



Claire Mainwaring

Call 2022

Practice Profile

Claire commenced pupillage under the supervision of Catherine Farrelly in October 2023. In Claire's second six she was under the supervision of Rupert Kent. Claire has now begun her third six under the supervision of Gregory Fishwick and is able to take instructions.

Claire's Privacy Policy can be downloaded [here](#).

Areas of Practice

News

Sexual Offences in the Online Safety Act 2023

28 November 2024

The Online Safety Act 2023 received Royal Assent on 26th October last year. The legislation's primary aim is to protect children and adults online, and, as part of that ambition, has introduced into law a number of new offences designed to tackle online sexual abuse. Claire Mainwaring, a probationary tenant at 5KBW has written an article which can be read below:

<https://www.5kbw.co.uk/resources/view-article/sexual-offences-in-the-online-safety-act-2023>

Non-Fatal Strangulation

9 January 2024

Claire Mainwaring, a first six pupil at 5KBW has written an article on Non-Fatal Strangulation. The standalone offence of non-fatal strangulation came into force on 7th June 2022, a decision welcomed by domestic abuse charities and victims alike. But why was this legislation introduced, how will it protect victims, and what is the current sentencing guidance?

The article can be read here: <https://www.5kbw.co.uk/resources/view-article/non-fatal-strangulation>

Case Update: R v BNE

15 December 2023

Claire Mainwaring, a first six pupil at 5KBW has written a summary of the recent Court of Appeal case of R v BNE which has provided useful guidance on the crown's disclosure duties in cases involving police use of decoy profiles to catch online predators.

The case update can be read here: <https://www.5kbw.co.uk/resources/view-article/case-update-r-v-bne>

Recent Cases

Articles

Case Update: R v BNE

15 December 2023

Author: Claire Mainwaring, first six pupil at 5KBW

Case Update R v BNE

Introduction

The recent case of R v BNE addressed the prosecutor's disclosure duties in cases which involve police use of decoy profiles to identify and charge those seeking to commit sexual offences against children online.

Summary of Facts

The appellant met X, an undercover police officer posing as a teenage girl, on the social media platform "Chatiw". X told the appellant that she was 14 years old, in Year 9 at school, and complained about having to wear her school uniform for another two years. The appellant truthfully told X that he was aged 44. The appellant and X exchanged sexualised messages online in which the appellant encouraged X to masturbate, explaining how to go about doing so, and in turn, indicated that he was also masturbating.

What is the Applicable Law?

The appellant was convicted of attempting to incite a child to engage in sexual activity, and attempted sexual communication with a child, contrary to section 10 and 15A of the Sexual Offences Act 2003 respectively.

Section 10 of the Sexual Offences Act 2003 provides:

A person aged 18 or over (A) commits an offence if –

He intentionally causes or incites another person (B) to engage in an activity,
The activity is sexual and
Either –

B is under 16 and A does not reasonably believe that B is 16 or over, or
B is under 13.

Section 15A of the Act states:

A person aged 18 or over (A) commits an offence if –

For the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),
The communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and
B is under 16 and A does not reasonably believe that B is 16 or over.

At trial, the principal matter in issue was whether the appellant reasonably believed that X was aged 16 or over.

The lower court considered the case of *R v Ishaqzai* [2020] EWCA Crim 222 which addressed the question of reasonable belief in age in sexual offences involving children. In that case, the Court of Appeal stipulated that the prosecution could prove the mental element of attempted sexual offences involving children in two ways. Firstly, by persuading the jury that the appellant did not believe X to be 16 or over (a subjective test), and secondly by proving that, if the appellant did so believe, that belief was not reasonable (an objective test).

Summary of Submissions

At trial, it was the appellant's case that he believed he was communicating with an adult who was pretending to be a 14-year-old in the context of a role-playing fantasy. As part of his defence, the appellant asserted that X's profile picture and images sent by her depicted a woman aged around 19-23. Defence requested disclosure of the actual age of the person shown, arguing that if the person photographed was 16 or over, this would lend support to the appellant's contention that he believed X was an adult engaging in role-play. Defence also asserted that it would be unfair to the appellant were the jury to be falsely led to believe that the person pictured was underage. The prosecution, however, refused to disclose the age of the person depicted and, following a Public Immunity Interest hearing, the trial judge ruled that although the actual age was prima facie disclosable, it should not be disclosed for reasons of public interest.

In the Court of Appeal, counsel for the appellant submitted that the true age of the person depicted was an important consideration for the jury in determining whether the appellant's belief that X was 16 or over was reasonable.

The respondent opposed the appeal, submitting that the age of the person was irrelevant to the issues of the case. In the alternative, the respondent argued that if the matter was relevant, the judge had rightly ruled against disclosure for reasons of public interest. Finally, even if the two former arguments were rejected by the Court of Appeal, it was submitted that the conviction was safe due to other evidence against the appellant.

Court's Decision

In his judgment, Lord Justice Holroyde provided that the direction customarily given to juries – that they should not speculate about any matter in relation to which they have heard no evidence – was insufficient in a case of this nature. This is because, without evidence to the contrary, the jury were likely to have assumed that the pictures used as part of the decoy profile were of a person aged under 16.

Lord Justice Holroyde went on to give guidance on disclosure in cases involving decoy profiles:

Firstly, where the image used is an unaltered photograph of a real person who was in fact aged 16 or over, the prosecutor should disclose the true age of that person to the defence.

Secondly, where the images are digitally created, altered or modified, the age of the person originally photographed is of no relevance, but defence should be informed that the image is manufactured, and it would generally be appropriate for this to be adduced in evidence before the jury.

In this case, Lord Justice Holroyde determined that the jury may well have assumed that the images were of a true likeness of a girl aged 14 and, on the evidence, this was not an assumption that they could have properly made. The Court of Appeal quashed the appeal and ordered a retrial.

Commentary

In an increasingly online world, where sexual offences against children continue to proliferate, police use of decoy profiles is accepted as a legitimate measure to prevent crime. R v BNE goes some way to elucidate the court's position in relation to disclosure in cases of this kind, a step which will undoubtedly be welcomed by RASSO practitioners.

R v BNE [2023] EWCA Crim 1242

Non-Fatal Strangulation

Author: Claire Mainwaring, first six pupil at 5KBW

Non-Fatal Strangulation

Introduction

The standalone offence of non-fatal strangulation came into force on 7th June 2022, a decision welcomed by domestic abuse charities and victims alike. But why was this legislation introduced, how will it protect victims, and what is the current sentencing guidance?

Research and campaigning

Strangulation has long been used by perpetrators of domestic abuse as a "tool to exert power and control"[1] and has been linked to a higher risk of homicide when compared to victims who have not been strangled.[2] Within domestic abuse organisations, non-fatal strangulation is therefore treated as an especially high-risk factor when assessing reported abuse.

Strangulation often does not cause any visible signs of physical injury, and as a result, victims are less likely to report it, and less likely to be believed when they do. However, despite the typical absence of visible injury, research into the impact of non-fatal strangulation has revealed a startling range of serious neurological consequences, including seizures, paralysis, and sensory loss.[3] Strangulation may also cause further long-term complications such as stroke or miscarriage.[4]

It is the unique physiological risks posed by non-fatal strangulation, its association with coercive and controlling behaviour, and the inevitable psychological impact on victims that led to demands for it to stand apart from other offences against the person.

Legislation

Prior to the implementation of the freestanding offence, there were three principal ways in which strangulation could be treated by the criminal justice system: as battery, ABH or GBH.

Due to the lack of any visible signs of injury, strangulation was generally charged as common assault,[5] a summary-only offence with a maximum sentence of 6 months' imprisonment. Campaigners argued that the charge of battery did not accurately reflect the gravity of the act of strangulation and its litany of physical and psychological consequences. In an attempt to address the law's impotence in this regard, the government introduced the new offence of non-fatal strangulation under the Domestic Abuse Act 2021.

Offence

Section 70 of the Domestic Abuse Act 2021 inserted the offence of strangulation or suffocation into section 75 of the Serious Crime Act 2015:

75A Strangulation or suffocation

- A person ("A") commits an offence if—
 - A intentionally strangles another person ("B"), or
 - A does any other act to B that—
 - affects B's ability to breathe, and
 - constitutes battery of B

Defence

Section 75A of the Serious Crime Act 2015 provides a defence to strangulation, limited by the provisions under s 75(3):

- It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.
- But subsection (2) does not apply if –
 - B suffers serious harm as a result of the strangulation or other act, and
 - A either –
 - Intended to cause B serious harm, or
 - Was reckless as to whether B would suffer serious harm.

Sentencing

Sentencing for the new offence goes further than that of common assault. Under section 75(5) of the Serious Crime Act 2015 defendants charged with non-fatal strangulation can now be tried in the Crown Court and face up to five years' imprisonment.

There are currently no sentencing guidelines for the offence of non-fatal strangulation. However, in the 2023 case of *R v Cook*[6], the Court of Appeal set out the desired approach to sentencing in the lower courts, the important points of which are summarised below.

Starting point

Sentence for intentional strangulation should ordinarily be one of immediate custody with a starting point of 18 months. Although strangulation is typically an offence perpetrated by men onto women, this starting point should be the same irrespective of the defendant's gender.

The context of domestic abuse

Where the offence of non-fatal strangulation has been carried out within a relationship, the Sentencing Council's overarching principles in relation to domestic abuse should be considered by the court.

Aggravating factors

The starting point may be increased in light of the following non-exhaustive factors:

- History of previous violence, the significance of which will be greater when the previous violence has involved strangulation.
- Presence of a child/children.
- Attack carried out in the victim's home.
- Sustained or repeated strangulation.
- Use of a ligature or equivalent.
- Abuse of power.
- Offender under influence of drink or drugs.
- Offence on licence.
- Vulnerable victim.
- Steps taken to prevent the victim reporting an incident.
- Steps taken to prevent the victim obtaining assistance.

Statutory aggravating factors will also apply:

- Previous convictions, having regard to –
 - the nature of the offence to which the conviction relates, and its relevance to the current offence, and
 - the time that has elapsed since the conviction.
- Offence committed whilst on bail.
- Offence motivated by or demonstrating hostility based on protected characteristics.

Mitigating factors

If the offence is carried out against a backdrop of domestic abuse, except in rare circumstances, provocation would not be considered a mitigating factor.

Mitigating factors include:

- Good character.
- Age and immaturity.
- Remorse.
- Mental disorder.
- Genuine recognition of the need for change and evidence of the offender having sought appropriate help and assistance.
- Very short-lived strangulation from which the offender voluntarily desisted.

Finally, as there is no specific sentencing guideline for the offence, the Sentencing Council Overarching Principles' Guideline applies.

Commentary

The case of *R v Cook* itself goes some way to demonstrate the efficacy of the new standalone offence. On 6th June 2022, one day before the implementation of the new offence, Mr Cook strangled the mother of his child. Consequently, in November 2022, he was convicted in the magistrates' court of common assault, for which he could not have received a sentence of more than 6 months. Under the new provisions, however, Mr Cook was sentenced to 15 months' imprisonment in relation to a later incident of strangulation of the same victim, a sentencing decision which was upheld and described as "entirely appropriate" by the Court of Appeal.

[1] <https://www.womensaid.org.uk/womens-aid-responds-non-fatal-strangulation-offence/>

[2] N. Glass et al., 'Non-fatal strangulation is an important risk factor for homicide of women' [2008] 35(3) J Emerg Med 329.

[3] H. Bichard et al, 'The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review' [2021] Neuropsychological Rehabilitation p. 4.

[4] Ibid.

[5] Kelly, R; Ormerod, D; (2021) Non-Fatal Strangulation and Suffocation. Criminal Law Review , 7 pp. 532-555.

[6] *R v Cook* [2023] EWCA Crim 452

Sexual Offences in the Online Safety Act 2023

Author: Claire Mainwaring, Probationary Tenant at 5KBW

Introduction

The Online Safety Act 2023 received Royal Assent on 26th October last year. The legislation's primary aim is to protect children and adults online, and, as part of that ambition, has introduced into law a number of new offences designed to tackle online sexual abuse.

The sharing of intimate images online

Prior to the implementation of the Online Safety Act 2023, section 33 of the Criminal Justice and Courts Act 2015 made it an offence to disclose a private sexual photograph or film without the consent of an individual who appears in it, and with the intention of causing that individual distress.

The new baseline offence

Section 188 of the Online Safety Act 2023 repealed s. 33 of the CJCA 2015 and introduced four distinct offences relating to the non-consensual sharing of intimate images online. Section 188 inserts sections 66B, 66C and 66D into the Sexual Offences Act 2003.

The new baseline offence under section 66B(1) SOA 2003 removes the previous requirement under s. 33 CJCA 2015 to prove intent to cause distress, considered to be an important factor in low prosecution rates. Instead, s. 66B(1) requires that A intentionally shares the image, B does not consent to the sharing of the image, and A does not reasonably believe that B consents, thereby adopting a similar test to that applied in the offence of sexual assault.

An offence under s.66B(1) is summary only and carries a maximum sentence of 6 months' imprisonment.

Further offences under s. 188

Offences under subsections (2) and (3) of s. 66B SOA 2003 confer a further mens rea component and vary depending on the underlying intention of the perpetrator, as set out below -

- **Subsection (2)** requires intent to cause B alarm, distress, or humiliation.
- **Subsection (3)** requires that A sends the intimate image with the purpose of A or another person obtaining sexual gratification.

Subsection (4) covers threats to share intimate photographs or film, and requires an intention that B, or another person who knows B, will fear that the threat will be carried out, or recklessness as to whether B, or another person who knows B, will fear that the threat will be carried out.

Offences under subsections (2), (3) and (4), are triable either-way and carry a maximum sentence of 2 years' imprisonment.

Deepfakes

In an attempt to tackle the epidemic of deepfake pornography online, s. 188 includes photographs and film which "appear to show" another person in an intimate state. This statutory construction can be widely interpreted, so that the sharing of deepfake imagery is encompassed within the protections of the Act, going a step further than the preceding offence under s. 33 of the CJCA 2015.

Defences under s. 66C SOA 2003

Section 66C of the Sexual Offences Act 2003, as inserted by s. 188 of the Online Safety Act 2023, confers four principal exemptions to the above offences, as set out below –

- **Intimate image shared publicly** - Subsection (1) confers a defence when the image was taken in a place which the public, or a section of the public, were permitted to have access (whether on payment or otherwise), and B had no reasonable expectation of privacy, and B was, or A reasonably believed B to be, in an intimate state voluntarily. This exemption is designed to incorporate circumstances in which an individual shares an intimate image on online platforms like OnlyFans.
- **Intimate image previously publicly shared** - Subsection (3) provides that no offence is committed if the image had, or A reasonably believes it had, been previously shared public, and B had, or A reasonably believes B had, consented to the previous sharing.
- **Healthcare for children under 16** - Subsection (4) provides for the sharing of intimate images of individuals under the age of 16 (B), and B lacks or A reasonably believes that B lacks capacity to consent to the sharing of the image, and the image is shared with a healthcare professional acting in that capacity, or the image is shared in connection with the care or treatment of B.
- **Between family and friends** - Finally, subsection (5) provides that a person does not commit an offence where the image is of a kind normally shared between family and friends.

Cyberflashing

The new offence of “cyberflashing” under section 187 of the Online Safety Act 2023 is the first time that the Government of England and Wales has recognised the unsolicited sending of nude images as a criminal offence.

Section 187 of the Act inserts section 66A into the Sexual Offences Act 2003 and provides –

187 Sending etc photograph or film of genitals

1. *A person (A) who intentionally sends or gives a photograph or film of any person's genitals to another person (B) commits an offence if –*
 - *A intends that B will see the genitals and be caused alarm, distress or humiliation, or*
 - *A sends or gives such a photograph or film for the purpose of obtaining sexual gratification and is reckless as to whether B will be caused alarm, distress or humiliation.*

An offence under this section is triable either-way and carries a maximum sentence of 2 years' imprisonment.

Commentary

The Online Safety Act 2023 is a signal to sexual predators that they can now expect serious consequences for forms of online sexual misconduct that have previously gone unpunished. Earlier this year, Nicholas Hawkes became the first person in England to be convicted of cyberflashing offences under s. 187 of the Act and was sentenced to 52-weeks' imprisonment.

However, the Act's potency in combatting rampant online sexual abuse remains to be seen. When recent research suggests that 1 in 7 women have experienced threats to share intimate images,[1] and 76% of teenage girls have been sent unsolicited nude images online, [2] it is clear that there is much more work to be done.

[1] Refuge (2020), The Naked Threat <https://refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf#>

[2] <https://www.gov.uk/government/news/cyberflashing-to-become-a-criminal-offence>