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ENTRAPMENT AND THE ROAD TO FRAUD

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Recent comments by Sheriff Brown in *P(P)*¹ address an increasing unease with vigilante groups described as ‘paedophile hunters’ and specifically the question of whether the evidence which they gather can be admitted into Scottish courts. Considering that such evidence could not, Sheriff Brown went further to state that the actions of the group in question amount to a criminal 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.

The ramifications of Sheriff Brown’s comments - intended no doubt to act as a deterrent to vigilante groups - will be fully considered.²

P(P) and the rise of the paedophile hunters

In October 2018 ‘P’ appeared in Dundee Sheriff Court, accused of communicating indecently with children he believed to be aged 12 and 14 contrary to sections 34(1) and 24(1) of the Sexual Offences (Scotland) Act 2009. The children involved in this accusation were in fact Mr U and Mrs W - adult members of a vigilante ‘paedophile hunter’ group. P’s legal representative lodged a plea of entrapment, arguing that the evidence which had been obtained by the vigilante group should not be admitted into evidence and also that his rights under Article 8 of the European Convention of Human Rights had been breached since the group were acting outwith the powers of the Regulation of Investigatory Powers 2 (Scotland) Act 2000 (“RIPSA”). Hearing the plea, Sheriff Alastair Brown agreed that, the evidence which had been gathered by the group should be excluded, but the plea of oppression based on entrapment was not upheld and similarly the arguments based on RIPSA were repelled.³

The existence of such groups is not a new phenomenon, but their accessibility has undoubtedly increased as a result of the ubiquitous nature of social media platforms, particularly Facebook where several groups have public pages. Groups who have received media attention include Wolfpack Hunters UK, Dark Justice, Guardians of the North, Silent Justice and Stinson Hunter, but others exist. In 2018 the BBC reported, following a freedom of information request sent to every police force in England and Wales, that evidence from paedophile hunter groups had been used to charge 150 suspects over the period of a year.⁴ Police Scotland have similarly accepted and used evidence from these private organisations with such evidence resulting in convictions against some of those individuals targeted by ‘stings’.⁵ However, there are increasing concerns associated with the activity

¹ [2019] SC Dun 39.

² *Ibid* at para 5.

³ For discussion, in a different context, of the admissibility of evidence in terms of RIPSA, see P Glover, “The Admissibility of covert video data evidence in wildlife crime proceedings: a ‘public authority’ issue?” (2017) 4 *Jur Rev* 269.

⁴ “‘Paedophile hunter’ evidence used to charge 150 suspects”, BBC News, April 10, 2018; available at: <https://www.bbc.co.uk/news/uk-england-43634585> [Last accessed 6 June 2019]

⁵ “Paedophile who travelled to Glasgow to meet ‘schoolgirls’ jailed for 15 months”, Glasgow Live, February 28, 2019; available at: <https://www.glasgowlive.co.uk/news/glasgow-news/paedophile-who-travelled-glasgow-meet-15900785> [Last accessed 6 June 2019]

of these vigilante groups, as reflected in Sheriff Brown's comments. In August 2018, Police Scotland issued a warning to members of the Wolfpack Hunters UK about their behaviour and presence at a private residence in Fife,⁶ and last year four members of the same group were arrested and subsequently prosecuted for abduction and assault, following a disturbance outside Edinburgh Bus Station.⁷ The National Police Chiefs Council have previously commented that such groups present "significant risks" due to their evidence gathering tactics.⁸

Entrapment

Historically under Scots Law, exclusion of evidence arguments has been primarily structured around whether or not evidence is unfairly obtained, rather than conceptualised as entrapment. The first time that entrapment was successfully argued in a Scottish court was following the incorporation of the ECHR into Scots Law in a case which concerned allegations of drug offences.⁹ Later, the case of *Brown v HM Advocate*¹⁰ suggested that the best approach was to stay proceedings and this approach was formalised by the decision in *Jones and Doyle v HM Advocate*.¹¹ Here, the court took the opportunity to discuss the elements of the plea of entrapment, concluding that it should stay proceedings since it is a form of oppression. The appropriateness of this decision has been discussed by Leverick and Stark, who point to problems with both semantics (that the flavour of entrapment is not captured by the word oppressive) and the communicative role that a trial should play (not just testing whether the *actus reus* and *mens rea* of an offence have been satisfied, but assessing whether the conduct in question should be disavowed by society).¹² It would appear that following from *Jones and Doyle*, entrapment as a plea in bar of trial is preferable but an exclusionary approach also remains competent. Leverick and Stark point to the unsatisfactory practice which may occur as a result of this decision: that the same point could be argued two different ways by the accused.¹³ Although Sheriff Brown proceeded on the basis of the entrapment plea in *P(P)*, he noted that the plea was not well founded and that "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".¹⁴

The test for entrapment is whether the accused was induced to commit an offence s/he would not otherwise have committed. A recent example of the operation and interpretation of the plea can be

⁶ "Vigilante Paedophile hunter group banned from area by police", *The Scotsman*, August 18, 2018; available at: <https://www.scotsman.com/news-2-15012/vigilante-paedophile-hunter-group-banned-from-area-by-police-1-4786179> [Last accessed 6 June 2019]

⁷ "Members of "Wolfpack" appear in court following Edinburgh sting", *The Courier*, September 29, 2018; available at: <https://www.thecourier.co.uk/fp/news/local/fife/734735/members-of-wolfpack-appear-in-court-following-edinburgh-sting/> [Last accessed 6 June 2019]

⁸ "'Paedophile hunter' evidence used to charge 150 suspects", *BBC News*, April 10, 2018; available at: <https://www.bbc.co.uk/news/uk-england-43634585> [Last accessed 6 June 2019]

⁹ "Disc jockey walks free after entrapment defence Historic Scottish judgment as sheriff rules clubber was coerced into supplying drugs", *The Herald*, February 29, 2000; available at: <https://www.heraldscotland.com/news/12201521.disc-jockey-walks-free-after-entrapment-defence-historic-scottish-judgment-as-sheriff-rules-clubber-was-coerced-into-supplying-drugs/> [Last accessed 6 June 2019]

¹⁰ 2002 S.L.T. 509.

¹¹ [2009] H.C.J.A.C. 86.

¹² Fiona Leverick and Findlay Stark. "How do you solve a problem like entrapment" (2010) *Edin. L. Rev.* 14(3) 467.

¹³ Fiona Leverick and Findlay Stark. "How do you solve a problem like entrapment" (2010) *Edin. L. Rev.* 14(3) 467 at 472.

¹⁴ [2019] SC Dun 39 at para 12.

seen in *HM Advocate v IP*.¹⁵ Here the Crown unsuccessfully appealed against the sheriff's decision to sustain a plea in bar of trial based on the entrapment of P who was accused of communicating with a person for the purposes of gaining access to a child for sexual activity, contrary to section 30 of the Sexual Offences (Scotland) Act 2009. In this case, the police had been investigating the website 'fabswingers' and an officer posed as a woman with a 14 year old daughter. P submitted that he had been invited by the officer to discuss engaging in sexual activity with a 14 year old girl. The sheriff's position was that there was no evidence that P had a predisposition to commit such an offence at the time the police engaged him in this communication, and as such the police did not have reasonable suspicion that he was about to commit such a crime. As with other entrapment cases, the key point was whether the accused had been encouraged to carry out an act they would not normally have been involved in.

Additional limitations have also historically been placed upon entrapment, specifically, that it only applies to the conduct of police authorities.¹⁶ Indeed, it has previously been commented that pleas of private entrapment will not be entertained by the Scottish courts.¹⁷ Sheriff Brown recognised that restriction and the comments made by Lord Reed in *Jones*.¹⁸ Although ultimately rejecting the plea, he also acknowledged comments made by the Court of Appeal in England in the case of *R v Hardwicke and Thwaite*¹⁹ and the European Court of Human Rights in *Shannon v United Kingdom*.²⁰ Both cases considered the behaviour of journalists in the context of entrapment, deciding that entrapment could be carried out by persons other than a law authority. Scope, therefore, exists in Scotland for the development of the use of the plea of entrapment as a route to evidence being declared inadmissible. However, due to the historic position adopted in relation to admissibility assessments and the ongoing approach by the courts, including that in *P*, it would appear that this remains an unlikely development.

Fraud

In addition to the decision to exclude the evidence gathered by the vigilante group, Sheriff Brown opined that their conduct "contained all the elements of the crime of fraud."²¹ In this way he was communicating a clear message aimed at deterring future 'hunters', against the growing concern about the role they are playing in bringing alleged sexual offenders to justice.

Fraud as an offence is mainly dealt with under common law, but it also includes a number of statutory offences. The main fraud offences are: common law fraud, uttering, embezzlement and statutory fraud. Under common law, the *actus reus* of fraud is satisfied by three elements: (1) a false pretence, (2) which produces a definite practical result with (3) evidence of a causal link between the pretence and the result. In *P(P)*, Sheriff Brown considered that these criteria were satisfied by the members of the group who had brought forward the evidence about P: they had engaged in a pretence about who was operating the account, they had knowledge of the pretence which was undertaken, and the pretence was employed to bring about a practical result, specifically enticing P to engage in criminal acts contrary to the Sexual Offences (Scotland) Act 2009.

¹⁵ [2017] H.C.J.A.C. 56.

¹⁶ *Jones and Doyle v HM Advocate* [2009] H.C.J.A.C. 86.

¹⁷ Fiona Leverick and Findlay Stark. "How do you solve a problem like entrapment" (2010) Edin. L. Rev. 14(3) 467 at 472.

¹⁸ [2019] S.C. Dun 39 at para 8.

¹⁹ [2001] Crim. L.R. 220.

²⁰ 67537/01, 6 April 2004.

²¹ [2019] S.C. Dun 39 at para 5.

The definition of fraud in Scots law has been described as “very wide”, with it being commented that where a fraud involves practical cheating, it is not necessary that any result be brought about - it is enough that the effort be made for a result to be brought about.²² It has been stated that the common law crime of fraud protects people from “their own gullibility”,²³ but that it also involves deceiving people in a way which has them acting in a way which they might not otherwise have done.²⁴ In this way there is obvious overlap with the plea of entrapment.

It has never been the case that the practical result of a fraud must involve an economic component, although many cases do involve such a dynamic. The leading authority on fraud, *Adcock v Archibald*²⁵, considered that a fraud must involve a legally significant prejudice, leaving the person in a worse position than they would have otherwise been. This authority was subject to recent discussion in the case of *Whyte v HM Advocate*.²⁶ Here the appellant proposed that *Adcock* should be reconsidered by a larger court, arguing that the authority was out of line with cases which described fraud as an offence against property. This appeal was refused and it was reiterated by the Court of Appeal that it is not necessary to prove an actual gain by the accused or an actual loss on the part of the person defrauded - any definite practical result achieved by the fraud is sufficient.

In terms of the types of practical results which may follow from a false pretence, inducing another to be liable to prosecution has been recognised elsewhere as a category in its own right, but alongside additional commentary that such behaviour might be considered to constitute instigation rather than fraud.²⁷ This also holds significance in the context of private groups gathering evidence against individuals in relation to alleged criminal conduct.

Conclusion

To date, the members of these vigilante groups have, for the most part, not been subject to criminal proceedings, unless there has been an element of public disorder associated with their confrontation with the individual alleged to have committed the sexual offences. It would appear that there has been some degree of cooperation between the police and those privately organising evidence gathering against sexual offenders, as suggested by the admission of such evidence in successful prosecutions.²⁸ As such, any adoption of Sheriff Brown’s view of mitigating “against excusing the impropriety involved in this kind of case”²⁹ and charging those involved with fraud would involve a significant departure from the approach currently being employed (even informally) by Police Scotland and the Crown Office and Procurator Fiscal Service.

Undoubtedly the police response to evidence gathered by such groups is likely to change if the Scottish appeal court endorses Sheriff Brown’s position and prevents such evidence from being used against an accused. Yet, if the courts do go further than simply not accepting such evidence and indeed criminalise group members in the way Sheriff Brown proposes, a further question arises:

²² Gerald H. Gordon, *The Criminal Law of Scotland*, edited by James Chalmers and Fiona Leverick, 4th edn (Edinburgh: SULI/W. Green, 2017), Vol.2, para 25.01.

²³ Timothy H. Jones and Ian Taggart, *Criminal Law*, 7th edn (Edinburgh: W. Green, 2018), para 10-66.

²⁴ Timothy H. Jones and Ian Taggart, *Criminal Law*, 7th edn (Edinburgh: W. Green, 2018), para 10-67.

²⁵ 1925 J.C. 58.

²⁶ [2017] H.C.J.A.C. 14.

²⁷ Gerald H. Gordon, *The Criminal Law of Scotland*, edited by James Chalmers and Fiona Leverick, 4th edn (Edinburgh: SULI/W. Green, 2017), Vol.2, para 25.25.

²⁸ “Paedophile who travelled to Glasgow to meet ‘schoolgirls’ jailed for 15 months”, Glasgow Live, February 28, 2019; available at: <https://www.glasgowlive.co.uk/news/glasgow-news/paedophile-who-travelled-glasgow-meet-15900785> [Last accessed 6 June 2019]

²⁹ [2019] SC Dun 39 at para 72.

should fraud be charged in addition to the sexual offences against the person 'caught' by the group or instead of this? Certainly, if the route to be followed is that evidence obtained by such groups cannot be admitted into court proceedings, then the likelihood of conviction is greater against the vigilante group member than the alleged sex offender. Perhaps now is the time for more resources to be given to those working within the authority of RIPSAs in order to respond to matters which are clearly a matter of great public concern and anxiety. As Sheriff Brown comments:

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.³⁰

³⁰ Ibid.