SHERIFF APPEAL COURT

[2019] SAC (CIV) 030
EDI-F1024-16

Sheriff Principal I Abercrombie QC
Appeal Sheriff P J Braid
Appeal Sheriff H K Small

OPINION OF THE COURT

delivered by APPEAL SHERIFF H K SMALL

in appeal by

CM

Pursuer and Respondent

against

ME-M

Defender and Appellant

Appellant: M Clark, advocate; Brodies
Respondent: Malcolm, advocate; Thorley Stephenson;

24 July 2019

Introduction

[1] The parties to this action had a relationship which began in 2000 and ended in September 2015. There is one child of the relationship, "A", born on 5 September 2011. Since separation A has lived with her mother (the defender and appellant). In August 2016 her father (the pursuer and respondent) raised the present proceedings seeking an order for contact with A in terms of section 11 of the Children (Scotland) Act 1995. There followed a

series of court orders permitting interim contact, but on a supervised basis, contact generally being supervised by the defender and/or her mother.

[2] The pursuer's application for contact was opposed. After sundry procedure, the case proceeded to proof at Edinburgh Sheriff Court over five days in 2018. In January 2019 the sheriff issued a judgement in which he held that contact with her father was in A's best interest. He granted the pursuer's crave for contact, initially on a supervised basis, but thereafter progressing, over a period of eight weeks, to unsupervised contact. The defender now appeals that decision to this court.

[3] The sheriff made 75 findings-in-fact, which, in large part, are not challenged. The matters giving rise to dispute between the parties first arose in August 2015, when A began to report matters to her mother which created concern as to possible sexual abuse, possibly at the instance of her father. A was the subject of a joint police/social work investigative interview. The allegations disclosed by A to her mother were not repeated at that interview, and it was only after the interview that A claimed that the pursuer had any involvement. The details of the whole matter are set out in the sheriff's findings-in-fact. The pursuer has never been charged with any offence, nor has there been a reference to a Children's Hearing. However, the results of these developments were that the parties separated, the defender believing that abuse took place, and the pursuer has not seen A, other than on a supervised basis, since September 2015.

[4] By the time of proof, the defender's pleadings included averments that A had made a number of sexualised comments and disclosures including references to intimate kissing, to grinding, to "glugging" and to oral sex; and had later advised the defender that she had learned these expressions from the pursuer. It was further averred that A expressed a fear of the pursuer to the defender "because of the bad things he did"; that in April 2016 she

disclosed that the pursuer had put hands round her neck; that in October 2016 she stated that the pursuer had touched her bottom and her genitals and in June 2017 that the pursuer had licked her genitals. It was further averred that in July 2017, A stated that the pursuer had threatened to push her down a hill in July 2015; that in October 2017, she stated that the pursuer had shown her inappropriate sexual images on an iPod (or iPad), and that in March 2018 A stated that the pursuer "did bad things" to her. It was averred that in April 2018, A disclosed to other children that the pursuer had made her touch his penis; that in June 2018, A told the defender that there had been an incident on an unspecified date between her and the pursuer in a wood when she had been swung upside down by her feet; and in further reference to that incident, in July 2018, A was said to have told the defender that she had been made to touch the pursuer's penis. It was also averred that in November 2015, A drew a picture of herself, as a parrot, sitting on a man's penis. In reply, the pursuer's pleadings included averments to the general effect that, while it could not be disputed by the pursuer that the child may have made such comments, he denied being responsible for any inappropriate actions or comments of a sexual and/or violent nature towards A. The question of the truth or otherwise of the allegations by A was the major and contentious issue at proof. The child did not give evidence. The court was assisted by the evidence of an expert witness Dr Katherine Edward who was initially instructed on a joint remit.

[5] In his judgement the sheriff made findings-in-fact in relation to these contentious issues, to the general effect that A had made these various statements of a sexual and/or violent nature to the defender; that A initially did not state where she had learned such language or behaviours; that she initially named a number of adults and family members as the source, then said that she had learned some of the behaviours from another child; and, at a later date, following the parties' separation and the first joint investigative interview at

which she made no disclosure of any sexual abuse, that she had learned some of the inappropriate comments from the pursuer. The sheriff also found that the further post-separation "disclosures" referred to in para [4] above were made. He found that as a result of the further statements made in April and June 2018, there was a further joint investigative interview in June 2018 at which A repeated little of the information she had given to the defender. He found that while various statements had been made to the defender, there were no disclosures made in the first joint investigative interview, no disclosures of a sexual nature in the second joint investigative interview and no disclosures of a sexual nature to anyone at school.

[6] Having considered all of the evidence and submissions made to him, the sheriff decided that while he was prepared to hold that A had made the sexual comments and other statements attributed to her, all coming after the parties' separation and being made to the defender and to other persons, he was unable to accept as trustworthy the hearsay statements of A. He found himself unable to conclude that the evidence was of sufficient quality and weight to lead him to the conclusion that the pursuer abused A. Thereafter, and on the basis that the supervised contact which had been operating for some time appeared to be operating satisfactorily and that it was in A's best interest that contact continue, he made the order in favour of the pursuer referred to at para [2] above.

The grounds of appeal

[7] In support of the grounds of appeal, Counsel for the appellant lodged a detailed note of argument (item 8 of process). The motions made by her to this court were:

a. The Sheriff having erred in law, and in fact and law, the decision contained within his Judgement being vitiated, the appeal should be allowed.

b. The court, having findings in fact from the Sheriff, evidence before it and guidance from the relevant authorities to justify so doing, should substitute its own decision for the decision of the Sheriff, by finding that the respondent sexually abused A.

c. *Esto* the court is not justified in substituting its own decision for the decision of the Sheriff, the cause should be remitted to another Sheriff for re-hearing of the diet of proof.

[8] The arguments advanced by counsel for the appellant in support of these motions fell into two parts. The first was that the sheriff erred in his evaluation of the quality and weight of the evidence by placing undue weight on the consequences for the respondent of a finding that he sexually abused A, and by considering such consequences in isolation. In so doing, he erred in his application of the decision in the case of *B* v *Scottish Ministers* 2010 SC 472. In general, the sheriff's forensic analysis of the entire evidence of the case failed to follow the approach laid down in the cases of *T* v *T* 2001 SC 337 and *A* v *A* 2013 SLT 355. He ought to have properly evaluated and attached due weight to the statements of A which were incriminatory of sexual abuse by the respondent, particularly when viewed in light of the evidence of Dr Edward the clinical psychologist. Counsel submitted that rather than affording due weight to certain of the statements made by A, the sheriff had simply disregarded A's statements. He failed to provide cogent reasons for so doing. He failed to attach due weight to the evidence of Dr Edward, the clinical psychologist. Counsel's subsidiary and second argument was that the sheriff also failed to recognise and apply the "paramountcy principle" of the best interests of A, as a component in his evaluation of the evidence and failed in his statutory duty to have due regard to the need to protect A from

the risk of abuse, all in terms of section 11(7)(a) and section 11(7B) of the Children (Scotland) Act 1995.

[9] In support of her substantive ground of appeal, counsel for the appellant referred to a number of findings which the sheriff had made about A's behaviour (findings-in-fact 19, 20, 38, 40, 41, 42, 43 – 46, 47, 48-49, 52, 53 and 55). In addition, the court had the benefit of the evidence of Dr Katherine Edward a chartered clinical psychologist. A full transcript of her evidence was made available to the court. Dr Edward had prepared two reports. In the first of these reports dated 13 October 2017, Dr Edward reported that she "saw no evidence in direct assessment of A that she has been abused by her father and that there is significant cause for concern that her later 'disclosures' have been confounded and confused by the responses and beliefs of her mother". However, in Dr Edward's second report, dated 1 November 2017, she referred to further disclosures made by A which could not be regarded as tainted by any confounding factors. In her second report, Dr Edward stated that the additional information (being the disclosure of 26 October 2017 regarding images on an ipod) increased her concerns. Further comments made by A at a playdate in April 2018 and on holiday in June 2018 would cause her as a clinician "considerable concern", and would cause her to conclude that there was cause for concern that something had happened to A in terms of sexual abuse. It was submitted that the sheriff, in assessing the evidence of A, and the effects upon that assessment of the evidence of Dr Edward, failed to follow the guidance given in the case of *T* v *T*, *per* Lord Rodger at page 349 C-F. It was submitted that by failing to "deal with" the statements made by A which the expert witness considered were of serious clinical concern, free of material confounding factors and highly suggestive of serious sexual abuse having been perpetrated upon A by the respondent, the sheriff was in error. He ought to have considered the hearsay evidence of the child, whilst also having

regard to the expert evidence from Dr Edward. Had he done so, it was submitted, and had he fully applied the approach required by the cases of *T* v *T* and *A* v *A*, then he would have found the hearsay evidence from A to be trustworthy, accepted it, and found in fact that the respondent was the perpetrator of abuse of A. The sheriff erred in not doing so. This court, on reviewing the evidence of Dr Edward which was available in transcript form, should overturn the sheriff's findings in relation to A, and should hold that the statements of A were accepted as truthful and that it was established that inappropriate sexualised language, inappropriate conduct, and sexual abuse had been visited upon A by the respondent. If that was done, it could not be said that contact was in A's best interests. The appeal should be allowed.

[10] In support of her submission that the sheriff misapplied the decision of the court in the case of *B* v *Scottish Ministers* and placed undue weight on the consequences for the respondent of a finding of sexual abuse, counsel for the appellant referred us to para [41] of the decision in that case. The case involved the decision of an Extra Division in an appeal relating to the provisions of the Mental Health (Scotland) Act 1984 and the standard of proof to be applied in proceedings under that Act. The court quoted with approval a passage from the case of *R (McCann)* v *Manchester Crown Court* [2003] 1 AC 787 where it is stated:

> "Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious consequence if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities."

[11] Having accepted that general proposition, the court went on, at para [42], to state:

> "Where an allegation of criminal conduct is made in civil proceedings, the standard of proof is the balance of probabilities; but the nature of the allegation may be such as to call for evidence of quality and weight and for that evidence to be carefully examined and scrutinised in the course of the forensic process."

[12] Counsel criticised the sheriff for his reliance on that part of the decision in *B* v *Scottish Ministers*. That case related to proceedings under mental health legislation. It was quite different, factually and legally, from the instant case which involved the best interests of a young child. It was clear from what the sheriff said at paras [55] and [56] that the question of the serious consequences for the respondent if the allegation was proved weighed heavily with the sheriff in his assessment of the evidence. He quoted the affidavit evidence from the respondent's employer of the nature of his employment and the consequences of a finding of abuse. He referred again to what was said in *B* v *Scottish Ministers*. In counsel's submission, the sheriff was clearly influenced in his assessment of the evidence by deciding to follow what was set out in paras [41] and [42] of that case. He referred to the case again when assessing the evidence, at para [62] of his judgement – which was essentially the operative part of the judgement – where he assessed all of the evidence and concluded that it was not of sufficient quality and weight to lead him to the conclusion that the respondent abused A.

[13] Counsel for the appellant submitted that the correct approach which the sheriff should have adopted was that set out in the case of *A* v *A*, where the court considered factors which may have a bearing on whether hearsay statements of a child may be relied upon. The five bench decision in *T* v *T*, considered with approval in *A* v *A* focused on the trustworthiness of evidence and the matter of statements coming from a child. It was submitted that, in reliance on the decision on *T* v *T*, the ultimate question for the sheriff ought to have been whether the hearsay statements of A were capable of being relied upon as being trustworthy. Counsel also submitted that the importance of "filtering the child's evidence through the evidence of an expert", as happened in this case, was relevant, as Lord Rodger, in *T* v *T* at page 349 C-F stated:

> "If evidence of their statements is admitted, the judge or jury will again have to use their wisdom and common sense to decide whether the statements are trustworthy. The exercise is not *au fond* different. In carrying it out, in the case of young children in particular, the judge or jury will be able to draw not only on their own experience of listening to children in everyday life but also on any expert evidence which may be tendered in relation to the individual whose statement is in issue."

[14] It was submitted that the sheriff had noted this guidance, but failed to follow it. It was submitted that rather than viewing the evidence of A through the prism of the expert evidence, the sheriff expressly rejected reliance upon the expert evidence – at para [62] of his judgement – and erred in so doing. He failed to deal with the statements made by the child which the expert considered were of serious clinical concern, free of material confounding factors, and highly suggestive of serious sexual abuse having been perpetrated upon A by the respondent. Rather, it was submitted, the sheriff's starting point had been the serious consequence for the respondent of a finding of sexual abuse and that he "calibrated the quality and weight of the evidence through the prism of the serious consequence for the respondent."

[15] In relation to the case of *A* v *A*, the court had considered factors which had a bearing on whether hearsay evidence of a child might be relied upon. Counsel referred to page 358 F-H of the decision where Lady Dorrian opined, as was said in *T* v *T*, that the ultimate question for the court was whether the hearsay statement relied upon is capable of being relied upon; whether it is trustworthy. The court went on to say, at page 360 A-B

> "In a case such as this, we do not consider that it is particularly helpful to try to confine this matter to one of the credibility and reliability of the maker of the hearsay statement, especially when that person is a young child. There will be many factors which are relevant to the question of whether the hearsay can be relied upon; are the people to whom the statements are said to have been made credible and reliable? Did they have some particular axe to grind, or animus towards the subject of the statement? Can the same be said of the actual maker of the statement? What were the circumstances in which the statements were made? Were they elicited in response to leading questions or was there an element of spontaneity? Did the people to whom the statements were made simply accept them at face value, or did they consider

> whether there might have been an alternative and innocent explanation for the statements? These are all factors which may have a bearing on the overall question of the weight which the fact finder may satisfactorily feel able to place on the hearsay statement."

[16] It was submitted that the Sheriff failed to evaluate the statements of the child in that manner and accordingly fell into error.

[17] Counsel for the appellant was also critical of the sheriff's failure to have due regard to the expert evidence of Dr Edward, when assessing the trustworthiness of the evidence of A. It was counsel's submission that, had the sheriff done so, he would have recognised when evaluating A's evidence the importance of the elements of spontaneity and other factors enhancing the credence of the information such as the location and time and place of the allegations. This was in accordance with the decision of the court in *A* v *A*. The sheriff's judgement, it was submitted, was absent of analysis and evaluation of the seriously concerning statements which the sheriff accepted had been made by A. Dr Edward's evidence would have assisted the sheriff in distinguishing evidence of statements which were difficult to interpret due to a confounding factor and statements which were not. It was submitted that Dr Edward made it clear that a number of statements by A were not subject to any material confounding factor, something which was highly relevant to the way in which the trustworthiness of that statement should be assessed. These statements were, firstly, the statement made by A on 26 October 2017 about the respondent showing pornographic material to A on his iPod. Secondly, there was the statement by A at a playdate on 7 April 2018 to another child; and thirdly, there was the statement made by A to the appellant whilst on holiday on 4 July 2018. Dr Edward had described this disclosure as "high up" on the scale of concern and that the disclosure was "much harder to misinterpret" and "much clearer to what she was trying to express". If truthful, the statement "causes very

considerable concern of an experience the child had in the company of her father." Counsel submitted that the sheriff, by failing to analyse or evaluate that statement properly when deciding what weight if any to attach to it, fell into error.

[18] The other substantive argument advanced by counsel for the appellant was that the sheriff in assessing the trustworthiness of the hearsay evidence of A failed to have regard to the statutory requirements of section 11 of the Children (Scotland) Act 1995 by failing, when assessing the evidence, to regard the welfare of the child concerned as the paramount consideration, in terms of section 11(7)(a); and also, when assessing the trustworthiness of the child, by failing to have regard to the requirement imposed by section 11(7B) of the Act to protect A from any abuse or risk of abuse which might affect her. No further authority was relied upon by counsel for this part of her submission.

[19] Counsel for the appellant invited this court to accept that the sheriff had erred in his approach to the evaluation of the trustworthiness or otherwise of the evidence of A and that, if satisfied that he had so erred, to have regard to the evidence of Dr Edward contained in the transcript, to hold that the respondent had acted towards A in the manner described by A in the various statements made by her to her mother and to allow the appeal and recall the order for contact. In the event that the court accepted and agreed with the submissions in support of the appeal, but felt unable to substitute its own findings-in-fact in relation to the pursuer's conduct, then the regrettable but appropriate course would be to allow the appeal and to direct that the proof be heard again, before a different sheriff.

The respondent's submissions

[20] In reply, counsel for the pursuer and respondent accepted that the primary issue in the case was whether or not it could be established that the respondent had perpetrated

sexual abuse on and otherwise acted in an inappropriate manner towards A such that contact should be terminated. The task for the sheriff at first instance was to assess the evidence before him and make findings-in-fact on the basis of that evidence, on the balance of probabilities. What made this task harder for the sheriff was that the main source of evidence of potential abuse was the hearsay statements of a child, aged between 4 and 6 years at the time when such incidents would have taken place. Counsel accepted that the correct approach to be followed in such cases was found in the binding decisions in the cases of *T* v *T* and *A* v *A*, both of which related to disputes over contact arrangements with a young child. In relation to hearsay evidence of a young child, counsel submitted that it was simply a matter of assessing the trustworthiness of the statements and the sheriff using his wisdom and common sense to assess what weight, if any, to give to that evidence, bearing in mind all the relevant factors. Reference was made to the opinion of the Lord President (Rodger) in *T* v *T* at page 349 C-F. In addition, and as a general proposition, she submitted that, on the basis of the decision in *B* v *Scottish Ministers*, the more serious the consequences if the allegations are proved, the stronger the evidence must be.

[21] Counsel submitted that the sheriff properly recognised the binding effect of these authorities and the approach he required to take to the statements of A. He understood that he needed to scrutinise them carefully having regard to the allegations of a criminal offence, but also recognised the need to consider the evidence within the context of the case as a whole. That was clear from para [60] of his judgement. As could be seen in the conclusion of his judgement at para [62], the sheriff did not, as counsel for the appellant had suggested, look at the issue of the consequences for the respondent in isolation or as a priority but rather considered all the factors relevant to the assessment of the weight to be given to the hearsay evidence of A. He had followed the guidance given in both *A* v *A* and *T* v *T*.

[22] In relation to the criticisms made of the sheriff in relation to his treatment of the expert evidence of Dr Edward, counsel submitted that he had properly had regard to that evidence. He considered that expert evidence at length in paragraphs [27] to [32] of his judgement. At para [62] (on page 44), he considered issues of spontaneity of the statements made by A and the view of that taken by Dr Edward. He also quite properly identified concerns about the evidence of the defender's actions and reactions, the independent views of the senior social worker, the possibility of the defender's strongly held beliefs that the pursuer was an abuser having influenced A, and the overall effect of all of the evidence on his assessment of the trustworthiness of A.

[23] Thereafter, having reached the view that no finding could be made that the pursuer had sexually abused the child, and having regard to the fact that other evidence indicated that contact was something the child enjoyed and benefited from, the decision which the sheriff ultimately reached in relation to contact was fully justified as being in the best interests of the child.

[24] Counsel for the respondent submitted that the grounds of appeal advanced by the appellant amounted to a submission to this court that the sheriff had erred in law either in regard to his approach to the evidence or his apportionment of weight. She submitted that if error regarding either of these elements was not established, then this court could interfere only if the sheriff's decision could not be explained or justified – *Thomas* v *Thomas* 1947 SC (HL) 45; *Henderson* v *Foxworth Investments Ltd and another* 2014 UKSC 41.

[25] Counsel did not accept the appellant's criticism of the sheriff to the effect that he had prioritised the consequence for the pursuer above all other considerations and effectively decided the case on that basis, having wrongly concluded on a reading of *B* v *Scottish Ministers* that this was the correct approach. Rather, the sheriff had correctly identified that

the decision in *B* v *Scottish Ministers* allowed him to take that into account as one factor when assessing the trustworthiness of A's statements. It was clear from a reading of his judgement as a whole that this was just one of the many factors taken into account when assessing the weight of what A said. It was her submission that rather than being unduly influenced by the case of *B* v *Scottish Ministers* the sheriff had, in fact, done all that was required of him by the cases of *T* v *T* and *A* v *A*. It was clear that the sheriff relied on *T* v *T*. He quite correctly identified at paragraph [62] of his judgement that the question was the trustworthiness of A's statements. The sheriff followed that approach and considered all material relevant to the assessment of the trustworthiness of A's evidence including matters such as spontaneity, credibility and reliability of other witnesses and other factors referred to in *A* v *A*.

[26] In relation to the appellant's criticism of the sheriff's apparent rejection of the expert evidence, it was her submission that this was not what the sheriff had done. What the sheriff says at para [62] (page 43) is "whether I accept the evidence is not a matter for expert evidence". In her submission, all the sheriff was seeking to convey was that the question of A's trustworthiness is not a matter for the expert to directly opine on. The decision on that matter is one for the sheriff. Although the sheriff accepted that the final assessment of the evidence was for him and him alone, he did not ignore the expert evidence of Dr Edward, when assessing the trustworthiness of A. This was borne out by the fact that he referred to the expert evidence in detail at para [62]. Accordingly, it was counsel's submission that Dr Edward's expert evidence was fully considered by the sheriff, as could be seen from his lengthy narrative of her evidence from paras [27] to [32]. In relation to the three later statements made by A which Dr Edward considered were not confounded, it was counsel's submission that these three statements were not of such significance as counsel for the

appellant sought to make out. While accepting that Dr Edward's view was that these three statements led to heightened concerns, these heightened concerns did not constitute a professional opinion from Dr Edward to the effect that they could be relied upon as accurate descriptions by A of abuse perpetrated by the respondent. If regard was had to Dr Edward's evidence, at page 178 of the transcript, it remained her expert opinion that she

> "…would say that it is possible that A is saying things that she has learnt to say or been coached to say, or she is recounting her experience. What I believe is that we have those two options, and I would be very unwilling to suggest to the court that I would discount either of them, and I certainly could not say to the court that, after these comments made by A, that I would be comfortable saying that she has not experienced abuse."

While the expert accepted that was different from the conclusion in her first report, she was still equivocating and could not come down on one side or another as to validity or otherwise of the later disclosures made by A.

[27] It was counsel's submission that a reading of the judgement as a whole demonstrated that the sheriff had carried out a careful balancing exercise in the assessment of the evidence and covered all relevant aspects of the evidence. In paras [62] and [63] of his judgement, he dealt with the assessment of the evidence and what he had taken into account in deciding whether or not the evidence of A is trustworthy, to the extent that he could reach a conclusion in relation to whether or not the respondent abused A. Having properly interpreted and assessed all relevant evidence, his decision that the evidence was not of sufficient quality and weight to lead to the conclusion that the respondent abused A could not be faulted. Having ruled out finding that abuse had taken place, the sheriff's analysis at para [63] of the evidence in support of contact, and his application of the appropriate tests required by section 11 of the Children (Scotland) Act 1995 likewise could not be faulted.

[28] In relation to that section, counsel for the respondent did not agree with the appellant's criticism to the effect that the sheriff erred by not having regard to the paramountcy test or the need to protect A from abuse, when assessing the trustworthiness of her statements. In her submission, the section 11 factors were relevant only in relation to whether or not a section 11 order should be made. The assessment of the evidence of A should not be made against a background of what was in the best interests of A.

[29] In the event that the court decided that the sheriff had erred in his approach and was minded to allow the appeal, it was counsel's submission that this court could not and should not make additional findings-in-fact to the effect that the pursuer had abused the child. The only evidence presently before this court was the evidence, in transcript form, of Dr Edward. There had been no opportunity for the court to assess the entire evidence in the case. If the sheriff's decision were to be overturned on appeal, then another proof before another sheriff would be required.

Discussion and Decision

[30] Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child. There requires to be a reasonable basis for a decision to refuse such an application. For an appellate court to interfere with a decision of this kind, it is not enough to disagree with the court below, in the sense that it would have reached a different decision. Absent some clear error, such as applying the wrong test, an appellate court can interfere only if the decision is plainly wrong, in the sense that no reasonable judge could have reached it. Furthermore a generous ambit is given to the sheriff who heard the proof. That sheriff requires to exercise his or her

judgement based on consideration of the relevant factors. Where the sheriff has seen and heard the witnesses, it would be unusual for an appellate court to interfere with the sheriff's judgement unless it has been shown to be unsound.

[31] We consider that the sheriff did not err in his overall approach to the decision-making process. He carried out a proper and detailed forensic evaluation of the evidence, and gave due weight to the evidence before him, particularly the nature of the allegation of abuse of A by the respondent. The sheriff did not in our view place undue weight on the serious consequences for the respondent if that allegation was proved.

[32] Contrary to the submissions on behalf of the appellant and given the sheriff's unchallenged findings-in-fact, we are satisfied that the sheriff's decision cannot be categorised as unjustifiable, inexplicable, one that he reached in error, or as one which was plainly wrong. On a reading of his judgement as a whole, it is clear that he has correctly identified and applied the observations of Lord President Rodger in *T* v *T* and of Lady Dorrian in *A* v *A*. He has also properly had regard to what was said in *B* v *Scottish Ministers* in relation to the nature of allegations of criminal conduct. We cannot accept the submission that he was unduly influenced in his decision by what was said in that case. While we accept that the decision in the case of *B* v *Scottish Ministers* was brought under mental health legislation and was made against a different factual background, the sheriff recognised that fact (see para [55] of his judgement). However, there is nothing in the decision in *B* v *Scottish Ministers* which restricts its application to cases other than those brought under the 1984 Act. We consider it is a valid statement of the law in relation to assessment of evidence of criminal conduct, in the course of civil proceedings where the test is one of a balance of probabilities. The seriousness of the allegations made by A and the consequences for the

pursuer if these allegations were proved was a relevant factor – but only one of a number of relevant factors – which the sheriff took into account.

[33] The operative part of the sheriff's decision can be found at para [62] of his judgement. There, he correctly identifies that the issue for him was whether or not he accepted the statements made by A as being evidence of the truth of what was said. The question was correctly summarised by him as trustworthiness of the evidence.

[34] In following the approach identified in *A* v *A*, the sheriff had regard to the credibility and reliability of the witnesses who were before him. In particular, he assessed, at paras [56] and [57], the evidence of each of the parties. It is of particular relevance to note that he found the respondent generally credible and reliable and was not prepared to disbelieve him in relation to his denials of abuse. While he found the appellant's evidence credible, he had reservations about the reliability of her evidence, having regard to other evidence in the case accepted by him that she was overprotective, and to his finding that she had convinced herself that abuse of A by the respondent had taken place. To that extent, she was ill disposed towards the respondent. A, however, having stated to the appellant that she was fearful of her father to an extent, was on the evidence accepted by the sheriff quite prepared to attend for contact with him, without displaying any difficulties or concerns. The sheriff held that a number of the statements made by A to her mother were confounded. Those which were not were made well after any incident to which they might have related, and had not consistently been made to others. All of these factors had a bearing on the overall question of weight and were taken into account by the sheriff as the fact finder – see para [62] of his judgement.

[35] We cannot accept that the sheriff failed to give due regard to the expert evidence of Dr Edward nor do we think he rejected her evidence, when considering the hearsay

evidence of A. In our view, the sheriff's comment "*whether I accept the evidence (of A) is not a matter for expert evidence*" (at para [62]), does not amount to him ignoring Dr Edward's evidence, and it is in our view unfair to categorise this statement as such. The sheriff clearly has not ignored Dr Edward's evidence. In a lengthy section of his judgement he analyses the evidence of A, under reference to the evidence given by Dr Edward. This can be seen on a consideration of pages 84 and 85 of his judgement. An expert witness's evidence cannot be determinative by itself in any case. It is for the fact finder to consider and assess that evidence and give it the weight he or she considers it deserves. The factors which the sheriff took into account in assessing A's hearsay evidence were of the sort referred to by Lady Dorrian in her observations in *A* v *A*. The sheriff had regard to the hearsay evidence of the child, under reference to the evidence of the expert as required by Lord Rodger in *T* v *T*. Before completing his assessment of the evidence, the sheriff reminded himself of what was said in *B* v *Scottish Ministers* about the seriousness of allegation and serious consequences which might follow. The sheriff's conclusion was that the evidence was not of sufficient quality and weight to lead him to the conclusion that the pursuer abused A. Nothing in his approach, nor his conclusion, can be faulted.

[36] No authorities were referred to by counsel for the appellant in support of what was the second part of her submission to the effect that the sheriff failed to have regard to the factors specified in sections 11(7)(a) and 11(7B) of the 1995 Act when assessing the evidence. It is clear from a reading of these sections that the welfare of the child as the paramount consideration and the need to protect the child from abuse arise when a judge is considering whether or not to make a section 11 order. We have no hesitation in deciding that these statutory requirements should play no part at the stage of the sheriff's assessment of the truthfulness or trustworthiness of the evidence he or she has heard.

[37] The appeal is refused. Unless parties can agree, we will fix a hearing on expenses.