Intoxication, rape and secondary liability: In what circumstances is a "Sheehan direction" necessary when determining the liability of an intoxicated secondary party?

R v Mohamadi **[2020] EWCA Crim 327, Court of Appeal**

Key words: Rape – secondary liability – intoxication – ***Sheehan*** **direction**

In September 2016, at around 3.30 in the morning, Rafiullah Hamidy (H), Hamid Mohamadi (M), Tamin Rahmani (R) and Shershah Muslimyar (S) were driving home from a nightclub in Ramsgate, Kent. R dropped the others off near his flat above a pizza and kebab takeaway on Margate Road and went to park. At the same time, a 16-year-old girl, E, was walking along Margate Road, alone. She had been out for the night with friends but had separated from them and was trying to find a friend's house where she planned to spend the rest of the night. She was 'very drunk' as well as lost. She spotted H, M and S and approached them to ask for directions to her friend's house. However, instead of helping her, they took her back to R's flat. There, she was stripped and raped both orally and vaginally on a mattress on the floor. One man also raped her anally. Afterwards, she got dressed and left the building. She was found by a couple returning home who called the police. M, R and S were arrested soon after. H, who had fled to Italy, was extradited back to the UK.

All four men were charged with rape. They appeared before HHJ Norton and a jury at Canterbury Crown Court in May 2017. H, R and S were convicted of rape after DNA evidence in the form of their semen was found on E's body and clothing, and on the mattress, which linked them to the offences. (Only H admitted having sex with E, which he claimed was consensual.) No such evidence linked M to the rape. Indeed, he denied having sex with E or even being present in the room. He claimed that he had been 'very drunk' on the night in question and, although he admitted being in the flat, said that he had fallen asleep in another room. However, he too was convicted after HHJ Norton directed the jury to convict if sure that he had intentionally penetrated E or, if not, that he had intentionally assisted the others to do so.

At one point during the trial, M had requested that the trial judge direct the jury on the significance of his intoxication. However, HHJ Norton had declined to do so because M's defence was that he was neither a participant in the rape nor an accessory to it; therefore, she said, any direction about M's intoxication would be addressing an 'entirely hypothetical' situation which had not been raised in evidence.

M appealed, contending that HHJ Norton had wrongly rejected his request to direct the jury. More specifically, M contended that she should have directed the jury according to the direction established in *Sheehan & Moore* [1975] 1 WLR 739 (a *Sheehan* direction).

HELD, dismissing the appeal, that there was no specific requirement to give a Sheehan direction in any given case (at [38]). The Court of Appeal acknowledged that the trial judge had been wrong to dismiss the possibility that M had (contrary to his claim) been present in the room as 'entirely hypothetical' (at [27] and [45]). Indeed, there was 'strong evidence' that M was present when the others raped E, and evidence that he was intoxicated (at [29]). It would, therefore, have been preferable for her to have directed the jury on the significance (if any) of M being intoxicated (at [43]). However, the combination of the defence's closing speech and the summing up did address those matters (at [44]); thus, the conviction was safe (at [45]).

Commentary

The Sheehan direction

In *Sheehan & Moore* [1975] 1 WLR 739, Geoffrey Lane LJ stated that:

> In cases where drunkenness and its possible effect on the defendant's mens rea is in 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. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to

> draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent (at p 744).

The *Sheehan* direction is (or should be) very familiar to all students and practitioners of criminal law, in particular the line 'A drunken intent is nevertheless an intent'. It has been repeated or at least paraphrased many times in the appellate courts, for example in *Heard* [2007] EWCA Crim 125, [2008] QB 43 at [17] (per Hughes LJ) and *Press & Thompson* [2013] EWCA Crim 1849 at [35] (per Pitchford LJ). In *Naylor* [2003] EWCA Crim 863, Rix LJ described it as a 'classic direction' (at [18]). The *Sheehan* direction was extended to cases involving involuntary intoxication in *Kingston* [1995] 2 AC 355, at p 369 (per Lord Mustill).

Equally familiar, however, is the proposition that a *Sheehan* direction is not a prerequisite in every criminal trial where the accused might have been intoxicated. This is especially, but not exclusively, the case where the accused runs a defence other than intoxication at trial and a *Sheehan* direction might contradict or undermine that defence. In *Groark* [1999] EWCA Crim 207; [1999] Crim LR 669, the defendant had unsuccessfully relied on self-defence at his trial for wounding with intent. That failed and he was convicted. On appeal, he contended that the trial judge should have given a *Sheehan* direction. The Court of Appeal disagreed. Waller LJ referred to an earlier Court of Appeal case, *Bennett* [1995] Crim LR 877, and said:

> *Bennett* is authority for the proposition that the judge is obliged to direct the jury on intoxication whenever there is evidence such that a reasonable jury might conclude that there is a reasonable possibility that [D] did not form the *mens rea* [but this] was a case in which [D] was in no way asserting that he was incapable of forming an intention. It was tactically absolutely right to allow self-defence to be run without a direction about not being able to form an intention at all.

Shortly afterwards, in *McKnight* [2000] EWCA Crim 33, the Court of Appeal dealt with a similar case in which self-defence was unsuccessfully relied upon, this time in a murder trial. Again the appeal was based on a failure to give a *Sheehan* direction and again the appeal was rejected. Henry LJ said that 'there must be a proper factual basis before the *Sheehan &*

Moore direction is given. It certainly is not every case of drunkenness that would require it' (at [37]).

In the last five years, the Northern Ireland Court of Appeal has rejected appeals against murder convictions on the basis that *Sheehan* directions were not given on no less than three separate occasions. In the first case, *Walsh* [2015] NICA 46, Morgan LCJ said that: 'The evidence indicated that the applicant had consumed alcohol but at its height the evidence indicated that [she had] stayed on the sober side of fairly drunk… The evidence taken at its height does not raise any case that the applicant was so intoxicated that it affected the issue of whether she did, in fact, form an intent' (at [28]). Two years later, in *White* [2017] NICA 49, Morgan LCJ said:

> The issue for the jury was the actual intent of the defendant but it is apparent that there was a relatively significant threshold which must be crossed before the court was obliged to give the *Sheehan* direction. The evidence of the appellant herself provided no support for such a direction… We would not have criticised the judge for giving a *Sheehan* direction out of an abundance of caution but we do not consider that the facts and circumstances of this case required such a direction to be given (at [20] and [21]).

In the third case, *Ward* [2018] NICA 40, the issue on appeal was similar to that before the Court of Appeal in the present case. Mark Ward had been charged with murder. His defence at trial was that he had not been anywhere near the victim's flat during the morning when the victim had been punched to death and the perpetrator must have been someone else. However, prosecution witnesses put him at the scene and the jury convicted. On appeal, Ward contended that the trial judge should nevertheless have directed the jury with a *Sheehan* direction. This was rejected and the conviction was upheld. McCoskey J, giving the judgment of the court, reviewed a series of cases including *Bennett*, *Groark* and *White*. Referring to the level of intoxication which must be reached to bring a *Sheehan* direction into play, which he called the 'threshold test', McCoskey J said:

> We consider that, on careful analysis, all of the cases speak with the same voice on the issue of the threshold test. Fundamentally, when the stage of directing the

> jury is reached… there must be an issue about alcohol consumption having extinguished the necessary mens rea. The issue must be concrete rather than flimsy or fanciful... In *White*, this court described the threshold to be overcome as a "relatively significant" one. This is so because, as a consideration of the judgment in *White* makes clear, the second threshold in play, which would be for the jury, namely evidence that the accused was so intoxicated that he lacked the specific intent which is essential for murder, is a self-evidently elevated one (at [25]).

Applying *Groark, Ward* and *White* to the present case, there was evidence that M was intoxicated. However, that evidence fell short of the 'relatively significant' level at which intoxication might have 'extinguished' his *mens rea*. Put another way, evidence of M's intoxication had not reached the 'self-evidently elevated' level at which a 'reasonable jury might conclude that there is a reasonable possibility that [D] did not form the *mens rea'*.

Secondary liability is a specific intent offence… even where the substantive offence is basic intent

M was convicted of raping E, but apparently not as a principal offender. Instead, M was convicted as a secondary offender, on the basis that he had aided and abetted H, R and S to rape E. Certainly, that is how the Court of Appeal approached the case. According to Leggatt LJ, 'There was little or no evidence to suggest that [M] had himself penetrated E. Indeed, the absence of any DNA linked to him on any of the sensitive swabs… positively suggested that [M] had not himself raped E' (at [27]). Rather, 'a conclusion that [M] did not actively participate in the rapes but was present when they took place… was a relevant, if not the most relevant and likely scenario' (at [30]). For Leggatt LJ, the 'question is what, if any, direction the judge should *in these circumstances* have given the jury on the relevance of drunkenness to the issue of intention' (at [31]; emphasis added).

The legal ground on which M was convicted is therefore to be found in s.8 of the Accessories and Abettors Act 1861. As is well-known, s.8 provides that 'whosoever shall aid, abet, counsel, or procure the commission of [any indictable offence] … shall be liable to be tried, indicted, and punished as a principal offender', but is silent on the *mens rea* required. The leading case on the *mens rea* of a secondary party is the Supreme Court's judgment in *Jogee* [2016] UKSC 8; [2017] AC 387. According to Lord Hughes and Lord Toulson:

> The mental element in assisting or encouraging is an *intention* to assist or encourage the commission of the crime…If the crime requires a particular intent, D2 must *intend* to assist or encourage D1 to act with such intent (at [9] and [10]; emphasis added).

The fact that the Court of Appeal was even prepared to entertain M's contention that he may have lacked the requisite mental element demonstrates that aiding and abetting an offence must be a crime for which intoxication can – potentially – negate *mens rea*. In short, aiding and abetting an offence must be a crime of specific intent. That in itself is not inherently controversial. As Lord Birkenhead LC said, in the seminal House of Lords judgment on intoxication, *DPP v Beard* [1920] AC 479:

> Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved (at p 499).

What makes the present case particularly interesting is the fact that the offence perpetrated by H, R and S – rape – is one of basic intent, i.e. an offence for which intoxication cannot be used to deny proof of *mens rea*. Authority for this proposition comes from two Court of Appeal cases, *Woods* (1982) 74 Cr. App. R. 312 and *Fotheringham* (1989) 88 Cr App R 206. In the former, Griffiths LJ said that: 'The law, as a matter of social policy, has declared that self-induced intoxication is not a legally relevant matter to be taken into account in deciding as to whether or not a woman consents to intercourse' (at p 315). In the latter case, Watkins LJ said that: 'In rape, self-induced intoxication is no defence, whether the issue be intention, consent or, as here, mistake as to the identity of the victim. We do not doubt that the public would be outraged if the law were to be declared to be otherwise' (at p 212).

Admittedly, both of these cases pre-date the revolution in the field of sexual offences brought about by the Sexual Offences Act 2003 (the 2003 Act). To this writer's knowledge, no case

since 2003 has explicitly questioned the status of rape as a basic intent offence. This is despite the fact that the definition of the substantive offence of rape, now found in s 1 of the 2003 Act, requires inter alia that penetration be 'intentional' (which was not a requirement when Woods and Fotheringham were decided). Applying Lord Birkenhead's proposition (above) to s.1 of the 2003 Act, is there a valid argument to say that rape is now specific intent? The answer, it is submitted, is 'no'. Indeed, this argument has already been presented to the Court of Appeal, albeit in the context of s.3 of the 2003 Act. In a similar way to s 1, the definition of the offence in s 3 (sexual assault) requires intention (to touch). However, in *Heard* [2007] EWCA Crim 125, [2008] QB 43, Hughes LJ ruled that sexual assault was a basic intent offence, notwithstanding the requirement of intent:

> There is a great deal of policy in the decision whether voluntary intoxication can or cannot be relied upon. We have already referred to one of several passages in R v Majewski where the rule is firmly grounded upon common sense, whether purely logical or not. We agree that it is unlikely that it was the intention of Parliament in enacting [the 2003 Act] to change the law by permitting reliance upon voluntary intoxication where previously it was not permitted. The decision in *R v C* [1992] Crim LR 642 is more clearly in point… The decision of this court was that indecent assault remained a crime of basic intent for these purposes… We are wholly satisfied that there is no basis for construing [the 2003 Act] as having altered the law so as to make voluntary intoxication available as a defence to the allegation that the defendant intentionally touched the complainant (at [32]).

The upshot of that for the accused in Heard was that he could not use evidence of his intoxication to deny liability under s.3, notwithstanding the statutory requirement that intent be proven. The same policy arguments referred to in *Heard* regarding sexual assault apply a fortiori to cases involving rape, suggesting very strongly that rape under the 2003 Act remains a crime of basic intent.

What does all of this mean? It is submitted that the law is as follows:

1. Rape, along with assault by penetration, sexual assault, and causing another person to engage in sexual activity (under ss.1 – 4 of the 2003 Act) are crimes of basic intent for the reasons given in *Woods, Fotheringham* and *Heard*. This means that any man charged with rape as a principal cannot use intoxication to deny *mens rea*. The public in 2020 would be outraged 'if the law were to be declared to be otherwise', just as they would have been in 1989.
2. Aiding and abetting rape (or indeed any other offence) is a crime of specific intent. This means that any man (or woman) charged with rape as a secondary party can use intoxication to deny *mens rea*… but only if the evidence showed that the intoxication had reached the 'threshold level' at which a reasonable jury might conclude that there is a reasonable possibility that the accused did not form *mens rea*.