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Archbold Review

Cases in Brief

Defences—self-defence—at common law—Criminal Law Act 1967 s.3—prevention of crime—whether available to recover stolen property

WILLIAMS [2020] EWCA Crim 193; 6 February 2020

Neither the common law defence of self-defence nor that of crime prevention under the Criminal Law Act 1967 s.3 permitted the use of force in recovering stolen property. The s.3 defence was only available in relation to preventing crimes in progress, not in relation to reacting to crimes already committed. The defences were accordingly rightly not left to the jury where B had stabbed W in the arm and taken a necklace from him at a party, run away and was chased by a group from the party led by W who, 120 metres from the flat in which the party had taken place, fatally stabbed him. W's renewed application for permission to appeal was refused.

[*Comment: If a robber snatched the day's taking from a shopkeeper, who then chased the robber out of the shop and caught him 120 metres down the street, it seems unlikely that the court would think the robbery was completed in the shop, and disallow the use of reasonable force by the shop-keeper to recover the takings. The argument may be less plausible on the merits when it is 16-year-old gang members (as suggested by newspaper reports), most of whom were armed with knives, but it is surely one for the jury. RP*]

Environmental crime—Environmental Permitting (England and Wales) Regulations 2010—waste operations—offences—when an exempt waste operator ceased to have that status

MUSTAFA AND BRESLIN [2020] EWCA Crim 597; 6 May 2020

Offences in the Environmental Permitting (England and Wales) Regulations 2010 were committed unless certain waste disposal or recovery operations were lawfully conducted as either a "regulated facility" or an "exempt facility". In the case of the former, an environmental permit was required, but not in the latter. The two categories were mutually exclusive. An exempt facility included an "exempt waste operation", and the latter was defined as a waste operation that met the requirements of Sch.2, para.3(1) to the regulations. These included registration of the waste operation, and (Sch.3) specific limits for particular activities, including, in the relevant case, a maximum weight of waste processed per week. Detailed provision was made for registration and de-registration (regs.5(1), 8(2), 12, 13, 14, 38, 41(1), Schs.2 and 3). On a straightforward interpretation of the regulations, a waste operation would only be an "exempt facility" if it fully met the requirements of Sch.2, para.3(1). If it did not, it could not be an "exempt facility", and it must be a "regulated facility"; there being no other status. If, as a "regulated facility", it is operated without an environmental permit, there was a breach of reg.12, and an offence under reg.38. The requirements of reg.12 were mandatory and cumulative. Where M and B's company breached the relevant requirements by virtue of the quantity of waste processed, the company, and thus M and B, committed the offences in reg.4, regardless of the fact that the facility had not been de-registered as an exempt facility. It was, by virtue of non-compliance, a regulated facility, and one that was being operated without an environmental licence (the 2010 regulations were revoked and replaced in substantially the same form by Environmental Permitting (England and Wales) Regulations 2016, with effect from 1 January 2017).

Evidence—bad character—Criminal Justice Act 2003 s.100(d)—application by prosecution—whether discretion under Police and Criminal Evidence Act 1984 s.78 available—whether evidence wrongly admitted

BOXALL [2020] EWCA Crim 688; 22 May 2020

(1) Where a judge acceded to a prosecution application to

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adduce evidence of the bad character of a non-defendant under the Criminal Justice Act 2003 s.100(d), there remained a residual discretion to exclude the evidence under the Police and Criminal Evidence Act 1984 s.78. The court approved a statement to that effect in Professor JR Spencer, *Evidence of Bad Character* (3rd ed, 2016), 3.53, "despite the Court of Appeal's emphatic words in *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 Cr.App.R. 18 and *Dizaei* [2013] EWCA Crim 88, [2013] 1 W.L.R. 2257".

(2) The bad character evidence adduced at B's trial for conspiracy to supply a controlled drug was a conviction of D, a non-defendant who was not alleged to be a part of the conspiracy, in respect of offending that took place three months after the facts of the offence with which B was charged. There was evidence that B was in contact with D at the time of the instant offence, and that they had previously been associated. Despite the judge at first instance having wrongly concluded that s.78 was not available, the court declined to grant leave to appeal on B's renewed application. The fact that applications under s.100 by the prosecution were rare did not affect the principles to be applied (the combined researches of the court and counsel uncovered as the only other potentially relevant cases *Wright* [2013] EWCA Crim 820; *Buaduwah-Esandol* [2005] EWCA Crim 3580; *Doyle* [2017] EWCA Crim 340; *Livesey* [2019] EWCA Crim 877; *Rand* [2006] EWCA Crim 3021). The evidence was relevant to the issue of whether B was a party to the conspiracy or innocently present at the material times. B's innocent explanations for various allegedly drug-supply related pieces of evidence had properly to be examined by the jury in the context of his contemporaneous association with D, a man involved in very similar large-scale drug dealing. Had an application under s.78 been made, it could not have conceivably succeeded. The judge would have been required to consider whether the probative value of the evidence exceeded its prejudicial effect. By definition, he was already satisfied that the evidence relating to D had substantial probative value, and the countervailing prejudicial effect was no more than the bare assertion that the evidence invited the jury to assume guilt by association: but that was an argument that the judge had already considered and rejected.

Evidence—guilty plea—two-person closed conspiracy—admission of guilty plea by co-defendant

HORNE [2020] EWCA Crim 487; 2 April 2020

The judge at H's trial for conspiring with P, in a closed conspiracy, to pervert the course of justice in connection with allegations of interference with witnesses, had been wrong to allow the prosecution to adduce P's plea of guilty under the Police and Criminal Evidence Act 1984, s74(1). The judge admitted the evidence on the basis that it supported the truthfulness of the allegedly interfered-with witnesses, and said he would direct the jury that it was not evidence against H. Neither *Denham* [2016] EWCA Crim 1048, [2017] 1 Cr.App.R 7 nor *Shirt* [2018] EWCA Crim 2486, [2019] 1 Cr.App.R 15, relied on by the Crown, involved a closed conspiracy consisting of two individuals. Of greater relevance was *R v S* [2007] EWCA Crim 2105. There was no doubt that the introduction of P's plea would have tended significantly to close down the central issue, namely whether H entered into the conspiracy with P. P could not have been guilty of conspiracy unless the appellant was also guilty, and, considered with a degree of realism on the facts of the case, P's involvement entirely depended on the participation of H. Furthermore, once the conviction was admitted into evidence, it included all the detail in the count. Notwithstanding the judge's directions in which he sought to limit the evidential impact of this evidence, there was a high risk that the jury would have drawn the conclusion that P's admission that he had conspired with H meant inevitably that the appellant had conspired with him. The conviction evidence should have been excluded under the Police and Criminal Evidence Act 1984 s.78 on the grounds that its admission would have such an adverse effect upon the fairness of the proceedings that it ought not to be admitted. The judge had not been taken to the critical line of authority which included *R v S*. Had he been, the Court doubted that he would have admitted this evidence. In the light of the findings on admissibility, the Court did not come to a concluded view on criticisms of the judge's directions.

Procedure—disclosure—post-conviction disclosure—duty of CPS—examples of likely cases appropriate for judicial review—availability of alternative remedy—application to the CCRC—suitability of judicial review on the facts

R (BAMBER) v CPS [2020] 1391 (Admin); 5 June 2020

(1) In recognising the duty to disclose which lay on the CPS even post-conviction, the Supreme Court in *R (Nunn) v Chief Constable of Suffolk* [2014] UKSC37, [2015] AC 225 equally emphasised that the CCRC should be the first port of call for a litigant to whom disclosure was not made. Whilst always a fact-specific determination, most instances of *Nunn* disclosure would arise in fairly clear-cut cases where it was plain that the disclosure would determine the case one way or another, for example, where a sample was discovered that could be scientifically tested, or a new scientific technique was developed which did not exist at the time of conviction which could now provide a definitive answer. In such a case if the CPS were to decline disclosure then the case on judicial review would be likely to be an obvious one. That was not this case, which concerned a request for disclosure of material relating to whether a particular item had been found at the scene of a notorious multiple murder in 1985.

(2) B was not without an alternative remedy. Much work had been done to prepare a (further) submission to the CCRC, and it was a clear case for the Commission. Massively complex, it had been investigated and re-investigated by more than one police force over some 35 years. The body of material was vast. After so many years, and so much litigation, the CCRC was the body undoubtedly best placed to consider B's arguments. The case was so complicated, and had so many overlapping layers, that judicial review was a hopelessly blunt tool with which to address and determine them. Even deciding what disclosure had, or had not, been made was fraught with difficulty, and even if B was right on his primary case, the Court was hardly in a position to say whether the CPS's determination that it would not mean the convictions were unsafe, was one which was not reasonably open to it. The Court was accordingly unable to say that the CPS erred in law in refusing to make the disclosure sought, and on B's renewed application, permission to apply for judicial review was refused.

Road traffic—certificate of insurance—voidable but not voided—whether valid for purposes of Road Traffic Act 1988 and regulations made thereunder; judicial review—conduct of public body—damages

R (LINSE) v CHIEF CONSTABLE OF NORTH WALES [2020] EWHC 1288 (Admin); 29 May 2020

(1) A certificate of insurance was valid for the purposes of the Road Traffic Act 1988 (Retention and Disposal of Seized Motor Vehicles) Regulations 2005 (and *semble*, other provisions of the Road Traffic Act 1988) where it could have been avoided for non-disclosure, but had yet to be avoided. The officers who refused to release a vehicle from seizure when presented with a certificate relating to an insurance policy they knew could have been voided for non-disclosure, but which had not been avoided, were wrong to have concluded that it was not "valid", and had acted unlawfully. In so concluding, the court considered a number of provisions of the Road Traffic Act 1988 (ss.143, 165, 165A, 151 and 152) relating to insurance, and *Durrant v McClaren* [1956] 2 Lloyd's Rep 170, decided on equivalent provisions of the Road Traffic Act 1934 (and, for the effect of non-disclosure, *Chitty on Contracts,* (33rd ed, 42-04) and *MacGillivray on Insurance Law* (14th ed, 31-008).
(2) The respondent had sold the vehicle in question at auction after an order had been made for a rolled-up hearing of the application for judicial review. As a challenge to the lawfulness of a decision of a public body, the matter was appropriately dealt with by way of judicial review, which must be and was brought promptly. Proceedings in the County Court for conversion was not an adequate alternative remedy. Although there was no order preventing disposal, the order for a rolled-up hearing made it quite clear that the court was seised of the matter and that there was a hearing to be listed. Disposal of the vehicle was not conduct to expected on behalf of a Chief Constable. Now that the vehicle has been disposed of there was no point in remitting the matter. Damages were recoverable in judicial review proceedings where they could have been awarded in an ordinary claim, as the defendant accepts they could have been in this case. To require separate county court proceedings would only increase costs and add delay. The court ordered that damages should be assessed in the judicial review proceedings.

Youth justice—Youth Court appointment of intermediaries—approach—non-assistance of general submissions

R (TI) v BROMLEY YOUTH COURT [2020] EWHC 1204 (Admin); 14 May 2020

The district judge had erred in refusing to order a whole trial intermediary for TI. She had before her reports from an intermediary and a psychologist.
(1) While the Youth Court was a specialist jurisdiction accustomed to dealing with vulnerable young people with complex needs, that did not mean that the judge in the Youth Court could not be assisted by another professional such as an intermediary if the needs of the individual required such assistance. As was emphasised in *Thomas* [2020] EWCA Crim 117, [2020] 4 *Archbold Review* 2, the circumstances of the individual must be assessed. In stating that the intermediary's recommendations as to the nature of the questioning appropriate for the claimant were familiar to her, the district judge did not address the evidence that, even with appropriate questioning, the claimant would find it difficult to cope with the trial process; nor did she explain how the court would be able to ensure that the claimant engaged with the trial process generally, given his inability to engage and to concentrate as reported by the intermediary and the psychologist.
(2) In stating that the bar to appointment of an intermediary was a high one, and using the term "rare" (referring to *Rashid* [2017] EWCA Crim 2, [2017] 1 W.L.R. 2449), the district judge had not have the advantage of the judgment in *Thomas* when she made her decision. If she had, she would have appreciated that what was said in *Rashid* was now reflected in CPD 3F.13, and referred to all cases coming before courts. In that context, most cases would involve defendants who did not require the assistance of an intermediary. Therefore, the appointment of an intermediary would be rare. It did not follow that there was a high hurdle to overcome for the appointment of an intermediary if one were necessary for the effective participation of a defendant in the trial process. The reference to the bar being a high one was not consistent with the application of careful scrutiny to the particular circumstances of TI. Her assertion that the court could adapt its processes to enable effective participation did not explain what adaptation would occur so as to ensure that the claimant concentrated on and engaged with the trial as it progressed.
(3) The district judge relied on the lack of an intermediary in a previous trial of TI, on the basis that there had been no appeal against the finding of guilt then made. That was insufficient.
(4) In many cases the fact that a defendant had given an account to the police when interviewed would be good evidence of an ability to participate in the trial process. It would demonstrate that he or she understood the allegation and could develop an account when questioned, which would suggest an ability to engage with a process akin to a trial. But the district judge was wrong to rely on a statement in an interview obviously prepared by TI's solicitor. It showed that TI was able to give basic instructions. It did not demonstrate that he could engage satisfactorily in the trial process.
(5) The district judge also described the proceedings as a "lawyers' only" case. The prosecution case consisted of contested identification witnesses, leading her to conclude that "participation will be very little if any". This was tantamount to saying that it would not matter if the claimant could not follow the proceedings. This was not consistent with a fair trial. In any event, while it may be an appropriate description of a case where facts were agreed, the only issues being the proper inferences from them (in which case, appointment of an intermediary before the defendant's evidence may be unnecessary), it was not a fair description of these proceedings. Where, as here, eye-witness evidence was disputed, it was impossible to say whether there would be some unexpected development in the course of the prosecution case. It could not be said that it was inevitable that TI would not have to contribute directly during the prosecution case. If he were not engaged with the proceedings, he would be unable to contribute should the need arise.
(6) The decision was based on focussed criticisms of the district judge's decision. The Court emphasised that it was not assisted by wide-ranging submissions on "international laws and norms" and on the treatment generally of young people in court, including a submission on a "general consensus" of inadequacy of special measures (similar to that reported in *Grant-Murray* [2017] EWCA Crim 1228, [2018] Crim. L.R. 71, [223], and rejected in [224] and [225].)

SENTENCING CASE

Section 18 assault, sentencing guideline

XUE [2020] EWCA Crim 587, 30 April 2020

The appellant had been convicted of wounding with intent contrary to s.18 of the Offences Against the Person Act 1861 and assault occasioning actual bodily harm contrary to s.47. The injuries caused to the victim of the wounding were lacerations to his cheek and hip (further described in [7] of the judgment). His victim impact statement described their ongoing effect upon him. X had been sentenced to 12 years' imprisonment for the wounding and two years for the ABH (to be served concurrently). The sentencing judge determined that the s.18 offence involved greater harm and higher culpability and thus fell within category 1 of the sentencing guideline for s.18 offences. X argued that the judge erred in so classifying the wounding with intent offence. Accepting there was higher culpability, he submitted that (i) the injuries sustained by the victim were not "serious in the context of the offence" and (ii) the assault was not "sustained" within the meaning of the guideline.

Observing that the question of whether a s.18 offence is "serious in the context of the offence" is essentially fact-specific and reference to determinations made in other cases are of limited value, the Court at [29]–[30] approved the guidance on the meaning of the phrase given in *Grant Smith* [2015] EWCA Crim 1482. It concluded that in the present case, the injuries suffered by the victim were very serious on a scale of assaults generally, but were considerably less grave than the injuries involved in many s.18 offences that come before the Crown Court and Court of Appeal, and were not "significantly above the serious level of harm which is normal for the purpose of section 18". The court stated that for the purposes of this assessment, it makes no difference whether the charge is one of wounding with intent to cause GBH or of causing GBH with intent. At [31]–[32] the court also approved the guidance given in *Grant Smith* on what constitutes a "sustained or repeated assault" and concluded that although the attack upon the victim was a nasty one, it was not a sustained or repeated assault that was so prolonged or persistent as to render it unusual for s.18 offences and therefore to constitute greater harm.

The Court concluded that the case fell within category 2 of the s.18 sentencing guideline. Applying relevant aggravating and mitigating factors (see [34]-[35]) the Court concluded that the appropriate sentence was eight years' imprisonment. The sentence of 12 years for the offence of wounding with intent was quashed and a sentence of eight years substituted. The concurrent sentence for the s.47 assault was unaffected.

Features

Re-evaluating the admissibility of *res gestae*

By Karl Laird[1]

Introduction

Body-worn video cameras ("BWVs") are widely used by police officers across the United Kingdom.[2] BWV can be used to capture a range of things, much of which will be admissible as direct evidence. Given that BWVs record not only images, but also sound, they can be used to capture a complainant's initial account. If the Crown proposes to rely upon what the complainant says on the BWV for its truth, it is hearsay.[3] Its admissibility will therefore depend upon whether it falls within one of the categories of admissibility in the Criminal Justice Act 2003. The category that is most apposite is *res gestae*, a common law doctrine that is preserved by s.118(4) of the 2003 Act. In terms of its admissibility as hearsay, a statement made by a complainant to a police officer on his or her BWV falls into the same category as comments which are written in the officer's notebook, a transcript of a 999 call, or a witness statement. The admissibility of such statements is therefore not a novel issue. Given that footage recorded on an officer's BMV captures not only what the complainant said, but also how he or she said it, it is likely to be much more impactful than a written statement that is read out by a prosecutor. If the complainant fails to attend court to give evidence, the material recorded on the officer's BWV may be treated by the Crown as an acceptable substitute for their oral evidence. The admissibility of such statements often arises in the context of domestic violence cases, where the complainant may, for various reasons, not wish to give evidence against their (former) partner. There have been a number of cases in the past few years in which the principles which govern the admissibility of *res gestae* have been restated. As the following analysis will demonstrate, the Divisional Court has, in cases of domestic violence, taken a permissive approach to the admissibility of *res gestae*.

The concept of *res gestae*

Professor Tregarthen trenchantly stated that

> in the whole dictionary of legal jargon, there is probably no phrase so devoid of meaning as the term *res gestae*, the delight of the quack, the despair of his opponent and the dilemma of the judge.[4]

Despite some commentators questioning whether the doctrine of *res gestae* should be retained at all,[5] it has now been "dignified"[6] with statutory recognition in s.118(4) of the Criminal Justice Act 2003. Section 118(4) provides

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2 At the end of 2017, the Home Office estimated that the number of BWV had reached 60,000. Home Office, *Home Office Consults on Using Body-worn Video for Police Interviews.* Available at: https://www.gov.uk/government/news/home-office-consults-on-using-body-worn-video-for-police-interviews.

3 See the definition in ss.114(1) and 115 of the Criminal Justice Act 2003.

4 J. B. C. Tregarthen, *The Law of Hearsay Evidence* (1915), pp.20-21.

5 D. Ormerod, "Redundant res gestae" [1998] *Criminal Law Review* 301.

6 P. Roberts and A. Zuckerman, *Criminal Evidence* (2010), 2nd edn., p.420.

> Res gestae
>
> Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—
>
> (a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,
>
> (b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or
>
> (c) the statement relates to a physical sensation or a mental state (such as intention or emotion).

Comments made by the complainant, upon which the Crown may seek to rely in the scenario described in the introduction, will fall into the first category. In the United States these are termed "excited utterances".[7] Section 118(4) merely codifies the common law, so it is necessary to turn to the pre-2003 Act case law to understand what types of "excited utterances" are capable of constituting *res gestae*.

In the infamous case of *Bedingfield*,[8] the court held that only statements which were uttered by the declarant at the time the act was being done were admissible as *res gestae*.

This "laughable doctrine"[9] imposed a strict temporal requirement, which was rejected by the Privy Council in *Ratten*.[10] Speaking for a unanimous Board, Lord Wilberforce stated that the test should not be the uncertain one [applied in *Bedingfield*] whether the making of the statement was in some sense part of the event or transaction.[11] Instead, it should be whether the statement was made in such circumstances of spontaneity or involvement in the event that the possibility of concoction or fabrication could be disregarded. His Lordship described *Bedingfield* as being "more useful as a focus for discussion than for the decision on the facts".[12]

The demise of *Bedingfield* was confirmed by the House of Lords in *Andrews*.[13] Here Lord Ackner, with whom the rest of the House agreed, set out the new test to be applied in a lengthy passage[14] which should be read in full – but which for present purposes may be summarised as follows.

The primary question which the judge must ask himself is whether "the possibility of concoction or distortion be disregarded".

To answer this the judge must first "satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection", and that it was so recent that "the mind of the declarant was still dominated by the event".

If these conditions are both met the statement should still be excluded if the evidence suggests the declarant might have had a particular reason to tell a lie or to distort the truth; and the judge should also consider excluding it if the evidence suggests a reason other than "the ordinary fallibility of human recollection" why the declarant might have been mistaken.

The touchstone for the admissibility of a statement as *res gestae* is whether, in the circumstances in which the statement was made, the possibility of concoction or distortion can be disregarded. This "functional approach"[15] requires the court to focus squarely on the reliability of the statement. As a result, a statement that was made shortly after the event in question may not necessarily be admissible, as in *Tobi v Nicholas*[16] where the complainant told a police officer what took place 20 minutes after a minor car accident. His written account was held by the Court to be inadmissible hearsay. *Andrews* was distinguished on the basis that the events in question – a minor collision with another vehicle – were not so unusual or dramatic so as to dominate the complainant's thoughts.

In adopting a functional approach, Lord Ackner in *Andrews* was emphatic that the *res gestae* doctrine should not be abused.[17] His Lordship stated

> Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place the relevant material facts before the court, so as to ensure that justice is done[18].

This point was emphasised in *Attorney General's Reference (No 1 of 2003)*,[19] in which the Court of Appeal stated that the *res gestae* doctrine should not be used as a device by the prosecution to avoid calling evidence that is potentially inconsistent with the case which they seek to advance against the defendant.

The Divisional Court's recent consideration of *res gestae*

There are a number of cases, decided over the past few years, in which the Divisional Court has considered the applicability of *res gestae*. All of these cases have considered offences which are alleged to have involved domestic violence, where, for a variety of reasons, the complainant was unwilling to give evidence.

The starting point is the Divisional Court's judgment in *Barnaby v DPP*[20] in which the prosecution sought to adduce an edited transcript of three 999 calls made by the complainant on the day in question and also evidence of what she had said to the police when they arrived. The complainant later refused to provide a statement or otherwise co-operate with the prosecution. Although there was some suggestion that she was in fear this was not proved to be so, so the relevant statements would not have been admissible under any part of s.116 of the CJA 2003. Nor would the complainant's reluctance to give evidence have been sufficient for her statements to have been admissible under s.114(1)(d) of the 2003 Act, since the Court of Appeal has repeatedly emphasised that this should not be a sufficient basis to ad-

7 Ibid.
8 (1879) 14 Cox. C.C. 341.
9 D. Birch, "Res gestae - statement by victim since deceased - admissibility - functions of judge" [1987] Crim. L.R. 487, 489.
10 [1972] A.C. 378.
11 At p.389.
12 At p.390.
13 [1987] A.C. 281.
14 At p. 301.
15 A. L-T. Choo, *Hearsay and Confrontation in Criminal Trials* (1996), pp.115-116.
16 (1988) 86 Cr.App.R. 323.
17 At p.302.
18 At p.302.
19 [2003] EWCA Crim 1286.
20 [2015] EWHC 232 (Admin).

duce evidence under that provision. In terms of their spontaneity and the dominance of her mind the complainant's statements were however classic *res* gestae, and on that basis they were held to be admissible. Professor Ormerod captured the potential incoherence in the following terms

> Some may find it odd that the evidence can be adduced under an old common law exception (retained largely for reasons of familiarity rather than necessity) but not under any of the exceptions created by the Act.[21]

The unavailability of the witness was never a prerequisite before a statement could be admissible as *res gestae* and this judgment confirms that the 2003 Act does not alter this position. In *Barnaby* the Court characterised the submission that the prosecution ought to have applied to introduce the evidence under s.114(1)(d) of the 2003 Act as being "without any sustainable foundation".[22] It also deprecated the fact that there had been no application to exclude the statements in question under s.78 of the Police and Criminal Evidence Act 1984 ("PACE"), yet there was an attempt on appeal to impugn the decision to admit it.

In the subsequent case of *Ibrahim v CPS*,[23] there was a delay of 1.5 hours between the incident and the 999 call in which the complainant alleged that the defendant had assaulted her. The district judge admitted the transcript of the call on the basis that the possibility of concoction or distortion could be disregarded. The Divisional Court upheld the defendant's conviction on the basis that the injuries had been sustained within a timeframe such that the possibility of concoction could be disregarded. The Court stated that the Court of Appeal's admonition in *Attorney General's Reference (No 1 of 2003)* must be distinguished from a situation where a victim of domestic violence is in fear of a risk of harm following cooperation with the police. Cranston J stated that there was ample evidence that the complainant was unavailable through fear.

There are two noteworthy aspects of *Ibrahim*. First, the Court appears to advocate a permissive approach to the admissibility of *res gestae* in cases involving allegations of domestic violence. Secondly, the Divisional Court stated that the district judge had "ample evidence"[24] that the complainant did not wish to give evidence because she was fearful of the consequences of doing so. *Ibrahim* can therefore be distinguished from *Barnaby*, as there was a statutory route through which the complainant's evidence might have been admissible: s.116(2)(e). Despite the existence of this statutory route, the Divisional Court concluded that the trial judge had been correct to admit the 999 transcript as *res gestae*. This demonstrates that there is no hierarchy which requires preference to be given to an available statutory category before reliance can be placed upon one of the retained common law categories. The significance of this is that evidence is only admissible under s.116(2)(e) if it satisfies an interests of justice test, whereas there is no such requirement before evidence can be admitted as *res gestae*. As a result, evidence which falls within a statutory category, but which might fail to satisfy the interests of justice test, may nevertheless be admissible as *res gestae*.

Similar issues arose in *Morgan v DPP*,[25] in which the prosecution sought to rely upon the transcript of the complainant's 999 call and the BWV of the officer who was first on scene. The district judge rejected the submission that this evidence ought to be excluded under s.78 of PACE. There was a delay between the incident and the making of the statements, but the Court observed that this was only one factor that ought to be taken into consideration and was not necessarily determinative. In terms of the s.78 application, the Divisional Court stated that there was, by reason of the evidence having been admitted as *res gestae*, reason to disregard the possibility of concoction or distortion. With respect, this reasoning is circular, given that the s.78 application concerned the exclusion of the evidence as *res gestae*. Furthermore, despite the Divisional Court's silence on the matter, surely the defendant's inability to cross-examine the witness must be a factor that is relevant to how the Court exercises its discretion under s.78. The Court also stated that the supporting evidence is an important consideration in evaluating the fairness of admitting *res gestae*. The submission was advanced on behalf of the defendant that special measures could have allayed the complainant's concerns. The Divisional Court rejected this submission for two reasons. First, it observed that this was not a s.116(2)(e) application where special measures are specifically mentioned. Secondly, it stated that special measures would not have addressed the specific reason found by the judge for the complainant's unwillingness to attend, namely her apprehension at having to relive the experience. Although this statement may be accurate on the facts of this case, it vividly demonstrates how *res gestae* may be relied upon by the prosecution to admit evidence that would otherwise be inadmissible. Ordinarily, a complainant cannot avoid giving evidence and being subject to cross-examination, no matter how traumatic the experience might be. Special measures can be a way of mitigating the complainant's apprehension, but they are unlikely to negate it altogether.

The final case in which *res gestae* has been considered in detail is *Wills v CPS*,[26] in which the defendants were convicted of assault by beating. The justices admitted a number of statements made by the complainant to the officers who attended the scene, as well as a transcript of her 999 call. They did not, however, consider the reason why the complainant was unavailable before admitting this evidence as *res gestae*. In allowing the appellants' appeal, the Court was emphatic that the justices should not have admitted the evidence as *res gestae* without investigating the reasons why the complainant was unavailable. This was especially so given the "fundamental importance"[27] of the complainant's evidence to the case. Significantly, and in contrast to the approach that was taken in *Morgan v DPP,* Collins J stated that if the complainant was concerned about her safety, measures could have been taken to protect her. Measures could also have been taken to enable her to give evidence out of the defendants' sight. The failure to make enquiries as to why the complainant was unavailable was held to be fatal to the admissibility of the evidence as *res gestae*. The Court also took cognisance of the discrepancies between the *res gestae* evidence and the s.9 statement the complainant made to the police. This was relevant to whether there was distortion at

21 At p.732.
22 At [36].
23 [2016] EWHC 1750 (Admin).
24 At [29].
25 [2016] EWHC 3414 (Admin).
26 [2016] EWHC 3779 (Admin).
27 At [10].

the time of the original complaint and was held to be a factor that ought to have been taken into consideration when the court was exercising its discretion under s.78 of PACE. The court stated that, given the discrepancies between the complainant's accounts, it was difficult to see how it was not unfair to admit her statements as *res gestae.* In a brief judgment, Irwin LJ described the approach that was taken as being "frankly lazy".[28]

The judgment in *Wills v CPS* is welcome on its facts, but their Lordships did not examine the previous case law in detail. As a result, the Court did not engage with the analysis in earlier cases in which the Divisional Court has stated that special measures are irrelevant to the admissibility of *res gestae*. It is therefore not clear what impact the Court in *Wills v CPS* envisages such enquiries having. Nor was there any recognition of the fact that the Court's approach was going against the grain of earlier decision of the Divisional Court. For these reasons, it cannot be said that *Wills v CPS* represents a sea change.

The applicable principles

It is submitted that the cases analysed above establish the following propositions:

(1) A statement can be admitted as *res gestae* even though it would not be admissible under any of the statutory conditions.

(2) A statement can be admitted as *res gestae* even if it would be admissible under one of the statutory conditions.

(3) Before admitting a statement as *res gestae*, the court should consider the reasons why the declarant is unavailable.

(4) In deciding whether to admit *res gestae*, regard should be had to the public interest in ensuring that allegations of domestic violence can be prosecuted.

(5) Should the defence wish to challenge the admissibility of *res gestae*, it ought to apply to exclude the evidence under s.78 of PACE.

It is unclear whether, in deciding whether to admit evidence as *res gestae*, the court should have regard to whether special measures would be capable of addressing the declarant's concerns and facilitate their giving live evidence. It is submitted that this should be a factor that is taken into consideration. Resort to *res gestae* should not become routine. If there are measures that would encourage the declarant to give live evidence – that can be subject to cross-examination – they should be taken. As Lord Ackner observed in *Andrews*, admitting evidence as *res gestae* deprives the defendant of the opportunity to cross-examine the declarant, which undermines their ability to challenge the prosecution's case.

The trend in recent cases concerning domestic violence has been to admit the absent complainant's evidence as *res gestae.* Notably, this stands in contrast to the stance that has been taken in other contexts, where reliance has been placed upon s.28 of the Youth Justice and Criminal Evidence Act 1999 (amongst other special measures). Even where pre-trial cross-examination is an option, the Court of Appeal has cautioned against using it too readily. For example, in *RK*[29] the court concluded that special measures, combined with ground rules hearings, makes cross-examination of young children possible.[30] By way of contrast, the approach in domestic violence cases has been to eschew reliance upon special measures and to admit evidence that is untested by cross-examination.

The second factor that ought to be borne in mind, which has never been recognised by the Divisional Court, is that in some of these cases the *res gestae*, whilst not the sole evidence upon which the prosecution relied, must surely have been decisive. Although the Court of Appeal confirmed in *Riat*,[31] following the judgment in *Horncastle*,[32] that there is no overarching rule that sole or decisive evidence is automatically inadmissible, the importance of the evidence to the case against the defendant is central to the admissibility of the hearsay. It is submitted that, in future, this is a factor which ought to be taken into consideration when the court is considering the admissibility of *res gestae*. It is no answer to say that, because the evidence is admissible as *res gestae*, its reliability can be assured. Such reasoning is circular.

The final point worth emphasising concerns s.78 of PACE. What is clear from the cases is that if the defendant wishes to exclude evidence which the court has held to be *res gestae*, then an application should be made under s.78. The threshold adopted by the Divisional Court before it will exclude *res gestae* has, however, been set impossibly high. Absent prosecutorial misconduct, a s.78 application seems bound to fail. This is not the test the court should adopt. The court must have regard to all the circumstances in exercising its discretion, not just whether the prosecution is seeking to manipulate the trial process. The Divisional Court in some cases has conflated the s.78 enquiry with the question of whether the evidence constitutes *res gestae.* The danger with this approach is that the court, in concluding that the evidence is *res gestae*, will pre-judge the s.78 application. The two issues should be kept distinct.

Conclusion

In evidential terms, the issues raised by BWVs are not new. As the Court of Appeal of Northern Ireland has stated, however, there are challenges when "the common law on hearsay evidence meets the modern world of policing with body worn video recording".[33] It may be that, as BWVs become more prevalent, there will be increased efforts to rely upon the statements that they capture as evidence of their truth. It is submitted that an authoritative judgment of the Court of Appeal, in which the proper approach is set out, would be welcome. The issue the court must squarely confront is whether a more permissive approach to the admissibility of *res gestae* ought to be adopted in domestic violence cases where the complainant refuses to give evidence. Courts must be wary of adopting an approach that is too permissive and fails to appreciate that, as Lord Ackner recognised in *Andrews*, admitting evidence as *res* gestae has the potential to place the defendant at a significant disadvantage.

28 At [25].

29 [2018] EWCA Crim 603.

30 For a valuable analysis of the issues which can arise in such cases, see E. Henderson, "Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people" [2016] Crim. L.R. 181.

31 [2012] EWCA Crim 1509.

32 [2009] UKSC 14.

33 *McGuiness v DPP for Northern Ireland* [2017] NICA 30, at [1].

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The Future of Dishonesty – Some Practical Considerations

David Ormerod and Karl Laird*

Introduction

On 29 April 2020, three months after it heard oral argument, a five-member Court of Appeal[1] delivered its judgment in *Barton; Booth* ("*Barton*").[2] The Court confirmed that the criminal law test of dishonesty is that suggested *obiter* by the Supreme Court in *Ivey v Genting Casinos* ("*Ivey*"):[3] the *Ghosh* test[4] is abolished. The test to be applied is now settled, but the Court declined the opportunity to consider numerous consequential implications. In this brief article, our focus is on some immediate practical problems facing the courts, although we recognise fully the theoretical significance of the redefinition of the dishonesty test and the Court's novel approach to *stare decisis.* By way of introduction it is necessary to say something about *Ivey.*

The Supreme Court's rejection of *Ghosh*

Applying *Ghosh,*[5] in those rare cases in which a direction on dishonesty was necessary, the jury were required to apply a two-limb test. They first had to consider whether the defendant's conduct was dishonest according to the standards of reasonable and honest people. If the defendant's conduct was dishonest according to that standard, the jury could only convict if the defendant realised that his conduct would be considered dishonest by that standard. One context in which the test was significant was recognised in *Hayes*,[6] where the defence relied on evidence about practices in a particular industry, such as banking. Lord Thomas CJ in that case held that such evidence was relevant only to the second limb of the *Ghosh* test, but not the first.

In *Ivey* Lord Hughes catalogued the reasons for rejecting the *Ghosh* test, focussing exclusively on the problems of the subjective second limb. It rendered the test for dishonesty inconsistent with the civil law, was difficult for juries to apply, and provided an opportunity for a defendant with warped moral standards to exploit the test.[7] The Supreme Court was keen to remedy these defects but without making the test for dishonesty purely objective. The test formulated by the Court in *Ivey* requires the jury first to ascertain the actual state of the defendant's knowledge or belief as to the facts. Once ascertained, the question for the jury is whether his conduct was dishonest according to the standards of ordinary decent people. Unlike under *Ghosh* there is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

Barton: the demise of *Ghosh* confirmed

Barton, the owner of a luxury care home, and Booth, the manager, were convicted of a range of dishonesty offences committed against the residents, for which Barton was sentenced to 21 years' imprisonment and Booth to six. On appeal, they argued that the judge should have applied *Ghosh* and not the test suggested *obiter* in *Ivey.* In a judgment delivered by Lord Burnett CJ, the Court of Appeal rejected this and held that it was bound to follow what, although strictly *obiter,* amounted to a binding direction from the Supreme Court.[8] The new test for dishonesty, it said, is this:

> (a) what was the defendant's actual state of knowledge or belief as to the facts; and
>
> (b) was his conduct dishonest by the standards of ordinary decent people[9].

Immediate Issues

That the Court of Appeal would follow *Ivey* was predictable, given its previous critical remarks about *Ghosh,*[10] *obiter* endorsements of *Ivey* in *Patterson v DPP* [11] and *Pabon,*[12] and explicit advice to judges in the *Crown Court Compendium* to follow *Ivey.*

As the debate about the relative merits of the *Ivey* and *Ghosh* tests has been rendered academic the immediate need is to resolve several practical issues that will confront practitioners and judges in the near future. Crucial to understanding the application of the law is appreciating the relationship between the first and second limb of the *Ivey/Barton* test and being very specific about the elements involved. It is unhelpful to assert that the second limb of *Ghosh* is gone without providing further explanation.

Dishonesty – conduct, states of mind and their assessment

The approach taken to dishonesty has shifted over the course of 50 years and can be summarised as follows:

Feely[13] when read properly, required:

> (a) Determination of the conduct/facts;
>
> (b) An objective assessment of the conduct/facts (having regard to *D's state of mind* about them, albeit this latter aspect was not made explicit[14]) applying the standards of ordinary decent people.

Ghosh required:

> (a) Determination of the conduct/facts;

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1 Which included the Lord Chief Justice, the President of the Queen's Bench Division and the Vice President of the Court of Appeal (Criminal Division).

2 *Barton; Booth* [2020] EWCA Crim 575.

3 *Ivey v Genting Casinos* (*t/a Crockfords Club Ltd*) [2017] UKSC 67.

4 *Ghosh* [1982] Q.B. 1053.

5 For discussion of the *Ghosh* test in this context see D. Ormerod and K. Laird, "*Ivey v Genting Casinos* – Much Ado About Nothing?" (2019) 9 Supreme Court Yearbook 1 at: https://ukscy.org.uk/doi/10.19152/ukscy.762.

6 *Hayes* [2015] EWCA Crim 1944.

7 [2017] UKSC 67 [58]. *Archbold Review* Issue 5 p 3.

8 On the implications see R Percival, [2020] *Arcbbold Review* 5, 3.

9 [2020] EWCA Crim 575 [84].

10 *Cornelius* [2012] EWCA Crim 500; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314.

11 *Patterson v DPP* [2017] EWHC 2820 (Admin).

12 *Pabon* [2018] EWCA Crim 420.

13 *Feely* [1973] Q.B. 530 at 541.

14 See E. Griew, *The Theft Act* (7th ed 1995) 2-132 et seq.

(b) Objective assessment (standards of reasonable honest people) of whether the conduct was dishonest;

(c) Determination of D's state of mind as to (a) and (b) i.e. the conduct and what reasonable honest people would think of it.

As a result of *Ivey/Barton*, in our view, dishonesty *now* turns on:

(a) Determination of the conduct/facts;

(b) Determination of D's belief about the conduct/facts (subjective state of mind); and,

(c) A decision whether to classify the conduct, in the light of D's subjective beliefs, as dishonest according to the standards of ordinary decent people.

Barton - Limb 1

The preliminary task, uncontroversially, is for the jury to establish the facts. Having done so the jury must then consider the first limb of the new test. That involves ascertaining the defendant's state of mind. In *Ivey* Lord Hughes was clear it is a subjective assessment – what was in this defendant's mind. This first limb is designed to address the well-worn example of the foreign tourist who does not realise that people must pay to use public transport in the UK.[15] Whereas previously the second limb of *Ghosh* would come to the "rescue"[16] to ensure acquittal; now it is intended for the first limb to fulfil this purpose. What *Ivey* did not make clear was the scope of the jury's inquiry: what facts or beliefs which the defendant might have held are the jury to consider? Did the Supreme Court in *Ivey*, by removing the second limb of *Ghosh* but retaining subjectivity in this first limb, mean to (a) render totally irrelevant D's belief as to the perceptions of others about the honesty of the conduct? Or (b) remove the binding nature of that belief – so that if D did not believe others would see it as dishonest this could still result in his acquittal, as under *Ghosh*?

The court in *Barton* seems to have provided the answer at [108]: the reference in *Ivey* to the "actual state of mind as to knowledge of belief as to the facts" was to *all* the circumstances known to the accused and not limited to consideration of past facts. Lord Burnett CJ explained that

> [*all*] *matters that lead an accused to act as he or she did will form part of the subjective mental state*, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused[17] (emphasis added).

We therefore suggest that in limb 1 the jury are to have regard not only to D's state of mind as to the facts, but also as to his beliefs about whether the conduct would be seen as dishonest (a matter which led him to act as he did).

Barton - Limb 2

The second limb of the test requires the jury to decide whether the defendant's conduct (having regard to his beliefs about the conduct/facts), was dishonest according to the standards of ordinary decent people. As noted above, *Ghosh* also included an objective limb, but under *Ivey/Barton* the objective limb takes on primary significance. Academics' "almost universal dissatisfaction"[18] with *Ghosh* had largely focussed on the objective limb. Although the Supreme Court and the Court of Appeal acknowledged the existence of this academic commentary, neither judgment engages with the challenges raised. Perhaps the most problematic aspect of the test for dishonesty—that it assumes the existence of a community norm on dishonesty—has become its most prominent feature.[19]

The relationship between the two limbs

The Supreme Court did not expand on the relationship between the subjective and objective limbs of the reformulated test for dishonesty and nor did the Court of Appeal in *Barton* other than explaining limb 1 as above. Analogies might be drawn with the two limbs of self-defence but it seems sensible to focus on the language of the judgments in *Ivey* and *Barton*.[20]

Considering the way the test is expressed (see [84] of *Barton*, cited above, and [60] of *Ivey*), it cannot have been intended that the two limbs of *Ghosh* were simply to be inverted. That would require the jury to ask what the defendant thought others would think was dishonest and then apply an objective assessment of dishonesty *constrained by* what the defendant thought others would consider was dishonest.[21] Accepting that approach to be untenable, what is the correct interpretation?

We suggest that the answer lies in appreciating the nature of the assessment required by the first limb. As we have noted, the jury is required to assess the defendant's conduct *and* state of mind as broadly construed in [108] above. It would, in practice, be wrong for the judge to limit that assessment by restricting what the defendant can adduce in evidence about either what he thought was dishonest or what he thought others thought was dishonest. It follows from [108] that it cannot be right to direct a jury that such evidence is to be ignored as irrelevant. Such an interpretation would contradict [108] and would, in effect, overturn *Hayes*, but there is no suggestion this was the intention of either the Supreme Court or the Court of Appeal and it seems contrary to the language of both judgments.

Accepting that limb 1 requires the jury to consider D's beliefs about all the circumstances, we must consider how the jury is permitted to use that in applying the second (objective) limb. When it eventually confronts the issue, we suggest that there are at least two ways in which the Court of Appeal might answer that question. First, it could hold that evidence of what the defendant believed about the honesty of his actions was evidence relevant only to his credibility. This is, we suggest, an undesirable approach. The distinctions between "issue" and "credibility" bedevil other areas of criminal law, and to say in this context that the defendant's perception of the honesty of his conduct affects only his likely honesty as a witness seems particularly unhelpful. The second approach is more pragmatic: to recognise that

15 As Campbell pointed out decades ago, if *Feeley* [1973] Q.B. 530 was applied properly *Ghosh* did not need to deal with this by creating limb 2. See K. Campbell, "The test of dishonesty in *Ghosh*" (1994) 43 C.L.J. 349.

16 G. Williams, *Textbook of Criminal Law* (2nd ed 1983), p 728.

17 *Barton; Booth* [2020] EWCA Crim 575, [108].

18 ATH Smith, *Property Offences* (1994), 7-60.

19 For a summary of the criticisms of the objective limb, see D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, 2018), pp 870-885.

20 The analogy is not perfect: in self-defence, the jury assesses D's subjective perception of one issue (the need to use force) and then applies an objective assessment of a different issue (the amount of force used).

21 That would be closer to the self-defence test.

defendants are entitled to adduce evidence of their perceptions of the honesty of their conduct; to tell the jury they can have regard to that evidence but also, crucially, to direct the jury that what the defendant believed is not determinative of whether that conduct was dishonest by objective standards. The relationship between the limbs and the way the jury is to be directed has real practical significance in cases such as *Hayes*. A defendant should be entitled to adduce evidence about industry practises (as they were entitled to do under the subjective limb of the *Ghosh* test), but the jury is no longer *bound* to acquit if the defendant held a belief that ordinary decent people would not regard his conduct as dishonest. Where necessary, juries should be directed to approach dishonesty as follows:

> 1. What were the facts or circumstances at the time D did what he is alleged to have done by the prosecution?
>
> 2. What was D's knowledge or belief as to those facts or circumstances. You are entitled to consider D's explanation for his conduct, his experience and his intelligence.
>
> 3. Having regard to the facts *and* D's state of mind about them, was his conduct dishonest according to the standards of ordinary decent people.
>
> 4. D's belief about the honesty of his conduct, or what others think of his conduct, is not conclusive. The standard of honesty in law is that of ordinary decent people, which is a matter for you and not the defendant.

When is a dishonesty direction required?

The *Ghosh* direction was only given in cases where the defendant claimed he did not realise that reasonable honest people would regard his conduct as dishonest.[22] Should juries now be directed on how to approach dishonesty in every case? A new approach is necessary because the reformulated test requires the jury to consider the facts or circumstances known to the defendant, including why he behaved as he did. We suggest that there will be many cases where, if no explanation or direction on dishonesty is provided, there would be a risk that jurors would simply apply an objective assessment without having proper regard to the defendant's knowledge or belief as to the facts. The safest course may be for at least the two limb *Barton* direction ([84]) to be given in every case. That would maximise consistency and reduce the possibility of defendants being disadvantaged. In more complex cases, it will be incumbent to consider whether any expanded direction on dishonesty must be given along the lines of the four steps we suggest above.

Looking forward

Space precludes us from examining the myriad other issues that may call for resolution, including:[23] how the disparity between approaches in theft (where s.2 of the Theft Act 1968 mandates certain conduct is not dishonest) and other dishonesty offences where *Ivey/Barton* defines dishonesty exhaustively; whether explicit Parliamentary statements that *Ghosh* will apply in the Fraud Act 2006 have any binding force (surely not?); and whether an Art.7 ECHR claim might be made by a defendant who claims that, (even with legal advice), he could not have anticipated that a jury would consider his conduct to be dishonest.

There are two further issues worth highlighting. Both arise because the approach to dishonesty has shifted from being conclusively determined by the defendant's state of mind (limb 2 of *Ghosh*), to a test that now turns on an objective assessment of the defendant's conduct and beliefs about all the circumstances. First, a company can only commit a crime if a corporate officer who is sufficiently senior to constitute its directing mind and will ("DMW") has the necessary *mens rea*.[24] In *SFO v Barclays Plc*[25] Davis LJ recently confirmed that since liability for an offence under the Fraud Act 2006 requires a "dishonest state of mind" a company could only be liable if a DMW behaved dishonestly. Following *Ivey* and *Barton* fraud turns more on the presence of a dishonest course of conduct than a dishonest state of mind. Whether this makes it easier to prosecute corporates remains to be seen, but that may prove to be the case. Secondly, to be guilty as an accessory a defendant must have knowledge or belief about any "facts" necessary to make the principal's conduct in question criminal. Similarly, for a statutory conspiracy the defendant must intend or know the facts necessary for the commission of the offence.[26] Following *Ivey* and *Barton*, on a rather technical construction it is arguable that a "fact" that makes the conduct criminal in dishonesty offences is that the principal's conduct would be considered dishonest by ordinary decent people. Could it be argued therefore that to be an accessory or a statutory conspirator the defendant must now be proved to have known/intended/believed that the principal's conduct would be considered dishonest by ordinary decent people?[27] That is likely to be an unpalatable interpretation for the Court of Appeal. It would make such offences difficult to prove; would distinguish statutory conspiracy from conspiracy to defraud;[28] and would mean that *Ghosh* was effectively retained in such cases, resulting in different tests for different offences,[29] thereby defeating Lord Hughes's aim of maximising consistency of approach. Moreover, on an examination of the elements above, it seems to be an over-simplification to say that the objective assessment of conduct is what renders it dishonest. Properly read, *Barton* requires an objective assessment of the conduct *and* the defendant's state of mind about it.

Conclusion

The judgment in *Barton* is of enormous significance for the law of precedent and all offences of dishonesty, but the law remains far from satisfactory. The Supreme Court's casting aside of the *Ghosh* test of dishonesty without detailed argument left many issues unresolved. *Barton* begins to provide the answers. Given the prominence of the role of dishonesty in so many very wide-reaching offences, further clarification is desperately needed.

22 See *Jouman* [2012] EWCA Crim 1850, in which the Court of Appeal reaffirmed that unless the question of the subjective element was properly raised, it was not necessary for the trial judge to give a full *Ghosh* direction. See also *Roberts* (1987) 84 Cr.App.R. 117.

23 Whether the *Ivey/Barton* test complies with Art.7 of the European Convention on Human Rights requires detailed judicial analysis. For discussion, see D. Ormerod and K. Laird, "*Ivey v Genting Still Casinos* – Much Ado About Nothing?, n 5 above.

24 For discussion, see D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, 2018), Ch 8.

25 *SFO v Barclays Plc* [2018] EWHC 3055, [129] and [131].

26 D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, 2018), Chs 6 and 11.

27 This issue arose in *Nyonyintono* [2020] EWCA Crim 454 but it was not considered in any great detail.

28 Unless *Churchill v Walton* [1967] 2 AC 224 applies.

29 Almost reminiscent of the position in *McIvor* [1982] 1 All E. R. 49 the court in *Ghosh* sought to resolve.

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