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Absence of Victims in sentencing for Sexual Offences

By Marie Spenwyn – May 2021

Criminal practitioners regularly cite cases before the courts that have become well-known for principles that emerged but not their facts – *Turnbull, Newton, Goodyear* to name a few. Not many of us who refer to these cases could actually recount the details of these cases. The case of *R v Manning [30 April 2020] EWCA Crim 592* has for the last year been oft cited concerning the potential impact of the pandemic on approach to sentencing. However, *Manning* was in fact an appeal focusing on the application of the sentencing guideline to offences under section 10 of the Sexual Offences Act 2003 (SOA 2003) - causing or inciting a child to engage in sexual activity. For section 10 offences where the facts would otherwise be placed in the harm category 1 (due to inciting penetration) *Manning* confirmed that the proper categorisation where no sexual activity actually takes place was category 3. This approved the decision in *Attorney-General's Reference No 94 of 2014 (R v Baker) [2014] EWCA Crim 2752).*

In terms of the sentencing guidelines they specifically apply to online/remote offences which are frequently indicted as attempts. Whilst such offences remain serious they take place at a remove and often involve online groups who specifically target offenders, later presenting the police with a file of evidence of online chats and videos/photographs for prosecution. There is commonly no evidence of any sexual activity actually taking place.

The line of authority that *Manning* followed had emerged from a series of cases which considered the proper approach to categorisation (harm and culpability) where the offences were charged as attempts and most often where there was not, and could never be, a victim of the offence because the offenders had been communicating online with an individual they thought to be a child but who in fact was posing as such.

Two streams of authority had emerged with a distinction roughly being drawn between offences where arrangements, to a greater or lesser degree, were made for an offender to meet the fictional child, and those offences which were confined to the online arena (so broadly the difference between an indictment with an attempt where a section 10 offence was underlying and an attempted offence under section 14). The case of *R v Privett (Steven Mark) 2020 EWCA Crim 557* in April 2020 identified the parallel lines of authority which had emerged over the past few years relating to online 'fictional' victims.

Within one line of authority - where there was only ever a fictional victim and no sexual activity ever could have occurred - it had been determined that offending could not fall within the first two elements of harm required by category 1 of the guideline and the harm therefore was to be placed within category 3 (other sexual activity). This followed *Attorney-General's Reference No 94 of 2014 (R v Baker) [2014] EWCA Crim 2752).* The second line of authority – that the categorisation should be determined by considering the intended harm even though it could never be achieved – allowed for offences to fall within category 1 or 2. In such cases the sentencer was then to appropriately reduce the sentence to reflect that the offence was an attempt (and thus that no harm had in fact occurred). This second stream followed *R v Bayliss (Simon Philip) 2012 EWCA Crim 269*. *Privett* went on to approve the *Bayliss* stream of authorities where the underlying offending was contrary to s14 SOA 2003.

In September 2020 the court in *R. v Woolner (Robert Alan) 2020 EWCA Crim 1245* agreed that a sentence was unduly lenient where offences of attempting to arrange or facilitate a child sexual offence under s14 SOA 2003 – online messages sent to a police officer posing as a 13 year old boy – had been incorrectly placed within category 3A. The line of authority approved in *Privett* had not been drawn to the attention of the sentencing Judge. Following the decision in *Privett* the proper approach on these facts was held to be categorisation within category 1A even where the offences were an attempt. In *Woolner* the court noted that *Privett* was not relied upon in *Manning* or another recent case *R v Russell (Duncan Craig) 2020 EWCA Crim 956.* Both *Manning* and *Russell* were decisions considering s9/s10 offences. As set out above *Manning* endorsed the category 3A approach for these offences. Specifically doubting *Russell* the court in *Woolner* noted that offences or attempts under s9/s10 'might need to be explored further' when they arose for consideration in the light of *Privett*.

The authority of *R v Reed (Alistair) 2021 EWCA Crim 572*, as predicted in *Woolner*, has now aligned the guidance on approach to sentencing for attempted offending under s10 with the line of authority that already applied to s14 offences. The court was clear that the distinction between the divergent lines of authority could not be allowed to persist. There can therefore now be no issue taken with the Crown's or the Court's approach to categorisation within the specific guideline for each offence being determined to fall within categories 1 or 2 (depending on the nature of the sexual activity). However, it remains important where offences are indicted as attempts to bring to the court's attention specifically that notwithstanding the seriousness the court can be properly asked to adjust downwards from the starting point to take into account the fact that there was no real child involved. In addition that whilst culpability may be high the harm factor is reduced when considering section 10 offences; "The sentencing Judge should make an appropriate downward adjustment, dependent on the facts, to reflect the fact that no sexual activity had occurred".

It is important to also note the guidance to prosecutors in *Reed* where they are enjoined to include a reference to the underlying offence alleged within the charge sheet and count(s) on the indictment. Though usually readily identifiable from a consideration of the facts this is a welcome improvement so that there is clarity for all parties as to the offences charged and the sentencing guideline(s) that will apply.

Marie Spenwyn is a criminal defence practitioner of over twenty years experience defending in cases of the utmost severity including across the spectrum of sexual offences. She is a Visiting Lecturer with the University of Law and trained as a facilitator for delivering Vulnerable Witness training.