

**The Sentencing of Offences of Arranging or Facilitating a Child Sex Offence and Inciting a Child to Commit a Sexual Offence, and the Impact of R. v Privett; R. v West; R. v Smisson; R. v Buonaiuto [2020] EWCA Crim 557.**

On 29<sup>th</sup> April 2020, the Court of Appeal heard four otherwise unrelated appeals all concerned with the correct approach to be adopted when sentencing offences of arranging or facilitating the commission of a child sex offence contrary to section 14 of the Sexual Offences Act 2003. The judgement is likely to have a significant impact on so called “Paedophile Hunter” cases where there is no actual child victim.

The common feature of the offences was that when the appellants had arranged, via the internet, to commit a sexual offence with a child, they were in fact communicating with a police officer and the child in question did not therefore exist. The question at the heart of the appeals was how the fact that no actual child was harmed should be taken into account at sentence when applying the relevant Sentencing Guideline. The central argument by the appellants was that whenever there is a fictional child victim, sentencing should fall into the lowest category of harm under the guideline (category 3), subject to upward adjustment to reflect any relevant factors in the case.

The court considered several authorities where section 14 and section 10 (inciting a child to commit a sexual offence) offences involved a fictitious child. In each case, the court had concluded that where there was no actual child, even if the act incited would otherwise have put the case in the highest category of harm, it should be categorised as “other sexual activity” within category 3. The court also considered Attorney General’s Reference No. 94 of 2014 (R v Baker) [2014] EWCA Crim 2752 (“Baker”) which was followed in R v Buchanan [2015] EWCA Crim 172. In these cases the court adopted the same approach where the child was real but there was no actual physical contact.

The court observed that the offence under section 14 is a preparatory offence which was completed when the arrangements for it were made or the intended offence facilitated. It was not dependent on the completed offence happening or even being possible. Therefore, the court concluded, the absence of a real victim did not reduce culpability. The court recognised that the harm in such a case will usually be greater where there was a real victim, but section 143(1) of the Criminal Justice Act 2003 nevertheless required the court to consider the intended harm in all cases. The approach set out in the Sentencing Guideline for section 14 offences followed section 143(1) as it required the court to determine harm by reference to the type of activity arranged or facilitated.

The court concluded that the correct approach when sentencing section 14 offences was for the court to firstly identify the category of harm on the basis of the sexual activity intended and then to adjust the sentence to ensure it was “commensurate” with, or proportionate to, the applicable starting point if no sexual activity had occurred, including circumstances where it could not have occurred because the victim was fictitious.

Whilst the judgement in Privett is strictly applicable only to the sentencing of section 14 offences, the court recognised that the reasoning applied to section 10 offences, including those committed in circumstances as occurred in Baker and that “aspects of the decision in Baker may well need to be revisited in the light of this judgment...” The postscript to the judgement invites the Sentencing Council to consider whether any and, if so, what clarification of the relevant Sentencing Guideline was necessary and whether further guidance can be given to sentencers. The logic behind the court’s reasoning being equally applicable to section 10 offences can be summarised as follows –

- i. The section 10 offence is completed as soon as the relevant incitement is made. It follows that there is no need to show that the child engaged in the activity, and the offence is therefore clearly analogous to the section 14 offence in focussing on the harm intended.
- ii. Section 143(1) of the Criminal Justice Act 2003 requires the court to consider the intended harm, not only the harm caused, in respect of all offences, and there is therefore a need to consider the intended harm in relation to offences under section 10 as there is in relation to section 14.
- iii. As the sentencing of section 14 offences requires the court to consider the guideline for the offence arranged or facilitated, it follows that where a section 14 offence involving an arrangement to commit a sexual offence with a fictitious child falls within category 1, actually inciting the same sexual activity must be similarly categorised.

The potential impact of the decision in Privett is illustrated by a case sentenced on 16<sup>th</sup> June 2020 by Bolton Crown Court. The defendant had made contact with the profile of a 13 year old girl created by a member of a group called “Redemption.” The defendant engaged in extremely sexualised communication, sent pornographic pictures and a picture of his erect penis. He also incited the “girl” to masturbate and penetrate her vagina. He was convicted by his plea of several offences of attempting to cause a child to watch a sexual act and three offences of attempting to incite a child to engage in sexual activity, the most serious (count 7) involving penetration.

The court adopted the approach in Privett in applying the Guidelines. There was no dispute that the defendant’s culpability in each case fell into the highest category. The court focussed on the most serious offence in count 7 and concluded that because of the penetration it fell into harm category 1. The starting point for sentence was therefore 5 years custody with a range of 4 – 10 years. If the court had not applied Privett, the starting point applying Baker would have been 26 week custody with a range of high level community order to 3 years custody.

Taking account of totality, the court determined the correct starting point to be 6 years custody. This was reduced to reflect the circumstances of the offence to 4 year 6 months. The defendant was given full credit for his plea and was sentenced to 3 years in total, the sentences on the other counts to run concurrently.

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