Neutral Citation Number: [2021] EWCA Crim 572

Case Nos: 202002921A3, 202002671A4, 202003125A1, 202100325A4, 2020003251A1, 202100072A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON AN APPEAL FROM THE CROWN COURT AT CHESTER (Reed)
His Honour Judge Thompson
T20207196
ON APPEAL FROM THE CROWN COURT AT MOLD (Bennett)
His Honour Judge Petts
T20207058
ON AN APPLICATION FROM THE CROWN COURT AT St ALBANS (Crisp)
His Honour Judge Grey
ON AN APPLICATION FROM THE CROWN COURT AT BASILDON (Vasile)
His Honour Judge Graham
ON AN APPLICATION FROM THE CROWN COURT AT SOUTHAMPTON (Millen)
His Honour Judge Burrell Q.C.
T20190300
ON AN APPLICATION FROM THE CROWN COURT AT PORTSMOUTH (Keirle)
His Honour Judge Melville Q.C.
T20197239

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2021

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE FULFORD)
MRS JUSTICE MCGOWAN
and
MR JUSTICE GRIFFITHS

- -

Between:

Alistair Reed — **Appellant**

and

Mark Bennett — **Appellant**

- and -

Respondent

The Queen

Attorney General References

Lee Crisp
George Vasile

Matthew Millen
Carl Anthony Keirle

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Mr P Jarvis (**instructed by the Attorney General's Office and the CPS Criminal Appeals Unit)**
Miss J Maxwell (assigned by the **Registrar of Criminal Appeals**) for **Alistair Reed**
Mr S Mintz (assigned by the **Registrar of Criminal Appeals**) for **Mark Bennett**
Ms N Carter (instructed by **Nobles Solicitors**) for **Lee Crisp**
Mr J Oliveira-Agnew ((instructed by **PCD Solicitors**) for **George Vasile**
Mr C Stimpson (instructed by **BCL Solicitors**) for **Matthew Millen**
Mr S Barker (instructed by **Goldman Bailey Solicitors**) for **Carl Anthony Keirle**

Hearing date: 4 March 2021
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Approved Judgment

Lord Justice Fulford VP:

This is the judgment of the court to which all members have substantively contributed.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to the victim in the case of Carl Keirle. No matter relating to "G" shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of the two offences of causing a child to engage in sexual activity contrary to section 10. This prohibition applies unless waived or lifted. There is no prohibition on reporting this judgment.

The Overarching Issue

1. These six cases have been listed together because they raise a particular aspect of the correct approach to be taken when sentencing certain offences against children under the Sexual Offences Act 2003 ("SOA"), namely when no sexual activity takes place, for instance, because i) the child is a fiction, ii) the defendant failed to persuade the child to engage in sexual activity or iii) the offender was thwarted. In the main, the offences referred to hereafter are under the SOA, and we refer to them simply by way of their section number unless another statute is engaged.

2. On 29 April 2020, the Court of Appeal (Criminal Division) ("CACD") in *Privett & Others* [2020] EWCA Crim 557; [2020] 2 Cr App R (S) 45 gave guidance on the approach to sentencing offences under section 14: arranging or facilitating the commission of a child sexual offence. The four cases were unrelated but they each concerned a defendant who had been in contact with an undercover police officer who had been posing as the mother of a fictitious child. All four defendants believed the intended victims were real and they arranged with the undercover police officers to engage in sexual activity with the children (thereby, intending to commit offences contrary to section 9 (*viz*. sexual activity with a child)). They were arrested having travelled to an agreed location in order to put the arrangement into effect.

3. By chance, the following day, a differently constituted division of the CACD gave judgment in the case of *Manning* [2020] EWCA Crim 592; [2020] 2 Cr App R (S) 46, in respect of sentences for one offence contrary to section 10 of causing or inciting a real child (V) to engage in sexual activity and four offences of engaging in sexual activity with a 15-year-old girl (V), contrary to section 9(1).

4. For reasons examined hereafter, it is suggested that the court in *Manning* adopted an approach that is potentially inconsistent with the guidance in *Privett.* As a consequence, the vestige of two contrasting lines of authority can be detected. The court in *R v Russell* [2020] EWCA Crim 956 followed *Manning* whereas *Woolner* [2020] EWCA Crim 1245 applied *Privett* (as discussed in [12] and [13] below).

5. These six cases have been listed together to consider whether the reasoning in *Privett* should apply more widely to other offences under the SOA when the defendant has committed a sexual offence with, or in respect of, a person who is, or who the defendant believes to be, a child and no sexual activity occurs. Under consideration in this context are certain offences or attempted offences relating to:

i) children under the age of 13, namely those of rape (section 5), assault by penetration (section 6), sexual assault (section 7) and causing or inciting a child under the age of 13 to engage in sexual activity (section 8);

ii) children under the age of 16, namely those of sexual activity with a child (section 9), causing or inciting a child to engage in sexual activity (section 10), engaging in sexual activity in the presence of a child (section 11), causing a child to watch a sexual act (section 12), child sex offences committed by children or young persons (section 13), meeting a child following sexual grooming (section 15) and sexual communication with a child (section 15A); and

iii) the sexual exploitation of children, namely paying for the sexual services of a child (section 47), causing or inciting the sexual exploitation of a child (section 48), controlling a child in relation to sexual exploitation (section 49) and arranging or facilitating the sexual exploitation of a child (section 50).

6. It is helpful to provide the briefest overview of the six cases, prior to more detailed consideration below. The individual circumstances are considered in [27] – [84]. Each was charged with an offence or offences under the SOA (Crisp was additionally charged under section 1(1) Protection Children Act 1978):

i) Reed: was charged with two offences of attempting to cause a fictional 13-year-old child ("Maisie") to engage in sexual activity (section 10) (the maximum sentence is 14 years' imprisonment). He was sentenced to 2 years' imprisonment. The Registrar of Criminal Appeals has referred his application for leave to appeal to the full court.

ii) Bennett: was charged with two offences (counts 1 and 2) of attempting to incite a girl (14-year-old child ("Carly") under the age of 16 to engage in penetrative sexual activity (section 10) (the maximum sentence is 14 years' imprisonment). There was an offence of attempting to cause a child to watch a sexual act (section 12) (the maximum sentence is 10 years' imprisonment). Finally, there was an offence of attempting to cause a girl under the age of 16 to engage in non-penetrative sexual activity (section 10) (the maximum sentence is 14 years' imprisonment). He was sentenced to 3 years 6 months' imprisonment on counts 1 and 2 with concurrent sentences of 7 months' imprisonment for the other two offences. The Registrar of Criminal Appeals has referred his application for leave to appeal to the full court.

iii) Crisp: is an application by the Attorney-General to refer the sentence to this court. Crisp was charged with nine offences against three fictional children: "Sasha" (aged 13), "Shelley" (aged 13) and "Lacey" (aged 12). There were three charges (offences 1, 2 and 3) of attempted sexual communication with a child (section 15A) (the maximum sentence is 2 years' imprisonment); three charges (offences 4, 5 and 6) of attempting to cause a child under the age of 16 to watch a sexual act (section 12) (the maximum sentence is 10 years' imprisonment); a single charge (offence 7) of attempting to incite a child under the age of 13 to engage in non-penetrative sexual activity (section 8) (the maximum sentence is 14 years' imprisonment); a charge (offence 8) of making an indecent image of a child (section 1(1) Protection Children Act 1978) (the

maximum sentence is 10 years' imprisonment); and a charge (offence 9) attempting to incite a child under the age of 16 to engage in sexual activity (section 10) (the maximum sentence is 14 years' imprisonment). He was sentenced to terms of imprisonment which were suspended for 2 years, the terms being 4 months on charges 1, 2 and 3; 8 months on charges 4, 5 and 6; 12 months on charges 7 and 9; and 1 month on charge 8. The sentences were ordered to run concurrently with the sentence of 12 months' imprisonment suspended for 2 years on charge 7. The court additionally imposed a rehabilitation activity requirement of 35 days.

iv) Vasile: is an application by the Attorney-General to refer the sentence to this court. Vasile was charged with arranging penetrative sexual activity with a fictional 12-year-old child ("Ella") (section 14) (the maximum sentence is 14 years' imprisonment). He was sentenced to a two-year community order.

v) Millen: is an application by the Attorney-General to refer the sentence to this court. Millen was charged with attempting to pay for the sexual services of a fictional 11-year-old child ("Grace") (section 47) (the maximum sentence is life imprisonment), *viz*. penetrative sexual activity with a child under 13. He was sentenced to 3 years' imprisonment.

vi) Keirle: is an application by the Attorney-General to refer the sentence to this court. Keirle was charged with sexual communication with a real 15-year-old child ("G") (section 15A) (the maximum sentence is 2 years' imprisonment) and two charges of causing a child to engage in sexual activity (section 10) (the maximum sentence is 14 years' imprisonment). He was sentenced to a 3-year community order.

The Jurisprudence

7. In *Attorney General's Reference (No.94 of 2014) (R. v Baker*) [2014] EWCA Crim 2752; [2016] 4 W.L.R. 121, the offender pleaded guilty to one count of inciting a real child to engage in sexual activity, contrary to section 10(1) and (2) in circumstances where the sexual activity that the offender had proposed to the victim did not take place. The court held that, because the offending did not proceed beyond incitement, it was "*other sexual activity*" within Category 3 of the Guideline, even when the activity that had been intended to be incited would have fallen within Category 1 or 2 if carried out.

8. The court in *Privett* decided that when sentencing an offender in respect of an offence contrary to section 14 when there was no real child, the judge should, first, identify the category of harm on the basis of the sexual activity that the defendant intended and, secondly, adjust the sentence in order to ensure that this was commensurate with, or proportionate to, the applicable starting point and range if no sexual activity had occurred. The court determined that it was necessary to keep in mind the terms of the offence contrary to section 14 (*viz.* intentionally arranging or facilitating activity that would constitute a child sexual offence, intending that this would happen). It was a preparatory offence and was complete when the arrangements for the offence were made or the intended offence had been facilitated and it was not, therefore, dependent on the completed offence happening or even being possible. In those circumstances, the absence of an actual victim did not, therefore, reduce culpability.

9. The court accepted that as a general proposition, the harm in a case would usually be greater when there was a real victim than when the victim was fictional. Nonetheless, section 63 Sentencing Act 2020 (formerly section 143(1) of the Criminal Justice Act 2003) requires the court to consider the intended harm. For a section 14 offence, the position under the guideline was clear: the judge should, first, identify the category of harm on the basis of the sexual activity that 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 was commensurate with, or proportionate to, the applicable starting point and range if no sexual activity had occurred (including because the victim was fictional) (see [59]–[67]).

10. Given the decision in *Baker* did not require that section 14 offences in which there was no real child always had to be treated as Category 3A offences under the guideline, it was unnecessary to resolve whether *Baker* had been correctly decided, albeit the court indicated, "*(w)e recognise that aspects of the decision in Baker may well need to be revisited in the light of this judgment* […]" (see [66]).

11. It is right to observe that no decision of the CACD since *Privett* has sought to depart from the principles it established. In *Manning,* the court was dealing with notably different circumstances, namely four offences of engaging in sexual activity with a real 15-year-old girl (V) contrary to section 9(1), and one offence of causing or inciting V to engage in sexual activity, contrary to section 10(1). It follows that the facts were far removed from *Privett* where the defendants arranged to commit section 9 offences against a fictitious child. The court in *Manning* was not taken to the decision in *Privett* and instead followed *Baker*, as affirmed in *Cook* [2018] EWCA Crim 530; [2018] 2 Cr App R (S)16. Indeed, the Solicitor General conceded the issue and there does not appear to have been any substantive argument on the issue (see [11] in the judgment in *Manning*).

12. In *Russell*, the appellant was charged with attempting to engage in sexual communication with a child (contrary to section 15A), and two counts of attempting to cause or incite a girl to engage in sexual activity (contrary to section 10). The victim was a 12-year-old fiction created by a vigilante group called Voices of the Innocent. The Crown was unrepresented and although the court was referred to *Privett* (referred to as *R v Previt*), it did not engage in any analysis of that decision or its impact on the issue the court needed to resolve. The court simply followed *Baker* and *Cook*.

13. The court in *Woolner* (an application by the Solicitor General to refer the sentence) was concerned with a defendant who had pleaded guilty, *inter alia*, to an offence involving a fictional 13-year-old boy, namely attempting to arrange or facilitate the commission of a child sex offence (contrary to section 1(1) Criminal Attempts Act 1981). We interpolate to note that this was an unnecessary charging decision, given a real child does not need to exist to make out the substantive offence under section 14 (see the CPS Guidance on Rape and Sexual Offences, Chapter 7, on the Charging Practice for section 14 offences, effective from November 2020: "*(i)f considering a charge under s14, in which no real child was involved, such as cases involving undercover officers or 'vigilante groups', prosecutors should charge the substantive offence and not an attempt*"). Accordingly, it was unnecessary to charge a section 14 offence as an attempt in the circumstances of a fictional victim. The court in *Woolner* expressed its agreement with *Privett*, which it followed (see [29]), and expressed considerable reservations about the decision in *Russell* (see [32]).

14. In the event, it is clearly established that *Privett* is to be followed for section 14 offences.

Discussion on the Overarching Principle

15. Of the offenders currently before the court, it is to be observed that only one of them (Vasile) was convicted of a section 14 offence, by arranging to commit a sexual offence against a fictitious child. The others were, in the main, convicted either of attempting to incite a fictitious child to engage in sexual activity (Reed, Bennett and Crisp), or of inciting an actual child to engage in sexual activity when no sexual activity took place (Keirle). Millen was convicted of attempting to sexually exploit a fictitious child by paying to engage in sexual services with her. Section 14 offences presently tend to arise – although by no means always – when the defendant communicates with a fictional child. In contrast, many of the other offences just described frequently occur when the accused makes contact with a real child and either engages in sexual activity with them or causes them to engage in sexual activity with themselves, or encourages them to do so. As the cases presently before the court demonstrate, however, they can also involve fictional children, when the offences will be charged as an attempt.

16. As matters presently stand, the cases of *Baker* and *Cook* have indicated that for the section 9 and 10 offences, or their inchoate forms, where no sexual activity has taken place – either because the child was fictional or because the defendant failed to persuade the child to engage in sexual activity or because the defendant's attempt to engage in sexual activity with the child was thwarted – harm will be within Category 3 irrespective of the defendant's intentions. As Sir Brian Leveson P put the matter in *Baker* (a case in which sexual activity was incited but it did not occur):

> "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."

17. Similarly, per Treacy LJ in *Cook* (when analysing the ground of appeal, which the court accepted):

> "8. The grounds of appeal urge that the judge fell into error in putting the case into Category 1A when the case should have been classified as Category 3A. Counsel had initially advised that there were no tenable grounds of appeal, but about nine months later he had become aware of the decision of this court in *R. v Gustafsson* [2017] EWCA Crim 1078. That decision was merely one of a series made in recent years holding that where the case involves inciting rather than causing sexual activity and where there was no physical contact with or any communication with a real child, Category 3A is the correct category. Those decisions include *R. v Buchanan* [2015] EWCA Crim 172; [2015] 2 Cr. App. R. (S.) 13 (p.129), *Attorney General's Reference (No.94 of 2014)* [2014] EWCA Crim 2752; [2016] 4 W.L.R. 121 and *Attorney General's Reference (No.94 of 2015)* [2015] EWCA Crim 2384."

18. As Mr Jarvis for the Crown has submitted, this suggested conclusion is somewhat surprising given Category 3 is reserved for cases of "*other sexual activity*" not falling into Categories 1 or 2, whereas in these cases no sexual activity whatsoever took place. If harm in the Guideline really means "*actual harm*" rather than, for instance, "*intended harm*" then a further Category was called for, entitled "*no sexual activity*", to cater for those

situations where nothing sexual in the sense meant by the Guideline occurred. Furthermore, the section 10 guideline has as a mitigating factor, "*sexual activity was incited but no activity took place because the offender voluntarily desisted or intervened to prevent it*." We also agree with Mr Jarvis that it is important to have in mind that section 9 and 10 offences share the same Guideline. The section 9 offence is a contact offence which requires actual sexual activity to have taken place, whereas the section 10 offence can be committed either when the child engages in sexual activity brought about by the defendant (the "*causing*" form of the offence) or when the defendant encourages the child to engage in sexual activity (the "*inciting*" form of the offence) but when that encouragement does not result in any actual sexual activity. Mr Jarvis tellingly observes that if the Sentencing Council had intended that every case of incitement should fall automatically within Category 3 for harm, this would inevitably have been stipulated.

19. The consequence of the decision in *Baker* is that wholly irrespective of the gravity of the sexual activity the defendant sought to persuade the child to engage in, whether the child was fictional or real, the starting point will always be the same.

20. We are acutely conscious of the seniority, distinction and roles of the judges who presided in *Baker* (Sir Brian Leveson P., Deputy Head of Crime and former Chair of the Sentencing Council) and in *Cook* (Treacy LJ, Chair of the Sentencing Council), but we consider that the decisions in both cases were made *per incuriam*, along with those that followed (*Manning* and *Russell*) which simply applied *Baker* and *Cook*. Section 63 Sentencing Act 2020 (formerly section143(1) of the Criminal Justice Act 2003, see [9] above) lies at the centre of this overarching issue of principle as regards sentencing. It was not referred to in any of these cases. In this context, its terms are critical:

> "**Assessing seriousness**
>
> Where a court is considering the seriousness of any offence, it must consider—
>
> (a) the offender's culpability in committing the offence, and
>
> (b) any harm which the offence—
>
> (i) caused,
>
> (ii) was intended to cause, or
>
> (iii) might foreseeably have caused."

21. Notwithstanding the submissions to the contrary by counsel on behalf of some the various accused, if the seriousness of an offence is to be judged by reference not just to the harm caused, but to the harm intended, then when a defendant encourages a child to engage in sexual activity but without that activity taking place, or attempts to engage in sexual activity with a child, the effect of section 63 Sentencing Act 2000 is that the harm should be assessed by reference to the defendant's state of mind and intentions. The decisions in *Baker* and *Cook* are unsustainable when considered in light of this clear statutory requirement, because they relegated seriousness to the lowest category of harm, wholly regardless of the harm the accused intended to cause, in clear contravention of this statutory provision.

22. Furthermore, the doctrine of *stare decisis* in the Court of Appeal (Criminal Division) has recently been given fresh expression by a five-judge court, presided over by the Lord Chief Justice, in *R v Barton & Another* [2020] EWCA Crim 575; [2020] 2 Cr App R 7 (at [103]):

> "103. The rules of precedent exist to provide legal certainty which is a foundation stone of the administration of justice and the rule of law. They ensure order and predictability whilst allowing for the development of the law in well-understood circumstances. They do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating."

23. The difference in approach as between *Privett* and *Baker*, which depends simply on the particular offence with which the accused has been charged, is unsustainable; it would mean that the assessment of harm would be markedly different in cases of grave sexual offending involving young people simply because of the particular section under which the perpetrator is charged. As already cited, the court in *Privett* observed "*(w)e recognise that aspects of the decision in Baker may well need to be revisited in light of this judgment*" (at [66]). This is an area in which injustice would undoubtedly result if the law is not able to develop. This decision will end the rigid distinction between those cases where particular sexual activity takes place and those cases where the defendant, for instance, does everything he is able to bring that sexual activity about but for reasons beyond his control it does not materialise. The sentencing judge should make an appropriate downward adjustment to recognise the fact that no sexual activity occurred, as demonstrated by the court in *Privett* (at [67]). Furthermore, we consider this approach should apply to all of the offences set out in [5] above when the defendant attempts to commit these offences or incites a child to engage in certain activity, but the activity does not take place. The harm should always be assessed in the first instance by reference to his or her intentions, followed by a downward movement from the starting point to reflect the fact that the sexual act did not occur, either because there was no real child or for any other reason.

24. The extent of downward adjustment will depend on the facts of the case. Where an offender is only prevented from carrying out the offence at a late stage, or when the child victim did not exist and otherwise the offender would have carried out the offence, a small reduction within the category range will usually be appropriate. Where relevant, no additional reduction should be made for the fact that the offending is an attempt.

25. But when an offender voluntarily desisted at an early stage, and particularly if the offending has been short-lived, a larger reduction is likely to be appropriate, potentially going outside the category range.

26. As indicated in *Privett* at [72], it may eventuate that a more severe sentence is imposed in a case where very serious sexual activity was intended but did not take place than in a case where relatively less serious sexual activity did take place.

The Individual Cases

Alistair Reed

27. This is an application for leave referred by the Registrar, and the main issue raised is whether *Privett* should be followed for offences under sections 9 and 10. Reed (who was 21 at the time of his offending) pleaded guilty to two counts of attempting to cause a child to engage in sexual activity (section 10), contrary to section 1(1) Criminal Attempts act 1981. The particulars of the offence on both counts were that (as a person over 18), Reed attempted to cause a child under 16 (that is, aged 13) to engage in sexual activity which

involved the penetration of her vagina with her fingers, not reasonably believing that she was aged 16 or over. Count 1 related to an offence on 10 January 2019 and count 2 to an offence on 11 January 2019. On 26 October 2020, he was sentenced in the Crown Court at Chester to concurrent terms of 2 years' imprisonment and made subject to a 10-year Sexual Harm Prevention Order.

28. Reed contacted a girl ("Maisie") on an online social network aimed at teenagers (MyLol) who told him she was 13. She was in fact an undercover police officer. He told her he was 17. He said he could "*teach her stuff*" and asked if she would like him to teach her how to have an orgasm. He incited her to masturbate herself by penetrating her vagina with her fingers, graphically instructing her while she gave the impression that she was complying. That was Count 1. The next day, sexual conversation between them resumed and Reed again incited her to masturbate herself by digital vaginal penetration and he referred additionally to anal penetration. That was Count 2. He said he was masturbating over her, asked for naked pictures of her and offered to take the train to meet her, saying he lived near Birmingham. He gave her his username on Kik (another social media platform) where the conversation continued. He asked for a picture of her in underwear, which she refused. The communications ended on 11 January 2019. Enquiries led the police to Reed. After his arrest on 2 April 2019, he handed over his MyLol account details and password on request. He was of previous good character.

29. The judge concluded there was no common sense to an approach which treated offences charged under sections 9 and 10 differently to offences under sections 14 and 15. Applying *Privett*, he relied on the harm intended and placed the offending in category 1A of the guideline, with a starting point of 5 years, before adjusting downwards "*for two features, the fact that there was no actual harm caused and also the fact that there could not be harm caused because it was a police officer involved*." His final sentence was 3 years concurrent before plea, reduced to 2 years after credit for plea.

30. Reed's application against sentence involves the argument that for section 9 and 10 offences, the approach in *Manning* and *Russell* should be followed instead of the approach in *Privett* which addressed section 14 and 15 offences, with the result that this offending should have come within category 3 ("*other sexual activity*") instead of category 1, along with an appropriate downward adjustment.

31. He also appeals against the judge's decision not to suspend the sentence. The judge decided that appropriate punishment for an offence which he thought involved a 13-year-old girl could only be achieved by immediate custody.

32. It follows from the discussion above that the judge was correct to apply *Privett* in this case. He was, therefore, right to place the offending in Category 1 and then to apply a downward adjustment. The reduction of 2 years to reflect the lack of harm and the fact that the child was fictional was notably generous, albeit we recognise that Reed appears to have broken off the discussions some significant time before his arrest. The sentence of 2 years was, therefore, neither wrong in principle nor manifestly excessive, given particularly there were two offences.

33. As to suspension, the judge was entitled not to suspend the sentence on the basis that appropriate punishment could only be achieved by immediate custody, in line with the Sentencing Council's Guideline on the Imposition of Community and Custodial Sentences. It is not at all surprising that the judge did not feel able to suspend the sentence for an

offence of this nature (see [58] below). An immediate custodial sentence was to be expected, even though the term did not exceed 2 years. This application is refused.

Mark Bennett

34. This is an application for leave to appeal against sentence, referred to the full court by the Registrar. The main issue raised is whether the judge was correct to follow *Privett*.

35. On 3 July 2020, in the Crown Court sitting at Mold, the applicant (then aged 43) pleaded guilty to four offences. On 24 September 2020, the applicant (by then aged 44) was **s**entenced to a total term of 42 months' imprisonment made up as follows:

    i) On counts 1 and 2: offences of attempting to incite a girl under the age of 16 to engage in penetrative sexual activity, contrary to section 1 (1) Criminal Attempts Act 1981 (section 10), a term of 42 months' imprisonment,

    ii) On count 3: an offence of attempting to cause a child to watch a sexual act, contrary to section 1 (1) Criminal Attempts Act 1981 (section 12), to a term of 7 months' imprisonment ordered to be served concurrently, and

    iii) On count 4: an offence of attempting to cause a girl under the age of 16 to engage in non-penetrative sexual activity, contrary to section 1 (1) Criminal Attempts Act 1981 (section 10), to a term of 7 months imprisonment ordered to be served concurrently.

36. As to the circumstances, a group of paedophile hunters created a fictitious 14-year-old girl, called "Carly". The applicant befriended her on social media. She told him she was 14. The exchanges between the two took place over a period of about 2 months. He said that he wanted "*adult fun*" and when Carly said that she did not know what that was, the applicant explained "*dirty chat, pics and vids and video calling*." He asked if Carly had ever masturbated and penetrated her vagina with her fingers. Carly said that she did not know what that meant and he explained. The applicant then asked if that was what she wanted to do. She responded by saying that she was only 14. The applicant replied "*ur choice*" and Carly asked if she would get into trouble. The applicant said only if people found out. He then asked if she had the KIK application and told her to add him.

37. The applicant spoke about penetrating Carly's vagina with his penis and different sexual positions (count 1). He asked her to wear a skirt. He spoke about wearing a condom but said it was up to her. The applicant encouraged Carly to masturbate and penetrate her vagina with her fingers (count 2).

38. Carly asked the applicant about his job and he indicated personal security. Carly asked if he had ever looked after anyone famous and he replied, "*Little Mix*". He asked whether Carly had digitally penetrated herself the previous night. When Carly said that she had tried but it had hurt, he replied that she would get used to it. He asked Carly for videos of herself as she did it.

39. He asked Carly if she wanted to see a picture of his penis and sent her a photo of an erect penis (count 3). He said, "that is going to be inside you when you are ready." The applicant then requested photographs of Carly's vagina (count 4) and said that she owed him a photograph. He enquired as to whether they could meet up for sex. He said that he wanted her to lose her virginity with him. An adult decoy was used to arrange a meeting in a retail

park on 2 October 2019. The applicant was confronted at the retail park, and the police were called.

40. The applicant provided a written basis of plea in the following terms.

> *"During a two-month period of exchanging messages with 'Carly' the defendant incited 'Carly to meet, and expressed fantasies about what sexual activity would take place, including digital penetration and sexual intercourse.*
>
> *These suggestions of meeting were fantasies and sex-talk: he had no intention of actually meeting up with 'Carly', nor is there any evidence that he at any time sought to make any practical arrangements to mee* (sic) *her, for example by arranging a date or a location for such meeting.*
>
> *It was because the defendant failed to make any actually* (sic) *arrangements to meet, that the 'paedophile hunters' resorted to using an adult 'decoy' to lure him into a public place. Within a matter of days the defendant had arranged a rendez-vous for that meeting."*

41. There was a Newton hearing, but the applicant did not give evidence. The judge did not accept the applicant's account as described in submissions, unsupported by evidence, that although he invited her to meet him for the purposes of having sexual intercourse, he had not intended that they would meet in person. He found that the applicant had intended to meet Carly, whom he believed was 14.

42. At the hearing the prosecution submitted that *Privett* should apply. The defence argued that the court should follow the approach in *Baker* because *Privett* dealt only with section 14 offences of arranging or facilitating the commission of child sex offences and did not apply to section 10 offences. The judge followed the approach in *Privett* and decided that there should not be a different approach for section 14 facilitation offences and section 10 incitement offences.

43. The judge determined that counts 1 and 2 were in category A culpability, given the grooming, the age disparity and the soliciting of sexual images of the child. He found harm at level A because what was contemplated was penetrative sexual activity, but he discounted the sentence because it was an attempt and on account of the absence of a real child. Accordingly, he applied a starting point of 5 years within the range of 4 -10 years. He found that counts 3 and 4 were in category A3 (therefore, a starting point of 26 weeks within a range of a Community Order to 3 years).

44. The judge found, as aggravating features, the length of time of the offending and the specific instruction to keep what had occurred a secret. In mitigation there was Bennett's previous good character and that he had caring responsibilities for his mother. The applicant had pleaded guilty at the PTPH but had required a Newton hearing and had been disbelieved. His entitlement to credit in those circumstances was only 12.5%.

45. The judge decided that 6 years would be the correct sentence if there had been a real victim and reduced it to 4 years because Carly was a fiction. The judge then further reduced the term to reflect the guilty plea to 3.5 years (42 months).

46. It is submitted on behalf of the applicant that the judge should have followed the *Baker* approach, and in any event the sentence was manifestly excessive. Dealing with the sentence imposed following the approach in *Privett*, we accept the submission that a term of 6 years as the sentence on count 1 before a reduction to reflect the absence of a real

child for one offence could be described as high. Set against that, given the applicant had not desisted – instead, he had travelled to meet with the adult decoy in a retail park at a time when he was hoping to meet with "Carly" – we consider that a discount of two years because the child was a fiction was markedly generous. Furthermore, there were four offences, and it is necessary to take into account the length of time over which they were committed (2 months), resulting in the attempted meeting. The offending involved a request to keep the planned activity a secret. Taking account of the persistence of the activity, we are of the view that it is unarguable that 4 years' imprisonment for the totality of this criminality is manifestly excessive and that the term of 42 months imposed after a guilty plea is unappealable. The application is refused.

Lee Crisp

47. This is a reference by the Attorney General. We give leave. This case involves consideration of the ambit of the principle in *Privett*.

48. On 4 November 2020, having pleaded guilty before the Magistrates, Crisp (now aged 38) was committed for sentence pursuant to section 3 Powers of Criminal Courts (Sentencing) Act 2000.

49. On 4 January 2021 the offender was sentenced by Judge Grey sitting in the Crown Court at St Albans to a total term of 12 months' imprisonment suspended for 2 years with a Rehabilitation Requirement, the sentence was made up as follows,

1, 2, 3	Attempting to engage in sexual communication with a child under 16 contrary to section 1(1) of the Criminal Attempts Act 1981 and section 15A of the Sexual Offences Act 2003	4 months suspended for 2 years, concurrent to sentence on count 7
4, 5, 6	Attempting to cause a child under 16 to watch a sexual act contrary to section 1(1) of the Criminal Attempts Act 1981 and section 12 of the Sexual Offences Act 2003	8 months suspended for 2 years concurrent to count 7
7	Attempting to incite a child under 16 to engage in sexual activity (non - penetrative) contrary to section 1(1) of the Criminal Attempts Act 1981 and section 8 of the Sexual Offences Act 2003	12 months suspended for 2 years
8	Making an indecent photograph of a child (category C) contrary to sections 1(1)(a) and 6 of the Protection of Children Act 1978	1 month suspended for 2 years concurrent
9	Attempting to incite a child under 16 to engage in sexual activity (penetrative) contrary to section 1(1)	12 months suspended for 2 years concurrent

	of the Criminal Attempts Act 1981 and section 10 of the Sexual Offences Act 2003	

50. He was also made the subject of a Sexual Harm Prevention Order for 7 years.

51. Crisp had made contact with 3 girls, "Sasha" (aged 13), "Shelley" (aged 13) and "Lacey" (aged 12). All were fictional.

    i) For Sasha, there are three offences: attempting to engage in sexual communications with her (namely, his canvassing the possibility of having sexual intercourse with her), attempting to incite her to engage in sexual activity of a penetrative nature (namely, inciting her to insert her finger into her vagina), and attempting to cause her to look at an image of sexual activity (namely, by watching a video of Crisp masturbating).

    ii) For Shelley, there were two offences: attempting to engage in sexual communications with her (namely referring to her masturbating and inviting her to touch his penis), and attempting to cause her to look at an image of sexual activity (namely, a video of the offender masturbating).

    iii) For Lacey, there were three offences: attempting to engage in sexual communications with her (namely, his canvassing the possibility of having sexual intercourse with her), attempting to incite her to engage in sexual activity (namely, inciting her to send him naked photographs of herself), and attempting to cause her to look at an image of sexual activity (namely, by watching a video of the offender masturbating).

    iv) Additionally, charge 8 was an offence of making indecent photographs of children between 1 May 2017 and 29 July 2018.

52. Crisp was 36 years of age at the time. He used a social networking website called KIK to make contact with Sasha, who told him she was 13. He engaged in sexualized conversations with Sasha knowing her age. He gave her instructions on how to masturbate and told her to put her fingers into her vagina. She wrote to tell him that it hurt. Through Sasha, he met her friends Shelley and Lacey, who were 13 and 12 respectively, and they engaged in group chats.

53. He embarked on sexual conversations with all three fictional victims. In messages between himself and Lacey he encouraged her to send him naked photographs of herself. He sent each of them a video of him masturbating. He had in reality been communicating with members of a group that style themselves as online paedophile hunters. After about a week of conducting these conversations, the offender voluntarily stopped communicating with the fictional girls. He was arrested at his home address a short time later. On his laptop computer the police found two indecent photographs of a girl who appeared to be around 14 years of age (charge 8).

54. The judge applied the principles in *Baker* and found that because there was no real girl the harm was category 3. He went on to find that all the offences were in category 3A with a starting point of 26 weeks and a range of a community order to 3 years. He imposed a sentence of 12 months' imprisonment on charge 9, making the other terms of imprisonment

concurrent. In the view of this court, applying the principle in *Privett*, this was an unduly lenient sentence.

55. The offence in charge 9 against Sasha was the most serious of the offences, involving an attempt to incite a penetrative sexual act and the judge was right to impose the lead sentence on that charge, making the other terms of imprisonment concurrent. In line with the principle set out above this should have been identified as a category 1A. The guideline sets a starting point of 5 years with a range of 4 to 10 years imprisonment for one offence. Upward adjustment is necessary to reflect the number of offences.

56. In our view the judge should have moved upwards within the range to 6 years. Thereafter, the figure needs to be adjusted downwards to reflect the absence of a real child. Additionally, it is necessary to reflect the fact that the offender had some notable personal mitigation. The offences, as we have already outlined, only spanned a week and he had broken off the discussions before any outside intervention occurred. He was drug dependant at the material time. Through no fault of his, there had been a troubling delay of 2 ½ years before the matter reached the Magistrates' Court. While the matters were being investigated and pursued the offender sought help for his addiction and he had been free of drugs since the period of this offending.

57. The combination of these features, which in our view are each of real significance, provide wholly exceptional grounds for a reduction in the term to 3 years, which is the least term consistent with the guidelines that could properly be imposed for these offences. After credit for his early guilty plea this is properly reduced to a term of 2 years.

58. We turn to the question of suspension. It is inevitable that immediate imprisonment will usually be the appropriate sentence for offences of this type. There may be exceptional circumstances, however, applying the Guideline on the Imposition of Community and Custodial Sentences, which will permit a court to suspend the term. That is particularly so when there is material with enables the court to impose a suspended sentence in combination with a Rehabilitation Requirement, as in this case. For these reasons, we take the view that the overall term of 12 months' imprisonment suspended for 2 years was unduly lenient and should be increased to a term of 2 years. We have decided that the justice in this case, given the strong mitigation and the clear prospect of rehabilitation, means that the term of 2 years' imprisonment should be suspended for a period of 2 years, in combination with the Rehabilitation Requirement.

59. The court record indicates that a surcharge order of £149 was imposed, albeit no order was made by the court. The sum ordered should have been £140. The imposition of a surcharge order is mandatory and *Stone* [2013] EWCA Crim 723 indicates that a surcharge order is part of a sentence under section 50 Criminal Appeal Act 1968; it is thus is subject to correction. There is no reason why this approach should not apply to Attorney General's references.

60. We grant the application. We quash the sentences, save on offence 8. On offences 1,2 and 3 we substitute a sentence of 6 months suspended for 2 years (concurrent to the sentence on offence 7); on counts 4, 5 and 6 we substitute a sentence of 12 months suspended for 2 years (concurrent to the sentence on offence 7); and on offences 7 and 9 we impose current terms of imprisonment of 2 years, suspended for 2 years The total sentence, therefore, is 2 years' imprisonment, suspended for 2 years in combination with the Rehabilitation Requirement of 35 days. We substitute a £140 surcharge order. The sentence on offence 8 is undisturbed.

61. At the adjourned sentence hearing on 4 January 2021, the judge was informed that in the wording of offence 7 the fictional victim had in error been named as "Sasha" instead of "Lacey". "Sasha" had been portrayed as being 13, whereas "Lacey" was said to have been 12, the age of the potential victim being relevant to the charge.

62. The judge, at the invitation of both parties, agreed to exercise his powers under section 66 Courts Act 2003. He purported, as a Crown Court judge, to remit the charge to the magistrates' court and there, as a District Judge, to amend the name of the hypothetical victim. The charge was then committed for sentence to the Crown Court. The judge failed to deal with any of the required procedures in the Magistrates' Court (*e.g.* those in section 17A Magistrates' Courts Act 1980) and he failed to specify the power under which the charge was re-committed for sentence.

63. Following the decision in *R v Gould & Ors* [2021] EWCA Crim 447 at [140], the charge contained an obvious typographical error which could simply have been ignored by agreement. The true position in the present case was agreed. Applying the approach set out at [144] of *Gould* "*(t)he judge embarked on an unnecessary process which was on its own terms flawed. The charge which was committed for sentence was not bad on its face. It was therefore properly before the court for sentence*". We therefore simply ignore the unlawful exercise undertaken by the judge, which was of no effect and unnecessary.

George Vasile

64. This is a reference by the Attorney General. We give leave. The central issue raised is that the court failed to follow *Privett*. Vasile (then aged 39) was committed to the Crown Court for sentence after pleading guilty before magistrates to arranging or facilitating the commission of a child sex offence, contrary to section 14. On 17 November 2020 he was sentenced in the Crown Court at Basildon to a two-year community order with an unpaid work requirement of 150 hours and a rehabilitation activity requirement of 60 days. The court imposed a Sexual Harm Prevention Order for 5 years.

65. Vasile used a dating website on 18 August 2020 to contact what he thought was a 12-year-old girl ("Ella"), although she was in fact an undercover police officer. He exchanged messages with her over 10 days, making suggestions which began with kissing and hugging and then escalated to proposed penetrative sex, including anal sex. She agreed he could drive to meet her in his company van where they could be private and intimate. This meeting was to take place at a car park in Essex at 3pm on 27 August 2020. Excited messages were exchanged as he made his way to this encounter. He was arrested on arrival. He was of previous good character.

66. The judge correctly sentenced on the basis of the sentencing guideline for a section 9 offence (sexual activity with a child). He was referred to *Privett*, but both prosecution and defence counsel suggested that the case was in category 3A with a starting point of 26 weeks in a range from a high-level community order to a sentence of 3 years. The judge accepted this was the correct approach, stating "*the category of offending is significantly affected by the fact that this is a fictional child*". He noted that Vasile had already spent 11 weeks in custody and was of positive good character. He did not deal separately with credit for plea but concluded that he should impose a 2-year community order with a 150-hour unpaid work requirement and a 60-day rehabilitation requirement. The Attorney General refers the sentence on the basis that it was unduly lenient.

67. This was a category 1 offence, by reference to the harm intended, which was penetrative sex, including anal sex. The judge was wrong to place it in category 3, applying the principles we have discussed above; we note in this regard that he was not best assisted by the inappropriate consensus between counsel at the sentencing hearing as to the approach to be followed. He was, however, correct to place it in category A as regards culpability, because of planning, grooming and the significant disparity in age. For a category 1A case, the starting point is 5 years' custody with a range of 4 to 10 years' custody.

68. As a category 1A offence, bearing in mind the facts of this case, no starting point below the starting point envisaged in the Guideline of 5 years' custody would suffice. The downward adjustment to reflect the fact that there was no real child should bring it to no less than 4 years. Adjustment then needs to be made for the fact that Vasile was of positive good character and the impact of COVID-19. As the Lord Chief Justice observed in *Manning*:

> "41. We would mention one other factor of relevance. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgement should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case—currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of COVID-19.
>
> 42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a magistrates' court to retain jurisdiction, rather than committing for sentence."

69. In this case, the offender has already spent 11 weeks in custody during the onerous circumstances of the COVID-19 pandemic and we take account of the requirements of the community order, with which, at least in part, he will already have complied. Against that background, and with some significant hesitation given the seriousness of the offending which the offender contemplated, we consider that a sentence before plea of not less than 3 years would be appropriate. After appropriate credit for his plea, this is reduced to two years.

70. As we have already indicated at [58], usually the appropriate punishment will only be achieved by immediate custody, even when the victim is not a real child. However, this application needs to be judged in April 2021 bearing in mind this offending occurred in

August 2020 and it follows the 11 weeks the offender has already spent in custody during the COVID-19 pandemic and the fact that he will have been complying with the 150-hour unpaid work requirement and the 60-day rehabilitation requirement imposed as conditions of the suspended custodial sentence. These are persuasive factors, particular to the circumstances of this case. We allow the application. We quash the two-year community order and substitute a 2-year sentence of imprisonment suspended for 2 years, leaving in place the 150-hour unpaid work requirement and the 60-day rehabilitation requirement imposed as conditions of the community order. The surcharge order requires amendment. The correct figure is £156 and we make an order in that sum.

Matthew Millen

71. This is a reference by the Attorney General. We give leave. The central issue is whether the judge correctly followed the approach outlined in *Privett*. Millen (who is 44) was convicted after a trial of a single count of attempting to pay for the sexual services of a child, contrary to section 1(1) Criminal Attempts Act 1981 and section 47(1) Sexual Offences Act 2003. The indictment particulars were that, between 1 and 15 March 2019, he attempted to obtain for himself the sexual services of a child under 13 years (that is, aged 11 years) involving the penetration of her mouth with his penis and promised to pay an adult man £300 for this abuse in advance. On 4 December 2020 Millen was sentenced in the Crown Court at Southampton to 3 years' imprisonment and made the subject of a Sexual Harm Prevention Order.

72. The facts were that Millen met a man online whom he understood to be the father of an 11-year-old girl ("Grace"). He was an undercover police officer and the girl was fictitious. They communicated by email, by text and by telephone voice calls and reached agreement that Millen would pay him £300 and penetrate the 11-year-old girl's mouth with his penis. A recording would be made which Millen would be able to save onto a USB stick. Millen took a day off work, withdrew £300 in cash, and travelled to a fast-food restaurant by train to meet the man and the child. A cover story was agreed in case the meeting was queried. Millen suggested that the messages between them should be deleted in order to be "*uber cautious*". He declined various opportunities to call it off, writing "*Believe me, I want this*!". He was arrested at the meeting place and found to be in possession of the £300 cash, a USB stick and a laptop computer. He was of previous good character.

73. The judge applied the Sentencing Guideline for a victim under 13, which referred him to the guideline for rape of a child under 13. He placed it in Category 3A of the guideline for rape of a child under 13, suggesting a starting point of 10 years in a range of 8 to 13 years imprisonment. Applying *Privett*, he decided there should be "*a substantial discount on sentence*" to reflect the fictitious nature of the father and daughter and also Millen's good character. This led him to the final sentence of 3 years. The Attorney General refers the sentence on the basis that it was unduly lenient.

74. We agree that it was unduly lenient. The judge applied *Privett*, which was correct, but a reduction of 7 years to 3 years, from a starting point of 10 years, was far in excess of anything that could be justified by the absence of a real child, even for an offender of previous good character, particularly given Millen had not desisted. The involvement of the father was an aggravating factor, only partly mitigated by the fact, unknown to Millen, that he was not the real father of a real 11-year-old girl.

75. Applying the principles we have discussed, the greatest reduction that could be justified by the absence of a real child from a starting point of 10 years, on the facts of this case,

was one of 3 years. The mitigating effect of the previous good character could not outweigh the aggravating feature of involving the fictitious father of the fictitious child. There was no reduction for a guilty plea, given the case was contested. Consequently, we quash the sentence of 3 years' imprisonment and substitute a sentence of 7 years' imprisonment.

Carl Keirle

76. This is a reference by the Attorney General. We give leave. The central issue is whether the judge should have followed the approach outlined in *Privett*. On 13 November 2020, in the Crown Court sitting at Portsmouth before Judge Melville Q.C. the offender was convicted of the offences set out below, and on 18 December 2020 he was sentenced to a concurrent Community Order for 3 years with a requirement to perform unpaid work for 200 hours. He was also ordered to participate in a sex offender programme and complete a rehabilitation activity requirement for up to 20 days.

    i) Count 1: an offence of sexual communication with a child (contrary to section 15A (1) and (3)).

    ii) Count 6 and 7: offences of causing or inciting a child to engage in sexual activity (contrary to section 10).

77. In addition, the judge imposed a Restraining Order for 5 years and he refused the application for a Sexual Harm Prevention Order.

78. The victim was a girl called G, who was aged 15, nearly 16 at the time. Keirle was 29 and in a relationship with G's stepsister. The offender sent sexually explicit messages to G over a 4-day period in February 2018. In one such message he expressed his intention, "*to fuck her brains out*" and he suggested oral and vaginal intercourse between the two of them.

79. There was a trial at which G was required to give evidence. The judge described her as recalcitrant and difficult. The prosecution abandoned its case on counts reflecting actual physical activity and relied on the messages sent by the offender to G. In due course therefore he was acquitted of the four counts relating to actual sexual activity with a child, contrary to section 9(1) (counts 2 – 5), when the Crown offered no evidence on those charges. He contested the counts relating to the communications, claiming that he believed that G was over 16 years of age at the time.

80. The judge followed the approach set out in *Baker* and placed the offending in counts 6 and 7 in category 3A as no actual physical sexual activity had occurred. This provided a starting point of 26 weeks in a range of high-level community order to 3 years' custody. There was a maximum sentence of 2 years on count 1.

81. We accept the submissions of the Attorney General that this case should have followed the approach in *Privett* given that activity which would have amounted to category 1 harm had been intended. Furthermore, the offender had involved the victim in highly explicit sexual communications. An apparent or actual willingness on the part of a child to engage in such conduct does not automatically reduce the harm to the lowest category, nor for the reasons set out above does the fact that the contemplated sexual activity does not occur. In accordance with the principle established in *Privett*, the harm intended was penetrative sexual activity. This offending should have been categorised as falling into 1A, with a starting point of 5 years within a range of 4 to 10 years custody. It follows that the sentence of a community order was unduly lenient.

82. The disparity in age was relevant factor as was the fact that the offender deleted the messages from his telephone. In mitigation, the offender had no previous convictions. The span of offending in this case was 4 days. The judge found that the offending stopped when he realised the victim's real age, by implication finding that Kierle had an unreasonable belief that she was 16 or over at the time.

83. Taking the starting point of 5 years, which we consider to be appropriate in the circumstances of this case, a downward adjustment is necessary. This is to reflect the fact that no physical sexual activity occurred and the offending was limited in time. The sentence must nonetheless reflect the fact that the offender caused the victim to be involved in the exchange of notably explicit sexual messages.

84. Taking into account all of these factors, along with the offender's previous good character, the principles outlined in *Manning* as regards the impact of the COVID-19 pandemic and the fact that he will have completed some of the unpaid 200 hours work (as well as participation in a sex offender programme and up to 20 days rehabilitation activity), we consider it would be appropriate to reduce the term to a sentence of 2 ½ years' imprisonment (30 months). We grant the application. We quash the sentence and impose concurrent sentences of 30 months' imprisonment on counts 6 and 7, and a further concurrent sentence of 12 months' imprisonment on count 1. The overall sentence, therefore, is 30 months' imprisonment. The surcharge order requires amendment. The correct figure is £170 and we make an order in that sum.

Postscript: The form of the indictment or charge sheet

85. The six cases we have considered in this conjoined appeal offer an opportunity to give guidance on best practice in drafting the statement of offence. It will assist judges and others, not least when it comes to identifying the relevant Sentencing Guideline, if the statement of offence, even in the case of a criminal attempt, in future identifies the substantive offence lying behind the attempt. This is likely to be of considerable assistance in any case of attempt, and not only when there is sexual offending. However, it is particularly valuable in these cases, because of the large number of crimes defined by the Sexual Offences Act, and the potential confusion or even ambiguity which may follow from a lack of precision.

86. All the statements of offence in these six cases were technically correct, but some of them were clearer and more explicit than others.

87. The model we favour and encourage was the form of the indictment in the case of Matthew Millen. The Statement of Offence on his indictment read:

> "Attempting to pay for the sexual services of a child, contrary to section 1(1) Criminal Attempts Act 1981 and section 47(1) of the Sexual Offences Act 2003."

88. This identified the substantive offence under section 47(1) as well as stating that the charge was an attempt.

89. The Statement of Offence in the indictment of Mark Bennett, on the other hand, read:

> "Attempting to incite a girl under 16 to engage in sexual activity (penetrative), contrary to section 1(1) of the Criminal Attempts Act 1981."

90. This is not incorrect, but it does not clearly identify the underlying offence. More information would have been provided by a Statement of Offence in the form:

> "Attempting to incite a girl under 16 to engage in sexual activity (penetrative), contrary to section 10(1) of the Sexual Offences Act 2003 and section 1(1) of the Criminal Attempts Act 1981."

91. Although the word "penetrative" is not strictly necessary, we agree with Mr Jarvis for the Crown that it is an important component, because it affects the maximum sentence.

92. Similarly, the Statement of Offence on the indictment of Alistair Reed was:

> "Attempting to cause a child to engage in sexual activity, contrary to section 1(1) of the Criminal Attempts Act 1981."

93. It would have been better to specify the statutory sexual offence, using a form such as:

> "Attempting to cause a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003 and section 1(1) of the Criminal Attempts Act 1981."

94. This point does not apply only to indictments. There was no indictment in the case of Lee Crisp because he pleaded guilty to the charges against him and was committed to the Crown Court for sentence. His charge sheet read (taking one example):

> "Attempt to cause / incite a female child aged under 13 to engage in sexual activity - no penetration
>
> between 14/07/2018 and 16/07/2018 attempted to incite 'SASHA' a girl aged 12, to engage in sexual activity of a non - penetrative nature, that is to take a photograph of herself naked and forward that photograph to him.
>
> Contrary to section 1(1) of the Criminal Attempts Act 1981."

95. We would have preferred to see an explicit reference to the substantive offence in section 8(1) (Causing or inciting a child under 13 to engage in sexual activity), not least to avoid confusion with the less serious offence under section 10(1) (Causing or inciting a child under 16 to engage in sexual activity). The charge sheet might then read:

> "Attempt to cause / incite a female child aged under 13 to engage in sexual activity - no penetration
>
> between 14/07/2018 and 16/07/2018 attempted to incite 'SASHA' a girl aged 12, to engage in sexual activity of a non - penetrative nature, that is to take a photograph of herself naked and forward that photograph to him.

> Contrary to section 8(1) of the Sexual Offences Act 2003 and section 1(1) of the Criminal Attempts Act 1981."

96. We agree with Mr Jarvis for the Crown that "*bearing in mind that charges and indictments need to be understood not just by lawyers but by defendants, the public and the press, clarity as to the offence attempted is essential*." We hope that following this guidance will achieve that necessary goal.