March 2021

The Sentencing Act 2020 c17

This Act came into force on 1 December 2020 and creates the "Sentencing Code" which addresses matters that take place before and at sentencing, but not release or recall provisions. It brings together the legislative provisions which courts refer to when sentencing offenders. Its remit is both adult and youth sentencing.

Its purpose is to make it easier for judges to identify and apply the law correctly, thereby reducing the number of criminal cases that are appealed on the basis of sentencing. The Code provides increased public transparency and is the outcome of the Law Commission's Sentencing Code project.

The Code applies to all those sentenced on or after the 1st December 2020 regardless of when the crime was committed.

Cases

R v Richards [2020] EWCA Crim 95

The question for the court to determine was whether D could be guilty of the offence of voyeurism under s. 67(3) Sexual Offences Act 2003 where he video recorded himself having sexual intercourse with a person, who was not aware they were being filmed. Did 'V' have a reasonable expectation of privacy during an act of intercourse with another taking place in V's bedroom and therefore did video recording the act of intercourse without her consent amount to a breach of that privacy for the purposes of the offence of voyeurism.

Held: There is a reasonable expectation that a private act of sexual intercourse with another in a bedroom would not be filmed by the other participant. Participating in the sexual intercourse is no bar to a charge and conviction for voyeurism under s. 67(3).

Facts:

Two women made complaints after the police discovered videos of sexual acts between them and D on D's mobile phone. The footage showed D having sexual intercourse with the women in their bedrooms. The complainants stated that they were not aware that they were being recorded and D was prosecuted for two counts of voyeurism under s. 67(3) Sexual Offences Act 2003. This offence requires that: a person (a) records another person (V) doing a private act, (b) D does so with the intention that D or a third person will, for the purpose of obtaining sexual gratification, look at an image of V doing the act, and (c) D knows that V does not consent to D recording the act with that intention. A private act as defined under s. 68 occurs when a person is in a place, which in the circumstances, would reasonably be expected to provide privacy.

By Vanessa Bettinson

It was the prosecution's case that although D participated in the sexual intercourse that he filmed with each of the complainants, the filming occurred in a place that could reasonably be expected to be private and free from filming. The trial judge had ruled against a submission of no to answer taking the view that the offence of voyeurism could be committed by a participant involved in the private act. D appealed against his conviction on this point.

The decision:

D argued that the offence of voyeurism could not take place where D was a participant in the sexual activity being filmed, as his presence in their bedrooms to which they consented to could not provide them with privacy. His argument was that the location of the person alleged to have observed or recorded complainants is relevant in part to the issue of whether there was privacy for the purposes of the voyeurism offence.

The Court disagreed with D and applied its previous decision of *R v Bassett* [2008] EWCA Crim 1174. The accepted view was that D had recorded the complainants having sexual intercourse with him for the purpose of sexual gratification when replaying the recordings and that the jury were entitled to find that they had not consented to the recording. Whilst it may be strange to find that a person can be guilty of voyeurism when they themselves are in the recording, participating in a sexual activity, this is what is clearly stated by the terms of s. 67(3).

The Court said:

"There was a case for the jury to consider that this act of intimacy occurred in a place which, in the circumstances, would reasonably be expected to provide privacy from, for instance, a secret observer or a secret recording. The presence of the appellant as one of the participants in the intercourse does not lessen the reasonable expectation of privacy in this sense, namely that what occurred would not be available for later viewing, even if only by the appellant."

Referring to commentary on *R v Bassett* by David Selfe in the Criminal Law Review (2009), 193, 2-3 the court stated that,

"the expectation of privacy may vary depending on the precise relationship between the person observed and his or her observer. A person naked in a communal changing room clearly does not have an expectation of privacy as regards other genuine users, even if one of the other users coincidentally gains sexual gratification from the other person's nakedness. But the person observed has an expectation in respect of some unknown person who is secretly observing him or her from outside. We would add that similarly a person who is engaging in an act of sexual intercourse alone with another in a bedroom is engaged in a private act in a place which, *prima facie*, would reasonably be expected to provide privacy from secret filming on the part of the other participant."

The court therefore applied *R v Bassett* using a literal interpretation of s. 67(3).

By Vanessa Bettinson

R v Long, Bowers and Cole [2020] EWCA Crim 1729

The question for the court to consider was whether unlawful act manslaughter can be committed where the base offence (unlawful act) was a conspiracy to steal.

Held: Dismissing the appeal against conviction the court found that conspiracy to commit theft can be the unlawful act on which to base an offence of unlawful act manslaughter.

Facts:

The three appellants were responsible for the death of PC Harper. They had tied up a quad bike which they had stolen to their escape vehicle. Upon encountering the police car, one defendant cut the tie intending to leave the quad bike behind and enable the driver to make their escape. PC Harper was caught in the loop of the band that was still attached to the getaway vehicle and was attached in this way to the car as it drove at speed away. He died as a result of his injuries. The defendants were not aware that PC Harper was attached to the car and being dragged to his death and therefore were not found guilty by the jury of murder. They were found guilty of manslaughter, but appealed this conviction on the basis that theft, or conspiracy to steal, was not an offence of violence and could not be the basis of unlawful act manslaughter.

The decision:

Applying the earlier decision of *R v Bristow and others* [2003] EWCA Crim 1540 a conspiracy to commit theft can form the basis of an unlawful act manslaughter charge. The case of *R v Bristow* involved a conspiracy to burgle and the court considered that it could amount to an unlawful and dangerous act,

"Whilst burglary of itself is not a dangerous crime, a particular burglary may be dangerous because of the circumstances surrounding its commission. We consider that the features identified by the Crown….[as summarised above]…..were capable of making this burglary dangerous when coupled with foresight of the risk of intervention to prevent escape. [34]"

In the court's view, the defendants' "escape and the dangerous manner in which it was carried out were part and parcel of the conspiracy to steal [43]."

R v Campeanu,[2020] EWCA Crim 362

The court had to determine whether the trial judge should have given the jury the *Sheehan* direction on intoxication, where D had taken cocaine before killing his intimate partner.

Held:

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The court dismissed D's appeal against conviction for murder as the trial judge was correct not to present the *Sheehan* Direction on intoxication to the jury. In order to present the direction, there must be evidence that D did was so intoxicated they were unable to form the requisite intent for murder.

Facts:

D had killed his intimate pregnant partner stabbing her with scissors 40 times. Prior to the killing both he and the victim had consumed a large quantity of drugs, including cocaine. D was able to explain the incident and what followed in detail and at no point suggested that he was not aware of "what he was doing or that he was incapable of forming the requisite intent for murder because of his consumption of crack cocaine 11]." Defence counsel argued that the jury should have been given the so-called Sheehan direction (*Sheehan and Moore* (1974) 60 Cr App R 308) which provides that "in cases of drunkenness and its possible effect upon the defendant's mens rea is an issue, we think that the proper direction to a jury is, first to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent [312]."
The trial judge rejected this argument based on the fact that there was no evidence suggesting that D had not formed the required state of mind because of his intoxication and gave weight to para 9 in section 9 "Intoxication" in the Crown Court Appendium. D appealed on this point.

The Decision:

The judge was correct in giving weight to the Crown Court Compendium, stating that "for a *Sheehan* direction to be necessary there must be a proper factual or evidential basis for it [22]." The mere presence of intoxication is not sufficient of itself, there must be a causal link between D's claim that he was unable to form the required mens rea due to his state of intoxication and the intoxication.

Instead of demonstrating that his intoxication meant that he was unable to form the intention to kill or cause grievous bodily harm, D "gave a detailed account in his evidence of exactly what happened at various stages of the evening including as their respective positions at various times [25]."

R v Foy [2020] EWCA Crim 270

The main issue of this case was whether fresh evidence could be admitted following a conviction for murder, which raised the matter of diminished responsibility manslaughter, given that the partial defence had been expressly considered and rejected at trial. However, the case also raised consideration around the complexities of voluntary intoxication and mental health issues on the part of the defendant.

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Held: S. 23 Criminal Appeal Act 1968 does not permit expert shopping, enabling a re-trial where the original arguments failed. The defence of diminished responsibility was not overlooked and no legal error was made. Had the specific fresh evidence been permitted in this case, it would still not afford the defence of diminished responsibility.

Facts:

D had been frequently drinking alcohol to excess and consumed large amounts of cocaine, although he was not suffering from an addiction to intoxicants amounting to a disease or recognised medical condition. He did suffer from paranoia, depression and anxiety and had received anti-depressant medication periodically. Prior to killing the victim, he had demonstrated bizarre paranoid behaviour to his family. He drank heavily and took cocaine over the course of two days. At the time of the killing he was in an intoxicated state and had been acting in an extremely disorderly way. He had hallucinated and was trying to cut his foot off outside his house as he believed a lump on it was a bomb. He saw the victim and fatally stabbed him with the knife in the stomach. Upon arrest, D's behaviour continued to be erratic and paranoid.
The defence expert psychiatrist's report stated that D had experienced a substance-induced transient psychotic disorder, caused by heavy use of cocaine and alcohol consumption. Taking the view that this would not support a defence of diminished responsibility as without the voluntary consumption of cocaine and alcohol the psychosis would not, in the view of the expert have substantially impaired D's responsibility, the defence team chose not to raise it at trial. The key issue at trial was whether he had been able to form the requisite intention for murder. On cross-examination he accepted that at the time of killing "he had a knife in his hand, knew that there was someone in front of him and knew that he was moving his knife forward [37]." The jury was persuaded that although he was intoxicated, he was still able to form the relevant intention for murder and they convicted him.

After the trial, D's family sought further expert psychiatric opinion. The second expert was of the view that D had experienced transient psychotic episodes when not intoxicated and at the time of the killing had suffered such an episode "possibly exacerbated by the abuse of cocaine [43]." This report formed the basis of the appeal to have fresh evidence adduced.

The decision:

S. 23 Criminal Appeal Act 1968 enables fresh evidence to be adduced where it is necessary and in the interests of justice to do so. The good administration of justice requires finality in litigation and "an appeal cannot simply be treated as a means of having a second go [50]." In this case there was no legal error and the issue of diminished responsibility was fully examined. The second psychiatrist's report could have been sourced and included in the trial. As stated in *Challen* [2019] EWCA Crim 916,

"As a general rule, it is not open to a defendant to run one defence at trial and, when unsuccessful, to run an alternative defence on appeal relying on evidence that could have been available at trial. This court has set its face against what has been called expert shopping."

By Vanessa Bettinson

The court went further and took the view that had the second expert's report been available at trial, a jury could not have accepted the defence of diminished responsibility on the balance of probabilities.

The Court repeated the principle that psychiatric experts can express an opinion on the fundamental elements of the defence but it is ultimately for the jury to determine the issue (*Hussain* [2019] EWCA Crim 666) [67]. Intoxication further complicates the application of diminished responsibility , but the current legal position is that "where the killing occurs when the defendant is in a state of acute voluntary intoxication, even if that voluntary intoxication results in a psychotic episode, then there is no recognised medical condition available to found a defence of diminished responsibility (*Dowds* [2012] EWCA Crim 281).This is so whether the intoxicant is alcohol or drugs or a combination of each [70]."

However, if the intoxication is a result of an addiction, there may be a recognised medical condition for the purposes of diminished responsibility.

The court then explored what the position is in law "where there is an abnormality of mental functioning arising from a combination of voluntary intoxication and of the existence of a recognised medical condition? What is the position, where the voluntary intoxication and the concurrent recognised medical condition are both substantially and causally operative in impairing the defendant's ability and explaining the defendant's act? [72]"

In answering these questions, the court referred to cases where the changes to diminished responsibility under s. 2 Homicide Act 1957 introduced by s 52 Coroners and Justice Act 2009 applied: *Kay and Joyce* [2017] EWCA Crim 647 which stated that a person who is suffering from a mental health condition and have become voluntarily intoxicated may still rely on the defence of diminished responsibility. In such cases,

"He must establish, on the balance of probabilities, that his abnormality of mental functioning (in this case psychotic state) arose from a recognised medical condition that substantially impaired his responsibility. The recognised medical condition may be schizophrenia of such severity that, absent intoxication, it substantially impaired his responsibility (as in the case of *Jenkin*); the recognised medical condition may be schizophrenia coupled with coupled with drink/drugs dependency syndrome which together substantially impair responsibility. However, if an abnormality of mental functioning arose from voluntary intoxication and not from a recognised medical condition an accused cannot avail himself of the partial defence. This is for good reason. The law is clear and well established: as a general rule voluntary intoxication cannot relieve an offender of responsibility for murder, save where it may bear on the question of intent (citing Hallett LJ in *Kay* at para. 16)"

It remains the task of the jury to decide whether the mental abnormality, arising from a recognised medical condition, *substantially* impaired D's ability in the relevant aspects and which provided an explanation for his/her actions, in light of their voluntary intoxication.

In this specific case, whilst D appeared to have suffered a psychotic episode, there was no evidence to suggest that any previous psychosis did not arise from the consumption of cocaine or alcohol [93]. Equally, there was no evidence in the proposed fresh evidence that would, on a balance of probabilities, show that any of the elements required under s. 2 Homicide Act 1957 were present to support the defence of diminished responsibility.