

**325.17 Victims Assessing victims who may encourage offence/Ostensive consent/Cultural considerations**

*R v Buica* 2018 EWCA Crim 1870 D pleaded to rape of a child aged under 13. In 2016, D, aged 24, returned home to Romania and he met W, a 12-year-old girl. Shortly after, they married according to Romany custom with the blessing of both families. They both considered they were in love and in a genuine marriage. D brought W to England and W did not consider herself in any way a victim and considered the age gap was nobody else's business. An expert said the age of consent in Romania was 16 but no one would have sought to question the relationship as it was normal. D's mother lived with them and W became pregnant. The police became involved when they investigated child workers at a car wash. The Judge considered *Att-Gen's Ref 2016 Re Gribby* 2016 EWCA Crim 1847, 2017 1 Cr App R (S) 18 (p 129), which said, 'The inability of a child under the age of 13 to consent to penile penetration is inherent in the offence. If there is force or violence or threats or coercion, that renders what is in itself already a serious offence an even more serious offence, as the categorisation in the *Sexual Offences Guideline 2014* illustrates. But the converse is not true; in the sense that "consent" by the underage victim, even if it is of itself some relevance, does not cause the offence to be considered as in some way exceptional. Children under the age of 13 require protection for their own benefit. They need to be protected from themselves. Their emotional immaturity precludes the notion of any informed consent. That in fact may be particularly in those cases (not this case we stress) where the child under the age of 13 is seemingly an enthusiastic participant'. The Judge put the case in Category 3. She found the emotional immaturity of the appellant to be an important mitigating feature. A consultant clinical psychologist said, "D does what he is told, and particularly by his parents and elders", which the Judge accepted. She found no aggravating factors. Held. Following *Att-Gen's Ref 2016 Re Gribby* 2016 there may be exceptional circumstances in which consensual sexual intercourse with a young girl might warrant an exceptional outcome when the absence of force or coercion may in an exceptional case justify such a departure. The background was the cultural context [which was] consensual sexual intercourse within a lifelong, loving union, which had the blessing of her family and their community and which took place without any force or coercion. Sexual activity of [this] kind should not be forced [into] a guideline which simply did not contemplate a situation of this sort. A more nuanced approach is required to reflect the far lower level of culpability of D than even the lower category in the guideline contemplates. However, that relatively low level of culpability has to be balanced against the fact that the appellant and the girl left their community for this country. The appellant has to recognise that, whatever his community thought of marriage to a girl as young as this and of the physical love between them which their marriage entailed, the view in this country of such a marriage is different. While he is here, he has to comply with our law. We start at 5 years, not 8, so with plea, **3 years 4 months** not 6 years.

**325.32a Child family member Child then aged 13-15 Sexual intercourse Post-2014 guideline case**

*Att-Gen's Ref 2017 Re RF*, 2017 EWCA Crim 1890 D pleaded to four counts of sexual activity with a family member and providing false notification information committed after the conviction but before the sentence (6 months' suspended concurrent). He had omitted to say he was staying in a hotel. D and his wife were foster parents specialising in mother and baby foster placements. The couple had two children of their own (aged 10 and 7) and D's wife was pregnant with a third child when most of the offending took place. When she was aged 5, V was placed on a child protection plan because her mother had physically and emotionally neglected her and an allegation was made that she had been raped by a babysitter. When she was aged 14, V gave birth to her first child and so she agreed to be placed into foster care and went to live with D and his wife. V soon became pregnant with her second child. D was

not the father. Whilst living with D, V told an ex-boyfriend that she was in a relationship with D. This was reported to the police but both D and V denied the allegation. D's wife was concerned and sought to ensure that V and D were never left alone together. After watching a football match as a family, D, his wife and their children went to a pub for the evening. D's wife and children left but D stayed on drinking until much later. When he returned home, D went into V's room and they had consensual sexual intercourse. D returned naked to his own room and his wife was surprised to see him like that. She discovered discarded clothes from V and D outside V's room and challenged them both. She tricked them by saying she saw them having sex and they didn't respond. D took V and her children to stay with V's aunt and it was then agreed that D would go to the police, which he did. In interview, D said he had sex with V about 20 times and it had started one night when they were together on the sofa and V had masturbated him. V agreed with D's statements. D was aged 40 and had no previous convictions. If sent to custody he would lose his job. In the pre-sentence report, D said he was under a lot of pressure at work at the time and as a result his marriage was under strain. He said he enjoyed the attention he received from V. The author of the report suggested that D became susceptible to the attentions he received from V because of his low mental state at the time. D was now excluded from the family home and had only supervised contact with his own children. He was separated from his wife. In a short statement, V said that the intercourse had always been consensual and something she had wanted to happen. She said she didn't want anything to happen to him and did not want to pursue any complaint against him. The Judge said the harm made it Category 1B, giving a starting point of 3½ years. Held. The disparity in age made the offence Category 1A, with a 6-year starting point. D's mitigation was his good character, his record of fostering for seven years, the impact of the offending on his children, his self-reporting, letters addressed to the court and the genuine remorse. However, a) D had ignored warnings from the fostering authorities, b) the offending was in V's home, c) the conduct carried on for more than six months, and d) V had had to leave her home as a result of the offending. D was an older man who was trusted with the welfare of V, who also needed protecting from herself. We start at 6 years and with the plea we move to 4 years. With the rehabilitation activity done, **3 years and 10 months immediate**, not 2 years' suspended. We unsuspend the 6-month notification sentence.

**325.37 Digital/oral penetration    Child aged 13-15    Defendant 25+**

*Att-Gen's Ref 2018 Re PD 2018 EWCA Crim 1181* D was convicted of five counts of causing a child, T, to engage in sexual activity, three counts of inciting a family member, his daughter, B, and he pleaded to two counts of causing a child to engage in sexual activity against T. T was a daughter of a family friend of D. One month before T's 16th birthday, D took advantage of T's crush on him and they discussed sexual activity, including full sex. D asked for photographs of T's vagina (the counts D pleaded to). At the first meeting D kissed T and touched T's vagina over her underwear. He also touched her breasts over her clothing. This activity was not indicted. On the next meeting D inserted a chocolate bar in a condom and put that in T's vagina. D stopped that when T said she felt pain. D also encouraged T to touch his penis and then suck it, which she did. D ejaculated in T's mouth. On the third occasion, D took her in a car to visit a flying club and stopped on the way. D asked T to perform oral sex on him. She did, and T again ejaculated in T's mouth after about 5 minutes. On the way home, D stopped again and D removed T's underwear and digitally penetrated T for about 10 minutes, when T asked him to stop. There was also oral sex then. T told a school friend and the conversation was overheard. Investigations led police to question B, D's daughter. Three counts related to B, when aged 5½, when she touched D's penis with her feet. This was from mid-2015 and was said to have 'happened a lot'. B also masturbated D with her feet until D ejaculated. T said she suffered from nightmares and panic attacks about meeting D. B was frustrated about not being able to see D. D was now aged 39, married and with a family. He had no convictions and suffered from Asperger's. D told the author of the pre-sentence report that he was a victim of a predatory child, namely T, and a vindictive wife who had manipulated B. Held. For the five main sentences involving T, we arrive at 8 years and with the mitigation we move to perhaps 6½ years. For the offences involving B on their own, we arrive at 6 years and with the mitigation move to 4½ years. We increase the extension period from 2½ years to 3. With totality, we arrive at 8 years for both, so 11 years' extended sentence (**8 years'** custody 3 years' extended licence) not 7 years' extended sentence (4½ years' custody 2½ years' extended licence).

**325.44 Seeking/asking for sexual activity      Child aged 13-15**

*R v Cook* 2018 EWCA Crim 530 D pleaded early to inciting a child to engage in sexual activity, three counts of possession of indecent photographs and possession of an extreme image. A police officer posed as a 13-year-old girl, F, online and D, who was also a police officer, responded. D steered the communications to sexual matters and eventually asked if he could take F's virginity. He asked for pictures of F and sent a picture of himself with an obvious bulge in his underwear. D was arrested. He was applying for a DBS check to act as a sports coach. D's phone was examined and 32 Category A images and 74 Category B images were found. They depicted girls aged 8-10. There were also two images of a female and a dog. D was aged 31 and of good character. The Judge compared the offence to Sexual Offences Act 2003 s 10 at Level 1A because of the desire for penetration and the grooming. Held. There was no actual contact. It was Category 3A (starting point 6 months) and we take into account the fact that he was seeking full sex and the indecent images. We move to 21 months, so with plea, 14 months not 3 years.

*R v Hurst* 2018 EWCA Crim 583 D pleaded to inciting a child to engage in sexual activity. Police set up a Facebook profile depicting a 14-year-old, where her age was made clear. D responded and sent her, G, a naked picture of himself and asked for naked pictures of her. D told her he wanted to spank her and he encouraged her to masturbate herself. In a telephone call, a police officer posing as G called D who encouraged her to skip school. He told her to have a change of clothes. In another call D talked about hiring a room in a B & B. D asked her if she wanted sex and a meeting was suggested. He discussed oral and anal sex. D was arrested for unconnected matters. D was aged 24 and had 54 convictions on 35 occasions. They were mostly for breaches of a Restraining Order, battery and criminal damage. Held. The case was in Category 3A. We start at 6 months and increase that to 9 months for the convictions. With plea, 6 months with the unrelated matters consecutive.

**Physical non-penetrative contact**

**Over clothing**

**325.48a Physical contact over clothing Child aged under 10      Defendant aged 25+**

*R v Kelman* 2017 EWCA Crim 2520 D was convicted of inciting a child under 13 to engage in sexual activity (count 1) and sexual assault of a child aged under 13 (count 2). D was a work colleague of V's father. D was a regular visitor to their house and befriended V, aged 6. D was allowed to stay overnight and in the early hours took V into the garden. D exposed his penis and asked V to touch it. D refused. This was count 1. D then touched V's penis over his pyjamas for a 'very short time'. This was count 2. V disclosed the offending about a year later. D was aged 32 and of good character. Held. Count 1 was a Category 3B case with a starting point of 2 years. Count 2 was a Category 2B case also with a 2-year starting point. V's youth, the betrayal of the friendship and the taking of the boy into the garden at night were aggravating factors. For count 1, 3 years not 8. For count 2, the Judge's 3 years was correct. The sentences remain concurrent.

*R v Ferry* 2018 EWCA Crim 1849 D pleaded (25% credit) to causing a child aged under 13 to engage in sexual activity and seven counts of sexual assault on a child aged under 13. He was in a relationship with P, who was V's mother. When V was aged 6-14, D touched her over her clothing. The first incident was when D seized V's hand and placed it on his penis, which was under his clothing. V remembered the seizing hurt her. On numerous other occasions, D touched V's breast and bottom over her clothing. D was then sectioned because of his mental ill-health and he told P that he touched children, including V, and that he was a paedophile. A few weeks later, P contacted the police. Reports set out D's 'various vulnerabilities and ill-health problems'. Held. The incidents were over a sustained period of time and

numerous, but at the lower end of the scale. D had brought the matter to light, which was significant mitigation. There was remorse. The first incident was an isolated incident. That deserves 24 not 30 months. That is consecutive to the last two counts making **3 years** not 4½ in all.

**325.49 Physical etc. Child then aged under 10 Defendant then aged 25+**

*R v PAR* 2018 EWCA Crim 779 D pleaded to sexual assault (section 7). D's granddaughter, V, used to stay with him and on occasions they shared a bed. D licked V's vagina once when she was 'no more than 6'. V's father found out and D admitted to him what he had done. D blamed V for it. The effect on D's family was devastating. D was aged 57 with no previous convictions. The pre-sentence report said that D posed a low risk of sexual recidivism. The Judge made the offence Category 2A. He moved from 4 years to 6 years and with the plea made it 4 years. Held. 40 months (which is 5 years before the plea discount).