

Criminal Law Directions

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Chapter 7 Non-fatal offences against the person

7.6 Administering a noxious thing

7.6.1.2 Poison or noxious thing

Urine is capable of being a ‘noxious thing’ within the meaning of s.24 of the Offences Against the Person Act 1861. The Court of Appeal in *R v Veysey* [2019] EWCA Crim 1332 relied on the decision in *R v Marcus* which focused on the manner and quantity in which substance was administered and drew attention to the court’s interpretation of ‘noxious’ as a substance which is ‘unwholesome’. The Court held that when the issue arises as to whether a substance is ‘noxious’ under s.24, it will be for the judge to determine as a matter of law whether the substance (taking into account the quantity and manner of administration) could properly be found by the jury to be ‘injurious, hurtful, harmful or unwholesome’. If so, it will then be a matter for the jury to determine whether they are satisfied that it was a noxious thing within that definition. In this case, the Court of Appeal held that the judges in the first instance decisions were entitled to find that a cup of human urine, from an unknown source, thrown at the face of the victim is capable of being an unwholesome thing, and therefore a noxious thing.

Chapter 8 Sexual Offences

8.7.3 Engaging in sexual activity in the presence of a child, s.11

The offence of engaging in sexual activity in the presence of a child under s.11 of the Sexual Offences Act 2003 required proof that the defendant had engaged in sexual activity in the presence or under the observation of a child in order to gain some sexual gratification from that presence or observation. In *R v B* [2018] EWCA Crim 1439, the Court of Appeal held that ‘for the purpose of obtaining sexual gratification’ under s.11(1)(c) was not superfluous and that the purpose of the sexual gratification had to be linked to the presence or observation of the child.

Chapter 9 Theft

9.2.1 Dishonesty

9.2.1.2 Positive aspect: *Ivey v Genting Casinos (UK) Ltd*

In *R v Barton* [2020] EWCA Crim 575, the Court of Appeal affirmed that the test for dishonesty in criminal proceedings is that set out in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. The Court of Appeal held that the rules of precedent required the Court of Appeal to follow decisions of the Supreme Court, even where the decision was strictly *obiter*. It held that rules of precedent had to be capable of flexibility where appropriate and acknowledged that the purpose of the rules of precedent is to provide legal certainty. Thus, where the Supreme Court unanimously directed that an otherwise binding decision of the Court Appeal

should no longer be followed and set out an alternative, then that alternative test should be adopted. This is the case even though the direction by the Supreme Court was strictly *obiter*. Thus, the test for dishonesty in respect of criminal law is that set out in *Ivey*.

Chapter 11 Fraud

11.2.1 Fraud by false representation

11.2.1.1 Dishonesty

The Court of Appeal has now confirmed that the test for dishonesty is that set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67: see *R v Barton* [2020] EWCA Crim 575 in update to 9.2.1.2.

11.2.2 Fraud by failing to disclose information

In *R v D* [2019] EWCA Crim 209, the defendant was charged with 5 counts of fraud by false representation and one count of fraud by failing to disclose information. The prosecution related to representations that the defendant had made to the local authority to the effect that she was no longer resident at the property and thus should not be liable for council tax payments. The prosecution case was that the defendant remained resident at the property and had made the representations to avoid paying council tax. The trial judge ruled that the charge of fraud by failing to disclose information should be terminated and the prosecution appealed against this ruling. The key issue that arose was whether the defendant was under a legal duty to notify the council that she continued to reside at the property. The Court of Appeal held that ‘legal duty’ was not defined under the Fraud Act 2006, and thus, the position depended upon whether as a matter of law such an obligation could be statutorily implied. The prosecution was unable to point to any statutory authority or documentation from the local authority that imposed such a duty on the defendant. There was no common law relationship between the local authority and the defendant which could give rise to such a duty. There was no fiduciary relationship or other equitable obligation requiring notification. Thus, there was no general legal duty to notify the local authority of her continued residence at the property.

Chapter 13 Defences I: incapacity and negating the elements of the offence

13.6.1 Involuntary intoxication

The principle in *R v Sheehan and Moore* [1975] 1 WLR 739, that a drunken intent is still an intent, is not a direction on a matter of law, but on how the jury should approach its fact-finding task. In *R v Mohamadi* [2020] EWCA Crim 327, the Court of Appeal held that while it would have been preferable for the trial judge to direct the jury in accordance with *R v Sheehan and Moore* on the relevance of intoxication to intention, the judge’s omission to do so did not render the conviction unsafe as she had directed the jury correctly on the law and had given a fair summing up of the evidence, including the evidence relating to the defendant’s intoxication.

Chapter 16 Accessorial liability

16.2.2 The decision in *R v Jogee*

The appellant's appeal against a conviction for murder was dismissed in *R v Johnson-Haynes* [2019] EWCA Crim 1217. The Court of Appeal held that the trial judge's direction had been impeccable according to the law as it had been pre-*Jogee*. In accordance with the decision in *R v Johnson* [2016] EWCA Crim 1613, the Court would only consider the safety of a conviction if an applicant could show 'substantial injustice'. This was a high threshold and the mere fact that there had been a change in the law was not of itself sufficient. In this case, there was a powerful case that the appellant was a party to a joint enterprise in which he personally intended that grievous bodily harm would be inflicted. Thus, there was a proper basis on which to conclude that the jury's verdict that the appellant was guilty of murder would not have been different notwithstanding the change to the law following *R v Jogee*.

In *R v N* [2019] EWCA Crim 2280, the Court of Appeal emphasised that in cases involving accessory liability, it was important that a trial judge provides the jury with written directions due to the complexity of the law. In this particular case, the Court of Appeal was surprised that the trial judge had not provided the jury with written directions, but the Court was nevertheless satisfied that the jury had understood the oral directions given in summing up.