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No Victim No Harm?

Sentencing attempted sex offences when there is no actual Victim?

How do you quantify the harm for sentencing purposes?

There has been a plethora of cases both in the news and courts of defendant's communicating and or arranging to meet what they believe to be children (under or the age of consent). They are actually communicating with a decoy (sometimes it is the police and sometimes members of self-styled" paedophile hunters") and the decoy is pretending to be underage. The Paedophile hunter group set up a profile and wait for someone to contact the "decoy" they interact with the contact, collect evidence acting as a child and either pass on the evidence directly to the police or in other cases confront the offender and live stream the meeting on the internet before passing the evidence on.

I do not seek to comment on the legality or morality of these so called" paedophile hunters" The evidence once provided to the police is admissible in the main but on how do the sentencers decide on what is the" harm" as required under the sentencing councils' guidelines?

(For the purpose of this article, I am referring to offences contrary to ss9,10 and 14 of the Sexual Offences Act (SOA 2003.)

s.9 (SOA 2003) and s.10 (SOA 2003) that is Sexual Activity with a child / Causing or inciting a child to engage in sexual activity and s.14 (SOA 2003), Arranging or facilitating the commission of a child sex offence have identical guidelines.

As far as the defendant was aware in all these cases but for the obvious fact there was no actual victim, he/she had committed the full offence. However, no actual harm occurred even if that was what was intended by the defendant.

What is the Harm?

As far as s14 cases on the 25th January 2020 the Court of Appeal (Criminal Division) heard the case of Privett and others which concerned the application of the guidelines where no child victim existed. The court concluded (at paragraph 67 and 72) The judge should first identify the category of harm on the basis of the sexual activity the defendant intended (the level of harm should be determined by reference to the type of activity arranged or facilitated"), and second, adjust the sentence in order to ensure it is" commensurate" with or proportionate to, the applicable starting point and range if no sexual activity had occurred (including because the victim was fictional)("sentences commensurate with the applicable starting point and range will ordinarily be appropriate")

Following Privett, therefore the court would look at the level of offending as though the full offence had been committed and adjust downwards for the fact it was an attempt.

On the 26th January 2020 the Court of Appeal (Criminal Division) heard the case of Manning which is often cited with reference to sentencing during the COVID pandemic. Manning involved a defendant charged with s10 offence and again it was a fictional victim. In the Manning case the prosecution accepted the defence submission that as there was no victim the category should be 3 "other sexual activity" and not 1 the activity intended (but for lack of victim). The court had not been referred to Privett but instead the line of authorities distinguished by the Court of Appeal in Privett. The court followed the line of argument following A-G ref (No94 of 2014) (Baker)[2014] EWCA Crim 2752,[2016] 4WLR 121. Baker had been followed in Gustafsson [2017], then Cook [2018]

and liddiard [2019] where the court had said where there is no actual child, the activity is category 3 not 1 for harm.

The C of A has further considered the point in Woolner [2020] EWCA Crim 1245 paragraphs 29-32 where the court considered all the authorities and while noting that the guidelines were the same for all three offenses distinguished the line of authorities following Manning and followed Privett but noting they were dealing with a s.14 case and not a ss.9 or 10 matter. The court made no finding re the appropriate level of harm in attempt cases for ss.9 or 10.

Where are we now?

In conclusion there appears now to be a different approach taken in offences charged under SOA 2003 ss9 and 10 to that of s14 SOA 2003, as is commented on by the editors of Blackstone's 2021 page 384. Advocates should familiarise themselves with the authorities as the difference in starting point on a 1A offence is 5 years and 3A is 26 weeks.

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