Neutral Citation Number: [2020] EWCA Crim 557

Case No: 201904144 A4, 201903591 A4, 201903543 A2 & 201903507 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT TAUNTON
HHJ TICEHURST
S20190294, 20190225, S20190236, S20190116 & S20190249

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
LORD JUSTICE HOLROYDE
and
SIR PETER OPENSHAW

- -

Between :

Steven Mark PRIVETT	**1stAppellant**
Tony John WEST	**2nd Appellant**
Philip Richard SMISSON	**3rd Appellant**
Marcello BUONAIUTO	**4th Appellant**

- and -

REGINA	**Respondent**

- -
- -

Mr Patrick Mason (instructed by **Boyce & Co Solicitors**) for the **1st & 2nd Appellant**
Mr Nicholas Wragg (instructed by **Stone King LLP**) for the **3rd Appellant**
Mr Will Rose (instructed by **Alletsons Solicitors**) for the **4th Appellant**
Mr Timothy Cray QC (instructed by **CPS Appeals & Review Unit)** for the **Respondent**

Hearing dates: 25th February 2020

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Approved Judgment

Lord Justice Fulford :

The Issue of Principle

1. These four otherwise unrelated cases have been listed together in order to give the Court of Appeal (Criminal Division) an opportunity to address sentencing practice for offences under section 14 Sexual Offences Act 2003 (arranging or facilitating the commission of a child sex offence) (a "section 14 offence"), and in particular the correct approach to assessing harm. There is tension within the relevant jurisprudence on this issue which requires consideration. The common feature between these cases is that when the individual defendants arranged, via the internet, to commit a sexual offence with a child, they were unaware they were in contact with a police officer.

Introduction

2. Privett and West both appeal against sentence by leave of the single judge. Smisson and Buonaiuto's applications for leave to appeal sentence have been referred to the full court by the single judge. Given the importance of the issue of principle and its potential impact on the sentences passed on them, we grant leave to appeal to Smisson and Buonaiuto.

3. Aside from certain discrete submissions relating to the individual cases, the central argument advanced on behalf of the appellants is that whenever there is a fictional child victim, sentencing will 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 Crown suggests that it would be wrong in principle to "pre-categorise" offences, simply on the basis that a police officer pretended to be a child victim. Instead, the respondent submits each case should be assessed on its own facts, and the court should adopt a flexible approach, determining the category of harm on the basis of the facts and the circumstances of the case.

The Facts

4. We have dealt with the four cases in the order in which sentence was passed.

Phillip Smisson

5. On 31 May 2019 the appellant (who is aged 45 and was previously of good character) pleaded guilty to four crimes: an offence contrary to section 14, two offences of possession of an indecent photograph of a child contrary to section 160(1) Criminal Justice Act 1988 and an offence of making indecent

photographs of a child contrary to section 1(1)(a) Protection of Children Act 1978. He was committed to the Crown Court at Taunton for sentence, and on 31 July 2019 he was sentenced to an extended sentence of 8 years for the section 14 offence (comprising a custodial term of 6 years and an extended licence period of 2 years), and 6 months' imprisonment concurrent on the other two offences. The judge imposed a sexual harm prevention order.

6. Between 4 April 2019 and 30 May 2019, the appellant communicated via the internet with an undercover officer using the name "Tia" who was posing as the mother of a fictional six-year-old girl. The appellant expressed his sexual interest in children and his desire to engage in vaginal and anal penetrative sexual activity with Tia's daughter. He used extremely explicit and graphic language. He sent the police officer images of his erect penis which he asked to be shown to the child so she would not be "freaked out". Arrangements were made for them to meet in Taunton on 30 May 2019, where the appellant drove from his home in Bath. He was arrested at the meeting point and his car was searched. He was in possession of two mobile phones, a laptop, a child's toy, two tubes of lubricant, an "anal plug" sex toy, a packet of moist toilet wipes and a partially consumed bottle of vodka. He claimed in interview that what had happened was a fantasy that had got out of hand and he implausibly suggested that he had never intended to have sex with a six-year-old child.

7. An iPad was subsequently seized from the appellant's work address, which was examined, along with the appellant's laptop and mobile telephones. The contents gave rise to the indecent image charges. All the devices contained category C images of girls (three images on the iPad, three on the laptop and twenty-one on one of the telephones), many of which were images of girls in the age range of 7 to 9. The prosecution submitted that section 9 Sexual Offences Act 2003 (sexual activity with a child) represented the relevant substantive offence.

8. The author of the pre-sentence report determined that the appellant posed a high risk of sexual harm to all children which could not be managed in the community. Dr Oliver White, a psychiatrist, expressed the view that the appellant has significant mental health difficulties, particularly depression and anxiety. It is suggested that sexual abuse of him as a child has resulted in the indications of post-traumatic stress disorder. He has a long history of excessive alcohol consumption. Doctor White indicated that any future sexual offending was likely to be towards children, including those not previously known to the appellant, and could potentially be serious in nature.

9. The judge gave full credit for the appellant's guilty plea, entered at the first opportunity. He determined that it was abundantly clear from the transcripts of the conversations that the appellant's entire interest and purpose was the sexual abuse and rape of a six-year-old girl. The judge was in no doubt that had the girl existed the appellant would have carried out what he described as these degenerate plans.

10. The judge determined that this was an offence which fell into category 1A of the Sentencing Guideline ("Arranging or Facilitating the Commission of a Child Sex Offence", effective from 1 April 2014). The relevant starting point was 5 years' imprisonment with a range of 4 to 10 years' imprisonment. The appellant had intended to engage in sexual activity with a six-year-old child and the fact he was unable to do so provided little mitigation. The judge concluded that his suggestion in interview and repeated by his advocate that it was a fantasy that would not have been carried out was contradicted by the comments he made to Tia, the purchase of the lubricant and condoms and the gift for the child. There was a significant degree of planning and significant disparity in age. He sent sexual images to the girl and it was clear there was grooming behaviour intended to be used against the victim.

11. On the basis of the material before the court, the judge concluded that the appellant was a dangerous offender. He placed the appellant's offending at the top of the sentencing range. An appropriate sentence after trial for the substantive offence was 9 years' imprisonment, reduced with full credit for the guilty plea to 6 years' imprisonment.

12. The appellant was assessed by the judge as being a dangerous offender and was sentenced as set out at [5] above.

Marcello Buonaiuto

13. On 12 July 2019 having pleaded guilty before the Taunton Magistrates, the appellant (who is aged 43) was committed for sentence to the Crown Court at Taunton pursuant to section 3 Powers of Criminal Courts (Sentencing) Act 2000 in respect of three offences. On 30 August 2019, he was sentenced to an extended sentence of 7 years 4 months for a section 14 offence (a custodial term of 5 years 4 months and an extended licence period of 2 years), 6 months' imprisonment to be served concurrently for distributing an indecent photograph of a child, contrary to section 1(1)(b) Protection of Children Act and 9 months' imprisonment, also to be served concurrently, for possession of an extreme pornographic image, contrary to section 63(1)(7)(d) Criminal Justice and Immigration Act 2008. The judge made a sexual harm prevention order.

14. Between 16 May 2019 and 11 July 2019, the appellant communicated via the internet with a law enforcement officer ("Kim") who was posing as the mother of a fictional six-year-old girl. The appellant said he had sexually abused his ex-girlfriend's daughter between the ages of nine and eleven, and expressed a desire to meet Kim and engage in penetrative sexual activity with her daughter which he described in extremely explicit and graphic terms. During their sexual conversations, he sent indecent (class C) images of children to Kim and extreme pornographic images portraying women providing oral sex to horses. He then arranged to meet Kim and her daughter, and on 11 July 2019 travelled by train from London to Taunton with toys for the child. He was arrested upon arrival. In interview he stated that the conversations with Kim began as a fantasy which turned into reality. He admitted that he travelled to Taunton intending to engage in penetrative sexual activity with a child which included the penetration of her mouth with his penis, the penetration of her vagina with his tongue and the child performing oral sex upon her mother. He claimed that he changed his mind en route to Taunton and would not have carried out the acts previously intended. Section 9 Sexual Offences Act 2003 represented the substantive criminal offence.

15. The appellant had one previous caution from 2016 for offences of possessing an indecent photograph of a child and possession of an extreme pornographic image.

16. The author of the pre-sentence report expressed the view that the appellant had minimised the seriousness of his offending behaviour, suggesting there was no "harm" because the 6-year-old girl did not exist. He maintained his denial that he would have gone through with his plan. He was assessed as posing a high risk of serious harm to children.

17. In passing sentence, the judge gave full credit for the appellant's guilty plea which was entered at the earliest opportunity. He concluded that it was abundantly clear from the conversations between the appellant and the officer that if the child had existed the appellant would have carried out his plan in full. In the judge's view, this case clearly fell within category 1A of the guidelines for the section 14 offence: the appellant intended to engage in sexual activity with a six-year-old girl, and the fact he was unable to do so provided little mitigation. The appellant had intended to penetrate the vagina and/or anus of a six-year-old, there had been a significant degree of planning and there was notable disparity in age.

18. The judge determined that the appellant was a dangerous offender based upon the nature of the offence, the detail of the text messages and the conclusions of the author of the pre-sentence report.

19. The judge took a sentence after trial for the substantive offence of 8 years' imprisonment. Giving full credit for the guilty plea, this was reduced to 5 years 4 months' imprisonment. An extended sentence was imposed in light of the judge's finding that the appellant was a dangerous offender.

Steven Privett

20. The appellant (who is aged 62) pleaded guilty on 27 June 2019 in the Taunton Magistrates' Court to an offence of arranging a section 14 offence and was committed to the Crown Court at Taunton for sentence. On 6 September 2019, he was sentenced to an extended determinate sentence of 7 years 4 months (the custodial term was 5 years 4 months, with an extended licence period of 2 years). The judge imposed a sexual harm prevention order.

21. Between 29 April 2019 and 26 June 2019, the appellant communicated via the internet with a police officer who was posing as the mother of a fictional six-year-old girl, "Mia". The appellant, in extremely explicit and graphic terms, expressed his wish to engage in penetrative sexual activity with the child, with the active participation of the mother. In due course he arranged to meet them in Taunton in order to commit this serious criminal offence. He travelled with a collection of items to facilitate the abuse (e.g. condoms, lubricant, a vibrator and gifts for the child). He was met by police officers and arrested. In interview he admitted his guilt, and agreed he had intended to penetrate the child sexually with a vibrator, along with his fingers and penis. The judge in passing sentence stated that he had no doubt that if the child had existed the offence (including vaginal and anal rape) would have been committed. The prosecution submitted that section 9 Sexual Offences Act 2003 represented the relevant substantive offence.

22. The appellant had 3 previous convictions for 7 offences spanning the years from 1997 to 2014. These included two offences of indecent assault on a female under 14, two offences of gross indecency with a child in 1997 (involving his nine-year-old daughter) and two offences in 2012 of failing to comply with notification requirements.

23. The judge gave full credit for his guilty plea, which was entered at the first opportunity. He placed the section 14 offence in category 1A of the Sentencing Guideline, given the offending clearly involved penetration of the vagina or anus and there had been a significant degree of planning. In considering the question of dangerousness, the judge took into account the

appellant's convictions. The transcript of the conversations over the internet provided clear insight into what the judge described as the appellant's depraved and perverted way of thinking. For instance, he said to the woman he believed to be the child's mother, "You are going to be there when she has her first fuck and her virginity is taken, a beautiful moment." The pre-sentence report assessed the appellant as posing a high risk of serious harm to children and the judge unsurprisingly assessed the appellant as being a dangerous offender.

24. Having considered some of the relevant case law, the judge determined that the appropriate sentence, after a trial for the substantive offence, was 8 years' imprisonment. Giving the appellant full credit for his guilty plea, this was reduced to 5 years 4 months. The extended licence period was 2 years, as set out above.

Anthony West

25. On 7 October 2019 the appellant (who is aged 48, and who had no relevant previous convictions) pleaded guilty in the Magistrates' Court to a section 14 offence and was committed for sentence to the Crown Court. On 1 November 2019, again at the Crown Court at Taunton, he was sentenced to 3 years 4 months' imprisonment. The judge imposed a sexual harm prevention order.

26. Between 10 September 2019 and 5 October 2019, the appellant communicated online with a police officer who was posing as the mother of a fictional 10-year-old girl. The communications rapidly turned sexual and the appellant expressed his wish to engage in vaginal and oral sexual intercourse with the child. Arrangements were made for the appellant to visit the mother and daughter on 5 October 2019 to commit this offence. The appellant travelled approximately 180 miles from the Midlands to Somerset where he was arrested in possession of condoms, Viagra, handcuffs and a tub of Haribo (the girl's favourite sweets). In interview he admitted that he had travelled to meet the mother with the intention of having sex with the child.

27. The judge indicated that section 9 Sexual Offences Act 2003 represented the relevant substantive offence. He was in no doubt that if the child had existed the appellant would have acted as arranged. In one of his conversations with her mother he said "I can't wait to make her happy, me inside her."

28. Although the appellant was a self-confessed paedophile, the judge, taking everything into account, did not consider he met the criteria for designation as a dangerous offender. He was accorded full credit for his guilty plea which was entered at the first opportunity. He had one unrelated driving conviction.

29. The author of the pre-sentence report indicated that loneliness was part of the motivation for this offending and suggested that there needed to be appropriate intervention to reduce the risk he would otherwise pose in the community.

30. The judge considered a number of the relevant sentencing decisions, and he took into account the extremely graphic nature of the messages which provided insight into the appellant's way of thinking, his sexual desires and his deviance. The judge determined this was a category 1A offence within the Sentencing Guideline. We note particularly that in this case the judge reduced what would otherwise have been a sentence after trial of 6 years' imprisonment to 5 years on the basis that the appellant could not have put his plans into effect. Applying full credit for his guilty plea, this reduced the sentence to one of 3 years 4 months' imprisonment.

The Submissions

31. The appellants have helpfully provided a joint skeleton argument. The court is reminded that section 14 of the Sexual Offences Act 2003 creates the offence of arranging or facilitating an act or acts which will involve the commission of an offence under sections 9 to 13 of the 2003 Act. The maximum sentence for offences under section 9, 10 and 14 (the relevant sections in the context of this case) is 14 years' imprisonment.

32. The Sentencing Guideline provides that when sentencing for section 14 offences, the courts "should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12" (namely, section 9: sexual activity with a child; section 10: causing or inciting a child to engage in sexual activity; section 11: engaging in sexual activity in the presence of a child; and section 12: causing a child to watch a sexual act).

33. The appellants' advocates have understandably based their submissions, in part, on the relevant jurisprudence. Given the tensions in the case law to which we have already referred, it has been helpful briefly to review the various decisions chronologically.

34. In *R v Bayliss* [2012] EWCA Crim 269; [2012] 2 Cr App R (S) 61 (which pre-dated the present sentencing Guideline) the facts were markedly similar to the instant cases, in that the section 14 offence related to a fictional ten-year-old boy. In the course of giving judgment, Openshaw J observed "of course, the requirements for punishment, deterrence and indeed public protection remain but we accept that the absence of a victim and with it the absence of actual harm does require that some reduction should be made from the

starting point […]" [11]. As a result, the court reduced the starting point from 4 years to 3 years' imprisonment.

35. In *Attorney General's Reference No. 94 of 2014 (R v Baker)* [2014] EWCA Crim 2752 ("*Baker*"), the offender incited a real 13-year-old girl, to engage in sexual activity (an offence under section 10 (1) and (2) Sexual Offences Act 2003), namely the penetration of the girl's mouth with the offender's penis. The proposed sexual activity never took place. In giving the judgment of the court, Sir Brian Leveson P stated:

> "34. In our judgment, what happened here did not fall within category 1 at all. In the circumstances, because the offending did not proceed beyond incitement, it was "other sexual activity" within category 3. That accords not only with the judge's rejection of the suggestion that the offender's behaviour justified a starting point of five years but also provides appropriate headroom between the sexual suggestion and any actual activity without necessarily engaging upon the exceptional basis for departing from the Guideline.
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> 35. The offence was undeniably one of high culpability but as category 3 had a starting point of 26 weeks in custody and a range up to three years' imprisonment the sentence passed by the learned judge fell fairly and squarely within it. […]"

36. We return to *Baker* in greater detail later in this judgment.

37. *R v Buchanan* [2015] EWCA Crim 172; [2015] 2 Cr App R (S) 13 was another section 10 offence in which there were conversations with a real 14-year-old child over the internet of an explicit sexual nature but with no physical contact, and, particularly, no intention to engage in such activity. The court concluded that this was a category 3A case.

38. In *R v Collins* [2015] EWCA Crim 915; [2015] 2 Cr App R (S) 50, the court (which included the Vice-President of the Court of Appeal (Criminal Division), Hallett LJ) dealt with a section 14 offence in which the appellant, after a significant degree of planning, had contacted a person he believed was the parent of a young child in order to sexually abuse the latter (the parent and child were fictional). The court concluded that an extended sentence comprising 10 years' imprisonment with an extended licence of two years was not manifestly excessive.

39. In giving the judgment of the court, Parker J said:

> "17. The starting point for an offence under s.9 in respect of Category 1A penetration of a victim's vagina or anus using body or object with high culpability is five years' custody, with a range of 4–10 years. In this case the harm was plainly in Category 1 and there were factors showing culpability of a very high order indeed: there was a significant degree of planning, the offender acting together with others to commit the putative offence. The judge concluded that there was an abuse of trust where the appellant intended to act together with and in the presence of the child's step-mother in order to engage in the sexual activity. Whether that is strictly correct analytically is not relevant because if it were not an abuse for the purposes of culpability, it would be a proper factor to take into account as aggravating the particular offence, and, as the judge held, there was a significant disparity in age."

40. In *R v Lewis* [2016] EWCA Crim 304 was another case involving a section 14 offence, with a fictional 15-year-old schoolgirl when the appellant had suggested vaginal penetration. The court observed, *inter alia*:

> "9. […] This was category 1 harm, as penetration of the vagina was intended. Culpability was category A because there was a significant degree of planning in the conversing through Facebook and the appellant took alcohol with him, albeit at the request of the other person. There was a significant disparity of age and so the starting point of 5 years with a range of 4 years to 10 years was appropriate here. Whilst it has to be accepted that no sexual act in fact took place and none could have, we agree with the learned judge that the fact that the person the appellant was to meet was not in fact a 15-year-old virgin is not relevant to the culpability for the circumstances of the section 14 offence that this appellant admitted."

41. In *R v Stillwell* [2016] EWCA Crim 1375, a section 14 case, the court was dealing with fictional children under the age of 13. In giving judgment, the court referred to *Baker* (see above), and it was observed:

> "24. In the light of those principles one is driven to conclude that before any question of adjustment arises, as provided for by the Sentencing Guidelines, the offence committed under section 14 was a category 3A offence and not a category 1A offence. Thus, a starting point of 26 weeks is provided for with a range of a high level community order to a sentence of 3 years' imprisonment."

42. The court went on to observe, however, at [35] " the absence of actual harm is not the sole criterion by which harm is assessed. Intended harm is something to which the sentencing court must have regard".

43. In *R v Solanki* [2017] EWCA Crim 1282; [2018] 1 Cr App R (S) 34 the appellant was sentenced for two offences: the first was attempting to cause or incite a real person under 16 to engage in sexual activity (the 14-year-old taking naked pictures of herself) (section 10 Sexual Offences Act 2003), and the second was attempting to meet a real person under 16 with intent following grooming (section 15 of the Sexual Offences Act 2003). The intent was penetrative sexual assault. In relation to each count, the judge passed concurrent 15-month sentences of imprisonment. The court decided that as no actual sexual activity of the sort described in categories 1 or 2 had taken place, the case should have been placed within category 3A on the basis that this amounted to "other sexual activity", with culpability A factors.

44. In *R v Gustafsson* [2017] EWCA Crim 1078, the appellant pleaded guilty to one offence of attempting to incite a child to engage in sexual activity, contrary to section 1(1) of the Criminal Attempts Act 1981 . He was sentenced to a term of 32 months' imprisonment. The appellant had been communicating online with a person he believed to be a 14-year-old girl. Instead, it was an adult male who was "investigating" offences of this kind and who had set up a profile on Facebook purporting to be a 14-year-old schoolgirl called Jodie. Having referred to *R v Buchanan* and the *Attorney General's Reference (No. 94 of 2015)* [2015] Crim EWCA 2384 the court (at [19]) indicated that the starting point was category 3 and not category 1.

45. In *R v Cook* 2018 EWCA Crim 530; [2018] 2 Cr App R (S) 16 (a case of attempting to incite non-existent children to engage in sexual activity) and *R v Allington* [2019] EWCA Crim 1430; [2020] 1 Cr App R (S) 16 (a case involving a section 14 offence and a fictional child), the court, following *R v Gustafsson*, *R v Buchanan* and the two Attorney General References set out above, indicated that category 3, as opposed to category 1, was the appropriate bracket.

46. The Sentencing Guideline "Arranging or Facilitating a Child Sex Offence" sets out:

> "Sentencers should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12:
>
> - Sexual activity with a child, Sexual Offences Act 2003, s.9

- Causing or inciting a child to engage in sexual activity, Sexual Offences Act 2003, s.10
- Engaging in sexual activity in the presence of a child, Sexual Offences Act 2003, s.11
- Causing a child to watch a sexual act, Sexual Offences Act 2003, s.12

The level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. For offences involving significant commercial exploitation and/or an international element, it may, in the interests of justice, be appropriate to increase a sentence to a point above the category range. In exceptional cases, such as where a vulnerable offender performed a limited role, having been coerced or exploited by others, sentences below the starting point and range may be appropriate."

47. Taking the Sentencing Guideline for sexual activity with a child/causing or inciting a child to engage in sexual activity as an example, it sets out the following:

"Harm
Category 1
- Penetration of vagina or anus (using body or object)
- Penile penetration of mouth

In either case by, or of, the victim
Category 2
- Touching, or exposure, of naked genitalia or naked breasts by, or of, the victim

Category 3
- Other sexual activity

48. Against that background, the appellants submit that in assessing harm there are three broad categories of cases: i) a real child is contacted or incited by way of "face to face" meetings (greatest harm); ii) there is " remote" contact with a real child or arrangements are made with that individual's parents or guardian (lesser harm); iii) the child is fictional (least harm).

49. It is accepted that the language of the guideline in categories 1, 2 and 3 is directed at sexual activity or contact with a "real" child, albeit the mitigating features allow, as appropriate, for the situation in which the activity did not, in fact, take place ("sexual activity was incited but no activity took place because the offender voluntarily desisted or intervened to prevent it").

Therefore, the "harm" component of the relevant Guidelines is not evidently engaged when the scenario intended by the offender did not and could not take place. In contrast, it is accepted by the appellants that culpability is not diminished because the child was fictional.

50. Based on a selection of the decisions of this court set out above, it is submitted that cases such as the present should always be treated as coming within the bracket of "other sexual activity" (category 3). It is accepted that with the more serious cases of this kind, the court will move upwards from the starting point.

51. Timothy Cray Q.C. on behalf of the respondent submits that this case falls into the exceptional category envisaged in *R v Thelwall* [2016] EWCA Crim 1755:

> "21. […] As the court has made clear in other cases where the offence is the subject of a Sentencing Council Guideline, and also in relation to Schedule 21, guidelines are guidelines. The citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance. There may be cases where the court is asked to say something about a guideline where, in wholly exceptional circumstances – and we wish to emphasise that these are rare – the guideline may be unclear. In such circumstances the court will make observations which may be cited to the court in the future. However, in those circumstances it is highly likely that the Council will revise the guideline and the authority will cease to be of any application.
>
> 22. It is important that practitioners appreciate that our system now proceeds on the basis of guidelines, not case law. It will, therefore, be very rare, where there is an applicable guideline, for any party to cite to this court cases that seek to express how the guideline works, other than in the rare circumstances we have set out. Decisions of this court are of particular importance to the individuals concerned, but they are unlikely to be of any assistance to further appeals where the guidelines are in issue."

52. Mr Cray invites the court to give guidance as to how the Guidelines operate in these circumstances.

53. He submits that it would be wrong in principle to predetermine (or "pre-categorise") the seriousness of a section 14 offence by reference to whether

there was a fictional child. He argues that cases in this context need to be considered flexibly, by reference to the circumstances of the particular offending. Therefore, when the evidence demonstrates that there was an intention to cause serious harm to a child victim, it may potentially come within category 1A notwithstanding the fact that this intention was revealed to an undercover police officer.

54. It is suggested that this meets the legislative requirements of section 143(1) Criminal Justice Act 2003:

> **"Determining the seriousness of an offence**
> (1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might forseeably have caused."

55. "Harm", therefore, is given a wide definition and includes the harm the offender intended to cause. This has been reflected in the Attempted Murder Guideline:

> "Attempted murder requires an intention to kill. Accordingly, an offender convicted of this offence will have demonstrated a high level of culpability. Even so, the precise level of culpability will vary in line with the circumstances of the offence and whether the offence was planned or spontaneous. The use of a weapon may influence this assessment.
>
> The level of injury or harm sustained by the victim **as well as any harm that the offence was intended to cause or might foreseeably have caused, must be taken into account and reflected in the sentence imposed**.
>
> The degree of harm will vary greatly. Where there is low harm and high culpability, culpability is more significant. Even in cases where a low level of injury (or no injury) has been caused, an offence of attempted murder will be extremely serious." (emphasis added)

56. Mr Cray emphasises the wording of section 14:

> **"Arranging or facilitating commission of a child sex offence**
> (1) A person commits an offence if–

> (a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and
> (b) doing it will involve the commission of an offence under any of sections 9 to 13."

57. It follows that what the offender "intends" or "believes" is a critical element of the offence, which encompasses preparatory behaviour that falls short of an attempt. Against that background, it is submitted that it would be wrong in principle routinely to reduce the seriousness of a section 14 offence to the lowest category of seriousness on the basis that no real child was involved. It is submitted the appellants in the present cases merit being placed in category 1A given they had done all they could to prepare themselves to carry out very serious forms of child sexual abuse and they intended to commit those crimes.

58. Mr Cray submits, therefore, that whether a case falls into category 1A will depend on factors such as the degree of preparation, the length of time over which the offender had the crime in contemplation and the way in which he demonstrated his intention.

Discussion

59. It is necessary, in our judgment, to keep in mind the terms of this offence. It is intentionally arranging or facilitating activity which would constitute a child sexual offence, intending that it will happen. This is a preparatory offence, albeit it could cover the case in which the offence was carried out. However, in that latter situation, the offender would ordinarily be charged as a participant in the full offence.

60. The offence is complete when the arrangements for the offence are made or the intended offence has been facilitated and it is not, therefore, dependent on the completed offence happening or even being possible, and the absence of a real victim does not, therefore, reduce culpability.

61. As a general proposition, the harm in a case will usually be greater when there is a real victim than when the victim is fictional. By way of analogy, the situation when an offender shoots and hits his victim is likely to be considered as involving greater harm than a case in which the offender shoots and misses. Nonetheless, as set out above, section 143(1) Criminal Justice Act 2003 requires the court to consider the intended harm.

62. The Guideline for section 14 (arranging or facilitating the commission of a child sex offence) reflects these considerations: "(t)he level of harm should be determined by reference to the type of activity arranged or facilitated.

Sentences commensurate with the applicable starting point and range will ordinarily be appropriate" (see [46] above). The court will consider, therefore, the sentence that would be appropriate for the full offence and then impose a sentence for arranging or facilitating that is "commensurate" with (put otherwise, that is in proportion to) that sentence.

63. The Guideline for sections 9 and 10 Sexual Offences Act 2003 (sexual activity with a child/causing or inciting a child to engage in sexual activity) mirrors this approach:

> "**Arranging or facilitating the commission of a child offence (section 14 of the Sexual Offences Act 2003**
>
> The starting points and ranges in this guideline are also applicable to offences of arranging or facilitating the commission of a child offence. In such cases, the level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. […]"

64. *Baker* has been a critical decision in the development of the relevant jurisprudence for section 14 offences. The offender in that case pleaded guilty to one count of inciting a real child to engage in sexual activity, contrary to section 10(1) and (2) of the Sexual Offences Act 2003. The sexual activity the offender had proposed to the victim, however, never took place (see [35] above): after a comparatively brief exchange of text messages, in which the offender effectively offered to buy the girl a telephone if she would perform oral sex on him, the offender abandoned the correspondence, telling the girl that it had been a silly idea. The question posed by the court was whether incitement to behave in the way the offender intended, which does not involve anything more, falls within the same category of harm as when the activity intended takes place, deserving as a result of similar sanction, subject to culpability and such aggravating and mitigating circumstances as might otherwise exist (see [28] in *Baker*). The court observed that if that was the case it could result in incitement to behaviour which never occurred, but which is in category 1, as being treated more seriously than an offence involving actual contact or exposure which falls into categories 2 or 3. The President stated:

> "29. On this basis, such incitement, which does not involve physical contact or exposure of any sort is more serious than a category 2 offence which involves touching or exposure of naked genitalia or naked breasts by or of the victim. To provide colour to this example, if the analysis is correct, it is more serious to incite a child as this offender

> did than had he actually persuaded her to undress before a web camera and expose to him her breasts or genitalia. It would equally be more serious than persuading a boy to masturbate in front of a web camera. In our judgment, that simply cannot be right."

And the court added:

> 31. The answer however is to recognise that this guideline covers very different offending and that the language used within it must be construed by particular reference to the offence then under consideration. Thus, if over a web camera, a female child is incited to insert an object into her vagina and she does so, a category 1 offence is committed; if a child is persuaded to touch or expose his or her naked genitalia and does so, that is a category 2 offence. Similarly, if a child is incited to persuade someone else (whether or not the offender) actually to behave in that manner, the offence is correctly characterised as category 1 or 2 respectively. The harm is the impact on the victim of behaving as he or she has done, whether in the presence of the offender or remotely or on line.
>
> 32. To that extent, the offence of causing sexual activity is potentially more serious than inciting such activity because the actual activity is a necessary part of the offence. Incitement can lead to actual activity which can be categorised accordingly. But where the incitement does not lead the child to behave in the manner incited, although the culpability is likely to be identical, the harm is necessarily less: the same is so in relation to attempts.

On this issue the court concluded (as set out above):

> "34. In our judgment, what happened here did not fall within category 1 at all. In the circumstances, because the offending did not proceed beyond incitement, it was "other sexual activity" within category 3. […]"

65. There are clearly some similarities between the position in *Baker* and the present appeals. There was no actual sexual activity in any of the cases. These four appellants were charged with "arranging or facilitating the commission of a child sex offence", and (as rehearsed above) sentencers are enjoined to refer to the relevant guideline for the applicable substantive offence of arranging or facilitating under sections 9, 10, 11 and 12. Indeed, under the Guideline, for sections 9 and 10 the level of harm for a section 14 offence should be determined by reference to the type of activity arranged or

facilitated ([63] above). In *Baker*, the offence to which the offender pleaded guilty was one of "inciting a child to engage in sexual activity" (section 10). Accordingly, whilst in the instant appeal the four appellants were charged under section 14, the relevant guideline to which the sentencer needed to refer was the same as that which applied in *Baker*. The three categories of harm applicable to both cases are set out at [47] above.

66. Notwithstanding those similarities, the court in the present case is dealing with a different offence and, at least to an extent, different circumstances from those that applied in *Baker.* We are unable to accept the submission that *Baker* requires that section 14 offences in which there is no real child must always be treated as category 3A offences under the Guideline. We recognise that aspects of the decision in *Baker* may well need to be revisited in the light of this judgment, but our present concern is with these section 14 offences.

67. Focusing on the particular issue raised in these appeals, we consider that for a section 14 offence, the position under the Guideline is clear: the judge should, first, identify the category of harm on the basis of the sexual activity the defendant intended ("the level of harm should be determined by reference to the type of activity arranged or facilitated"), and, second, adjust the sentence in order to ensure it is "commensurate" with, or proportionate to, the applicable starting point and range if no sexual activity had occurred (including because the victim was fictional) ("sentences commensurate with the applicable starting point and range will ordinarily be appropriate").

68. This approach was applied in *Bayliss,* the first of the cases reviewed above ([34] *et seq.*), albeit it was decided before the present sentencing Guideline came into force. That appeal concerned a section 14 offence involving a fictional child, and, as already rehearsed, the court decided that although all of the usual considerations on sentence apply, the absence of actual harm requires some reduction from the starting point (reduced in that case from 4 years to 3 years).

69. *Baker* was the next decision of note, and there have been a number of subsequent decisions involving section 10 offences (*e.g. Buchanan* and *Solanki*) which have affirmed the approach that *Baker* established. In *Gustafsson* and *Cook*, cases of attempting to incite non-existent children to engage in sexual activity, the court similarly has followed *Baker.*

70. For section 14 offences, the court in *Collins* applied the Guideline and assessed harm in a manner consistent with *Bayliss*: "the harm was plainly in Category 1" given the intended penetration was "of a victim's vagina or anus using body or object". This approach was adopted in *Lewis* (another section 14

case involving a fictional child). In *Stillwell* and *Allington*, cases also involving a section 14 offence and fictional children, the court followed the approach in *Baker* rather than that adopted in *Bayliss*, *Collins* and *Lewis*.

71. It is clear from the conclusions we have set out above that in our judgment the decisions involving section 14 offences in *Stillwell* and *Allington* failed properly to follow the approach established in *Bayliss*, *Collins* and *Lewis* and the requirements of the Sentencing Guideline. Section 125(1) Coroners and Justice Act 2009 provides:

> "Every court –
>
> a. Must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
> b. […]
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so."

72. Sentencers in future with section 14 offences in these circumstances should follow the Sentencing Guideline in the way we have described above at [67]. This may lead to the result that a defendant who arranges the rape of a fictional 6-year-old is punished more severely than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. In our view, there is nothing necessarily wrong in principle with that result. The sentence should be commensurate with the applicable starting point and range, and in cases where the child is a fiction this will usually involve some reduction (as in *Bayliss*) to reflect the lack of harm.

73. Against that background, we turn to the individual appeals. Notwithstanding Smisson's previous good character and personal problems as set out particularly in the psychiatric report, we are unable to fault the judge's decision that the offending came at the top of the range for a category 1 A offence. The crime which the appellant intended to carry out was extremely serious. We accept that the starting point of 9 years' imprisonment, reduced to 6 years to reflect his guilty plea, resulted in a long sentence. We also recognise that the judge did not reduce the starting point to reflect the absence of harm, but even allowing for those factors, we conclude that the sentence was not manifestly excessive, given Smisson intended on arrival in

Taunton to engage in vaginal and anal penetrative sexual activity with a six-year-old girl.

74. Smisson's challenge to the judge's finding of dangerousness is without merit. As set out above, the author of the pre-sentence report determined that the appellant posed a high risk of sexual harm to all children which could not be managed in the community. Dr Oliver White, a psychiatrist, indicated that any future sexual offending was likely to be towards children, including those not previously known to the appellant. As the judge found, the appellant's overriding focus had been to abuse sexually and rape a six-year-old girl. The judge concluded that had the girl existed the appellant would have committed these extremely serious offences. Although various explanations for Smisson's offending have been proffered, these do not materially lessen the danger this appellant poses to young people, which the present offence exemplified. The concurrent sentences of 6 months' imprisonment for the combination of three offences relating to indecent photographs were appropriate. The only element of Smisson's sentence that requires adjustment relates to the victim surcharge order, because some of the offences for which he was sentenced dated back to 31 May 2013 (see *R v Abbot and others* [2020] EWCA Crim 516 at [83]). The order should have been in the sum of £120.

75. With Buonaiuto, the intended offending was, although undoubtedly grave in nature, of slightly less seriousness than that contemplated by Smisson. In the result, the starting point was 8 years' imprisonment, reduced to 5 years 4 months to reflect the appellant's guilty plea. We have borne in mind the lack of relevant previous convictions, appellant's marital difficulties and the apparent remorse he has expressed, but given the appellant intended to engage in penetrative sexual activity with a six-year-old child which included the penetration of her mouth with his penis, the penetration of her vagina with his tongue and the child performing oral sex upon her mother, as with Smisson we do not conclude that this lengthy sentence was manifestly excessive. Again, there is no challenge to the judge's finding of dangerousness.

76. Privett, in extremely explicit and graphic terms, expressed his wish to engage in penetrative sexual activity with a six-year-old child, with the active participation of her mother. He admitted in interview he had intended to penetrate the child sexually with a vibrator, along with his fingers and penis. In those circumstances, a starting point of 8 years' imprisonment, reduced to 5 years 4 months to reflect the appellant's guilty plea cannot sustainably be characterised as manifestly excessive. This is particularly the case for an appellant with previous convictions of the kind Privett had accrued.

77. With West, the appellant expressed his wish to engage in vaginal and oral sexual intercourse with a 10-year-old girl. The judge determined that the appellant was not dangerous and he reduced what would otherwise have been a starting point after trial of 6 years' imprisonment to 5 years on the basis that the appellant could not have put his plans into effect. Applying full credit for his guilty plea, this reduced the sentence to one of 3 years 4 months' imprisonment. In those circumstances the sentence was not manifestly excessive.

78. For the reasons set out above, these four appeals against sentence are dismissed, save that in Smisson's case the appeal is allowed to the extent that the Victim Surcharge Order is reduced to £120.

Postscript

79. We invite the Sentencing Council to consider whether any and, if so, what clarification of the relevant Sentencing Guideline is necessary, and whether further guidance can be given to sentencers. This exercise may involve consideration of other Guidelines.