performing fireman's lifts" and has "had this fetish for a number of years" but that he has "never acted on it and would never act upon it." The appellant stated his fetish was the sole reason for having these videos and pictures.

[11] Upon hearing this, TPI Watson contacted colleagues as he was concerned that these comments "might cross the line into criminality and require a caution." He was advised by his colleagues that there was no crime.

[12] The following day, 18 February 2021, a further application was made by the police to the Procurator Fiscal for a search warrant request. The request was again refused. TPI Watson was made aware of its refusal. He subsequently attended at the appellant's home to advise the appellant the request had been refused.

[13] Upon removing the appellant's devices, police officers undertook analysis of the data on the devices. There searches identified that between 1 January 2013 and 17 February 2021, both dates inclusive, the appellant took photographs of pupils performing wrestling manoeuvres in the school whilst acting in his capacity as their teacher. He also took a photograph of pupils at a local football field which he subsequently altered by superimposing images of children being held in a fireman's lift.

[14] The appellant retained said images on personal devices, including a hard drive, laptop and iPad without the knowledge or consent of the school children, their parents, the school or South Lanarkshire Council. Forensic examination of the appellant's hard drive, laptop and iPad found a total of 3,275 imaged of children with creation dates ranging between 19 March 2008 and 6 February 2021 and last accessed dates between 29 January 2018 and 14 February 2021.

[15] For a number of images the appellant had used image editing software to edit the images he held, for example, a number of said images had been altered with one child's head having been superimposed onto another's head.

[16] The appellant was subsequently charged on 28 April 2021 and pled not guilty. The matter proceeded to trial.

The trial

[17] Upon conclusion of the Procurator Fiscal's case the defence submitted, in terms of section 160 of the Criminal Procedure (Scotland) Act 1995, that there was no case to answer on either charge. The Procurator Fiscal opposed the section 160 submission and invited the summary sheriff to find that there was a case to answer.

[18] In deciding that there was a case to answer, the summary sheriff found that the police officers had lawfully obtained the electronic devices of the appellant and fairly obtained his written statement on 17 February 2021. The summary sheriff was satisfied that the police attended at the appellant's address to make general enquiries and that, at the point the appellant was asked if he would voluntarily hand over his devices for examination and provide a statement confirming same, he was not in the position of being a suspect in relation to a specific crime which the police were in the course of investigating.

[19] Separately, the appellant argued before the summary sheriff that for the Procurator Fiscal to prove breach of the peace it required to prove a public element to the offence: *Smith* v *Donnelly* 2002 J.C. 65. The appellant contended that there was insufficient evidence to constitute the crime of breach of the peace. The summary sheriff dismissed that submission and found that there was sufficient evidence in law to establish a breach of the peace. She considered that the appellant's conduct could have been discovered in a number of ways. Another teacher or employee of the school may have become suspicious on seeing the appellant photograph or video the children in wrestling poses without any apparent educational purpose. There was the possibility of pupils informing their parents of such photographs and videos being taken. The appellant himself could have revealed (as he ultimately did to police officers) that he was taking such photographs and videos and his reason for doing so. Were such conduct to be discovered, the summary sheriff concluded that it would have presented as genuinely alarming and disturbing, in its context, to any reasonable person and that it might reasonably be expected to lead to parents, pupils, school teachers and members of the public to being alarmed, disgusted, upset, humiliated, shocked or tempted to make reprisals at their own hand and thereby threaten serious disturbance to the community.

[20] Following the repelling of his submission of no case to answer, the appellant chose not to lead any evidence. The summary sheriff considered the evidence and proceeded to convict the appellant of both charges. The summary sheriff also found that there was a significant sexual element to the appellant's offending behaviour which resulted in the appellant being made subject to the notification requirements under Schedule 3, paragraph [60] of the Sexual Offences Act 2003 ("the 2003 Act").

Submissions for the appellant

[21] The first issue in this appeal deals with the question of whether the recovery of the electronic devices seized in the context of the consent sought from the appellant was fair, as well as whether the statement given by the appellant to officers was fairly obtained. Counsel for the appellant submitted that that by the time the police attended at the appellant's property on 17 February 2021 they suspected him of an offence. That was clear not least from the fact they had sought and had been refused a search warrant for the appellant's property on the basis that there was no reasonable cause to suspect criminality on the part of the appellant.

[22] Where there is no reasonable cause to suspect criminality, the police require the consent of an accused person in order to search their home and seize devices. Such consent must be informed. It was submitted that the issue was one of fairness. Where the police have tried and failed to obtain a search warrant, they are acting in that knowledge, and seeking cooperation from a suspected person in a way that is incompatible with that individual's right against self-incrimination. That right must not be given up without informed consent.

[23] The police had no means to investigate without the consent of the appellant, because there was no evidence of any wrongdoing. The appellant was not properly informed that he did not need to comply. The appellant was not cautioned. The appellant did not have proper information on his ability to both decline to answer and decline to give the police his devices. Had he done so, there would have been no further action against him given the lack of evidence of criminality on his behalf. Under reference to Lord Sutherland in *Brown* v *Glen* 1998 J.C. 4 at 8B-C, counsel for the appellant submitted the appellant was under the requisite suspicion and he ought to have been cautioned or warned that he need not comply with the requests of the police to provide them with his devices or provide a statement and certainly not without legal advice.

[24] On that basis, counsel for the appellant moved this court to amend the summary sheriff's finding that the police officers did not suspect the appellant of any specific crime (finding-in-fact 31). That finding was not substantiated by the evidence led by the Procurator Fiscal.

[25] The second issue of the appeal concerns whether the appellant's actions amounted to a breach of the peace. While the appellant's behaviour was accepted to be bizarre and potentially concerning, that did not automatically make them criminal. To establish that a breach of the peace had been committed it was necessary that the offending conduct should, in some sense, at least, cause or threaten disturbance to the public peace: *Harris* v *HM Advocate* 2010 J.C. 245 at paragraph [24]. Further, where the behaviour is in private, the court outlined that "if in private, there must be a realistic risk of it being discovered": paragraph [25] of *Harris*.

[26] Counsel for the appellant submits that his conduct was not genuinely alarming and disturbing, that there was no evidence of actual alarm, that the behaviour occurred in

private with no realistic risk of discovery and that therefore the conduct of the appellant required to be flagrant which this was not. There was no foundation for the Procurator Fiscal's submission that the images were capable of discovery. The conduct was in private and the appellant's conduct was not flagrant to the degree required to amount to a breach of the peace per the tests outlined in *Smith* and *Harris*.

[27] The final issue of the appeal concerned the question of whether there was a significant sexual element to the behaviour in relation to a finding of same for the Sexual Offences Act 2003. Breach of the peace is not an offence to which the notification requirements under the Sexual Offences Act 2003 generally applies. The sheriff relied on paragraph 60 of Schedule 3 of the 2003 Act to determine that there was a significant sexual aspect to the appellant's behaviour in committing the offence.

[28] Counsel for the appellant submitted that the sole basis for the finding that there was a significant sexual aspect in this case is the use by the appellant of the word "fetish" when describing his fascination for the subject matter of the images. This was insufficient given the objectively non-sexual nature of the images.

Submissions for the respondent

[29] In relation to the first issue, the advocate depute submitted that the summary sheriff was correct to find that the electronic devices were lawfully obtained and the statement fairly taken by the police. This was not a case where the police were effecting wilful blindness in order to entrap the appellant, but rather a situation where the officers who attended at the appellant's home on 17 February 2021, did so fully aware that the Procurator Fiscal had already advised that there had been no criminality in the making of the payment to the South African website.

[30] The police had attended at his property on 17 February 2021 to ask him about his use of the website and what he had bought. The police are entitled to make general enquiries with the public in the pursuance of their duties. Upon being allowed entry to the appellant's property, with his consent, the appellant had advised them that they would find nothing indecent and untoward on the electronic devices. The advocate depute submitted that lent credence to her submission that there was no need for the police officers to provide a caution to the appellant or to advise him that he had the right to refuse to provide his electronic devices and a statement.

[31] The evidence before the summary sheriff was that the appellant had no concern about self-incrimination. There was a distinction to be made between the police carrying out initial investigations in discharge of their duties in the public interest and reaching a stage where a person is a suspect of a crime and questions are directed to elicit an admission of culpability for that crime. The admissions made by the appellant were spontaneous and not elicited or prompted in response to questions asked by the police officer noting the statement. That evidence was admissible: *Miln* v *Cullen* 1967 J.C. 21 at 31.

[32] In the event that the appeal court considered the police officer had obtained the electronic devices and the statement from the accused unlawfully, the advocate depute's secondary position was that this court excuse the unlawfulness of the obtaining of the electronic devices and the statement from the accused to render that evidence admissible: *Lawrie* v *Muir* 1950 J.C. 19 at 26-27.

[33] The advocate depute submitted the summary sheriff was correct in finding that there had been a breach of the peace. She referred to the High Court's decision in *Smith*. The advocate depute submitted that (i) the taking of photographs and (ii) the storing and editing of those photographs amounted to public conduct. In relation to the latter, such conduct

was public on the basis that in the event of discovery it had the potential to cause serious disturbance to the community.

[34] Finally, the advocate depute submitted that the summary sheriff was correct to find the offending had a significant sexual element. The advocate depute submitted that the appellant's evidence that he had a fetish justified the summary sheriff subjecting the appellant to the notification requirements under the 2003 Act.

Decision

Preliminary matter Questions posed

[35] We deal firstly with the questions posed for the court.

[36] The questions in a stated case are the limit of the appeal; the scope is governed not by the grounds of appeal, but by the questions posed (*Wallace* v *Thompson* 2009 SCCR 24). Accordingly the questions should correctly focus the ground of appeal. If a finding in fact is challenged, the stated case should address that in the question – "was I entitled to make finding in fact number …?"

[37] A request at the adjustment stage that the finding be deleted does not constitute such a challenge. (*Aziz* v *PF Edinburgh* 2023 JC 51). The court will not readily explore matters not focused in the questions posed.

[38] The appellant did seek to challenge the findings in fact by way of adjustment, albeit using a blunderbuss approach. The sheriff was satisfied that the questions posed in the draft stated case adequately covered the matters raised. We consider that she was in error.

[39] The proposed questions should have been more focused. The final stated case should have recognised the attack on certain discrete findings, which were not adequately dealt

with by the more generic questions posed. The observations of the High Court in *Prentice* v *Skeen* 1977 SLT (Notes) 21 bear repeating:

> "… when the issue raised in a stated case is incorporated in a finding-of-fact conclusive or at least indicative of guilt and the point sought to be argued is that there was not sufficient evidence in law to warrant that finding, it is not appropriate merely to pose a question of law in general form such as 'On the facts stated was I entitled to find the appellants guilty as libelled?' The proper method of stating the question in such circumstances is in the form proposed by the appellants' solicitor to the sheriff ["was there sufficient evidence to entitle me to make finding-in-fact No. 7?"]...
>
> … when such an issue is the only issue in the case, or is a crucial issue in the case, it is imperative that the judge in the inferior court should incorporate a question in the appropriate form either ex proprio motu or on request. Failure to do so may well frustrate the whole method of this form of appeal."

[40] There is, on one view, no question which entitles us to look behind the findings in facts and look directly at the evidence; but on the authority of *Aziz* at paragraph [9], we consider that the failing was in the questions asked in the final stated case, and that the complaints made were clear in the note of appeal; we are accordingly prepared to consider the merits of the appeal.

Were the devices and the statement fairly obtained?

[41] The issue is whether in recovering the devices and then taking a statement the police had acted unfairly. The appellant timeously objected to the admissibility of the evidence seized and the statement. The sheriff repelled the objection and the related submission of no case to answer. The point made by the appellant, and reiterated in the appeal was that the appellant was plainly a suspect.

The relevant law

[42] Any analysis of this area starts with Lord Justice-General Cooper's opinion in *Chalmers* v *H. M. Advocate* 1954 JC 66 where he points out (at p. 78):

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g. , to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded."

[43] The law was considered further in *Miln* v *Cullen* 1967 JC 21 where the court said at p 26:

> "While, according to our common law, no man is bound to incriminate himself, there is, in general, nothing to prevent a man making a voluntary and incriminating statement to the police if he so chooses, and evidence being led of that statement at his subsequent trial on the charge to which his statement relates. (See, e.g. *Manuel* v *H. M. Advocate*, 13 at p. 48). Where exactly the danger line is to be drawn will vary according to the particular circumstances (cf. Brown 15). But I am satisfied that we are well short of it in the present case. I would be prepared to hold that this case had never got beyond the investigation stage. In any event, however, there was no interrogation in the proper sense of that word, no extraction of a confession by cross-examination, no taint of undue pressure, cajoling or trapping, no bullying and nothing in the nature of third degree and it is not suggested that the respondent, by reason of low intelligence, immaturity or drink, was incapable of appreciating what was going on."

[44] The court in terms recognised the limited and focused nature of the enquiry, continuing:

> "It is well to keep in mind that, in applying the test of fairness, one must not look solely and in isolation at the situation of the suspect or accused: one must also have regard to the public interest in the ascertainment of the truth and in the detection and suppression of crime."

[45] Reference was also made by parties and the sheriff to *Brown* v *Glen* 1998 JC 4 at 6 where the court said:

> "Where, however, the police are making general enquiries and the person with whom they are dealing has not reached the stage where he could be described as a suspect, except in the most general and nebulous sense, the police are not obliged to caution the person as to his answers to questions and there appears to us to be no logical reason why they should be obliged to issue any caution to accompany a request for a search to be carried out when it must be perfectly obvious that the answer to that request may be either yes or no.
>
> The validity or otherwise of consent cannot, in our view, be made to depend upon whether the person concerned voluntarily hands over some item or waits until it is found in his or her possession by the police. …Whether the request is to hand over what might be an incriminating item or is for permission to search for what might be an incriminating item, the test of validity of consent to that request must be the same, namely, fairness to the accused.
>
> …We are therefore of opinion that so long as the person whose consent is being sought is not in the position of being a suspect in relation to a specific crime which the police are in the course of investigating, and thus a person to whom a caution would be required to be administered before being asked any questions, any request to hand over any item or for permission to search does not require to be accompanied by a specific warning that the request is one with which the person is not obliged to comply."

[46] But the observations in *Brown* have to be put in context; the High Court considered that intimation had to be made if (as in the case of *McGovern* v *HM Advocate* 1950 JC 33) the applicant had been cautioned and a search warrant obtained. The search warrant and an application therefore are accordingly indicative of suspicion.

[47] Against that legal background we consider the facts; there were a number of stages in the police officers' approach to this matter, all as highlighted in the sheriff's note at paragraphs 8, 9 and 10:

- The police officers were members of the proactive unit, whose remit included investigation of suspected online abuse
- A suspicious activity report had been received in relation to the appellant's interaction with [a] website

- It was a website of interest because of concerns about child exploitation, albeit no illegality had been established by South African authorities
- A search warrant request had been submitted to the Procurator Fiscal the day before the search but had been refused on the basis that the crown considered that there was no cause to suspect criminality
- The police officers concerned were tasked to attend at his home and ask about his interactions with the website
- They visited the property
- The appellant allowed entry. He was not told that an application for a search warrant had been made but not proceeded with by the Procurator Fiscal
- The appellant was asked about the website; he responded that he had purchased videos and photographs, but that there was nothing indecent
- The police asked to see the video to check there was "nothing untoward"; the appellant agreed
- The police officer viewed the video to which reference had been made; he said that he had the view that criminality had not been met
- Against a background of his repeatedly stating that there was nothing of an indecent nature on the devices, the police then asked if the appellant would be willing to give the police his devices to enable them to be examined
- He agreed to hand them over – mobile laptop, iPad, Samsung tablet and external hard drive
- He was then asked if it was "ok" if he gave a statement. During the taking of the statement he provided unsolicited information

- The following day, a further warrant was sought; it was again refused; the appellant was told that this had happened

[48] We consider that the police officers were entitled to attend, to ask questions about the interaction with the website, and even view the footage. The introductory phase when the police visited and asked about the involvement was not unfair (although perhaps difficult to understand). But by the time the police had determined that they wanted to recover items: items which they knew had not been recoverable by way of a search warrant, we consider that the line was crossed into unfairness.

[49] By the time of that request the actions had gone well beyond the permissible conduct in *Miln* (one question - "Were you the driver?") *Brown* (one question – "Anything on you?" and a search) and *Devlin* v *Normand* 1992 SCCR 875 (one question "Do you have anything in your mouth?" and a request for the accused to open her mouth) and the actions flowing from that request to take the items we view as unfair. We consider that the sheriff was in error in repelling the objection to the fairness of the recovery.

[50] We are fortified in our view by the fact that the visit and subsequent events did not take place in a vacuum; they took place in the context of the police having sought a warrant which the crown declined to proceed with. That application can only have arisen because the applicant police officer considered that there was reasonable suspicion; we consider that when the stage has been reached where there is sufficient suspicion for an application for a search warrant, there should be a specific warning of a right to refuse to provide items or provide a statement. The seizure and everything flowing from it was unfair.

The crown alternative argument

[51] The crown fall-back position was that even if there was some unfairness it should not vitiate the recovery of the items; reliance was placed in the case of *Lawrie* v *Muir* 1950 JC 19, to the effect that an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible.

[52] We acknowledge that there have been cases where irregularly found evidence has been admitted; these are fact specific. In *McGovern* (supra), the High Court was not prepared to excuse the police for their failure to obtain a warrant to take samples from Mr McGovern's fingernails. The Lord Justice General (Cooper) stated,

> "To look at the matter from the other standpoint discussed in the Full Bench case of Lawrie, irregularities of this kind always require to be " excused " or condoned, if they can be excused or condoned, whether by the existence of urgency, the relative triviality of the irregularity, or other circumstances".

[53] Such other circumstances have arisen where there is a legitimate reason for seeking entry (*Freeburn* v *HMA* 2013 SLT 70 for example, where the police entered premises without a warrant to search for a person allegedly held against their will); or urgency (*Walsh* v *Macphail* 1978 SLT (Notes) 47 - invalid warrant overlooked because of possibility of disposal of evidence by the accused); or where the irregularly obtained evidence could easily have been obtained regularly (*Fairley* v *Wardens of Fishmongers of the City of London* 1951 JC 14), or where there has been an irregularity in the search authorised by warrant itself (*Hepburn v Brown* 1998 JC 63); or where there was a misunderstanding of police powers to search (*B* v *HM Advocate* 2015 SLT 182); or where an authorised search for evidence of one crime revealed evidence of another crime (*Burke v Wilson* 1988 JC 111).

[54] In our view the circumstances of this case were neither urgent nor trivial. The police knew very well that they required a warrant. They had tried to obtain one and had failed.

The evidence ultimately obtained was essential to the prosecution. No "other circumstances" of this case justify the excuse of any irregularity.

[55] We also considered whether there is any requirement to tell an accused that he did not require to comply with requests made by the police. Following *Bell* v *Hogg* 1967 JC 49 and *Freeburn* we recognise the failure to give such advice is not necessarily fatal to the admissibility of the evidence. However these cases should be read in light of the observations of LJG (Cooper) in *Chalmers (supra)* where he examines the vulnerability of a person who has been being "asked " to do certain things by police officers albeit he has not been formally detained or arrested.

[56] The appellant in this case was, on the evidence, attempting to cooperate as much as he could and believed he had done nothing of a criminal nature. The police on the other hand clearly had suspicions about his activities as evidenced by their attempt to obtain a warrant fortified by their depositing with him a leaflet from "Stop It Now".

[57] In the circumstances of this case, the prejudice to the accused in admitting the evidence which ultimately formed the basis of his conviction outweighs the public interest in allowing it to be admitted. The convictions in relation to each charge should be quashed.

[58] That is sufficient to dispose of the appeal but in deference to the submissions made, we consider the other aspects of the appeal.

Public feature of the Breach of the Peace charge

[59] The appellant advanced an argument about the nature of the conduct, submitting that it did not constitute behaviour that was disturbing or alarming. We reject that argument; we proceed on the basis that, if admissible, the recovered material would have caused legitimate alarm and distress if in the public domain. The sheriff indicates the likely

reaction of a parent on learning of or seeing the images and we agree with her assessment at paragraph [41] of the stated case.

[60] Breach of the peace can only be established if there is a public element. It was accepted that there was no public element, but that the offence can be established if there was a realistic risk of discovery; the sheriff found that there was such a realistic risk.

The law

[61] Parties accepted that there must be a public element of the crime. In *Harris* v *HM Advocate* 2010 JC 245, a court of five judges considered the definition of a breach of the peace. What was necessary for the offence to be committed was a need that the "offending conduct should, in some sense at least, cause or threaten disturbance to the public peace." (paragraph [24]).

[62] The court went on to say at paragraph [25]:

> "It is unnecessary for the purposes of this opinion to seek to give definitive guidance as to what public element would be sufficient. Disturbance or potential disturbance of even a small group of individuals in a private house - as in *Paterson* v *HM Advocate* [2008 JC 327] - may suffice. The conduct need not be directly observable by the third parties (as it was not in that case) but, if in private, there must be a realistic risk of it being discovered (*Jones v Carnegie* [2004 JC 136] at paragraph [12])."

[63] But Jones goes further than that; in *Jones*, the Lord Justice General (Cullen), giving the opinion of the five judge bench said:

> "However, we would caution that where the conduct complained of took place in private, there requires to be evidence that there was a realistic risk of the conduct being discovered."

[64] There must be a realistic risk of discovery, not a notional or hypothetical risk. And there must be evidence of such realistic risk, not speculation or conjecture. There was no

such evidence. The sheriff has speculated about the possibility of discovery; her list of possible means of discovery was supplemented by the Advocate Depute in her submissions. But there was no evidence of such risk, far less a realistic risk.

[65] We have considered whether, absent such evidence, the court could fill that gap as it did in *McIntyre* v *Nisbet* 2009 SCCR 506 for example; is it self-evident that the taking or storage of the images would have been discovered? In *McIntyre* the evidence showed a noisy, sustained breach of the peace, in a flat overlooking a city centre thoroughfare in the context of an ambulance calling. There are no features in the instant case which allowed the sheriff to find or infer that that was a "realistic risk" of discovery. In the absence of such realistic risk, however flagrant or potentially disturbing the conduct, the charge of breach of the peace cannot stand, irrespective of whether the crime arises from the taking or the storing or some combination. The sheriff should have sustained the submission of no case to answer in relation to charge.

Significant sexual element

[66] We approach this having regard to the guidance in *Hay* v *HM Advocate* 2014 JC 19 and *Aziz* where the court said at paragraph [26]:

> "No doubt it is necessary for the sentencer to keep a sense of proportion and to use common sense when determining whether a significant sexual aspect is evident (*Hay* v *HM Advocate* , Lord Justice Clerk (Gill), para 52). If the conduct indicates an underlying sexual disorder or deviance, that will be a strong indicator."

[67] The appellant himself used the word "fetish" on which the sheriff placed reliance. Not every self-proclaimed fetish will necessarily meet the standard of being sexually significant but in this case, we are satisfied that the test would have been met. We rely on the number of images, their storing and doctoring, the timescale over which they were taken

and saved and the self-proclaimed fetish together with the words "I would never have acted on it"; these are capable of supporting a significant sexual aspect. If the statement had been admissible and there had been a public element, the offence could have been so categorised.

[68] We accordingly answer the questions posed as follows, and in doing so allow the appeal against conviction in relation to both charges:

1. Did I err in law in repelling the objection that the evidence recovered from the appellant's devices was unlawfully obtained? Yes

2. Did I err in law in repelling the objection that the statement obtained by the police from the appellant was unfairly obtained? Yes

3. Did I err in law in repelling the submission of no case to answer? Yes

4. Did I err in determining that the appellant took photographs of pupils and retained the images for purpose of sexual gratification? Unnecessary to answer

5. Was I entitled to find that the conduct of the appellant constituted a breach of the peace? Unnecessary to answer

6. Was I entitled to convict the appellant? No

7. Was I entitled to find that the appellant's conduct had a "significant sexual aspect"? Unnecessary to answer