



3 Temple Gardens

Arranging or facilitating the commission of a child sex offence: the correct approach to sentencing

Samantha Ball and Stephen Garbett consider the recent judgment of Privett & ors. [2020] EWCA Crim 557 which addresses sets out the correct approach to sentencing and in particular the assessment of harm in relation to offences contrary to section 14 of the Sexual Offences Act 2003 (arranging or facilitating the commission of a child sex offence) where the communication is with undercover police officers and the relevant children are fictional.

Principles in Privett

Culpability

As the section 14 offence is committed when the arrangements for the substantive offence are completed, or the intended substantive offence is facilitated, the absence of a victim does not reduce culpability - there is no requirement for the substantive offence to have occurred (or even to be made possible) for a section 14 offence to be committed.

Harm

The harm will usually be greater where there is a real victim than where the victim is fictional as in the case of an undercover police officer and attention must be paid to the Criminal Justice Act 2003 s. 143(1) which provides as follows:

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 foreseeably have caused.

The judgment in *Privett* confirms that the sentencing guidelines reflect this approach both in relation to section 14 and in relation to sections 9 and 10 (sexual activity with a child and causing or inciting a child to engage in sexual activity respectively). This is because the court should consider the sentence that would be appropriate for the full offence and impose a sentence for arranging or facilitating which is proportionate to that sentence.

The correct twofold approach in sentencing is as follows:

1. Identify the category of the offence, on the basis of the sexual activity the defendant intended, and;
2. Adjust the sentence 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).

Practical effect

This approach may mean some cases of arranging or facilitating offences against fictional children receive higher sentences than other cases involving real children. In *Privett*, Fulford LJ illustrates this with the example of a defendant who arranges the rape of a fictional 6-year-old receiving a more severe punishment than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. The Justices in *Privett* did not see anything necessarily wrong in principle with this result. Ultimately, the sentence should be commensurate with the applicable starting point and range, with cases involving a fictional child often involving some reduction to reflect the lack of actual harm.

The effect of *Privett* on previous sentencing cases

At paragraphs 34-45 of his judgment, Fulford LJ sets out the previous sentencing cases.

The Court of Appeal deemed that the correct approach had been taken in *Bayliss* [2012] EWCA Crim 269, despite it being a case which pre-dates the current sentencing guidelines. This was a section 14 case involving a fictional child where the court decided that although all of the usual sentencing considerations apply, the absence of actual harm justified a lower starting point. The sentence was reduced from 4 to 3 years' imprisonment.

The court in *Privett* held that the later section 14 cases of *Collins* [2015] EWCA Crim 915 and *Lewis* [2016] EWCA Crim 304 correctly followed the approach established in *Bayliss*. *Lewis*, in particular, involved a fictional child.

In the AG's Reference No. 93 of 2014 (*R v Baker*) [2014] EWCA Crim 2752 - a section 10 case where the proposed sexual activity did not take place - the court held that the offence fell in category 3A. Fulford LJ, however, observed that the offence and circumstances were different to those in *Privett*. A number of section 14 cases involving fictional children had followed the approach in *Baker* rather than *Bayliss*, most notably *Stillwell* [2016] EWCA Crim 1375 and *Allington* [2019] EWCA Crim 1430. However, Fulford LJ observed that *Stillwell* and *Allington* had failed to properly follow the sentencing guidelines and the approach in *Bayliss*, *Collins* and *Lewis*, the effect of which was set out above.

The Appeals

Each of the four appellants in *Privett* – S, B, P and W - pleaded guilty to section 14 offences (and other matters). The substantive offence in each case was under section 9 (sexual activity with a child). The sentencing judges determined that the appellants' offences fell into category 1A of the sentencing guideline entitled 'Arranging or Facilitating the Commission of a Child Sex Offence'. Each appeal was pursued on the basis that the offence should have been placed in category 3 rather than category 1 in relation to harm, because

each of the children was fictional and so there was no actual or potential victim. Accordingly, they argued, the sentences were manifestly excessive.

Appellant S

During online discussions with the undercover officer, S expressed his desire to have vaginal and anal intercourse with her six-year-old daughter. He used graphic and explicit language and sent images of his erect penis to the fictional girl. He was arrested on arrival at the arranged meeting. A search of his car revealed a child's toy, lubricant, an 'anal plug' sex toy, a packet of moist toilet wipes and a partially consumed bottle of vodka.

As well as the section 14 offence, the appellant pleaded guilty to offences arising out of child sex images found on two mobile phones, a laptop and an iPad. He was of previous good character and was given full credit for his early guilty plea. The section 14 offence was held to fall within category 1A and he was sentenced to 8 years imprisonment consisting of a custodial term of 6 years with an extended licence period of 2 years.

Appellant B

B expressed his desire to have penetrative sex with the undercover officer's six-year-old daughter. He said that he had sexually abused his ex-girlfriend's daughter between the ages of nine and eleven. The Appellant used graphic and explicit language, and sent indecent images of children to the officer, along with extreme pornography. He was arrested on arrival at the arranged meeting with child toys in his possession.

The Appellant pleaded guilty to the section 14 offence and offences associated with the images. He was cautioned in 2016 for possessing an indecent image of a child and extreme pornography. He was given full credit for his guilty plea and sentenced (within category 1A) to 7 years 4 months' imprisonment, comprising a custodial term of 5 years 4 months with an extended licence period of 2 years.

Appellant P

P informed the undercover officer of his desire to engage in penetrative sexual activity with her six-year-old daughter. He used graphic and explicit language and invited the active participation of the officer who was acting as the girl's mother. He was arrested on arrival to the arranged meeting. He was in possession of condoms, a lubricant, a vibrator and gifts for the child.

The Appellant pleaded guilty to the section 14 offence and was given full credit. He had three previous convictions for seven offences between 1997 and 2014, including an indecent assault of a female under fourteen and two offences of gross indecency with his then nine-year-old daughter in 1997. He was sentenced on the basis of this being a category 1A offence, to 7 years 4 months' imprisonment, comprising a custodial term of 5 years 4 months with an extended licence period of 2 years.

Appellant W

W expressed his desire to engage in oral and vaginal intercourse with the ten-year-old daughter of the undercover police officer. He was arrested on arrival at the arranged meeting. He was discovered with condoms, Viagra, handcuffs and a tub of the fictional girl's favourite sweets.

The appellant pleaded guilty to the section 14 offence and was given full credit. He had one previous conviction for a driving offence. The judge sentenced him on the basis of this being a category 1A offence, to 3 years 4 months' imprisonment, but did not find him dangerous.

Outcome of the appeals

Each of the appeals was dismissed. For the reasons cited above, the court held that the sentencing judge had appropriately classified the offences as category 1A, and that the sentences were not manifestly excessive in light of the facts.

Conclusion

Privett provides much needed guidance on the correct approach when assessing harm in section 14 cases involving fictional children. While the appeals in *Privett* involved interactions with undercover police officers the guidance is likely to apply to all cases involving fictional children, including so-called ‘paedophile hunters’. Crucially, the final paragraph in *Privett* invites the Sentencing Council to consider whether any clarification of the sentencing guidelines is required so practitioners are advised to watch this space!

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