Section 1 of the Sexual Offences (Amendment) Act 1992 applies in the case of Chaplin. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed.

Neutral Citation Number: [2022] EWCA Crim 433

Case No: 202102210 A2 / 202002185 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT EXETER
His Honour Judge Horton
T20210018, S20210009
AND ON APPEAL FROM THE CROWN COURT AT IPSWICH
His Honour Judge Levett
S20200053, S202000093

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2022

Before :
LORD JUSTICE EDIS
MR JUSTICE FRASER
and
HER HONOUR JUDGE DHIR QC

- -

Between :
REGINA
- and -
THOMAS PAUL CHALK **Appellant**

And between :
REGINA
-and-
ANDREW GEORGE CHAPLIN

Applicant

- -

Mr N Wraith appeared on behalf of the Appellant
Ms S Wyeth appeared on behalf of the Applicant
Mr A Johnson appeared on behalf of the Crown
Hearing date: 4 February 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:00am on Thursday 31st March 2022.

Mr Justice Fraser :

1. This is the judgment of the court. The appeal (in the case of Thomas Chalk) and renewed application for leave to appeal (in the case of Andrew Chaplin) are both in relation to sentence. They have been listed together because they raise common technical issues relating to the lawfulness of what occurred at the respective Crown Courts. In particular, they both concern the lawfulness of rulings made by the judge when sitting as a District Judge pursuant to section 66 Courts Act 2003, and the degree to which they affect the lawfulness of the sentences imposed. They both concern matters that had been committed for sentence to the Crown Court by the Magistrates' Court, and certain steps taken in the Crown Court where the sentencing judge sat as a District Judge in the Magistrates' Court under section 66 (to which we shall refer as sitting as a DJ(MC)). The two cases have no other connection. The appeal and the renewed application were heard together for that reason.

2. Neither the appellant nor the applicant raised the technical issues in question at the time, nor indeed when they submitted their respective Grounds of Appeal following their sentencing. However, these matters were noticed by the Registrar of Criminal Appeals when the papers were initially considered, and a note was sent to all the parties by the Registrar notifying them and inviting further submissions. These issues were therefore all addressed by all of the parties, including the respondent, but without any clear resolution to these technical issues emerging.

3. Particularly because of the rapidity with which matters are now being put to defendants in the Magistrates' Court, technical issues such as those in these two cases (or broadly similar ones) may occur in future cases. As well as resolving the technical issues that arise in these cases, this judgment is also intended to focus the minds of those prosecutors who appear in the Crown Court in particular, so that they are aware of the need for vigilance, and technical accuracy, when such situations arise.

4. Although these two cases have been listed together, they each concern individuals and will receive entirely separate attention when we come to decide the appeal and the renewed application. They were both brought as challenges to the sentences on the basis that they are manifestly excessive, separate to the technical issues we have described. We shall refer to those seeking to appeal by their surnames in the body of this judgment; this is for brevity and does not mark a lack of respect. It also avoids the need to consider, when referring to such a person, whether they are, at that point, an appellant, an applicant, or a claimant in judicial review proceedings.

5. We should record that each of these two cases involve attempts to solve technical problems by sitting as a DJ(MC) under section 66. No objections were made by either Chalk or Chaplin to this course of action at the time, and no prejudice was caused to either of them by what occurred. Indeed, Chalk did not attend the hearing of his appeal before us, and Mr Wraith explained to us that he was not engaging with his legal representatives on any aspect of his case, and was not providing any instructions. Regardless of this, we received assistance both from Mr Wraith and also from Ms Wyeth for Chaplin.

6. Finally by way of introduction, the parties have drawn our attention to a number of authorities and the prosecution have suggested a variety of different ways in which the technical issues could be addressed. We have considered them all but we only identify

those within this judgment necessary properly to resolve the appeal and the application, and give such guidance as may be helpful in other cases going forwards. We do not address all of the different permutations or suggested solutions.

The facts – the case of Thomas Chalk

7. On 6 August 2020 Chalk assaulted his former partner, Sherrie McBay, by punching her in the back outside a Tesco Express store in Paignton. He was arrested later the same day and became violent: spitting, threatening to break the windows of the police car that attended, shouting, screaming, using foul language and abusing and threatening the officers and also their families. He bit the hand of one of the officers, PC Smart, breaking the skin; he bit PC Smart's leg; and he grabbed and squeezed PC Deveau's leg in a painful manner.

8. Chalk, who was born in March 1988, had been diagnosed with ADHD as a child. For the pre-sentence report, he told the probation officer that his life had gone into a downwards spiral following the death of his mother about 11 years before, but several of his offences pre-dated that. He had committed his first offence in 2004, when he had received a warning. Since then, he had been convicted of 36 offences, including battery in 2005 and 2015, assault in 2009 and 2014, assault of a constable in 2017, two offences of assault of an emergency worker in 2020, using threatening, abusive or insulting words or behaviour with intent to cause fear or provocation of violence in 2015, 2016, 2017 and 2020, affray in 2015, possessing a knife in a public place in 2014 and possessing a firearm when prohibited in 2018.

9. Chalk had commenced an on-off relationship with Miss McBay in about 2011. At one stage, she had obtained a non-molestation order against him. In 2013 he committed three offences of breach of that order. She was also the victim of two assaults by Chalk in 2014, which resulted in a restraining order being made against him. Nevertheless, the relationship continued, on and off, until May 2020.

10. He was staying at her home on 13 January 2020 when he broke a window and was arrested, having assaulted two police officers and damaged his cell. On 6 March 2020 five suspended sentence orders were made for these offences. There were two orders with concurrent terms of 12 weeks' imprisonment, suspended for 12 months, in respect of two offences of assault of an emergency worker. For two offences of criminal damage, there were two orders made, each with terms of 8 weeks' imprisonment, also suspended for 12 months. These terms were concurrent with one another, but consecutive to the two 12-week terms. Finally, there was an order with a concurrent term of 6 weeks' imprisonment for an offence of using threatening, abusive or insulting words or behaviour with intent to cause fear or provocation of violence.

11. Chalk breached the suspended sentence orders by failing to attend any appointments and he was fined for that breach on 14 September 2020. From 24 September to 6 November 2020 he was remanded in custody in connection with an unrelated prosecution, which was discontinued.

12. In respect of the instant offences, which were committed on 6 August 2020, Chalk appeared at Newton Abbott Magistrates' Court on 14 January 2021. There were five charges in all. The assaults on police officers were charged as assault by beating of an emergency worker, contrary to section 39 of the Criminal Justice Act 1988 and section 1

of the Assaults on Emergency Workers (Offences) Act 2018. The assault on Miss McBay was charged as assault by beating contrary to section 39 of the 1988 Act. He indicated that he would plead guilty to the charge of assaulting PC Deveau, but not guilty to the other charges. On the charge of assaulting PC Smart he was sent for trial to the Exeter Crown Court pursuant to section 51(1) and (2)(b) of the Crime and Disorder Act 1998. On the charge of assaulting Miss McBay, he was sent for trial pursuant to section 51(3) of that Act. On the charge of assaulting PC Deveau, he was committed for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000.

13. Since the conviction took place after 1 December 2020, the reference should have been to section 14 of the Sentencing Act 2020, rather than section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, but that did not invalidate the committal. This is made clear in the case of ***R v Jex*** [2021] EWCA Crim 1708 at [24] to [36].

14. Chalk appeared at a plea and trial preparation hearing before the Crown Court on 9 February 2021. By then, one of the five original charges was no longer pursued and there were four counts on the indictment, including a count in respect of the charge of assaulting PC Deveau. In relation to that count, counsel submitted that, because Chalk had not pleaded guilty in the Magistrates' Court, but had only indicated a guilty plea, he should have been sent for trial, rather than committed for sentence.

15. That submission was incorrect as we explain in the section "The legal framework" below.

16. The judge was invited to exercise his powers as a DJ(MC). He accepted counsel's submission and said as follows:

> "Right, well then, that is what I'll do. I'll correct the sending in relation to the allegation of 6 August, assaulting PC Deveau as an emergency worker, to a sending under section 51(1) and (2)(b) of the Crime and Disorder Act 1998 and therefore delete, as it were, the purported sending, or committal for sentence under section 3, but obviously, it will be noted and kept in mind that, in relation to that matter, if Mr Chalk pleads guilty to it, then his credit will be the full one third."

17. The plea and trial preparation hearing was adjourned to 19 February 2021. On 7 May 2021 he pleaded guilty to all three counts upon re-arraignment and a not guilty verdict was entered on the count that was not pursued. He was therefore sentenced on 28 June 2021 on the counts to which he had pleaded guilty on 7 May 2021, and the one count which had been sent to the Crown Court by the judge acting as a DJ(MC) relating to the assault upon PC Deveau as we have explained above.

18. The pre-sentence report stated that, at the time of these offences, his life was in chaos due to his drug use and homelessness. He had attitudes and beliefs which supported aggression and violence and he had developed animosity towards the police. On the other hand, there were signs that he was trying to move away from his previous lifestyle and behaviour. He had moved from Torquay to Exeter and had worked hard to obtain stable accommodation. He had regular contact with his 2 year old daughter and had resumed his relationship with her mother. Chalk wrote a letter to the judge in which he expressed his regret for what he had done and stressed his efforts to better himself and his future.

19. Prosecution counsel submitted that the assault on Miss McBay fell within category 3 in the offence-specific guideline then in force, with a starting point of a Band A fine and a range up to a Band C fine. There was no guideline then in force for the offence of assault of an emergency worker, but the judge noted that the maximum sentence was 12 months' imprisonment, rather than the maximum of 26 weeks for the offence of common assault.

20. In passing sentence, the judge noted that the assault of Miss McBay was a case of domestic violence. He described Chalk's conduct towards the officers as appalling, and the incident as prolonged and violent. He had regard to Chalk's many previous convictions, to the contents of the pre-sentence report and to Chalk's own letter.

21. The judge said that he gave a 20% discount for Chalk's guilty pleas. He imposed a sentence of 12 weeks' imprisonment for the assault on Miss McBay and sentences of 24 weeks' imprisonment for each of the offences of assault of an emergency worker. He made those sentences concurrent with one another, but consecutive to the sentence for assault. He activated the suspended sentences, saying that the sentence would be reduced from 20 weeks to 18 weeks, which would be consecutive to the other sentences. That made a total of 54 weeks' imprisonment.

22. The sentence for the assault of Miss McBay was equivalent to a sentence of 15 weeks' imprisonment if Chalk had not pleaded guilty. The sentences for the offences of assaulting an emergency worker were equivalent to 30 weeks' imprisonment if Chalk had not pleaded guilty. The judge did not indicate which of the suspended sentences he was reducing in order to achieve the overall total of 18 weeks which he activated. In effect, he treated the suspended sentences as one suspended sentence with a single term of 20 weeks, reduced down to 18 weeks.

The facts – the case of Andrew Chaplin

23. Chaplin pleaded guilty to a number of different sexual offences that arose out of communications on a social messaging site between 30 January 2020 and 11 February 2020. Chaplin was already subject to a Sexual Harm Prevention Order ("SHPO") which had been in place since 24 November 2017 following earlier offending. This imposed certain restrictions upon him, including the requirement to declare to the authorities his electronic devices. He was also prevented from using a chatroom.

24. In 2020 he began communication online on a social media site with a male who told Chaplin that he was 14 years of age. This communication was initiated by Chaplin. Unbeknown to Chaplin, this was an undercover police officer posing as a young male called 'Ryan'. Such police officers are trained and authorised to take part in such undercover operations. An online profile is displayed and no contact is initiated by the officer. The officer will wait to be contacted by those interested in communicating, some of whom, regrettably, may turn out to be paedophiles with a sexual interest. Early in their communications 'Ryan' told Chaplin that he was only 14 years old. They sent messages to one another, and Chaplin sent an image of his own face and an image of a nude man sitting on the lavatory.

25. Communication then moved to WhatsApp. During this phase of the communication, Chaplin sent 'Ryan' a picture of his own erect penis, and later a movie clip of himself urinating and masturbating. 'Ryan' sent a consented image of a young male holding a phone up to partially obscure his face. A consented image is one that has been approved

as not containing any illegal element, and such images are usually sufficiently interesting or attractive to paedophiles to continue their interest in the sender of such an image. Chaplin suggested having penetrative sex, and sent a further video clip of himself masturbating, and also a video of a third party adult male inserting a sex toy into his own anus. 'Ryan' sent a selfie style image of a male laying on his front under a Marvel patterned duvet.

26. Other illegal activity took place in terms of the content and nature of the messages sent to the officer by Chaplin, including express invitations for 'Ryan' to engage in penetrative activity with Chaplin, encouragement to send explicit photographs, further inquiries by Chaplin about his school friends, requests as to whether 'Ryan' used drugs, and generally illegal online sexual behaviour with someone of the age Chaplin believed 'Ryan' to be. On 6 February 2020 Chaplin discussed with 'Ryan' plans for the two of them to meet, and this was discussed again on 10 February 2020. A plan was made between the two of them to meet the following day at Christchurch Park in Ipswich. Chaplin sent a message that said "U going to fuck me r u" and sent four images of his shaved legs, groin and torso area. 'Ryan' sent Chaplin a selfie image of a male in a bathroom wearing a short sleeve school shirt with undone buttons.

27. On 11 February 2020 Chaplin travelled to Christchurch Park to meet 'Ryan' in accordance with this plan, where he was met by police officers who arrested him. He was found in possession of two phones, one of which had not been declared to the PPU, which was therefore in breach of the existing SHPO. His home was also searched which revealed a small quantity of cannabis, a controlled Class B drug.

28. This activity resulted in the subsequent charges brought against him following his arrest, namely:

    1. Meeting a child following sexual grooming - contrary to section 15 of the Sexual Offences Act 2003;

    2. Sexual communication with a child - contrary to section 15A(1) and (3) of the Sexual Offences Act 2003;

    3. Breach of a Sexual Harm Prevention Order (namely the possession of the mobile phone) – contrary to section 103I(1) and (3) of the Sexual Offences Act 2003;

    4. Possession of a controlled drug of Class B (cannabis) - contrary to section 5(2) of and Schedule 4 to the Misuse of Drugs Act 1971;

    5. Breach of a Sexual Harm Prevention Order (namely entering and engaging in messages on chat rooms) – contrary to section 103I(1) and (3) of the Sexual Offences Act 2003;

    6. Attempting to cause a child aged under 16 to look at an image of sexual activity - contrary to section 1(1) of the Criminal Attempts Act 1981.

29. A notice was served under section 23A Prosecution of Offences Act 1985 that no proceedings would be continued against Chaplin for the breach of the terms of the SHPO that prevented him from entering and engaging in messages on chat rooms.

30. On 13 February 2020 he pleaded guilty to the charges in the Suffolk Magistrates' Court, which was plainly the first opportunity. Indeed, it was only 48 hours after he had been arrested in the park. We were told by counsel for the respondent, Mr Johnson, that this type of very short interval before defendants appear in the Magistrates' Court is becoming increasingly common. It may explain why the charges were framed in the way they were, which is the origin of the technical issues which we will explain. However, even where there is such a short interval, this is no excuse for the type of error that occurred in this case. On the facts of this case, Chaplin could not have met a child following sexual grooming, nor had sexual communication with a child, because no child was involved.

31. The Magistrates committed all five offences to the Crown Court for sentence under case number S20200053. The matter was listed for sentence at the Crown Court on 12 March 2020.

32. Shortly before the matter came to the Crown Court, it was realised that the two most serious charges of the five – namely those under section 15 and section 15A of the Sexual Offences Act 2003 – had been incorrectly charged. Chaplin had neither met a child following sexual grooming, nor had he had sexual communication with a child. 'Ryan' was not a child; as an undercover police officer, he was an adult. The target of the activity by Chaplin was not an underage child, but an undercover police officer posing as one.

33. Chaplin had been guilty of *attempting* to commit each of these offences contrary to the Criminal Attempts Act 1981. These two offences should not have been charged as substantive offences under each of section 15 and section 15A of the Sexual Offences Act 2003, as the elements of these choate offences were not supported by the facts of what had occurred. The conclusion that the two offences should have been charged as attempts was reached just before the date when the matter had been listed for sentence, namely 12 March 2020. After some days of consideration, on 19 March 2020 the two new charges were uploaded to the DCS. These two new charges were:

    1. Attempting to meet a child following sexual grooming - contrary to section 1(1) of the Criminal Attempts Act 1981;

    2. Attempting to have sexual communication with a child - contrary to section 1(1) of the Criminal Attempts Act 1981.

34. The prosecution produced an undated document headed "Charges" which was uploaded to the DCS on 19 March 2020 under the title "Amended Charges for the Next Hearing.doc". We shall refer to this as the "Amended Charges" document. It consisted of 4 numbered paragraphs. Each paragraph consisted of the particulars of each offence. Paragraph 1 now stated the matter was being charged as an attempt, contrary to section 1(1) of the Criminal Attempts Act 1981, and in bold in brackets in the document stated:

    "(This is a substitution of charge 1 under section 15 of the Sexual Offences Act 2003)".

35. The same approach was adopted in respect of paragraph 2. Paragraph 3 charged the drug possession charge, with the words "(as per original charge sheet)" following it, and paragraph 4 charged the breach of the SHPO, with the entry "(as per charge 4 of the original charge sheet)" following. The original charge 4, namely that as set out at [28] above, was the drug possession charge as it happens, and the breach of the SHPO

(possession of the undisclosed mobile phone) was original charge 3, but nothing turns on that. There was no reference in this document to the charge of attempting to cause a child aged under 16 to look at an image of sexual activity, contrary to section 1(1) of the Criminal Attempts Act 1981, which is one of the original charges set out at [28] above.

36. The Amended Charges document was uploaded to the "Applications" section of the DCS on 19 March 2021.

37. The sentencing judge was the same judge who had imposed the SHPO upon Chaplin in 2017 for similar offences. The 2017 offending had concerned a 13 year old boy, whose father discovered (from looking at his son's Facebook messages) that he had arranged to meet Chaplin. The father drove to the area where his son and Chaplin had arranged to meet, and discovered his son in the passenger seat of a car with Chaplin. He told his father "he wanted me to suck his dick dad, but I didn't want to". On 10 June 2017 Chaplin had pleaded guilty to two offences, one a breach of Sexual Offences Prevention Order (or SOPO) (which had been imposed for similar offences in February 2015), and the second of causing or inciting a male child under the age of 16 to engage in penetrative sex with an adult contrary to s.10(1)(a) Sexual Offences Act 2003. Chaplin was sentenced on 24 November 2017 to 20 months imprisonment for this offence, with a term of imprisonment of 9 months concurrent for the breach of the SOPO. A SHPO was imposed.

38. Therefore the sentencing judge had direct prior dealings with Chaplin, having imposed these sentences himself in November 2017. A sentencing note was prepared for him by counsel for the prosecution (not Mr Johnson who appeared before us on this appeal and renewed application). This stated at paragraph 20 the following:

"20.The defendant appeared at the magistrates' court on the 13.02.20 and entered guilty pleas. At the hearing on the 16.03.20 both prosecution and defence counsel indicated that 2 of the charges should have been charged as attempts. The correct charges have been uploaded onto document Q2 and it is intended to request the Crown Court to utilise its power to sit as a District Judge in the Magistrates' Court."

39. The following therefore occurred on 26 March 2020. Counsel for both prosecution and for the defendant were agreed that the two original charges of meeting a child following sexual grooming (contrary to section 15 of the Sexual Offences Act 2003) and sexual communication with a child (contrary to section 15A(1) and (3) of the Sexual Offences Act 2003) were incorrectly charged and should not have been brought. The sentencing judge said that these two original charges should be "withdrawn". The judge was invited by the prosecution to sit as a DJ(MC) under s.66. Acting in this way, he accepted two pleas of guilty to the two new charges (alleging attempts and set out at [33] above) and committed these two offences to the Crown Court for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 under case number S20200093.

40. The judge then sought to proceed to sentence on all the offences before the Crown Court, three of the original five (which had been originally committed to the Crown Court by the Magistrates' Court) and the two newly charged attempts (committed to the Crown Court by the sentencing judge sitting as a DJ(MC)). Chaplin was appearing by video link, visible to the judge. All counsel were appearing by telephone. Chaplin, who maintained he had mental health issues, became increasingly distressed and wished to leave. The judge therefore took the decision to adjourn the sentencing hearing part way through.

41. Further hearings were listed for sentence on 1 June 2020 and 15 June 2020, but these were not effective for a number of reasons, including absence of Chaplin. Eventually, the sentencing hearing took place on 27 July 2020 in his absence.

42. The sentencing judge pointed out that Chaplin had refused to engage with the probation service when a pre-sentence report had been ordered, and also that it was accepted that any mental condition or medical issues from which he was suffering were not linked to this particular offending. He explained that he considered the sexual behaviour to young boys by Chaplin to be entrenched and devoid of any self-control, and that his previous offending had consisted of sexual activity with a 15 year old friend of his son in 2015, and similar behaviour with a 13 year old boy in 2017. He observed that the current offending demonstrated that Chaplin refused to comply with licence conditions or the terms of the orders designed to protect the public, particularly young boys, namely the SOPO and SHPO.

43. He found Chaplin to pose a high risk of causing serious sexual harm to male children, and found him to be dangerous. He found that an extended sentence was necessary to protect the public from harm in the future. He characterised count 1 as Category A in terms of harm culpability, which has a starting point of 4 years with a range of 3 to 7 years for person of good character. He adjusted that for the aggravating factors present, in particular the entrenched recidivist behaviour and the failure to comply with previous orders. He arrived at a sentence of 6 ½ years for the completed offence, reduced it to 6 years as it was an attempt and not a completed offence, and then reduced it for Chaplin's plea downwards to 4 years. He also expressly considered totality.

44. He therefore sentenced Chaplin to the following on each count:

    1. Attempting to meet a child following sexual grooming - contrary to section 1(1) of the Criminal Attempts Act 1981. An extended sentence of 12 years, namely a custodial element of 4 years and an extended licence period of 8 years.

    2. Attempting to have sexual communication with a child - contrary to section 1(1) of the Criminal Attempts Act 1981. 14 months imprisonment to be served concurrently to the sentence on count 1.

    3. Possession of a controlled drug of Class B (cannabis) - contrary to section 5(2) of and Schedule 4 to the Misuse of Drugs Act 1971. 28 days imprisonment to be served concurrently to the sentence on count 1.

    4. Breach of a Sexual Harm Prevention Order (namely the possession of the mobile phone) – contrary to section 103I(1) and (3) of the Sexual Offences Act 2003. 16 months imprisonment to be served concurrently to the sentence on count 1.

    5. Attempting to cause a child aged under 16 to look at an image of sexual activity - contrary to section 1(1) of the Criminal Attempts Act 1981. 2 years imprisonment to be served concurrently to the sentence on count 1.

45. Consequential other orders were also made in terms of imposition of a further SHPO, imposition of the victim surcharge, and restrictions under the Safeguarding Vulnerable Groups Act and the Debarring and Disclosure Service.

46. An appeal was promptly lodged including a ground that the sentence on count 1 exceeded the maximum sentence of 10 years' imprisonment for the offence of offence under section 15 of the Sexual Offences Act 2003. The sentence passed was indeed in excess of that, as it was a total sentence of 12 years. The Registrar of Criminal Appeals brought this to the attention of the sentencing judge, together with the fact that the court was still within time to have the benefit of the period available to vary or rescind a sentence. This is now contained in section 385 of the Sentencing Act 2020, but at the time the relevant statutory provision was section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 as amended. The 56 day period to vary or rescind a sentence is the same under both provisions.

47. Accordingly, the judge realised that he had passed a sentence that exceeded the statutory maximum, and exercised the powers available under this provision to reduce the sentence on that first offence. He did that on 18 September 2020 and varied the sentence for that offence, so that the custodial element remained at 4 years but the extended licence period became 6 years, thus equating to an overall sentence of 10 years. This was within the statutory maximum sentence available for the substantive choate offence, and not in excess of it.

48. The technical difficulty in this case is as follows. The original five charges with reference S202000053 were all validly before the Crown Court, having been committed to the Crown Court for sentence entirely correctly by the Magistrates' Court. The Magistrates' Court was therefore *functus officio* in respect of these offences and could take no further steps. No sentence had been passed upon the two offences under section 15 and 15A to which Chaplin pleaded guilty before the Magistrates and which were then sent to the Crown Court for sentence. No sentences were passed in respect of these offences; the sentencing judge merely stated that these were to be "withdrawn".

The legal framework

49. We do of course bear in mind the overriding objective in Criminal Procedural Rules 2020 rr.1.1 to rr.1.3. However, there is a limit to the ability of the court to rely upon or apply these in dealing with issues of jurisdiction. The Divisional Court in ***Hubner v District Court of Prostejov, Czech Republic*** [2009] EWHC 2929 (Admin) stated at [7] (per Elias LJ) that the over-riding objective could not affect the interpretation of substantive law or regulate the manner in which principles of law must be interpreted or construed. If something was done without jurisdiction, there is no mechanism available under the Criminal Procedural Rules to remedy this.

50. Section 66 of the Courts Act 2003 permits holders of judicial office to act as DJ(MC) and gives them the same powers – but only the same powers – as they would have acting in the Magistrates' Court when they do so.

51. The section states:

> "66 **Judges having powers of District Judges (Magistrates' Courts)**
> (1) Every holder of a judicial office specified in subsection (2) has the powers of a justice of the peace who is a District Judge
> (Magistrates' Courts) in relation to–
> (a) criminal causes and matters
> [a repealed provision which formerly extended scope to family proceedings]

(2) The offices are–
(a) judge of the High Court;
(aa) Master of the Rolls;
(ab) ordinary judge of the Court of Appeal;
(ac) Senior President of Tribunals;
(b) deputy judge of the High Court;
(c) Circuit judge;
(d) deputy Circuit judge;
(e) recorder;
[(f) – (o) then continues the list, these having been added by paragraph 4 of Schedule 14 to the Crime and Courts Act 2013, which appears in Part 2 of that Schedule.]

(7) This section does not give a person any powers that a District Judge (Magistrates' Courts) may have to act in a court or tribunal that is not a magistrates' court."

52. In ***R v Gould*** [2021] EWCA Crim 447 the Court of Appeal considered the extent to which Crown Court judges could use the powers of a DJ(MC) to regularise or correct serious failures by the prosecution in charging criminal offences. It was made clear that the different jurisdictional limits of the different courts, which are set down in primary legislation, must be respected. That case contains a more detailed analysis of the statutory provisions, which are set out extensively in ***R v Gould*** at [9] to [13].

53. That case also explains the following at [80]:

> "[80] These important parameters within which the section 66 powers may be used have been overlooked in some of the present cases and perhaps elsewhere. It is worth restating them:-
>
> i) When the Magistrates' Court makes an order which gives jurisdiction in the case to the Crown Court, whether by committal for sentence or sending for trial, that is the end of their jurisdiction in the case. In technical language they are *functus officio.* The Crown Court judge cannot use section 66 to make any order which the Magistrates' Court could no longer make.
>
> ii) There is no power in the Crown Court to quash an irregular order. Where it is plainly bad on its face, the Crown Court may hold that nothing has occurred which is capable of conferring any jurisdiction to deal with it.
>
> We shall return to these points. We appreciate that this consequence of the decision in *R. v. Sheffield Crown Court* limits the power under section 66 to correct errors in committals for sentence, but it is unavoidable. If quashing is required this can only be done by a Divisional Court. We have held above that it is open to the judge in the Crown Court, as a DJ(MC), to lay and commit a new charge in the correct form. The relevant Rules Committees should consider whether an expedited and summary procedure could be adopted for the quashing by consent of unlawful committals and sendings which have been overtaken by events."
>
> (emphasis added)

54. The power of the Magistrates' Court substantially derives from the Magistrates' Court Act 1980 ("MCA 1980"). Two sections are reproduced here for convenience. Section 17A states (showing amendments such as to the Sentencing Code in section 17A(4)(b) that are currently in force and have been added):

"17A **Initial procedure: accused to indicate intention as to plea.**

(1) This section shall have effect where a person who has attained the age of 18 years appears or is brought before a magistrates' court on an information charging him with an offence triable either way.

(2) Everything that the court is required to do under the following provisions of this section must be done with the accused present in court.

(3) The court shall cause the charge to be written down, if this has not already been done, and to be read to the accused.

(4) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—

(a) the court must proceed as mentioned in subsection (6) below; and

(b) he may (unless section 17D(2) below were to apply) be committed for sentence to the Crown Court under section 14 or (if applicable) 15 of the Sentencing Code if the court is of such opinion as is mentioned in subsection (1)(b) of the applicable section.

(5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

(6) If the accused indicates that he would plead guilty the court shall proceed as if—

(a) the proceedings constituted from the beginning the summary trial of the information; and

(b) section 9(1) above was complied with and he pleaded guilty under it.

(7) If the accused indicates that he would plead not guilty section 18(1) below shall apply.

(8) If the accused in fact fails to indicate how he would plead, for the purposes of this section and section 18(1) below he shall be taken to indicate that he would plead not guilty.

(9) Subject to subsection (6) above, the following shall not for any purpose be taken to constitute the taking of a plea—

(a) asking the accused under this section whether (if the offence were to proceed to trial) he would plead guilty or not guilty;

(b) an indication by the accused under this section of how he would plead".

55. In the Respondent's Notice, the court's powers under s.142 of the MCA 1980 were brought to our attention. Section 142 states:

> "(1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.
>
> (1A) The power conferred on a magistrates' court by subsection (1) above shall not be exercisable in relation to any sentence or order imposed or made by it when dealing with an offender if—
>
> (a) the Crown Court has determined an appeal against—
>
> (i) that sentence or order;
>
> (ii) the conviction in respect of which that sentence or order was imposed or made; or
>
> (iii) any other sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of that conviction (including a sentence or order replaced by that sentence or order); or
>
> (b) the High Court has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the imposition or making of the sentence or order.
>
> (2) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may, so direct."

56. ***Blackstone' Criminal Practice*** (Oxford UP: 2022) makes clear (D22.73) that this "enables an accused who was convicted in a magistrates' court (whether as a result of a guilty plea or of a finding of guilty after a trial) to ask the magistrates to set the conviction aside." Therefore the fact that Chaplin had pleaded guilty, rather than having been found guilty after a trial, does not mean that the power under this section was not available. However, it does not assist in this scenario because there was no sentence or other order imposed upon Chaplin which was sought to be varied. The only order the Magistrates made – which was entirely valid – was that committing him to the Crown Court for sentence. The effect of this order was to deprive the Magistrates of any further jurisdiction in the case, see above.

57. So far as Chalk is concerned, the provisions of section 51 of the Crime and Disorder Act 1998 are relevant because that was the power that the sentencing judge sought to invoke in acting as a DJ(MC) and sending the matter to the Crown Court. That section states (in part only):

"**51. Sending cases to the Crown Court: adults**

(1) Where an adult appears or is brought before a magistrates' court ("the court") charged with an offence and any of the conditions mentioned in subsection (2) below is satisfied, the court shall send him forthwith to the Crown Court for trial for the offence.

(2) Those conditions are—

(a) that the offence is an offence triable only on indictment other than one in respect of which notice has been given under section 51B or 51C below;

(b) that the offence is an either-way offence and the court is required under section 20(9)(b), 21, 22A(2)(b), 23(4)(b) or (5) or 25(2D) of the Magistrates' Courts Act 1980 to proceed in relation to the offence in accordance with subsection (1) above;

(c) that notice is given to the court under section 51B or 51C below in respect of the offence.

(3) Where the court sends an adult for trial under subsection (1) above, it shall at the same time send him to the Crown Court for trial for any either-way or summary offence with which he is charged and which—

(a) (if it is an either-way offence) appears to the court to be related to the offence mentioned in subsection (1) above; or

(b) (if it is a summary offence) appears to the court to be related to the offence mentioned in subsection (1) above or to the either-way offence, and which fulfils the requisite condition (as defined in subsection (11) below).

(4) Where an adult who has been sent for trial under subsection (1) above subsequently appears or is brought before a magistrates' court charged with an either-way or summary offence which—

(a) appears to the court to be related to the offence mentioned in subsection (1) above; and

(b) (in the case of a summary offence) fulfils the requisite condition, the court may send him forthwith to the Crown Court for trial for the either-way or summary offence."

58. It can be seen (relevant in the case of Chalk) that by use of the phrase "the court shall send him forthwith to the Crown Court", the section is dealing with the powers of the Magistrates' Court. If the case is not before the Magistrates, or if the Magistrates no longer have jurisdiction to deal with it, then the Magistrates cannot use this power to send matters to the Crown Court. The same applies to a judge of the Crown Court who is seeking to act as a DJ(MC). He or she can only make an order if the Magistrates' Court could do so.

59. The relevant power to be considered in the case of Chaplin is that of the court to permit a defendant to change their plea from one of guilty, to a plea of not guilty. This is a power that does not originate in statute, but rather the common law. This is a discretion; ***S v Recorder of Manchester*** [1971] AC 481, which the passage in ***Blackstones*** describes thus:

> "The existence of the discretion was indirectly confirmed by the House of Lords in ***S v Recorder of Manchester*** [1971] AC 481, when it held that, <u>in the context of</u>

> change of plea, there is no conviction until sentence has been passed, and therefore magistrates (like the Crown Court) can allow a change to not guilty provided they have not yet passed sentence."
>
> (emphasis added)

60. The procedure for such an application is set out in Criminal Procedure Rules 25.5. Rule 25.5(2) requires it to be made in writing as soon as practicable after becoming aware of the grounds for doing so, and at (a)(ii) "in any event, before the final disposal of the case, by sentence or otherwise". We are of the view that the term "by sentence" must relate to sentence on the count or offence in respect of which the guilty plea is sought to be vacated. Until a defendant is sentenced on that particular count, the court retains the power to allow that defendant to change their plea on that count.

61. ***R v Gould*** considered this Part of the Criminal Procedure Rules at [110] to [112] and concluded that the need for a written application to vacate a guilty plea was a mandatory requirement. The court also stated that the court had the power to direct that a guilty plea be vacated, even against the wishes of the person who entered it (although it was accepted that would be highly unusual and only in an extraordinary case). This makes clear that a guilty plea can be vacated at the instigation of the prosecution or even of the court.

62. Finally, given when Chaplin was charged with the two attempts on 26 March 2020 he had already pleaded guilty to the two substantive offences under s.15 and s.15A Sexual Offences Act – and was merely awaiting sentence for these in the Crown Court, where these offences had been lawfully committed for that purpose – he would have been entitled to have raised the plea of autrefois convict when these two new offences (the attempts) were put to him by the judge sitting as a DJ(MC). However, this plea, together with those of autrefois acquit and pardon, operate as what are called pleas-in-bar. This means that, if they are upheld, these pleas bar any further proceedings. This is a procedural mechanism that acts as a safeguard against a defendant being repeatedly prosecuted, or prosecuted more than once. They do not, in law, extinguish the underlying offence, or mean that the court has no jurisdiction in respect of matters arising out of the same facts as those related to the underlying offence for which a conviction already exists.

63. There is extensive case law concerning the precise circumstances in which such pleas-in-bar can be relied upon, and what exactly qualify as findings that can form the basis of such pleas. It is not necessary to consider them in any detail here. All we would observe is that the availability to Chaplin of such pleas on the two attempt charges does not, of itself, invalidate the bringing of those new charges against him, or mean that this was done without jurisdiction.

64. Two cases were cited to us which it was said did invalidate the bringing of two charges of attempting to commit the s.15 and s.15A offence, when convictions were in place for the substantive offences themselves. These were ***R v Manchester Crown Court ex parte Hill*** (1985) 149 JP 257, a decision of the Divisional Court, and the far more recent decision of this court in ***R v Jessemey*** [2021] EWCA Crim 175. In ***ex parte Hill***, the Divisional Court found that on an appeal against conviction for a full offence (in that case making off without payment contrary to s.3(1) of the Theft Act 1978) to the Crown Court from the Magistrates' Court, the Crown Court could not on that appeal acquit the defendant of the offence but find him guilty of an attempt and convict under s.1(1) of the

Criminal Attempts Act. It was held that there was no power to substitute an alternative charge for that which appeared in the information before the court. The justices themselves could not have done so, and therefore the Crown Court could not on appeal either, as the powers of the Crown Court in dealing with an appeal against conviction were the same as those of the justices at the summary trial.

65. In ***Jessemey***, William Davis J (as he then was) considered an appeal against sentence, which concerned a similar offence to those brought against Chaplin, namely attempting to incite a child under the age of 13 to engage in non-penetrative sexual activity and to engage in sexual communication with a child. The "child" in question was thought by the appellant to be a 12 year old girl, but was in fact an undercover police officer. The following is explained:

"[7] In June 2020 the appellant was sent a postal requisition. It contained a single charge of attempting to engage in sexual communication with a child. The substantive offence is set out in section 15A of the Sexual Offences Act 2003. It is an either way offence with a maximum sentence of 2 years' imprisonment.
[8] On 11 August 2020 the appellant appeared at the Oxford Magistrates' Court. This was his first appearance in answer to the postal requisition. At court the prosecution preferred a second charge, namely the charge in respect of which the appellant eventually was sentenced. The underlying substantive offence in relation to that charge (namely section 8 of the Sexual Offences Act 2003) also is an either way offence. Where the activity alleged is non-penetrative the maximum sentence is 14 years' imprisonment. Although particularised as an *attempt* to commit the offence - as it had to be since there was no child to incite - the offence was described on the court record as being *contrary to section 8 of the Sexual Offences Act 2003* rather than section 1 of the Criminal Attempts Act 1981.
[9] This is the first procedural issue which we must address. Rebecca Saillet was concerned that the statement of the offence being in those terms might have affected the lawfulness or validity of the charge. We are satisfied that it did not. Anyone charged with a substantive offence can be convicted in the alternative on an attempt to commit the offence. It must follow that a misdescription of the statutory basis of the charge of the kind that occurred in this case will be of no substantive consequence."
(emphasis added by underlining; italics present in original)

66. We are satisfied that there is no inconsistency between these two cases. They deal with different issues. ***Ex p. Hill*** concerns the powers of the Crown Court on hearing an appeal against conviction after a summary trial before Magistrates. The Crown Court has no power to substitute a conviction for some offence other than that on which the Magistrates had convicted, even where that other offence was an attempt to commit the substantive offence when the Magistrates had convicted of the full offence. ***Jessemy*** decided that a charge is not rendered bad in law where it alleges an attempt but cites the statute creating the substantive offence, rather than the Criminal Attempts Act 1981 as the offence creating provision. The reasoning in support of that proposition may require further thought if a case ever arises where the point falls for decision. It is not clear where the very broad proposition that "Anyone charged with a substantive offence can be convicted in the alternative on an attempt to commit the offence" originates. It cannot be section 6 of the Criminal Law Act 1967 because that relates only to the power of a jury to return verdicts of guilty to lesser offences where they acquit of a more serious offence on an indictment. No jury was involved in ***Jessemey*** which concerned a

committal for sentence in an either way offence following a guilty plea. The position is not the same in summary proceedings as it is where there is an indictment. However, there is no reason to doubt the actual decision in ***Jessemey*** which is that a clearly drafted charge of an attempt is not vitiated by the citing of the provision which created the substantive offence as opposed to the Criminal Attempts Act 1981. The better modern practice suggests that both statutes should be cited in the charge or count, see ***R v Reed*** [2021] EWCA Crim 572.

67. In any event, the fact that in the Crown Court someone being tried for a substantive offence can be convicted, in the alternative, of an attempt, with there being no corresponding power in the Magistrates' Court (or the Crown Court on appeal from the Magistrates' Court) unless the attempt is separately charged, does not impact upon our analysis in this case of Chaplin.

68. In the case of Chaplin, the Magistrates' Court did nothing wrong, and the errors flowed from the prosecution charging Chaplin with two substantive offences under s.15 and s.15A of the Sexual Offences Act 2003, when it was impossible for him to have committed these, given the involvement of the undercover police officer. Chaplin himself pleaded guilty to these, and all five were validly committed to the Crown Court for sentence. Applying the ratio of ***Gould*** set out at [53] above, the Magistrates' Court was thereafter *functus officio* in respect of those five charges.

69. When it was realised that two new charges were required to charge Chaplin with attempts, rather than the substantive offences (to which he had already pleaded guilty) the judge acted correctly in sitting as a DJ(MC), taking pleas and sending these offences to the Crown Court for sentence. The possible availability to Chaplin of the pleas-in-bar of autrefois convict on the two new counts does not impact upon the jurisdiction of the court to do that.

70. All that remains is for the two pleas of guilty for the substantive offences under s.15 and s.15A to be vacated. There was no factual basis for these charges to have been brought against Chaplin, and even though he pleaded guilty to them both, this should not have occurred. Vacating these two pleas can be done by the Crown Court, as the matter was correctly committed to the Crown Court for sentence and is therefore no longer before the Magistrates' Court. We waive the requirement for a written request under Crim PR 25.5(2). Vacating these pleas cannot be done by the Court of Appeal. The court has therefore nominated Fraser J to sit as a judge of the Crown Court in this respect in order to do this. Nothing further is required in this respect because Chaplin was never sentenced by the court for either of the two offences in question, matters proceeding on the two attempts as we have explained. The effect of doing so means that Chaplin will no longer have pleaded guilty to these two offences, which were committed to the Crown Court for sentence and in respect of which no sentences were passed. They will be remitted to the Magistrates. The respondent has undertaken to issue to the Magistrates' Court a notice of discontinuance, pursuant to section 23 of the Prosecution of Offences Act 1985, in respect of both offences.

71. Turning to Chalk, five offences were sent to the Crown Court by the Magistrates' Court. As we have explained, four of these were sent to the Crown Court for trial, and one was sent for sentence, namely assault by beating an emergency worker, in this case PC Deveau. That is because Chalk had indicated that he intended to plead guilty to this offence. One of the four counts sent for trial was discontinued, and Chalk pleaded guilty

to the remaining three of them on re-arraignment in the Crown Court. Everything that transpired on those three was valid and lawful, as were the sentences passed upon them.

72. However, the sentencing judge on 9 February 2021 was told that the count relating to PC Deveau had not been lawfully committed to the Crown Court for sentence. He was told that this was because there had been no plea entered in the Magistrates' Court. For this reason that count had appeared on the trial indictment. There had also been the recording error that we have explained at [13] above on the memorandum of sending.

73. In fact, this is not what had occurred in the Magistrates' Court. The prosecution has explained in the Respondent's Notice before us that "neither party understood the legal effect of what had occurred in the Magistrates' Court". Chalk had indicated a plea of guilty to this count in which case section 17A(6) of the Magistrates' Court Act 1980 means it was validly before the Crown Court. The matter was lawfully committed to the Crown Court for sentence. The Magistrates' Court was therefore *functus officio*, the matter was before the Crown Court for sentence and it was validly before the judge who was sitting in the Crown Court.

74. This means that the sentencing judge had no power to act as a DJ(MC) under s.66 of the Courts Act 2003. He was encouraged to act as such by the prosecution, who invited him to do so to send the charge relating to PC Deveau to the Crown Court under section 51(1) and (2)(b) of the Crime Disorder Act 1998. Having been so invited, the judge did so. He explained that in practical terms it would "be noted and kept in mind that, in relation to that matter, if Mr Chalk pleads guilty to it, then his credit will be the full one third".

75. However, what the sentencing judge had been told was wrong. The committal for sentence had in fact been lawful. This means that the count relating to the assault by beating of PC Deveau was validly before the Crown Court for sentence. The sentencing judge's use of s.66, by purporting to correct the situation by sitting as a DJ(MC), was without jurisdiction and the steps taken thereafter in respect of this offence were unlawful. This was incorrect and this is conceded by the prosecution. Having taken the various procedural steps he did, he passed a sentence of 24 weeks imprisonment for that offence, but concurrently with the sentences on the other counts. That sentence for that specific offence was unlawful, as what he purported to do as a DJ(MC) was without jurisdiction.

76. Accordingly, we sit as a Divisional Court. We will give leave to bring judicial review proceedings to quash what the sentencing judge did in relation to that offence acting as a DJ(MC), as it was unlawful. All procedural requirements are dispensed with and we make that quashing order. The effect of this is that the sentence of 24 weeks on that count is also quashed, as it was an unlawful sentence. The original charge, validly committed to the Crown Court for sentence, remains to be sentenced by the Crown Court.

77. We are of the view that, given the sentence was ordered to run concurrently with the sentences on the other counts, and given Chalk has now been released having served that term of imprisonment, the interests of justice do not require him to be subject to a separate sentence for that offence. Accordingly, we nominate Fraser J to sit as a judge in the Crown Court, and no separate penalty is imposed for this offence.

78. The sentencing judge in Chalk was also faced with activating a Suspended Sentence Order. That was activated by the sentencing judge, with the operative period of 20 weeks

being reduced to 18 weeks. However, the SSO that had been imposed was itself made up of 2 sentences of 12 weeks' imprisonment concurrent to one another (both suspended for 12 months) and 2 sentences of 8 weeks' imprisonment, concurrent to one another but consecutive to the two sentences of 12 weeks (also suspended for 12 months). We have referred to details of these at [10] above. The activation did not make clear which sentences were being reduced to arrive at the period of imprisonment of 18 weeks. Clarification is therefore required in this respect.

79. We turn therefore to the submissions that the sentences in fact passed upon each of Chalk and Chaplin were manifestly excessive.

The substantive appeal in Chalk

80. This is brought with the leave of the single judge. There are three grounds of appeal. These are that the starting points adopted by the judge were too high; that there was insufficient regard had to the principle of totality; and that there was insufficient regard to the personal mitigation available to Chalk.

81. We start by recording the aggravating factors of the assault against Miss McBay. Chalk had committed a number of different offences of violence against her, amongst his previous convictions which number 36 different offences. Not only had she previously obtained a non-molestation order against him, but in 2013 he committed three separate breaches of that order, and he assaulted her twice in 2014, leading to a restraining order. Offences committed within the context of a relationship are not lessened in their seriousness by their regularity, or by the fact that the relationship may continue. Indeed, they are more serious as a result.

82. Victims of domestic violence and abuse suffer in everyday life, and in the location where people are entitled to feel most safe, namely at home, or doing normal everyday tasks such as going about their daily affairs in the company of their partner.

83. Another group of people in society who are entitled to go about their daily affairs without having violence inflicted upon them are emergency workers, in this case police officers. Their job is to protect members of the public and investigate crime. The two officers involved in this case were assaulted; subjected to shouting and screaming; had foul language used against them; and were abused and threatened. This also included abuse and threats towards their families. One of the officers was bitten on the hand, and also the leg. The other officer had his leg grabbed and squeezed.

84. Nor are these isolated occurrences. These offences took place on 6 August 2020 but Chalk was actually serving suspended sentences at the time, imposed on him in March 2020, five months earlier. Those sentences were for very similar offences which had occurred in January 2020, when he broke a window at Miss McBay's home, and assaulted two police officers who came to arrest him. He also then damaged the cell into which he was placed at the police station. As noted by the sentencing judge, these offences were entirely consistent with the pattern of his offending over the years, and the suspended sentences passed on him earlier in 2020 seem to have had absolutely no impact upon his offending at all.

85. There is little doubt that Chalk's behaviour went somewhat downhill since his mother died 11 years ago, but a very large proportion of the population suffer family

bereavements, and this is not an excuse for the prolonged offending, including the numerous offences committed since 2015.

86. We are entirely satisfied that the sentences passed by the judge adopted the correct starting points, taking into account all of the relevant factors of the offending, also took proper account of totality, and fully considered the personal mitigation available to Chalk. The resulting sentences were not manifestly excessive.

87. There is one respect in which an order of this court is required. Clarification is required in terms of which of the sentences that had been suspended, but were being activated, were reduced in order to achieve the overall total of 18 weeks. We have concluded that the correct order in all the circumstances is to activate each of the four suspended sentences (two orders with concurrent terms of 12 weeks' imprisonment for offences of assault of an emergency worker, and two orders of 8 weeks' imprisonment for two offences of criminal damage) but reduced by one week each, thus reducing the overall total by 2 weeks from 20 weeks to 18 weeks' imprisonment. That 18 weeks' imprisonment is to remain consecutive to the period of imprisonment of 36 weeks' imprisonment on the offences, the subject of the instant appeal, that were committed on 6 August 2020.

88. We have already dealt with the fifth offence of assault by beating an emergency worker in respect of what occurred to PC Deveau. No separate penalty is imposed for that offence for the reasons we have explained above at [77] above.

The renewal of the application to appeal in Chaplin

89. The grounds are three-fold. They were that the court was wrong in principle to refuse to adjourn the sentencing hearing for a psychiatric report to be prepared; that the court imposed a manifestly excessive sentence as the starting point was too high for the lead offence; and the court gave insufficient weight to Chaplin's case, alternatively failed to give sufficient weight to the fact the offences were attempts and that the victim was a police officer and not a real child.

90. In refusing permission to appeal, the single judge said:

> "1. Your first ground of appeal concerns the judge's decision to sentence in the absence of a psychiatric report and to decline to adjourn sentencing on 27 July for that purpose. I accept that psychiatric evidence of a mental disorder may provide grounds for mitigation in accordance with the sentencing guidelines for your s.15 offence ("mental disorder … particularly where linked to the commission of the offence") and more generally (see the decision in ***R v PS*** [2019] EWCA Crim 2286).
>
> 2. However, the judge recorded in his sentencing remarks that it was "accepted that any current medical or mental issues that the defendant has were not linked to the particular offences for which he's being convicted on his own plea of guilty". Whilst current mental issues could be taken into account on sentence in relation to the impact of custody, this would only be "in a limited way": see ***R v PS*** paragraph [9].
>
> 3. In my view, the judge's decision to proceed to sentence in the absence of a psychiatric report involved no arguable error of principle, and was well within the ambit of his discretion, in the context of: (i) the background described below; (ii) the fact that the

judge had a detailed pre- sentence report on the issue of dangerousness (based principally on an earlier pre-sentence report), which included reference to your history of anxiety and depression; and (iii) the potential for only a limited impact of any psychiatric issues in the context of the impact of custody.

4. That background, as reflected in the comments recorded on the DCS, was that: (a) On 25 February 2020, the judge was told that the report would be served by 6 April 2020.
(b) On 28 May, the judge was told that the report "could be served by the end of June".
(c) At this point, sentence had previously been listed for sentence on two previous occasions.
(d) On 1 June 2020, the judge adjourned sentencing to 15 June, stating that the court was to be informed as to what happening in relation to the report, with the defence to inform the court as to its relevance for sentencing. It does not appear that the defence provided any relevant information in response to this direction.
(e) On 15 June, sentencing was further adjourned to 27 July, with the court directing that the psychiatrist's report be served by 20 July. No report was served.
(f) On 24 July, the judge asked for an update and was then wrongly informed by the defence solicitors that a report "had been refused on two occasions".
(g) On 25 July, the judge summarised the history in a comment on the DCS, and indicated his intention to sentence on 27 July.

5. Your second ground of appeal is that the judge's starting point of 6 years (in relation to the custodial term of your extended sentence), prior to reduction for your guilty plea, was manifestly excessive. I do not consider that this is arguable. The judge correctly treated the s 15 offence (attempting to meet a child following sexual grooming) as the lead offence, and his sentence for that offence took into account the other offending to which you had pleaded guilty. It is not arguable that the judge erred in categorising the s.15 offence as "Category 1" (starting point 4 years, range 3- 7 years) in view of the exchange of sexual images and the intention to commit penetrative sexual acts. In view of your prior offending, and the overall criminality for which the judge was sentencing you, a custodial term of 4 years (after credit for plea) was within the sentencing guidelines and well within the scope of the judge's discretion on sentence.

6. Your third ground of appeal concerns other mitigating factors: in particular (i) that your s.15 and related offences only involved an attempt (because the intended victim was an undercover police officer); (ii) the impact of Covid-19 on prisoners, particularly yourself; and (iii) your mental health condition of anxiety and depression. The judge was, however, well aware of all of these matters. Even taking them into account in your favour, a custodial term of 4 years is not arguably manifestly excessive in the circumstances of your case."

91. We have nothing we can usefully add to those detailed views, with which we wholly agree.

92. We have already at [70] above explained that we vacate the two guilty pleas leading to the two convictions for the two substantive offences under s.15 and s.15A of the Sexual Offences Act 2003, to which Chaplin pleaded guilty at the Magistrates' Court but which were never sentenced. This is done by one of our number sitting in the Crown Court as we have explained. No other order is necessary and given no sentences were ever passed on those two offences (which were replaced by the charges of attempts, which were

sentenced), doing so has no effect upon the terms of imprisonment currently being served by Chaplin, or upon any of the other orders.

93. We refuse the renewed application for permission to appeal.

Conclusion

94. Unlawful sentences cannot be permitted to remain in place undisturbed, and such errors should be avoided in the future. If sufficient care is taken when charges are drafted and put to defendants in the Magistrates' Court, and accurately described and then explained (if necessary) in the Crown Court, then this type of scenario can be avoided. Speedy resolution of proceedings in the Magistrates' Court is a laudable aim, but it cannot be at the expense of technical accuracy. Prosecutors in particular should be careful in proceeding correctly. The type of technical error that has occurred in these cases takes a great amount of court time and use of resources to correct.