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Criminal Appeals Bulletin

Welcome

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Welcome to the May edition of our monthly Criminal Appeals Bulletin.

In this month's edition, Sarah Elliott QC looks at **R v Reed and others**, where the CACD considered the correct approach to sentencing in sexual offences against children where no actual sexual activity took place, including those cases where the child was fictional. Rabah Kherbane looks at the case of **R v White** where the CACD considered the application of the Drug Offences Guideline and the appropriate reduction for strong personal mitigation, and I look at the case of **Plaku**, where the CACD set out guidance as to the proper approach to reductions for Guilty pleas.

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In this issue

Welcome

Sentencing child sexual offences in the absence of sexual activity or real children

Appeals against Sentence; England and Wales

R v Plaku and others [2021] EWCA Crim 568

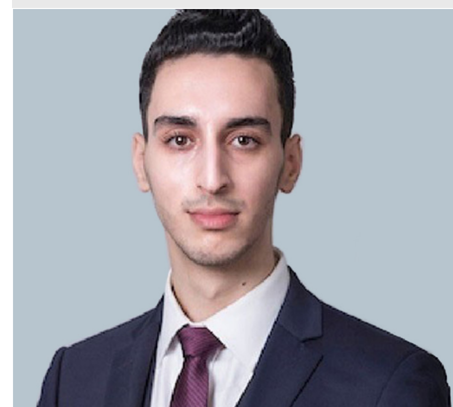
CPS v Emma White [2021] EWCA Crim 141

Sentencing child sexual offences in the absence of sexual activity or real children

Sarah Elliott QC considers the case of Reed where the CACDconsidered the proper approach to sentences for child sex offences where no sexual activity took place.

Appeals against Sentence; England and Wales

Farrhat Arshad looks at the case of Plaku re credit for Guilty pleas.



Rabah Kherbane considers the case of White and the application of the Drug offences Guideline.

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Archive

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Sentencing child sexual offences in the absence of sexual activity or real children

By Sarah Elliott QC

Relying on Court of Appeal authorities such as Baker [1] and Manning[2] to downgrade the category of harm in child sexual offences cases which involve "decoys", be they undercover police officers or paedophile hunters may be history in the light of the CA decision in Reed and others[3] where the Court gave considerable guidance for those tasked with mitigating victimless offences.

The decision of the Court of Appeal to follow their own decision in Privett and others[4] rather than their own decision in Baker and subsequent appeals came as no surprise given the composition of the court but also because it focussed the debate on the sentencing principle of considering the harm intended when assessing the seriousness of the offence. (s63 Sentencing Act 2020).

The decision in Privett applies now to child sexual offences under the SOA 2003 whether there is a real child or where the defendant believes there to be a child - and no sexual activity occurs so that includes.

Offences or attempted offences relating to children under 13 such as:

> Causing/inciting a child under the age of 13 to engage in sexual activity.

Offences or attempted offences relating to children under 16 such as:

> Sexual activity with a child (section 9)
>
> Causing/inciting a child to engage in sexual activity (section 10)
>
> (Section 9 and 10 were the offences specifically dealt with in Baker and other authorities that followed that line of reasoning)
>
> 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 (section 13)
>
> Arranging or facilitating the commission of child sexual offence (section 14)
>
> (This was the offence specifically dealt with in Privett)
>
> Meeting a child following sexual grooming (section 15)
>
> Sexual communication with a child (section 15a)

Offences or attempted offences relating to children under 18 (the sexual exploitation of children offences) such as:

> 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)
>
> Arranging or facilitating the sexual exploitation of children (section 50)

Privett applied to section 14 offences intentionally arranging or facilitating activity that would constitute a child sexual offence, intending that this would happen. As the court observed it is by its nature a

1 Attorney General's reference (No 94 of 2014) (R v Baker) [2014] EWCA Crim 2752; [2016] 4 W.L.R. 121
2 Manning [2020] EWCA Crim 592;[2020] 2 Cr App R (S) 46
3 Reed and others [2021] EWCA Crim 572
4 Privet and others [2020] EWCA Crim 557; [2020] 2 Cr.App.R (S) 45

preparatory offence and is therefore completed once the arrangements had been made or the offence facilitated. It is not dependent on the completed offence happening or even being possible so the absence of an actual victim does not serve to reduce culpability. The category of harm should be based on that which was intended and adjusted to ensure it was proportionate to the applicable starting point if no sexual activity had occurred.

That approach now post Reed is to be applied across the board – harm should be assessed by intentions followed by a downward adjustment from the starting point to reflect that the sexual act did not occur either because there was no real child or for any other reason.

The extent of the downward adjustment is fact specific.

An offender stopped at a late stage in the process or stopped purely by absence of a real child will likely only attract a small reduction within the category range. Moreover no further reduction should be made merely because the offending is an attempt.

But larger reductions are possible including a reduction down from one category to the next if for example the offender stops themselves at early stage and especially if the offending has been short lived.

Reed and others involves six conjoined cases, two appeals where the sentencing judge passed a sentence based on Privett where it was argued Baker should apply and four references by the attorney general where Baker was applied and the sentence had been referred as unduly lenient.

In both appeals against sentence the reduction from the starting point to take account of the absence of a real child was two years, described by the Court of Appeal as 'markedly' and 'notably' generous.
What might then be the appropriate extent of the downward adjustment? In only one of the four references (Vasile) is there a specific indication namely that a year would be appropriate for the absence of a child alone before any other factors taken into account ; in the remaining references the downward adjustment is not separated out from other factors including covid, participation in community service and strong mitigation. Vasile was apprehended on his way to an arranged penetrative sexual encounter with a '12 year old' police officer albeit the communications had been over only 10 days. He had in fact been charged with the s14 offence making the decision of the sentencing court to make the offence a category 3 surprising!

With regard to the two appeals where the reduction of 2 years was said to be generous, Bennett also had travelled to meet for sex with a fictitious 14 year old created by paedophile hunters when he was caught. Reed never got that far and broke off discussions with a 13 year old undercover police officer which the Court of Appeal conceded was relevant to the 2 year reduction.

In the reference of Crisp, the Court turned to the issue of the possibility of suspending sentences in cases where the length of the custodial term made it possible to do so stating,

It is inevitable that immediate imprisonment will usually be the appropriate sentence for offences of this type.

But they accepted there may be exceptional circumstances where it is appropriate to suspend, particularly where there is material which allows a rehabilitation requirement to be added to the sentence. In Crisp's case the appropriate starting point should have been 6 years for an attempt to incite a penetrative sexual act amongst other offences but the downward adjustment, the week long duration of offending, the voluntary break-off of communications, and mitigation including drug dependency which was overcome during the investigation period and lengthy delay in the prosecution allowed not only a final sentence of two years but a suspended one.

If you would like to speak to Sarah Elliott QC about this article, please click here.

About Sarah Elliott QC

Sarah Elliott QC specialises in sexual offences and homicide.

To see Sarah's full profile, click here.

Appeals against Sentence; England and Wales

Appropriate reduction for Guilty pleas; Application of sentencing Guideline; s.73 Sentencing Code

By Farrhat Arshad

R v Plaku and others [2021] EWCA Crim 568

The CACD considered the appropriate reduction for Guilty pleas, applying the Sentencing Council's "Reduction in sentence for a guilty plea" definitive guideline (in force since June 2017). The Court emphasised that section 73 of the Sentencing Code required a court to take into account the stage in the proceedings at which the defendant had *indicated* the intention to plead guilty, and the circumstances in which the indication was given. The Guideline set out the principles a court should follow in reducing a sentence by reason of guilty plea. The Guideline's purpose was to encourage those who were going to plead guilty to do so as early as possible. The Court emphasised that the Guideline must be applied. A defendant could only receive full credit where they had indicated a guilty plea at the first stage of proceedings. In relation to indictable-only offences that meant the first hearing in a Magistrates' Court, where the defendant should be asked whether he intended to plead guilty in the Crown Court. If he indicated a guilty plea and went on to enter a guilty plea at the first hearing before the Crown Court, he would receive a one third reduction. An indication of a guilty plea had to be an unequivocal indication. Indication of a likely plea was not enough. If the plea was not indicated at the Magistrates' Court even if a guilty plea was then entered at the first Crown Court hearing full credit should not be given unless the case fell within the exceptions set out at F of the Guideline.

In an either way case, it was a necessary part of the plea before venue procedure under section 17A of the Magistrates' Courts Act 1980 that a defendant must be asked "whether (if the offence were to proceed to trial) he would plead guilty or not guilty". If he indicated a not guilty plea or made no indication but then entered a guilty plea at the Crown Court the maximum reduction would be a quarter.

The exceptions covered a number of situations, including where the defendant required further information before indicating his plea (F1). However, that exception itself made a distinction between, "cases in which it is necessary to receive advice and/or have sight of evidence in order to determine whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal."

It was necessary for the Crown Court to have a clear record of what indication was given in the lower court, therefore when a case was sent to the Crown Court, it was essential that the Better Case Management ("BCM") form was uploaded to the Digital Case System and the Common Platform once that was rolled out across courts. The revised version of the BCM form, that came into force on 2 November 2020, (drafted after the decision in **Hodgin [2020] EWCA Crim 1388**) must be used, as that contained a warning as to the effect on credit of the indication give at the Magistrates' Court.

Commentary

Whilst reference was made to the exceptions that applied, as set out in the Guideline, and the difficulties caused by the pandemic in respect of providing legal Advice in time for the first hearing, by insisting on a rigid application of the Guideline unless the circumstances were "exceptional", the Court did not grapple with the realities that legal representatives and their clients face generally and especially in the time of Covid. Whilst the Court acknowledged the exceptions in F of the Guideline and in particular those cases where it is necessary to receive advice in order to determine whether a defendant is in fact or law guilty the CACD emphasised the distinction between such cases and those where a defendant delays "in order to assess the strength of the prosecution case". The reality is that there is not necessarily a ready and clear distinction between the two sorts of cases. Should access to meaningful legal advice before any plea is entered not be a fundamental right without a defendant having to run the risk of losing full credit? In order to preserve credit for their clients, the legal representative's best bet would seem to be to flag up on the Better Case Management form if there has been a real difficulty in advising the client and why that advice matters before a plea is entered. In **R v Marland [2021] EWCA Crim 706**, a post-Plaku appeal against sentence, the CACD determined that where the guilty plea was entered at the PTPH, in the particular circumstances of the case, full credit of one-third should have been given rather than one-quarter. There, the first hearing at the Magistrates' Court had taken place remotely, with the appellant and his legal representatives attending from separate locations, and there had

been no opportunity at all for the appellant's legal representatives to speak to him before the hearing. These matters were confirmed on the Better Case Management Form. Additionally, at the time of the hearing in the Magistrates' Court, the appellant's legal representatives held genuine concerns about his mental health and his fitness to plead. The CACD considered that the circumstances that existed in the case were exceptional and it was therefore right to treat the PTPH as the first opportunity that the appellant had to enter a guilty plea.

If you would like to speak to Farrhat Arshad about this article, please click here.

About Farrhat Arshad

Farrhat defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2021 as: *"the consummate appeals barrister, with an instinctive feel for the shape of an appeal. She is a leader in this field."* Her appellate practice includes both conviction and sentence appeals to the Court of Appeal, the Privy Council and applications to the Criminal Cases Review Commission. Farrhat authored two of the chapters in the 2nd edition of Taylor on Criminal Appeals, (OUP, March 2012): Appeals to the Divisional Court by way of Case Stated and Appeal to the Supreme Court and is Co Vice-Chair of the Criminal Appeal Lawyers Association.

To see Farrhat's full profile, click here.

Sentence – drugs guidelines – Class A drugs supply – exploitation – lesser role – mitigation – rehabilitation – substance misuse – pre-sentence report – licence conditions – immediate release

By Rabah Kherbane

CPS v Emma White
[2021] EWCA Crim 141

Facts

EW, a 30-year-old mother of two with a chronic Class A drugs addiction, had been recruited by a local drug dealer, KR, to front pre-arranged deals. EW supplied Class A drugs four times to undercover officers between 9 March and 23 April 2020. Alongside EW, KR exploited four other Class A drug users to facilitate his drugs line, including TC who was additionally prosecuted for permitting her premises to be used. On 22 July 2020, EW entered Guilty pleas to offences of supplying Class A drugs. On 29 September 2020, the sentencing judge imposed a sentence of 30 months' imprisonment.

Sentence

EW entered Guilty pleas, particularising two occasions where KR had assaulted her. The prosecution disclosed KR was known for violence within the drugs trade, and EW sought to draw on various strands of prosecution evidence to put forward this extraneous mitigation. EW resiled from giving evidence due to fear.

By the date of sentence, EW had spent three and a half months remanded in custody, and made significant progress on her methadone script. Despite various vulnerabilities, including learning difficulties, two applications for a pre-sentence report were refused by the judge.

The prosecution accepted EW acted under direction and had a limited function, but suggested she fell in the 'cusp' of significant and lesser role, as the feature of significant role 'motivated by financial or other advantage' applied. The Defence submitted that her case fell within lesser role, and the exploitation within the relationship described could not be considered an 'advantage' as intended by the drafters of the guidelines. It was further submitted that her case merited considerable downward adjustment from any starting point due to the offence and personal mitigation present, and time spent remanded in custody in the context of 23.5-hour lockdowns and other appalling prison conditions during the Covid-19 pandemic.

The sentencing judge agreed with the prosecution categorisation that EW's involvement lay between significant and lesser role. The judge suggested she had taken into account mitigation, including progress by EW to address her addiction issues during remand in custody ahead of sentence, and passed a sentence of 30 months' imprisonment, with a starting point taken of 40 months.

Appeal

EW appealed on two main grounds:

i. The judge did not apply the correct starting point, as EW did not at all occupy a significant role. Nor did the judge reflect any practical reduction to recognise the substantial mitigation (and other exceptional factors) which featured in this case; and

ii. The judge did not order a pre-sentence report ('PSR'), where one was required in all the circumstances.

The CACD accepted that the correct starting point for EW fell within category 3, lesser role. The CACD highlighted that any so-called 'advantage' to EW was 'at the lowest level.' Moreover, being at the 'bottom of the supply chain', the dynamics of EW's exploitation meant she was acting under 'some level of pressure.' Importantly, the CACD observed that the 'repetition' of the conduct, far from being a significant aggravating factor, was simply part of the pattern of a dealer who sells at the direction of another – KR – who 'avoids direct personal involvement.'

When granting leave to appeal, the Single Judge ordered a PSR. The CACD accepted it was wrong in principle that a PSR had not been ordered by the sentencing judge in this case and observed that (i) a report would have informed the judge 'more fully' on the appellant's personal circumstances and on the progress being made; and (ii) the sentencing judge 'would have been better able to make an individual assessment of this appellant had such a report been available.'

Taking into account the very strong personal mitigation, and credit for Guilty plea, CACD reduced the starting point to 18 months' imprisonment, resulting in imminent release for EW in time to meet the provision of available accommodation support.

A novel point during this appeal was the CACD's expressed concern for release of EW without appropriate support in place to assist continued rehabilitation. The hearing was adjourned, and counsel undertook to explore provision of post-release measures, and further suggested reliance on Section 328 of the Sentencing Act 2020 whereby the court could recommend appropriate licence

conditions on release. The CACD therefore adopted Appendix A to its judgment, for this purpose.

In light of the above, further appeal points on which leave had been granted regarding (i) a failure by the judge to consider extraneous mitigation by adopting an approach that sought to bind EW to give evidence despite inferences available from circumstantial evidence to support her assertions, and (ii) parity, were not considered in detail by the CACD. The suggestion by the CACD that a Newton hearing may have been appropriate is not correct, as this case concerned 'extraneous mitigation' outside of the prosecution's knowledge which put a civil burden on the defendant, rather than facts disputed on the prosecution case where the Newton procedure could apply.

Commentary:

First, frequently when sentencing offenders for supply of Class A drugs, courts place emphasis on the ruin that addiction to crack cocaine and heroin cause to peoples' lives, to families, and communities. Offenders suffering from Class A drugs addiction are therefore precisely the victims of this form of offending. In particular, where their substance misuse disorder is exploited to facilitate increased profits and reduced risk from drugs supply for more sophisticated offenders, they are twice victims. It is perverse that the same class of victims should be considered to be making a 'benefit' from this dynamic, or categorised as 'significant role', which tips the scale against the prospect of a rehabilitative sentence that can offer the crucial intervention necessary.

The CACD's recognition that any 'advantage' in this case is at the 'lowest level', and subsequent placement of the offending within lesser role because of this, is welcome. Sentencing courts ought to make use of the structure of the guideline in this way where there are plainly overwhelming lesser role factors present in a case. Moreover, a listed statutory mitigating factors on the same guidelines applies where the offender has only 'supplied drugs to which they were addicted.' Feeding an addiction or offending due to a mental disorder is a feature of offending which reduces culpability, and it should not be relied upon by judges or prosecutors to argue 'significant role' within the first step of sentence categorisation.

Secondly, practice with pre-sentence reports in lower courts is inconsistent. Sentencing courts ought to be reminded that the normal requirement is that a pre-sentence report should be ordered (Section 156 of the Criminal Justice Act 2003; Blackstone's 2020, E1.27). The Probation Service is able to offer an independent, expert assessment on issues of personal background, vulnerability factors, and prospects of rehabilitation, which necessarily almost always have a bearing on the sentencing decision, unless there are alternative and adequate sources of information available.

Lastly, practitioners can make use of Section 328 of the Sentencing Act 2020, and liaise with the Probation Service to offer appropriate licence conditions where a defendant has spent a considerable amount of time in custody and the ideal sentence would constitute time served at the point of disposal. A court may be reluctant to order a sentence that means immediate release into the community because the halfway point has already been completed by the defendant. In those circumstances, a persuasive supervision and rehabilitation package may assist. This is likely to become more relevant considering recent delays in proceedings, in part due to the Covid-19 pandemic, and any late Guilty pleas where defendants have already accrued substantial time remanded in custody.

Rabah represented Ms White in the Court of Appeal.

If you would like to speak to Rabah Kherbane about this article, please click here.

About Rabah Kherbane

Rabah specialises in crime and appeals, crime related public law, extradition, and international law. He advises on fresh appeals against conviction and sentence. He has advised on miscarriages of justice in complicated murder cases and historic convictions. Rabah has appeared successfully both alone and led in the Court of Appeal, including in a recent case overturning a serious conviction on bias by the trial judge and lack of a fair trial.

To see Rabah's full profile, click here.