SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2019] SC DUN 39

DUN 2018-002343

NOTE BY SHERIFF ALASTAIR N BROWN

in the cause

PROCURATOR FISCAL, DUNDEE

against

P H P

Minuter

Introduction

[1] The Minuter is charged with attempted contraventions of sections 34(1) and 24(1) of the Sexual Offences (Scotland) Act 2009 by sending sexual messages by social media to persons he believed to be children aged respectively 14 and 12. The truth was that no such children existed. The Minuter (assuming, as has not been admitted or proved, that it was he who was involved in the communications), was, unknown to him, actually exchanging messages with JRU and CW, who are both adults living in England. They were involved in a scheme set up by Mr U of a sort which has become relatively common, in which they pretended to be children in the hope of, in their words, "catching predators" by getting them to engage in sexual messaging. Three Minutes have been lodged which challenge the competency of the prosecution and the admissibility of the evidence thus obtained.

[2] There is a compatibility issue Minute. The proposition is that the activities of Mr U and Ms W interfered with the Minuter's rights under Art 8 of the European Convention on Human Rights without any authorisation under the Regulation of Investigatory Powers

(Scotland) Act 2000 ("RIPSA") so that admitting their evidence at trial would involve the court acting incompatibly with the Minuter's Art 8 rights. There is a Minute which states an objection to the admissibility of "all of the Crown evidence" intended to be led against the Minuter on the basis that, in the absence of an authorisation under RIPSA for the use of Mr U and Ms W as covert human intelligence sources, their evidence had been unlawfully (and, hence, irregularly) obtained and should be deemed inadmissible. In that event, the argument goes, there would have been no lawful basis upon which the Minuter was interviewed or the matter investigated by the police, so that evidence from police "and other witnesses" is inadmissible. Finally, there is a plea in bar of trial on the ground of oppression. The proposition is that the ingathering of such evidence by covert means is entrapment in a factual if not strictly legal sense, and that reliance on that evidence by the police and the Crown, which would be deemed oppressive had they gathered the evidence themselves, is oppressive, would offend the public conscience and be an affront to the justice system.

Summary of the decision

[3] In the next three paragraphs, I summarise the conclusions which I have reached. Those three paragraphs are, however, no more than a summary. Anyone who wishes to understand the reasoning properly will have to read the remainder of this Note.

[4] I have reached the conclusion that the compatibility issue minute and the minute based on the provisions of RIPSA should be repelled. For the reasons given in this Note, I consider that the arguments in support of them are not sound. In relation to the plea in bar, I have had regard to *Jones* v *HM Advocate* 2010 JC 255, which tells me that issues relating to entrapment should ordinarily be dealt with as relating to the admissibility of evidence rather

than as a plea in bar on the basis of oppression and I have approached the question in that way. Although entrapment as such relates to the conduct of the authorities, both the Court of Appeal in England and the European Court of Human Rights have recognised the existence of a category of conduct which they have called "commercial" or "private" entrapment as something which can raise questions about the admissibility of the evidence thus obtained. I have reached the conclusion that the scheme operated by Mr U and Ms W was unlawful at all stages and, hence, that its results are inadmissible in evidence unless the irregularity involved is excused. I have not been persuaded that it ought to be excused.

[5] Put shortly, what Mr U and Ms W did was fraud. They made a false pretence (about the identity and characteristics of the person operating the account), knowingly (and, accordingly, dishonestly) in order to bring about a practical result (namely, to induce persons open to temptation to engage in messaging). Their conduct therefore contained all of the elements of the crime of fraud. Having induced the person alleged to be the Minuter to exchange electronic messages, they then set out to induce him to continue with the exchange of messages until he had, in their view, conducted himself in a way which was likely to result in a substantial prison sentence. That they did by maintaining the false pretence and by wheedling him to continue. Their conduct of the exchanges was calculated and manipulative. Mr U then travelled to Dundee, with two other men, to confront the Minuter and that made it necessary for the police to take him to a police station for his own safety. Such confrontations have the potential for serious public disorder and will, in some circumstances, constitute the crime of breach of the peace. It was Mr U's wish to get a photograph, which he would post on the internet with a caption stating that the Minuter had been arrested for suspected child sex offences. Such a caption would have been misleading (because it implies an offence involving the abuse of real children; but there were

no actual children involved) and liable to put the Minuter at risk of harm. Since an arrested person is likely to appear in court the next day, the publication of such a photograph and caption risks interfering with the administration of justice and might sometimes amount to contempt of court.

[6] No adequate basis for excusing the irregularity which all of this constituted was advanced before me. I have rejected the possibility that what was done was done in good faith, at least on Mr U's part. I gained the clear impression that personal gratification was, for him, a significant motivator. Moreover, in my opinion there are strong public policy considerations which militate against excusing the impropriety involved in this kind of case. To be sure, internet crime is a serious issue, though it is far more complex than Mr U and Ms W appeared to recognise. Police Scotland take it seriously. But policing is a skilled, professional activity which ought to be left to the police. Police officers work within a careful scheme of regulation and inspection and they are democratically accountable. When it comes to covert policing, they operate within a carefully constructed regulatory framework which exists for the protection of the public as a whole. They go about their work in a way which involves making careful judgments about what lines of enquiry to follow up and takes account of factors such as cognitive impairment in a suspect. They respect jurisdictional boundaries. They do not confront suspects and they understand that arrests ought to be made in a way which does not risk public disorder. They do not post photographs of arrested suspects on the internet. None of these things is true of what was done and planned here. To excuse the improprieties in what happens in such cases would be to encourage those who are inclined to pursue such action to think that they can operate outside any regulatory structure, to think that they can operate outside the law, to think that they can operate without having to observe the carefully considered limits which the

legislature has applied to the police (whom they claim to be helping) and to think that they can manipulate the courts into imposing condign sentences. That would be contrary to the wider public interest in the rule of law.

[7] I have, accordingly, decided to sustain the objection to the admissibility of evidence to the extent of excluding the evidence of Mr U and Ms W as inadmissible.

Entrapment

[8] The plea in bar of trial invokes the concept of entrapment. There is an obvious difficulty in that for the Minuter because that concept is restricted to the activities of the law enforcement authorities. Lord Reed said as much in *Jones* v *HM Advocate* 2010 JC 255 at para [12]. Moreover, appellate courts in other jurisdictions have repeatedly made the involvement of the authorities an inherent part of the definition of entrapment. Lord Reed cites several of them in *Jones*. Perhaps the clearest example is the passage which Lord Reed quotes, at para [17], from judgment of the Supreme Court of Canada (Lamer, J) in *R* v *Mack* [1988] 2 SCR 903 in which entrapment is defined explicitly in terms of police conduct. In *R* v *Hardwicke and Thwaite* [2001] Crim LR 220; 2000 WL 1629663, under reference to *R* v *Latif and Shahzad* [1996] 2 Cr App R 92, the Court of Appeal in England said, in relation to entrapment, that "...what the court seeks not to condone is malpractice by law enforcement agencies which would undermine public confidence in the criminal justice system and bring it into disrepute". There is a strong case for the proposition that the law of entrapment is concerned at least as much with the societal interest in keeping the police in order as it is with the liability of the particular accused to be prosecuted and convicted.

[9] However, in *R* v *Hardwicke and Thwaite*, the Court of Appeal in England did contemplate the possibility that conduct equivalent to entrapment but carried out by

persons other than law enforcement officers might found an objection to the admissibility of the evidence. In that case, it was claimed by the appellants that they had been entrapped by a journalist, who (after publishing an article) passed material to the police, resulting in their prosecution. Whilst the appeal was dismissed, the Court of Appeal recognised the existence of a category of conduct which they characterised as "commercial lawlessness" and which they contrasted with the "executive lawlessness" which is the usual foundation for an objection based on entrapment. The Court analysed the issue in terms of s78 of the Police and Criminal Evidence Act 1994, which is concerned with the admissibility of evidence. Then, in *Shannon* v *United Kingdom* (67537/01, 6 April 2004) the European Court of Human Rights dealt with what it called "private entrapment", once again by a journalist (the same journalist who featured in *Hardwicke and Thwaite*). It is clear from that decision and from the commentaries that, in the Strasbourg jurisprudence, the phenomenon of alleged entrapment by private persons is dealt with as a question of the admissibility of evidence and its effect on the fairness of the trial for the purposes of Article 6. The Court contemplated the possibility that the admission of evidence obtained by such entrapment, not involving the authorities, might, in certain circumstances render the proceedings unfair. The Court examined whether such unfairness had resulted in the particular circumstances of that case and did so under reference to the results of an evidential hearing in the English High Court.

[10] Lord Carloway pointed out in *Jones* v *HM Advocate* 2010 JC 255 (a case of alleged executive entrapment) that "Scots law has hitherto dealt with 'entrapment' in the context of admissibility of evidence...The primary method of dealing with claims of 'entrapment' in Scotland is by way of objection to the evidence as unfairly obtained" (para [83]).

[11] All of this suggests that each case will turn on its own facts and it seemed to me that it was essential for me to hear evidence and make findings in fact. I heard the evidence on 6 March 2019, with submissions on 7 March.

[12] Having said that, the conclusions to which I have come are that neither the Compatibility Minute nor the plea in bar of trial is well founded but that the evidence of Mr U and Ms W is inadmissible on the basis that their conduct involved significant irregularities which the Crown has not persuaded me that I should excuse. That being so, in any similar case in the future, I would take the view that the question was exclusively one of admissibility of evidence and, in a summary prosecution, I would deal with the matter at trial, by a trial within a trial (in terms of *Thomson* v *Crowe* 1999 SCCR 1003 and *Jeffrey* v *Higson* 2003 SLT 1053). On indictment, the admissibility of evidence of this sort would be a preliminary issue to be dealt with under the procedure set out in ss71 and 79(2)(b)(iv) of the Criminal Procedure (Scotland) Act 1995.

Facts

[13] In this case, I found the following facts admitted or proved:

1. J R U operates a scheme, which he calls "Keeping Kids Safe", in terms of which he creates decoy accounts on social media in which he pretends to be a child. When someone makes an approach, he replies giving the decoy's name and age. If the person making contact sends a sexual message, he replies as the decoy. He maintains the exchanges until he believes that they have broken the threshold of a custodial sentence but tries to build the exchanges up and maintain them for 2 weeks in order to obtain a more severe sentence. If the person with whom he has been exchanging messages ceases to send messages, he tries to restart communication by sending a

message saying "Hi". He tries to discover the address of the person with whom the exchanges have been taking place and goes there with 2 other men to seek to confront the person. That confrontation is filmed. The matter is then reported to the police. Once a person has been charged, he posts a picture of the person on Facebook, accompanied by text which says "This male has been arrested on [date] for suspected child sex offences".

2. On 22 May 2017, Mr U had an account on an internet dating site called "SayHi" in the name "Bexii".

3. Mr U believed that the use of SayHi is restricted to persons aged 18 and over.

4. Contact was made by a person who gave the name "P...". The following exchanges took place.

   08.03.14, P...: "Looking for naughty fun".

   08.04.10, Bexii: "What do you mean?"

   08.04.39, P...: "Would you like your pussy licked or rubbed"

   08.04.53, Bexii: "I don't have a cat sorry"

   08.05.29, P... "I'm on about your fanny between your legs xxxx"

   08.06.09, Bexii "Oooops sorry lol never had thay done before am only 14"

   08.06.39, P... "Would you like it licked or rubbed".

5. At Mr U's suggestion, the exchanges moved to WhatsApp.

6. On WhatsApp, the person with whom Mr U was exchanging messages was identified as "P... Sunderland".

7. The following exchanges took place:

   08.32.51, P..., "Hiya sexy".

   15.14.44, Bexii, "Hey just finished school".

15.16.07, P...: "I leave you alone sexy xxxx"

15.19.35, Bexii: "Why"

15.23.41, Bexii "Why yoy leaving me alone have I done something wrong?"

15.29.39, P... "No just I will sexy okay xxxxxx".

15.30.11, Bexii: "No you don't have to, i just couldn't talk whilst at school"

15.30.54, P...: "Im looking for fun but you only 14 so I leave you alone xxxxxx"

15.32.16, Bexii: "Oh and my age means im no good"

15.32.33, Bexii: "After everythinbg you said this morning"

15.33.01, P...: "Didn't mean it like that babe's sorry do u still want to talk xxxxx"

15.33.27, Bexii: "I do still want to talk yes and what do you mean you didnt mean it like that"

15.34.07, P...: "Doesn't matter are you walking home or on the bus home xxxxx"

15.49.02, P...: "If I was sitting next to u on the bus with my hand on your leg and it slipped between your legs what would you do xxxx"

15.51.53, Bexii: "I dunno no one ever done that before"

15.52:20, P...: "Okay shall I leave you alone xxxxx"

15.52.37, P...: "Just imagine me kissing you on the lips xxxx"

15.52.54, Bexii: "No stop saying your going...its because I am a virgin and no one has ever given me attention before".

8. There were further exchanges on subsequent days. During them, the person giving the name "P..." invited "Bexii" to imagine them kissing and asked questions such as "What would you do if I put my hand down your boxers" and, ultimately, "If I was with you would you like me to shag you".

9. During 2017, C W volunteered as a decoy with Mr U's organisation.

10. In August 2017, Ms W had an account on "SayHi" as a decoy

11. Contact was made by a person who gave the name "PP". The following exchanges took place:.

    P: "Looking for a bit of naughty fun gorgeous".

    Decoy: "What u mean? I'm only 12".

    P: "OK I leave you alone"

    Decoy: "OK"

    P: "Do u want me to leave you alone"

    Decoy: "Its up 2 u"

    P: "No up to you".

12. The exchanges moved over to WhatsApp on 9 August 2017 at Ms W's suggestion.

13. In the initial exchanges on WhatsApp, the person whose name was given as "PP" asked "Do you want me to leave you alone", ultimately receiving the response "I don't mind".

14. On 11 August 2017, after a silence of 29 hours, Ms W initiated contact again, sending a message which said "Hi".

15. Ms W sent the messaging to Mr U.

16. Mr U traced an address for "PP" and spoke to the Minuter's ex-wife. She said that he had left but gave them his mother's details. They visited his mother and Mr U told her that he was a "child protection advocate" and that Mr P had been trying to contact children online. She gave them his address.

17. Mr U travelled to Dundee with two other men to confront Mr P. They phoned the police in Dundee, who insisted on seeing the evidence before they did anything.

18. Before Mr U and his associates arrived in Dundee, police officers went to the Minuter's home and took him to Longhaugh Police Station for his own safety.
19. Once Mr U arrived in Dundee and showed printouts of the exchanges to police officers, the Minuter was detained for a suspected contravention of s7 of the Sexual Offences (Scotland) Act 2009.

Evidence

[14] The first witness was JRU, who is a 29 year old unemployed man from Nottinghamshire. He said that he proactively tries to seek out people who want to contact children online in order to act as a deterrent to potential child predators. Once a person has been charged, he puts a picture up on Facebook "as a kind of burglar alarm" so people can "see who is doing things". The photograph is accompanied by text which says "This male has been arrested on [date] for suspected child sex offences". He believed he had done that in this case. Mr U described the method he uses. He said that he creates accounts on social media which show a photograph of a child. The photograph is of a person who is now over 18 and has consented to the use of the photograph. (The photograph used by Mr U was not before me in evidence and neither were any profile pages which existed for the relevant accounts.) Mr U said that he waits for someone to make an approach. When they do, he replies giving the decoy's name and age (that is, the name and age attributed to the child in the fiction which Mr U has created) at the earliest opportunity. In the responses he gives as the decoy, he makes out that the decoy does not know what the person is talking about. He said that he stops when he believes that they have broken the threshold of a custodial sentence but that "we like to build it up a bit to hopefully get a tougher sentence". If the

person with whom he has been exchanging messages has not messaged for a couple of days, he sends a message saying "Hi" to try to restart communication.

[15] Production 11 for the Crown was said to be material downloaded from Mr U's phone, which had been seized by Nottingham Police in connection with a different case. The pages towards the end of that production are printouts from an app called "SayHi" and those at the front are from WhatsApp. Mr U said that these were the record of his conversations, using the pseudonym "Bexii", with the person alleged to be the Minuter.

[16] Mr U said that "SayHi" is a dating app. He thought that users were supposed to be over 18.

[17] Mr U gave evidence of his participation, as "Bexii" in certain exchanges. To the extent that they were led in evidence, I reproduce those exchanges in the foregoing findings in fact. There are other exchanges in the production but evidence was not given about them.

[18] Mr U gave evidence that the messages continued over a couple of weeks until Nottingham Police seized his phone in connection with another case. He said that he was "majorly disappointed" when that happened. Following contact by the man alleged to be the Minuter with C W, another decoy, they contacted the police in Dundee. The person had said that he lived in Sunderland and they had gone to his house there. His ex-wife said that he had left but gave them his mother's details. They visited his mother and Mr U told her that he was a "child protection advocate" and that Mr P had been trying to contact children online. She gave them his address. Mr U decided to travel to Dundee with two other men to confront Mr P. One of the three of them would phone the police, one would hold the camera and one would do the talking. (In describing this part of his scheme, he referred to it consistently as "the sting".) In England, he said, he would have made a "section 24A citizen's arrest" but he understood that in Scotland a person cannot be arrested on suspicion

so they phoned the police in Dundee, who insisted on seeing the evidence before they did anything.

[19] Cross-examined, Mr U agreed that the early exchanges would have been enough for suspicion. He was asked why he did not contact the police then and said that in previous cases the person had used the excuse of drunkenness and got away with a suspended sentence. He found that frustrating. He wanted a two week period because he hoped for a custodial sentence. He was asked whether he was trying to do the job of the police. He said that he was trying to help the police. He said that he wanted to avoid the Regulation of Investigatory Powers Act. He agreed that he encouraged the person to keep going and that he did so because he wanted a wider portfolio of offending so as to get a more punitive disposal. He said that when he spoke to Mr P's ex-wife and mother he said that he was a "child protection advocate" trying to locate Mr P but that he did not say that he was part of an unregulated volunteer group. He agreed that they might have thought he was a social worker.

[20] The next witness was CW. She is a 29 year old lady who is now a student, from Leicestershire. She gave evidence that on 18 August 2017 she set up a profile as (she thought) a 14 year old girl and waited for responses. She could remember little about the episode. Her evidence in chief consisted very largely of her being taken through parts of Productions 7 and 8, which were said to be transcripts of the exchanges she had had, printed out by her. To the extent that they were led in evidence, they are reproduced in the foregoing findings in fact. The profile pages for these accounts were not placed before me in evidence. In production 7, each message from Ms W as the decoy is accompanied by a photograph of a girl which (as placed before me) is of very poor quality but does appear to be of a young teenager. No evidence was led about whether the Minuter, if he was the

person with whom she exchanged messages, would have received the photograph as well as the message. There were no photographs with production 8.

[21] Ms W agreed with the procurator fiscal that there were several occasions when she encouraged the person to keep going with the conversation. She said that the end goal was to catch predators and report them to the police. She sent the chat to Mr U when it contained enough information.

[22] Cross examined, Ms W said that she had been part of Mr U's organisation for about a year and had adopted two or three profiles altogether, though not at the same time. She said that she had wanted to help because the police have too much work and not enough officers. When she started, she was given previous chatlogs and told not to initiate sexual conversation. It was suggested that she should use "SayHi". She agreed that that was a dating website intended to be used by adults. She agreed that the person with whom she was exchanging messages had kept drawing a line under things but that she had kept things going and that, on 11 August, she had re-started the conversation. She said "I shouldn't have done that".

[23] PC Ross Fraser gave evidence that he and another officer had been sent to Mr P's home because his mother had called the police to tell them that a vigilante group were en-route to confront him. Dundee Police had recently had a bad experience with a similar group which nearly caused a riot. The police were concerned for Mr P's safety. They took him and his partner to Longhaugh Police Station for Mr P's protection. He was quite frightened. He remained in the police station with Mr P until 11.45pm, when the CID took the matter over.

[24] PC Hannah Baigne gave evidence that she accompanied PC Fraser and that she remained at Mr P's home in case the vigilante group turned up there.

[25] Detective Constable Melanie Scott gave evidence that on 22 August 2017, she had been on duty at Police HQ, working on another case when she was told by her sergeant that a vigilante group was coming and that a man had been taken to the police station for his own safety. The group had been told to go to Police HQ. When they arrived she took statements and took possession of the transcripts of the chats. She was not happy with those documents. She said that Dundee Police had recently had a bad experience with a similar group which could have caused a riot.

[26] Detective Constable Innes Morrison gave evidence that he had gone to Longhaugh Police Station at 11.45 pm and detained Mr P for a suspected contravention of s7 of the Sexual Offences (Scotland) Act 2009 (communicating indecently). Mr P replied that he didn't have anything on his mobile phone.

[27] No evidence was led for the defence.

[28] I accepted the evidence of Ms W as factually accurate. I also accepted the evidence of all of the police officers as reliable.

[29] As to Mr U, I accepted that his account of the facts, in the sense of the things that happened, was accurate but I did not entirely accept his evidence about his motivation. Since that becomes relevant at points below, I record here that, although the stated aim of his scheme was to help the police, having heard him give evidence, listened to the way he expressed himself and observed his demeanour, I formed the view that Mr U's activities are, at least to a significant extent, actually motivated by his wish to feel important and his desire for the gratification of inflicting punishment on those whom he regards as "predators". He appears to apply that categorisation in a blanket way without any real understanding of the criminology of internet offending or any recognition of the fact that those responding to his bait might themselves be vulnerable (for example, I was told without dispute that the

Minuter suffers cognitive impairment amounting to a mild learning disability). Mr U showed no understanding of the concept of due process or of its importance and he appeared to regard the law as presenting a series of obstacles to be avoided or overcome in order to achieve his desired outcome, which was to see a substantial custodial sentence imposed on someone who had participated in the exchanges which Mr U had cultivated. He treated aggravating factors mentioned in the relevant sentencing guideline as targets to be achieved rather than as criteria to be applied in a measured and dispassionate way. He appeared to derive excitement from the confrontations which were the culmination of his activities and from being able (as he thought), in England, to perform a citizen's arrest. His practice of publishing photographs on Facebook seemed to me to have more to do with using Facebook as a kind of electronic trophy room than with alerting anyone to risk (as a means of doing that, it is hard to see how it could be effective). The absence of a finding in fact to the effect that Mr U's aim was to assist the police is not, therefore, an oversight. It is entirely deliberate.

Compatibility Minute

[30] The compatibility minute invokes Article 8 ECHR. It proposes that Mr U and Ms W, who covertly ingathered the evidence in relation to the Minuter, acted in breach of his Article 8 rights, that there was no authorisation under RIPSA, that "appropriate procedures" were not observed and that, in relying on evidence so obtained, the Lord Advocate is acting incompatibly with the Minuter's Article 8 rights. The written submissions lodged on behalf of the Minuter propose that it is trite to say that communications between private individuals through social media are private matters which are protected by Article 8.1. That proposition is correct as far as it goes but it overlooks the clear jurisprudence of the

European Commission of Human Rights which tells us that a letter writer retains no right to respect for his correspondence once it is in the hands of the addressee. Once in the hands of the addressee, it loses the character of correspondence. (*G, S and M* v *Austria* 9614/;81; *AD* v *Netherlands* (21962/93, 76A DR 157 (1994)). It follows that the right is not violated if the content is revealed by that addressee. What is true of letters is, in my opinion, equally true of electronic means of communication. On the facts as I have found them to be, Art 8.1 was not engaged and there is no interference with the Minuter's Article 8 rights. There is, therefore, nothing to be justified in the framework of Art 8.2.

[31] Accordingly, I repel the Compatibility Issue minute.

Objection to evidence – Covert Human Intelligence Source

[32] The minute objecting to the admissibility of all of the evidence proceeds on the basis that Mr U and Ms W acted as covert human intelligence sources ("CHIS") within the meaning of RIPSA, that there was neither authorisation in terms of s7 of RIPSA nor compliance with the applicable provisions of RIPSA, that in the absence of such authorisation and compliance the evidence was unlawfully obtained and that it is, hence, irregular and inadmissible. In my opinion, a sound objection to the admissibility of the evidence of Mr U and Ms W does emerge from the evidence and the debate but this is not it.

[33] As defined in RIPSA, read short, a person is a covert human intelligence source if the person establishes or maintains a personal or other relationship with another person for the purpose of covertly obtaining information or disclosing information obtained by the use of such a relationship. Several of these terms are not defined in the Act and their application in the present case is open to debate. In their written submissions, however, the Crown have conceded explicitly that "U and W at least maintained a relationship with another person for

a purpose which was covert, and that they used that relationship to obtain or provide access to information, or otherwise covertly disclosed information obtained by use of the relationship or as a consequence of it". I proceed on the basis of that concession. That being so, I agree with the Minuter's submission that the activities of Mr U and Ms W were the sort of activities which would be undertaken by a CHIS as defined in RIPSA, though without the element of appointment to such a role by the police.

[34] That is not the end of the matter. RIPSA applies to the conduct and use of covert human intelligence sources. The Minuter submits that by obtaining information from a CHIS, the police and the Crown are "using" that CHIS, so that RIPSA applies by virtue of s1(1)(c), which specifies "the conduct and use of covert human intelligence sources". Use is defined by s1(6)(a) as "inducing, asking, or assisting a person to engage in the conduct of" a CHIS. That all contemplates things done before the conduct takes place. I am not persuaded that, in terms of the Act, to make use of information or evidence obtained by covert conduct is the same thing as using a person as a CHIS.

[35] The Minuter also submits that, by conducting investigations and charging persons on the basis of evidence ingathered by vigilante groups, the police and the Crown encourage and embolden such groups to continue in what they do. I have no doubt that that is correct but I agree with the Crown submission that, where the public authorities did not even know of the activities of Mr U and Ms W until after the event, they cannot in any proper sense of the word be said to have induced them. The fact that the public authorities arrest, charge and prosecute on the basis of the activities of groups such as Mr U's no doubt helps to satisfy Mr U's motives as I have perceived them to be and, to that extent, operates as an inducement. That is not, however, by any means the same as the police or the Crown inducing a person to act as a CHIS. Nor am I persuaded that unlawful conduct on the part of

persons who report alleged offences to the police precludes the police from investigating those allegations, as the Minute contends. On the contrary, in my opinion the police have a duty to make such investigations (and also to investigate the conduct of those reporting the matter, where that conduct appears to have been unlawful).

[36] I have held that the activities of Mr U and Ms W were of the sort which would be undertaken by a CHIS but not that the public authorities had anything to do with that. The proposition for the Minuter is that, since each of them satisfies the definition of a CHIS, absence of compliance with RIPSA renders their activities unlawful. In that, it is my opinion that the Minuter's submission is incorrect in a way which is fatal to the proposition in this Minute, even if the foregoing analysis of the concept of conduct and use of a CHIS is incorrect. RIPSA was enacted as a response to *Khan* v *United Kingdom* (2001) 31 EHRR 45 (decided in May 2000) in which there had been a clear interference with the applicant's Art 8.1 rights (the police installed a covert listening device), which required to be justified in terms of Art 8.2 as being, *inter alia*, "in accordance with law". There was no statutory system to regulate the use of convert listening devices and the Government relied on the existence of Home Office guidelines which were not publicly accessible. The European Court of Human Rights held that those guidelines lacked the quality and predictability required for compatibility with the rule of law and found a breach of Art 8. The United Kingdom and Scottish Governments responded by legislation in the Regulation of Investigatory Powers Act 2000 and RIPSA so as to provide a legal framework, compliance with which would confer the quality of lawfulness on activities which would interfere with the Art 8.1 rights. As the Crown submissions point out correctly, s30 of RIPSA provides specifically that nothing in the Act is to be construed as making it unlawful to engage in conduct which would not be unlawful apart from the Act. An absence of compliance with RIPSA does not

per se render conduct unlawful. It does, however, mean that conduct which *is* unlawful apart from RIPSA cannot be rescued from that unlawfulness by s5 of the Act.

[37] I therefore repel the Minute objecting to admissibility on the Covert Human Intelligence Source ground.

Entrapment

[38] This brings me to entrapment. Although the Minute dealing with that is couched in terms of oppression, it appears to me, on the basis of Lord Carloway's Opinion in *Jones*, that I ought to consider it as a question of the admissibility of evidence.

[39] I have concluded above that entrapment, properly so called, operates only where the authorities have been involved in the impugned conduct but I have noted the related concepts of commercial entrapment and private entrapment which arose in *R* v *Hardwicke and Thwaite* and in *Shannon* v *United Kingdom*.

[40] In *Hardwicke and Thwaite*, the "Investigations Editor" and another journalist of the (now defunct) *News of the World*, posing as wealthy Arabs, met the appellants and drank with them. They turned the conversation to drugs and Hardwicke offered to "sort out" some drugs within half an hour. Thwaite made a telephone call to place an order and, later, left the room to take delivery of cocaine. While he was out of the room, Hardwicke explained that Thwaite had been a very successful drug dealer to "mug Sloanes" introduced to him by Hardwicke. The following day, Hardwicke delivered a second consignment of cocaine. In due course, the newspaper published an article and then handed the material to the police. A prosecution and convictions followed, an application to stay the proceedings as an abuse of process having been refused. The jury added the interesting rider that the circumstances of the case had made it very difficult to reach a decision and that, had they been allowed to

take into account what they described as "the extreme provocation", they would have reached a different verdict. It appears that that jury at least had misgivings along the lines that what had happened was, in Lord Reed's phrase in *Jones* (para [11]), offensive to ordinary notions of justice.

[41] On appeal, the Court of Appeal took note of the distinction, in English law, between staying proceedings for abuse of process and the discretion to exclude evidence conferred by s78 of the Police and Criminal Evidence Act 1984 and noted that, in the exercise of the court's discretion to exclude evidence on the grounds of its adverse effect on the fairness of proceedings, one of the factors to be considered is how the evidence is obtained. The Court drew the distinction which I have noted above between what it called "executive lawlessness" and what it called "commercial lawlessness" and took the view that "...what the court seeks not to condone is 'malpractice by law enforcement agencies' which 'would undermine public confidence in the criminal justice system and bring it into disrepute'". The Court went on to say "Obviously that is not a consideration which applies with anything like the same force when the investigator allegedly guilty of malpractice is outside the criminal justice system altogether".

[42] That is, with respect, not as obvious as was suggested. To be sure, malpractice by law enforcement agencies ought not to be condoned; but it is not, to me, self-evident that persons who set themselves up as private investigating bodies with the explicit aim of securing prosecutions ought to be able to use methods which would be condemned if used by the police. Investigation for journalistic purposes might be different but I am not concerned with that here.

[43] *Hardwicke* was followed by *Shannon* v *United Kingdom*. The facts were that the same *News of the World* journalist was given information that the applicant, a well known actor,

was supplying drugs in show business circles. He set up a meeting at which he posed as a sheikh interested in employing the applicant as a celebrity guest. He steered the conversation (which was recorded) towards drugs and told the applicant that he required cocaine for a party. The applicant said that he could supply drugs and reconfirmed that offer several times. The journalist's assistant asked about cannabis and he offered to supply that as well. He made a phone call to his agent about getting cocaine and, when the agent asked him if he knew what he was doing and declined to get involved, became angry and said he would arrange it himself. The journalist gave him money and he obtained samples from a dealer, which he handed to the journalist. The journalist handed the material to the police (but not before a long article was published by the newspaper). The applicant was arrested and prosecuted. He sought unsuccessfully to have the evidence obtained by the journalist excluded on the ground that it had been obtained by entrapment. The trial judge refused that application, holding that he had volunteered, offered and agreed to supply drugs without being subjected to pressure. The European Court of Human Rights found no reason to question that assessment and found no breach of Art 6.1.

[44] In reaching its conclusion, the Human Rights Court reviewed relevant English law and came to the conclusion that "the domestic courts have held that evidence obtained by means of 'private' entrapment, rather than entrapment by or on behalf of agents of the State, may give rise to issues of fairness under section 78 of PACE". The Court said that the principles set out in *Teixeira de Castro* v *Portugal* (1999) 28 EHRR 101 are "to be seen as principally directed to the use in a criminal trial of evidence obtained by means of an entrapment operation carried out by or on behalf of the State or its agents". In a passage which is of critical importance, the Court went on to say:

> "However, just as the domestic courts have held that evidence obtained by means of 'private' entrapment, rather than entrapment by or on behalf of agents of the State, may give rise to issues of fairness under section 78 of PACE, the Court does not exclude that the admission of evidence so obtained may, in certain circumstances render the proceedings unfair for the purposes of Article 6 of the Convention."

[45] That will bring me, shortly, to *Lawrie* v *Muir* 1950 JC 19. First, though, I have to deal with the proposition advanced on behalf of the Minuter that it is oppression for the Crown to prosecute on the basis of evidence obtained by entrapment in a factual sense. The written submissions for the Minuter draw my attention to the well known observation by the Lord Justice-General (Emslie) in *Stuurman* v *HM Advocate* 1980 JC 111 that

> "...the High Court of Justiciary has power to intervene to prevent the Lord Advocate from proceeding upon a particular indictment but this power will be exercised only in special circumstances which are likely to be rare. The special circumstances must indeed be such as to satisfy the court that, having regard to the principles of substantive justice and of fair trial, to require an accused to face trial would be oppressive. Each case will depend on its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects of a fair trial the question for the Court is whether the risk of prejudice is so grave that no direction of the trial Judge, however careful, could reasonably be expected to remove it."

[46] That passage in *Stuurman* was applied in favour of the accused in *HM Advocate* v *Withey and Grier* 2017 JC 249, where material was recovered under breach of legal privilege. It included a detailed statement from the accused in relation to the charges on the indictment and that was examined and submitted to an expert despite a plea of legal privilege being advanced. The Lord Justice-General (Carloway), delivering the opinion of the court, said that the protection which confidentiality gives to the solicitor-client relationship must be guarded jealously; that in the majority of cases, that may be achieved simply by excluding evidence recovered in breach of that confidentiality; but that the way in which the Crown had used the material made that one of those rare cases where that remedy would not redress the illegitimate prejudice caused to the accused.

[47] From all of this, I take it that a plea in bar of trial on the ground of oppression can only succeed where exclusion of the evidence does not address the need and where a direction would be inadequate. The focus in the present case at this stage therefore comes to be on the admissibility or otherwise of the evidence of Mr U and Ms W.

[48] The Minuter referred me to *Lawrie* v *Muir* 1950 JC 19. Prof Davidson has analysed the effect of that decision as being that improperly obtained evidence is to be excluded unless factors can be found which serve to excuse the impropriety (Fraser P Davidson, *Evidence*, W Green, 2007 para 9.08); in other words that the default position is that evidence which has been obtained improperly will be excluded but that the court has a discretion to admit it by excusing the irregularity. That analysis receives support from *Thomson* v *Crowe* 1999 SCCR 1003, in which the Lord Justice-General (Rodger), dealing with statements made by accused persons, said (at 1033E-F) that "[t]he judge will exclude the statement if it was taken in circumstances which render it inadmissible under any rule laid down by the law. In other cases" (that must mean cases not involving a specific exclusory rule) "the judge will admit the statement if the Crown satisfies the court that it would be fair to do so". Summarising the effect of the decision, Lord Rodger said that "[w]here an issue arises on the evidence, it is for the Crown to satisfy the judge that the statement is admissible" (at 1043F). In *Jeffrey* v *Higson* 2003 SLT 1053, delivering the Opinion of the Court, Temporary Judge CGB Nicolson QC said in terms that, although *Thomson* v *Crowe* was concerned with the admissibility of a statement, "it is implicit in the opinions in that case (and is now generally accepted) that the principles underlying the decision apply equally in any case where the admissibility of any evidence is dependent in the first place on certain matters of importance, such as fairness, reasonable grounds for suspicion, and so on, being established as a precondition for the lawfulness and admissibility of subsequent evidence".

[49] I conclude that, where an issue arises on the evidence about the admissibility of any adminicle or chapter of evidence on fairness grounds or on the grounds that it has been obtained unlawfully or irregularly, it is for the Crown to establish that it is admissible, not for the defence to establish that it is not. The default position is that evidence which has been obtained improperly will be excluded but that the court has a discretion to admit it by excusing the irregularity.

[50] I emphasise that the first question will always be whether an issue arises on the evidence. It is not open to the defence to state a general challenge to the admissibility of the evidence and put the Crown to proof on admissibility before putting the Crown to proof on the merits. There must, on the facts, be some *prima facie* irregularity or impropriety before the Crown can be required to discharge the burden of satisfying the court that it would be fair to admit the evidence.

[51] This means there is an underlying distinction between the English law approach to cases of this sort and the approach of Scots law. In English law, s78 of PACE gives the court a discretion to exclude evidence if satisfied that its admission would be unfair; that is, the default position is to admit the evidence. In some cases, that might make a difference to the result.

[52] In my opinion, there is impropriety and irregularity in this case.

[53] The starting point is to recognise that the whole scheme operated by Mr U and Ms W is unlawful. To the extent that it takes effect in relation to a person in Scotland, from its very earliest stage it satisfies the definition of the crime of fraud in *Adcock* v *Archibald* 1925 JC 58 (the fact that the pretence is made by a person situated in England being immaterial to jurisdiction – *Lipsey* v *MacIntosh* (1913) 7 Adam 182; *Wm Allan* (1872) 2 Couper 402; *Clements* v *HM Advocate* 1991 JC 62 – and, *a fortiori*, in my opinion, immaterial to analysis of the

quality of the conduct for other purposes to the extent that it takes effect in Scotland). In *Adcock*, Lord Hunter said that "the essence of the offence consists in inducing the person who is defrauded ...to do some act which he would not otherwise have done, or to become the medium for some unlawful act". The Lord Justice-General (Clyde) said that "[a]ny definite practical result achieved by the fraud is enough". The Court held that pecuniary loss is not an essential element in the crime of fraud. Referring to that, in their discussion of the types of result which are relevant to the crime of fraud, the learned authors of the 3rd edition of *Gordon's Criminal Law* (W Green, 2001) give as an example inducing a person to render himself liable to prosecution (para 18.25). In the same paragraph, they go on to say that it would be fraud to induce someone to commit a crime. In my opinion, that analysis is correct and very much in point. In discussing *mens rea*, they write that that a policeman who induces someone to commit a crime, such as selling him drugs or liquor out of hours, but concealing his identity or assuming a false identity, will have a defence of public duty, provided he does not stray into entrapment (para 18.33). I observe that the treatment of public duty as a *defence* supposes that what was done was, but for that, fraud.

[54] In this case, the pretence was that the person involved in messaging was a teenage girl who had a genuine interest in online chat and then, as the exchanges went on, who did not want the exchanges to stop. The truth was that the person was an online vigilante who wanted to cultivate and maintain sexual messaging in order to get someone convicted and imprisoned and to publicise it. The practical result was that person alleged to be the Minuter engaged in and continued with exchanges. On the evidence, there is no reason to suppose that, if he had known the truth, he would have done so.

[55] Prof Davidson observes that "it is appropriate for *the police* to indulge in a measure of deception and even *minor* illegality in order to discover whether *a suspect* is willing to

engage in a criminal act (*op cit* para 9.74 and authorities there cited; my emphasis) and that is consistent with Lord Steyn's approach in *Latif and Shahid* which was to regard it as significant that the (somewhat technical) breach of the law by a customs officer who, in a controlled delivery situation, carried drugs as part of an official operation but without an importation licence was venial compared to that of the defendant, who was one of those involved in arranging the importation. The minor nature of the illegality, the fact that the target is already a suspect and the fact that the operation is properly regulated all matter (see, for example, the importance which the European Court of Human Rights attached to the facts that the applicant in *Teixeira de Castro* was not a suspect and that the operation was not judicially authorised – that is, the public prosecutor had not approved it). To that, one might add that s5 of the Regulation of Investigatory Powers (Scotland) Act 2000 ("RIPSA") would confer the quality of lawfulness on conduct which was the subject of an authorisation under that Act.

[56] The misrepresentations were not confined to the initial profile of the decoys. They were maintained throughout the exchanges. Then when Mr U visited the Minuter's mother to try to discover his address, he gave himself the misleading title "Child Protection Advocate", did not disclose the true nature of his activity and agreed that she might well have thought that he was a social worker (though she does seem to have phoned the police about Mr U's intention to visit her son).

[57] This characterisation of the conduct as fraud is an important difference from the unreported decision of Langstaff, J in *R* v *Gareth Walters; R* v *Abdirizak Ali* (unreported, 6 April 2017, Crown Court at Newcastle), to which the Procurator Fiscal referred me. In that case, he was dealing with a group who operated a very similar scheme to Mr U's and cases in which the "targets" arranged to meet the putative teenage girls (which is not alleged

against the Minuter). Langstaff, J was concerned chiefly with the relevance of the Regulation of Investigatory Powers Act 2000 and whether the vigilante group constituted covert human intelligence sources. He said (and I agree) that "the Act does not make the behaviour of a CHIS unlawful where it would not otherwise be so, but, rather, protects the CHIS if in the course of behaving as such he offends against the law...in which case any authorisation protects him from liability" (para 23). In discussing the application of that, he went on to say "[a]n ordinary member of the public...may be telling lies on a dating website but as such commits no crime. It is not arguable that it is unlawful for him to do so for the covert purpose of obtaining information which he intends to relay to a public authority" (para 34). Therein lies the essential difference between those cases and the present one. As I understand it, there is no general offence of fraud in English law. In my opinion, as a matter of Scots law, Mr U's actings and those of Ms W contained all of the elements of a common law crime, were therefore unlawful and were not rescued by either public duty or a statutory authorisation. Their motives (even if I accepted what Mr U said about those motives, which I do not) are irrelevant. Ends do not justify means and there is a public interest in not conveying the impression that the court will adopt the approach that they do (Lord Steyn in *Latif and Shahzad* at 101D).

[58] The unlawfulness of the scheme, in respect of its fraudulent character, is, in my opinion, enough to raise the question of impropriety so that the Crown require to satisfy the court of the fairness of admitting the evidence and excusing the irregularity.

[59] That unlawfulness is not, however, the whole issue. There are other aspects of the execution of this scheme which involved impropriety or, at the very least, irregularity.

[60] In *Nottingham City Council* v *Amin* [2000] 1 Cr App R 426 at 431, Bingham LCJ (as he then was) provided a helpful summary of the distinction made by the courts where the *agent*

provocateur is a law enforcement officer and, whilst recognising that the Court of Appeal in *Hardwicke* was of the view that the standards to be expected of those who are not law enforcement officers are lower, what Lord Bingham said nevertheless articulates the fundamental distinction to be drawn:

> "...[courts] recognise as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he had only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand, it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law-enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."

[61] Law enforcement agencies have a duty to enforce the law. Neither Mr U nor Ms W had any such duty to the public to enforce the law and cannot pray any such duty in aid of the legitimacy of their conduct. Neither law enforcement agencies nor private individuals have either a duty or a right to seek out those susceptible to temptation and subject them to an integrity test, which is essentially what was done by Mr U and Ms W.

[62] The fact that a person is already a suspect has been a factor of importance in executive entrapment cases and was also a factor in *Shannon*. By contrast, Mr U and Ms W went on fishing expeditions. They had no reason to suspect the Minuter. And there is, moreover, ground for concern about the pond in which they chose to fish. They used a dating site. Not only that, they used a site which, they believed, was restricted to over-18s. There was no evidence about whether that belief was correct but, in examining their conduct, it is reasonable to take note of the fact that they chose such a site. The extent to which the profile, including the photograph of the child, was visible to a person coming to the website in the way the Minuter is alleged to have done was not explored in evidence and I will not make any assumptions about that. That being so, it was only when the decoy sent

a message about age that the person alleged to be the Minuter can be said, on the evidence, to have had any knowledge about that matter. Although it lacks subtlety and anything resembling good taste, sending a message to an adult about "looking for naughty fun" is not a crime. It does not follow from the willingness of the person to embark on an exchange of messages on an adult dating site that he was looking for children under 16.

[63] In both cases, the exchanges continued after the decoy stated an age. To that extent, it is fair to say that the person *was* willing to continue. It is noticeable, however, that in both cases he became ambivalent and said that he would leave the decoy alone. Mr U and Ms W both – in Lord Bingham's word – "wheedled" him into continuing. Almost the first message received by Bexii (U) once the messaging moved over to WhatsApp was "I leave you alone sexy", to which the response was "Have I done something wrong?" The reply was "No just I will sexy okay", to which Bexii (U) responded "No you don't have to...". The person alleged to be the Minuter sent a message "I'm looking for fun but you only 14 so I leave you alone" to which Bexii/U responded "Oh and my age means I'm no good". Shortly afterwards, the person sent a message "Okay shall I leave you alone" and another message "Just imagine me kissing you on the lips". The response from Bexii/U was "No stop saying your going...".

[64] There was a similar pattern in the exchanges with Ms W. The initial approach on SayHi was "Looking for a bit of naughty fun gorgeous". There is no evidence that the person alleged to have been the Minuter had any information about the age which Ms W, as the decoy, was claiming to be when he sent that message. Her reply, however, was unequivocal: "What u mean? I'm only 12". His immediate response was "OK I leave you alone" and then, when she replied "OK", "Do u want me to leave you alone". W replied "Its up 2 u" and the person relied "No up to you". When the exchanges moved over to WhatsApp, the person alleged to be the Minuter asked several times "Do you want me to leave you alone",

ultimately receiving the response "I don't mind". Ms W agreed with the Procurator Fiscal that she had been encouraging him to keep going.

[65] On 11 August 2017, after a silence of about 29 hours, Ms W initiated contact again, sending a message which said "Hi". Counsel for the Minuter asked her about that and her answer was "I shouldn't have done that. My mistake". Asked whether it was the case that she had kept communicating instead of taking up the offer to be left alone and that, when he had drawn a line under things, she kept them going, she replied "Yes, you could say that".

[66] All of this reflects the fact that it was a deliberate part of the scheme that the decoy would build things up to get a tougher sentence and try to keep things going for two weeks. Whilst it is true that neither Mr U nor Ms W initiated sexual content, and that neither pressed the person alleged to be the Minuter in the way that was done in *HM Advocate* v *IP* [2017] HCJAC 56, it is also true that their whole idea was to cultivate sexual content, grow it on and nurture it for long enough to make it serious. Their conduct of the exchanges was, in my opinion, manipulative, especially in relation to a person who suffers from a degree of cognitive impairment.

The motion to excuse irregularity

[67] The position of the Crown is that the activities of Mr U and Ms W were not unlawful but that, if there was irregularity, it ought to be excused. The Crown refer to *Lawrie* v *Muir* and submit (correctly) that there is no absolute rule. The Crown submit that the Minuter is alleged to have committed a serious crime and to have involved himself in sexual exchanges voluntarily.

[68] For the reasons given above, I approach this question on the basis that the default position is that evidence which has been obtained improperly will be excluded but that the

court has a discretion to admit it by excusing the irregularity and that it is for the Crown to establish that it is admissible, not for the defence to establish that it is not. The Crown has not persuaded me that the evidence should be admitted.

[69] First, there is a substantial difference between this case and the kind of example contemplated in *Lawrie* v *Muir* in which Lord Cooper said it would be "usually" be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained. That example, which Lord Cooper regarded as extreme, involved an officer exceeding the limits of a warrant or (as the case law has developed) circumstances of urgency in relation to a very serious case in which there had been real harm to a real person. This case involves a deliberate scheme in which there was never a real child. There is irony in the fact that Det Con Morrison detained the Minuter for a crime of which (even assuming he was the person involved) he was certainly innocent. He was not guilty of the crime of communicating indecently because the people with whom he communicated – Mr U and Ms W – were adults who were consenting to the communications – indeed they were hoping for them. It is not self-evidently correct that a person whose conduct is in fact entirely lawful (communicating sexually with a consenting adult who encourages that communication) should nevertheless be convicted of an offence because, acting under error as to the facts induced by the adult in question, he tried to act unlawfully. That issue is potentially complex and was not debated before me. I therefore do not require to decide about it; but, in other similar cases, it might become relevant. There is an obvious distinction between that and cases such as *Hardwicke* in which drugs were supplied unlawfully and what the defendant did could never have been lawful whatever the facts had been.

[70] The level of criminality involved on the part of the Minuter was not especially serious (this is, after all, a summary prosecution for an attempt at the impossible) and, although some of what he is alleged to have said in the messages was deplorable, little, if any, of it is any worse than what most real 14 year olds and many real 12 year olds are likely to hear in school corridors and playgrounds every day.

[71] Second, the irregularity which the Crown asks me to excuse is deliberate dishonesty. What is often forgotten about *Lawrie* v *Muir* is that the Court refused to excuse the irregularity and that the reason given by Lord Cooper is that "...the inspectors acted in good faith, but it is incontrovertible that they obtained the assent of the appellant to the search of her shop by means of a positive misrepresentation made to her." In my opinion, deliberate dishonesty on a central matter is rarely likely to be excusable (at least in the absence of a proper authorisation in terms of RIPSA, in which case it would probably not need to be excused). I reject any suggestion that Mr U acted in good faith.

[72] Third, in my opinion there are strong public policy considerations which militate against excusing the impropriety involved in this kind of case. To be sure, internet crime is a serious issue, though it is far more complex than Mr U and Ms W appeared to recognise. Police Scotland take it seriously. But policing is a skilled, professional activity which ought to be left to the police. As to their resources, the police have what has been allocated to them by the Scottish Government, which is made up of representatives elected by the people of Scotland (and, as I understand it, contrary to the assumption made by Mr U and Ms W on the basis of UK Government resourcing of the police in England, police numbers in Scotland have increased over the last few years). Whereas it is the statutory duty of a constable to prevent crime (Police and Fire Reform (Scotland) Act 2012 s20(1)(a)), it was the objective of Mr U's scheme to tempt the susceptible to commit it. Police officers work within a careful

scheme of regulation and inspection and they are democratically accountable. When it comes to covert policing, they operate within a carefully constructed regulatory framework which exists for the protection of the public as a whole. They go about their work in a way which involves making careful judgments about what lines of enquiry to follow up and takes account of factors such as cognitive impairment in a suspect. They respect jurisdictional boundaries (there would have been no question of police officers from Nottinghamshire conducting an investigation outside their own force area, much less travelling to Dundee to try to confront a suspect, without close liaison with their colleagues in the jurisdiction in which events were taking place). They do not confront suspects and they understand that arrests ought to be made in a way which does not risk public disorder. They do not post photographs of arrested suspects on the internet because they understand that the person is likely to appear in court the next day and that publishing photographs poses risks for the administration of justice and might amount to contempt of court (*McAlister* v *Associated Newspapers Ltd* 1954 SLT 14; *Lord Advocate* v *Scottish Daily Record and Sunday Mail Ltd* [2018] HCJAC 32). None of these things is true of what Mr U and Ms W did (or, as I understand it, of vigilante groups generally). To excuse the improprieties in what happens in such cases would be to encourage those who are inclined to pursue such action to think that they can operate outside any regulatory structure, to think that they can operate outside the law, to think that they can operate without having to observe the carefully considered limits which the legislature has applied to the police (whom they claim to be helping) and to think that they can manipulate the courts into imposing condign sentences. That would be contrary to the wider public interest in the rule of law.

[73] I have, accordingly, decided to sustain the objection to the admissibility of evidence to the extent of excluding the evidence of Mr U and Ms W as inadmissible. I repel the

objection to the rest of the evidence *in hoc statu* on the basis that I have no information about what that evidence is or the extent to which it depends on the evidence which I have excluded.