



Neutral Citation Number: [2024] EWCA Crim 780

Case No: 202303094 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ISLEWORTH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2024

Before :

LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal, Criminal Division)
MR JUSTICE JAY
and
MRS JUSTICE ELLENBOGEN DBE

Between :

VICTORIA GOLDSMITH **Appellant**
- and -
REX **Respondent**

M Keliris-Thomas (instructed by **HP Gower**) for the **Appellant**
T Naik (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date : 04 July 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.00am on 12 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

THE HON. MRS JUSTICE ELLENBOGEN DBE:

1. The question in this appeal is whether, in a trial of fact conducted under section 4A of the Criminal Procedure (Insanity) Act 1964, as amended ('the 1964 Act'), relating to an offence of possession with intent to supply a controlled drug contrary to section 5(3) of the Misuse of Drugs Act 1971 ('the 1971 Act'), a jury is obliged to consider only whether the defendant was in possession of the drugs in question, or whether it must also consider whether the defendant intended to supply them. The answer to that question will turn on whether the latter element forms part of the act charged against the defendant as the offence. We summarise the circumstances in which that issue has arisen, below.

The facts

2. On 8 October 2022, police were called to the BrewDog public house in Shepherd's Bush, after the Appellant had entered the lavatories. When officers arrived, she had been outside that public house but had walked away. She was followed by Special Constable Webb, arrested and searched. Two balls of a then unknown substance, suspected to be drugs of Class A, were found. When unwrapped, the balls were found to contain twenty smaller packages of Crack Cocaine, having a combined weight of 1.76 grams. The lavatories of the public house were searched by PC Skeldon. 114 wraps of suspected drugs were discovered, later determined to be Heroin, having a combined weight of 16.8 grams. On 10 October 2022, the Appellant was remanded in custody.
3. At her Plea and Trial Preparation Hearing on 7 November 2022, at Isleworth Crown Court, the Appellant pleaded not guilty to a five-count indictment concerning two counts of possession of drugs of Class A with intent to supply (respectively, Heroin and Crack Cocaine), and three counts of simple possession of the same drugs.
4. Thereafter, expert reports were sought regarding the Appellant's state of mental health, the first of which was provided by Dr Ghosh on 6 January 2023. Further reports were provided by Dr Hussain, on 28 January 2023 and 18 May 2023, and by Dr Shirazi, on 31 July 2023. The reports expressed various concerns and concluded that the Appellant suffered from paranoia; delusional beliefs; socially and sexually uninhibited behaviour; and memory loss. On 25 May 2023, HMP Bronzefield transferred the Appellant into hospital care, under section 48 of the Mental Health Act 1983. She was diagnosed by Dr Shirazi as suffering from schizoaffective disorder. Medical opinion was that she was unfit to plead and stand trial.
5. On the date listed as the first day of trial, 7 August 2023, the Appellant was not produced. Her treating clinician, Dr Shirazi, appeared via video-link and confirmed that she was not fit to attend the trial. The parties agreed that it would be appropriate to proceed in her absence and, informed by Doctor Shirazi's account, the Recorder found that it was in the interests of justice to do so, going on to make a determination as to the

Appellant's fitness to plead and stand trial. She gave a reasoned ruling, no copy of which has been provided to us, for her conclusion (shared by the parties) that the Appellant was unfit, in accordance with the test in *R v M (John)* [2003] EWCA Crim 3452 and *R v Pritchard* (1836) 7 C&P 303. She ordered that a trial of the fact take place, pursuant to section 4A of the 1964 Act, appointing Mr Keliris-Thomas to put the case for the Defence, as he does before this court. The not guilty pleas which the Appellant had entered at her PTPH were quashed and all charges other than that with which this appeal is concerned were left to lie on the file, on the usual terms.

6. There followed legal argument as to the scope of the mental element engaged by the single offence which was to proceed, the particulars of which were that the Appellant *'on the 8th day of October 2022 had in her possession a quantity of crack cocaine, a controlled drug of Class A with intent to supply it to another in contravention of section 4(1) of the Misuse of Drugs Act 1971.'* The parties were agreed that, on the question of possession, in order to determine whether the Appellant had done the act charged, the jury would need to determine whether she had had knowledge of the presence of the drugs. They disagreed as to whether the mental element for intention to supply formed part of the act charged. In short, the Defence contended that intention formed part of that act and could be assessed objectively. The Crown's position was that a trial under section 4A was not concerned with mens rea, such that consideration of intent was not appropriate. The Recorder accepted that submission, ruling that, *'There is a clear division between the mental element and the physical element when it comes to the question of intent to supply, as opposed to the question of the possession, and so, for that reason, my ruling is that the jury will be directed that the act encompasses the possession of the crack cocaine, requiring the Crown to prove both possession and that the drug was crack cocaine, but not the intent element.'*
7. At trial, the Crown relied upon the read statement and bodyworn video-camera footage of SC Webb. Evidence was provided by the officer in charge of the investigation, which confirmed that (in broad terms) a no comment interview had been given; the fact that the Appellant had been on her own when stopped and searched; the lack of messages on her telephone regarding the purchase or sale of drugs; and the fact that she had had no cash on her when arrested. No evidence was called for the Defence. The Recorder directed the jury that its only consideration was whether the Appellant had been in possession of crack cocaine, in that she had had knowledge of its presence and some control over it.
8. On 8 August 2023, by a majority, the jury found that the Appellant had done the act charged. On 24 October 2023, following the Recorder's consideration of written material from Doctors Shirazi and Hussain, and of Dr Shirazi's oral evidence, via video-link, a hospital order was made, under section 37 of the Mental Health Act 1983, requiring that the Appellant remain at the hospital specified, under his care. Given the nature of the trial, any such order ought to have been made under section 5(2)(a) of the

1964 Act and the order made has since been corrected to that effect. The Recorder also ordered forfeiture and destruction of the drugs seized.

The ground of appeal

9. The single ground of appeal is that the Recorder had been wrong to find that intent to supply was irrelevant to a consideration of whether the Appellant had done the act charged, and, thus, to have removed consideration of that issue from the jury. The competing submissions may be encapsulated as follows.

For the Appellant

10. For the Appellant, it is said that the offence of possession with intent to supply, contrary to section 5(3) of the 1971 Act, has, as a fundamental requirement, that the person in possession of any controlled drug has an intention to supply that drug: *R v Maginnis* [1987] AC 303, at 316D. Possession without such an intention is specifically catered for by section 5(2) of the Act. The two offences are not interchangeable. There are policy reasons for that difference, not least that those who do not contribute to the onward trade of drugs, and who are themselves often addicts, should be treated differently from those who trade in narcotics. To allow the facts of a simple possession to ground a decision that the Appellant had committed the act of possession with intent to supply is said to run contrary to the intention of Parliament, in rendering the two offences identical for an individual subject to a trial of the act charged, conducted pursuant to section 4A of the 1964 Act.
11. It is submitted that, drawing on the relevant caselaw, the proper approach to determining the mental element, if any, which is to be left to the jury in a trial of ‘the act’ is as follows. First, the nature of the offence in question must be analysed in order to ascertain its gravamen and those elements which can properly be considered to constitute ‘the act’. Those might include mental elements, where they are essential to the proper construction of the offence and where their absence would emasculate the act in question, as framed by the relevant statute. Where such factors are able to be proven by ‘objective’ evidence, they are suitable to be left to the jury.
12. Mr Keliris-Thomas submits that, in a case of possession with intent to supply, intention can be, and commonly is, proven by reference to external factors. Examples commonly deployed by the Crown are digital messages; cell-site data; quantities of drugs or money; drug purity; images; associations and witness accounts. The availability of objective factors to prove intention to supply would cause no difficulty for the jury and would be consistent with the approach adopted in *R v MB* [2012] 3 All ER 1093 and *R v Wells & Others* [2015] EWCA Crim 2.

13. On the facts of this case, it is said, the approach adopted by the Recorder results in a perverse outcome; that a person who is found unfit to plead may be convicted of a more serious offence, where only the elements of a lesser offence are proven.

For the Respondent

14. For the Respondent, Mr Naik submits that *R v Attorney General's Reference (No.3 of 1988)* [2000] QB 401, approved in *R v Antoine* [2001] AC 340, itself followed in *R v Grant* [2001] EWCA Crim 2611 [45], confirms that the focus is on the act and not on the mental element of the offence. Acknowledging that, in *R v MB* [2012] 3 All ER 1093 [62], the defendant's state of mind was considered as part of the act of voyeurism — an activity comprising two components, together held to constitute the relevant act — it is submitted that, in a trial of fact regarding possession with intent to supply, only the actus reus of possession falls to be considered by the jury, absent the mental element of intention to supply. There is and can be no evidence as to the Appellant's mental state at the material time, on which it would be dangerous for the jury to speculate. Unlike the offence of voyeurism, in which the act is intrinsically linked to the purpose of sexual gratification, possession with intent to supply has two separate components; the actus reus is possession, itself constituted in the actus reus of having drugs on one's person, coupled with the mens rea of awareness that that is the case. Thus, in a trial under section 4A of the 1964 Act which is concerned with an offence of simple possession, the jury would be concerned only with the actus reus of that offence. In this case, it is said, it was never disputed that the Appellant had been aware that she had had drugs on her person, but that is a matter distinct in character from the intention — by its nature subjective — with which those drugs had been possessed. Any unfairness in that approach is said to be ameliorated by the fact that the jury's determination is of whether the act was done, as opposed to a finding of guilt from which the related criminal disposal would follow.

The Law

15. Section 4A of the 1964 Act provides:

'4A Finding that the accused did the act or made the omission charged against him.

- (1) This section applies where in accordance with section 4(5) above it is determined by a court that the accused is under a disability.
- (2) The trial shall not proceed or further proceed but it shall be determined by a jury—
 - (a) on the evidence (if any) already given in the trial; and
 - (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence,

whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.

- (3) If as respects that count or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.
- (4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.
- (5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried.'

16. The meaning of 'the act', for the purposes of section 4A(3) above, has been the subject of consideration in a number of cases, though counsel have been unable to find any concerned with an offence contrary to section 5(2) or 5(3) of the 1971 Act.

17. *Attorney-General's Reference (No. 3 of 1998)* [2000] QB 401 was concerned with Section 2(1) of the Trial of Lunatics Act 1883 which also contained the phrase, 'did the act or made the omission'. In that case, the defendant had been charged with aggravated burglary of a residential property. On the medical evidence, the parties were agreed that, at the time at which he had entered the property, he had been legally insane. Nevertheless, he was fit to plead. The issue raised by the reference was whether, where insanity had been established, the Crown was required to prove both the actus reus and the mens rea of the offence charged against the defendant, or something less, and if so what that was. Giving the judgment of the court, Judge LJ (as he then was) held that ([409C-E]):

'...whether the case is proceeding on the ground of insanity or unfitness to plead, by statute, the issue is identical, that is, whether or not the defendant did the act or made the omission charged. Such acts or omissions must be examined in the context of the offence alleged, but nothing in the legislation suggests that if the jury has concluded that the defendant's mental state was such that, adapting Lord Diplock's observation in *Reg. v. Sullivan* [1984] 1 A.C. 156, 170, his mental responsibility for his crime was negated, it should simultaneously consider whether the necessary mens rea has also been proved. These mutually incompatible features may of course require examination by a jury when, contrary to the defence plea of insanity, the Crown is nevertheless seeking to establish guilt of the offence charged, but once it is decided that the defendant was indeed insane at the time of his actions, in accordance with *Felstead v. The King* [1914] 1 A.C. 534, mens rea becomes irrelevant.'

18. The court went on to hold that the Crown was required to prove the ingredients constituting the actus reus of the offence, by showing that the defendant had caused a

certain event, or that responsibility was to be attributed to him for the existence of a certain state of affairs, which was forbidden by the criminal law, but was not required to prove the mens rea of the crime alleged and that, apart from the issue of insanity, the defendant's state of mind ceased to be relevant.

19. In *R v Antoine* [2001] 1AC 340, HL, the certified issue for determination was whether a person charged with murder was entitled to rely upon the defence of diminished responsibility under section 2 of the Homicide Act 1957, when he had been found by a jury to be unfit to plead by reason of mental disability, and the jury had proceeded under section 4A(2) of the 1964 Act to determine whether he had done the act charged against him as the offence. The court held that, at such a hearing, the defendant could not raise that defence, going on to consider a 'wider question', framed as follows: '*Where, pursuant to section 4A(2) of the Criminal Procedure (Insanity) Act 1964, a jury has to determine whether an accused did the act or made the omission charged against him as the offence, must the jury be satisfied of more than the actus reus of the offence? Must the jury be satisfied of mens rea?*' The House of Lords' conclusions on that question, per Lord Hutton, were helpfully summarised in *R v MB* [2012] EWCA Crim 770, at [45] to [48], as follows:

'45. Lord Hutton then considered the "wider question". He analysed the decisions in *R v Egan* and *Attorney General's Reference (No 3 of 1998)*. He opined that the former was wrongly decided and the latter was correct. He gave four principal reasons for this conclusion ...

46. First, Lord Hutton stated that the use of the words "did the act" in the 1883 Act, which was in contrast to the words "committed the offence" in the 1800 Act, was significant in considering the ambit of the words "the act ...charged against him as the offence" in the 1964 Act. The use of those words pointed to the conclusion that the word "act" did not include intent. Secondly, if the word "act" included the mental element of specific intent in the offence of murder then it had a bizarre consequence which Parliament could not have intended. Thus a defendant who had killed someone but who was insane when he did so and was unfit to stand trial as a consequence would have to be acquitted, because the necessary mental element of the offence could not be proved because of the existence of the insanity at the time of the alleged offence. Thirdly, although the Butler Committee of 1975 on Mentally Abnormal Offenders had stated that when a defendant is found to be under a disability and there has to be a trial of the facts, "the issues to be decided include the defendant's state of mind", that view had not been carried into section 4A(2) of the 1964 Act when it was amended by the 1991 Act. This was because it was both unrealistic and contradictory to decide issues of the mental state of the defendant if the reason for him being unfit to be tried was the defendant's very lack of a normal mental state.

47. Lastly, Lord Hutton considered that the purpose of section 4A(2) was:

"...to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea..."

Lord Hutton considered that the section struck this balance by distinguishing between "... a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea". Lord Hutton did not discuss further what he meant by an "injurious act". The problem is, therefore, in discerning what elements of the "offence" with which the person under a disability is charged constitutes the "injurious act" and what constitutes the mental element.

48. However, Lord Hutton recognised that there were, in some cases, practical difficulties in distinguishing between the "act" of the crime (what he called actus reus) as opposed to the mental element (what he called mens rea) and he recognised that in some instances the "act" of the crime itself may include a mental element. Moreover, he also recognised that certain defences, such as accident, mistake and self-defence, could relate to the mental state of the defendant. How was that to be dealt with in a case where there was a determination under section 4A(2) where the defendant was declared unfit to stand trial because of his mental disability? Lord Hutton proposed the following solution:

"If there is objective evidence which raises the issue of mistake or accident or self-defence, then the jury should not find that the defendant did the "act" unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has negated that defence....But what the defence cannot do, in the absence of a witness whose evidence raises the defence, is to suggest to the jury that the defendant may have acted under a mistake, or by accident, or in self-defence, and to submit that the jury should acquit unless the prosecution satisfies them that there is no reasonable possibility that that suggestion is correct".'

20. We shall return to *MB* in due course. In *R v Grant* [2001] EWCA Crim 2611, applying *Antoine*, a defendant who had been found unfit to be tried for the murder of her boyfriend by reason of her mental state was precluded from relying on the defences of lack of intent and provocation since it was not open to the jury to consider issues of mens rea when carrying out their determination under section 4A of the 1964 Act. Considering the defence of provocation (since abolished in favour of loss of control), the court held (at [43] to [47]):

'43. In relation to offences other than murder, provocation is a mitigating circumstance to be taken into account in sentencing. In relation to murder alone it is regarded as a sufficient extenuating feature to cause the offence to be reduced from murder to manslaughter. But its application presupposes that all the other elements of murder are otherwise present: if they are not, the

defendant is entitled to be acquitted of murder. As Lord Hutton stated in *R v Antoine*, “[t]he defence of provocation to a charge of murder is only relevant when the jury are satisfied that the defendant had the requisite mens rea for murder” (377D); see also *Lee Chun-Chueng v. The Queen [1963] AC 220*, 228, where it was held that the defence may arise where the defendant had the intent to kill or to cause grievous bodily harm but such intent arose from a sudden loss of self-control by reason of provocation. Thus, the requirement to direct a jury that before considering provocation they should be sure that all the other elements of murder, including the requisite intent, have been proved goes beyond mere practical convenience. It reflects the nature of the defence of provocation itself. It follows that the defence cannot sensibly be considered in the context of s.4A, where the jury cannot consider the question of intent and cannot therefore reach a conclusion on whether all the other elements of murder are made out.

44. Moreover the defence of provocation is intimately bound up with the defendant's state of mind. Any consideration of provocation inevitably requires examination of the defendant's state of mind, in determining whether there has been a sudden and temporary loss of self-control and whether that loss of self-control was caused by the conduct of the deceased. In the course of his submissions, Mr Cosgrove pointed out that a defendant may react to provocation so quickly that he does not even form the intent necessary for murder. That submission serves to underline the difficulty of treating provocation in an altogether different way from intent for the purposes of s.4A. It was pointed out in *R v Antoine* that, where a person is unfit to be tried in the normal way because of his mental state, it would be unrealistic and contradictory that in carrying out the determination under s.4A(2) the jury should have to consider what intention that person had in mind at the time of the alleged offence, and that by using the word “act” in the statutory provision Parliament had made it clear that the jury was not to consider the mental ingredients of the offence (375B–C). In our judgment similar considerations apply to provocation. It would be unrealistic and contradictory, in relation to a person unfit to be tried, that a jury should have to consider what effect the conduct of the deceased had on the mind of that person. Parliament cannot have intended that question to be included within the determination of whether the person “did the act” charged.

45. The distinction applied in *R v Antoine* between actus reus and mens rea is not clear-cut, but in our judgment provocation falls clearly on the mens rea side of the dividing line. The distinction was perhaps further clouded in *R v Antoine* by an acceptance that certain defences, namely accident, mistake and self-defence, could be considered under s.4A if there was objective evidence which raised them, notwithstanding that such defences almost invariably involve some consideration of the mental state of the defendant. We do not think that what was said in that connection can be applied to the defence of provocation. The defences that it was held could be raised all related to what their Lordships regarded as the actus reus of murder. By contrast, it is clear that their Lordships did not consider it open to the jury to consider issues of mens rea under s.4A(2) whatever the circumstances; and within that were included the issues of lack of specific intent and diminished responsibility. For the reasons already given, the same must apply to the defence of provocation.

46.. Finally, although the first of the considerations upon which Lord Hutton relied in *R v Antoine* as a ground for holding that diminished responsibility could not be advanced in the context of s.4A of the 1964 Act was specific to

the language of s.2 of the 1957 Act, which has no direct parallel in s.3 of the 1957 Act in respect of provocation, other aspects of his reasoning in relation to diminished responsibility, based on the anomalies that would result if the appellant's case were correct, can be applied equally to provocation. In our judgment they provide additional reasons for rejecting the appellant's submissions.

47. Accordingly the judge was in our judgment correct to rule that lack of intent and provocation could not be raised on behalf of the appellant at the s.4A hearing in this case.'

21. In *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), the claimant investment adviser had been charged with dishonest concealment of material facts relating to bonds, contrary to section 47(1) of the Financial Services Act 1986 (since repealed). That section provided:

'(1) Any person who —

- (a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts; or
- (b) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive,

is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made or from whom the facts are concealed) to enter or offer to enter into, or to refrain from entering or offering to enter into, an investment agreement or to exercise, or refrain from exercising, any rights conferred by an investment.'

22. The particulars of the offence included: (i) that he intended then and there to have a personal interest, and/or (ii) intended then and there to have control of the bonds, and/or (iii) intended then and there to manipulate the conversion of the bonds so as to enhance the value of his personal interest. A jury determined that he was unfit to plead and the judge ruled that his intention as to future conduct, as particularised in the charge, was capable of being a fact, and that investigation of that intent was the proper subject of inquiry by the jury in relation to the section 4A determination since it was not possible to decide whether the claimant had committed the acts alleged without inquiring into his intentions. The Divisional Court dismissed the claimant's application for judicial review of that ruling. At [34] and [35], Rose LJ held:

'34. As a matter of statutory interpretation, section 47(1) of the Financial Services Act 1986, to my mind, includes within material facts dishonest concealment, which is one of the forms of offence under the section, of a defendant's present intention, as particularised in [specified counts on the

indictment]... It is, as it seems to me, plainly a matter of interpretation of the particular statutory provisions whether that is so or not. A statement of intention for the purposes of the Larceny Act 1916 or, indeed, the Summary Jurisdiction Act 1899 did not, as a matter of interpretation, give rise to a false pretence as was held in *Dent*. But that, as it seems to me, is not determinative of the matter in the present case, and it is pertinent that Devlin J. reached no conclusion as to whether intention was or was not a matter of present fact.

35. So far as Jackson J.'s second conclusion is concerned, it seems to me that it is appropriate for the jury charged with the inquiry under section 4A of the 1964 Act to consider the intentions of the defendant not, of course, in relation to dishonesty, and not in relation to the purpose of making the representations, but his intention as one of the facts represented, according to the particulars of the offence, to those said to be the victims of his activity.'

23. Leveson J (as he then was) held, at [38] to [41]:

'38. I also agree. I add only a few words on the issues surrounding section 4A of the Criminal Procedure (Insanity) Act 1964. The function of a trial of the facts is to determine whether the jury are satisfied that the defendant did the act or made the omission charged. If they are so satisfied to the criminal standard, a finding is made to that effect. This is not a conviction or the equivalent of a conviction, but rather protects the defendant against the risk of a verdict of guilty. Further, if the jury are not so satisfied a verdict of acquittal is returned which does have the same status as an acquittal in any other criminal proceedings.

39. Turning to the facts of this case, the particulars of the allegation of dishonestly concealing material facts, contrary to section 47(1) of the Financial Services Act 1986, have already been set out by Rose L.J. If [counsel for the claimant's] submission is correct, the acts considered by the jury under the section 4A hearing would be restricted to prove that: (1) between ... the defendant was an investment adviser to ...; (2) he had been concerned in the design and structure of the...; (3) he concealed such facts from the trustees of the investment fund; (4) these facts were, in fact, material relevant to the consideration of the trustees whether to enter into an investment agreement to purchase ... the bonds or warrants.

40. I have no doubt that a determination of these facts does not on its own address the very important issues with which section 4A is intended to deal. The gravamen of the allegation is utterly emasculated by that formulation. A consideration of whether the defendant did the act, or made the omission charged against him as the offence which is required by section 4A(2) of the Act must, therefore, in the context of this case, go beyond purely physical acts. Indeed, the *actus reus* of this offence is far wider than that; as Rose L.J. has observed, it involves concealing a positive state of affairs, namely the nature of the fixed intention which this defendant had at the time.

41. In my judgment, these further facts properly fall within the purview of the jury, only a consideration of all these matters provides some real meaning to the verdicts which they reach.'

24. We return to consider *MB*. In that case, the court was concerned with an appellant who had been charged with two counts of voyeurism, contrary to section 67(1) of the Sexual

Offences Act 2003. The particulars of each alleged offence were framed in this way: *'for the purpose of sexual gratification, observed [X or Y, as the case might be] doing a private act, knowing that [X or Y] did not consent to being observed for [the appellant's] sexual gratification'*. The judge declared the appellant unfit to be tried. He ruled that *'all that is required for the prosecution to prove in this case is that [the appellant] on 20 April 2010 observed the relevant boy doing a private act. It seems to me that the Crown does not need to prove either that it was for the purpose of sexual gratification or that it was necessarily done knowing that the victim did not consent to being observed for sexual gratification.'* The jury was directed to decide *'...whether [the appellant] observed the child in question doing a private act... You are not concerned to decide whether his motive was or was not a sexual one or whether he knew that what he was doing was wrong or knew that it was inappropriate or that it would be regarded by other people as wrong or inappropriate, that is not the issue you are here to decide'*. It found him to have committed the act charged against him in respect of one of the two counts, acquitting him on the other. On appeal, it was submitted that the jury ought to have been directed to consider the element 'for the purpose of sexual gratification' as part of the act charged as the offence, which, it was said, could not be considered an independent mental element. The respondent's position was that the judge's ruling and direction had been correct; as it had been agreed that the boys in question had, at the relevant time, been doing a private act, the only issue for the jury had been whether the appellant had 'observed' each of them doing so, requiring that his action had been deliberate rather than accidental. Having analysed the elements of the offence charged, this court concluded that ([64] to [68]):

'64. ...the link between deliberate observation and the purpose of sexual gratification of the observer is central to the statutory offence of voyeurism. To use Lord Hutton's phrase, it is that purpose which turns the deliberate observation of another doing an intimate act (such as undressing) in private into an "injurious act". We have to accept that enquiring into someone's purpose for doing something is to enquire into that person's state of mind when he did the relevant act. However, a person's state of mind is, of course, just as much a fact as the outward act of deliberate observation and, in this case at least, the creation of the state of mind must be the result of a positive thought process by the observer. For the offence of voyeurism, these two actions, the one aimed at the outside world and the other going on in the consciousness of the observer, have to go together; the deliberate observation must be done simultaneously with the specific, albeit subjective, purpose of obtaining sexual gratification.

65. If that is so, then we must conclude that, in the case of an offence of voyeurism ..., the relevant "act...charged as the offence" of the purposes of section 4A(2) is that of deliberate observation of another doing a private act where the observer does so for the specific purpose of the observer obtaining sexual gratification. That omnibus activity is the "injurious act". Although the

activity has two components, they are indissoluble; together they are the relevant “act”.

66. As for the further element in the offence of voyeurism, the observer’s knowledge that the person observed does not consent to being observed for the purposes of the observer’s sexual gratification, that is not directly linked to the outward component of the “act”. It refers to the state of mind that the observer must have, but it is not the reason for the observation. Accordingly, for the purposes of *section 4A(2)*, we have concluded that this element of the offence is not a part of the “act...charged as the offence” and so is not something the jury will be concerned to determine.

67. We think that this conclusion is consistent with the social purpose of *section 4A* of the 1964 Act as identified by Lord Hutton in *R v Antoine* and which we have quoted above. If all that a jury had to determine was whether a person deliberately observed another doing a private act, then the consequence would be that the defendant would have to be dealt with in accordance with *section 5* of the 1964 Act. So he could be subject to a hospital order with or without a restriction order. He would have to register on the Sex Offenders Register: *section 80(1)(c)* of the SOA. He could be the subject of a SOPO, as happened in this case. In our view, although a person observing another doing a private act can be regarded as an unpleasant nuisance, there is not the same pressing social need to protect the public from him as there would be if it were proved that the observation was done for the specific purpose of the observer’s sexual gratification.

68. We think that our conclusion is also consistent with the approach of this court in *R(Young) v Central Criminal Court*. There the key outward act of the defendant was an omission: he failed to state material facts to the potential investor. But, as in the present case, these outward failures had to be indissolubly linked to the defendant’s state of mind which gave rise to the outward failure, viz. the defendant’s present intentions as to his future activities. As Leveson J put it: the physical act concealed a “*positive state of affairs....the fixed intention that the defendant had at the time*”.’

The appeal on that issue was allowed.

25. *R v Wells and Others* concerned four conjoined appeals in each of which the appellant had been found unfit to plead, and then, by a jury, to have committed the act, or made the omission, charged against him, pursuant to *section 4A* of the 1964 Act.

26. Giving the judgment of the court, Sir Brian Leveson P began with certain preliminary observations, noting that the consequences of a finding of unfitness to plead generated difficult issues of balance, as described in *section 4A* of the 1964 Act. He held ([3] to [5]):

‘3. In the event that a defendant is found to have done the act or made the omission, there is no determination of a criminal charge and no question of conviction or punishment: see the analysis in *R v M* [2002] 1 WLR 824. Only the act or omission has been proved and there has been no investigation or attempt (even less, a successful attempt) to prove all the constituent ingredients of the offence charged. The powers of the court are therefore not those which

follow a conviction but are restricted to measures designed to treat, rehabilitate and support while, in the most serious cases, providing protection for the public.

4. Thus, the court is confined to ordering an absolute discharge, a supervision order or, if appropriately certified by medical practitioners, making a hospital order (with or without a restriction order): see section 5(2) of the 1964 Act. A restriction order would not be available as a civil remedy under the Mental Health Act 1983 so that, in the case of a hospital order with a restriction order which is still in place, the Secretary of State, if satisfied after consultation with the responsible clinician that the person can properly be tried (that is to say, is no longer unfit to plead), may remit the person for trial whereupon the hospital order (and the restriction order) shall cease to have effect: see section 5A(5) of the 1964 Act.

5. The balance which the legislation seeks to strike, therefore, is to protect the rights and interests of those accused of crime to ensure that their liberty is not adversely affected without the appropriate safeguards of a court having established beyond reasonable doubt that the accused did the act or made the omission charged. On the other hand, the public interest is also protected from those who are proved to have committed the most serious acts but who cannot be tried on the grounds that they are unfit to take part in a trial of the allegations made against them.'

27. At [9] to [12], he continued:

'9. ..., it is worth emphasising that a hearing pursuant to section 4A of the 1964 Act is not a criminal trial to determine the guilt or otherwise of an accused person. It is the consequence of an inability to conduct a trial with that aim in mind because of the mental incapacity of the defendant; it recognises that the part which can be played by the defendant is necessarily limited because, for whatever reason connected with that incapacity, by definition, he or she cannot participate in the trial. Further, if the incapacity was in place at the time of the incident, what was said then or what the defendant would now say cannot be evaluated by a jury in the normal way. The exercise, therefore, is limited to ensuring that the interference with the liberty of the defendant consequent on whatever order might be made following an adverse finding can be justified by reference to what can be proved about what he or she did, even if intention might have been clouded by delusion or other incapacity.

10. That there is such a bespoke procedure is critical and can be demonstrated quite simply. If, on the one hand, it was necessary for the Crown to prove all the ingredients of murder, a paranoid and delusional schizophrenic would be able legitimately to plead self-defence to murder on the basis that he or she truly believed that he or she was being attacked by an alien even though his or her interaction with his or her victim was, in objective reality, entirely benign. Subject to intervention under the Mental Health Act 1983, he would then be free to do so again. In *Attorney General's Reference (No 3 of 1998)* [2008] QB 401, Judge LJ provided a different graphic illustration of the difficulty, at p 411:

“Where on an indictment for rape it is proved that sexual intercourse has taken place without the consent of the woman, and the defendant has established insanity, he should not be entitled

to an acquittal on the basis that he mistakenly, but insanely, understood or believed that she was consenting.”

11. Having provided that example, however, Judge LJ also went on to explain why the requirement to prove that he or she “did the act” was so important:

“But when an individual surrounded by a group of much larger, aggressive and armed youths, strikes out and lands a blow on one of them who unfortunately falls to the ground sustaining a fatal head injury, it would be unjust if he were prevented from inviting the jury to consider that his violence might have been lawful, merely because, as a result of insanity, he believed that the group of youths was a mob of devils attacking him because (as the defendant in the present case believed) he was Jesus Christ. Excluding this individual’s own damaged mental faculty at the time, the jury might conclude that although he caused death, his actions were not unlawful, and so did not constitute the actus reus of murder, or manslaughter.”

12. It is not difficult to see that these examples qualify the act. If committed in self-defence, an assault is not unlawful; if an accident, the act is not deliberate; if a mistake, the quality of the act has been affected by the circumstances. This delineation is clear but does lead into the first question, namely, the extent to which it is always possible or appropriate to separate actus reus from mens rea. Other offences create rather more difficulty and underline that a proper consideration of the “acts” required to prove an offence require an offence specific consideration of its ingredients. As the authorities make clear, there is no bright line and the actus reus may, indeed, involve mental elements.’

28. From the above line of authority, and acknowledging that its navigation is not straightforward, we consider the following principles to derive:

- a. A hearing pursuant to section 4A of the 1964 Act is limited to ensuring that the interference with the liberty of the defendant consequent upon whatever order might be made following an adverse finding can be justified by reference to what can be proved about that which he or she did (or omitted to do), even if intention might have been clouded by delusion or other incapacity: *Wells*.
- b. In such a hearing, the jury will be concerned only with the ‘injurious act’ (or omission) which would constitute a crime if done (or made) with the requisite mens rea: *Antoine*.
- c. In demonstrating the actus reus, the Crown must show that the defendant ‘has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law ...’: *Attorney-General's Reference (No. 3 of 1998)*, approved in *Antoine*.

- d. There is no ‘bright line’ between the actus reus and the mens rea; depending upon the nature of the offence charged, the former may involve mental elements. A proper consideration of the ‘acts’ required to prove an offence requires an offence-specific consideration of its ingredients: *Wells* and *Grant*.
- e. In some cases, there are practical difficulties in distinguishing between the act of the crime (the ‘actus reus’) and the mental element (the ‘mens rea’), it being the case that, in some instances, the act of the crime might include a mental element: *Antoine*, as explained in *MB*.
- f. In each case, it will be necessary to analyse, with care, the gravamen (that is, the essence) of the allegation which constitutes the act or omission for the purposes of section 4A. Where the offence charged is statutory, that will require interpretation of the language used and of the pleaded particulars of the offence. That exercise may result in a conclusion that the ‘act’ of which the jury must be sure, goes beyond physical acts and encompasses some aspect of the defendant’s intention or purpose at the relevant time. In such circumstances, it is that intention or purpose which results in the act in question being, in the language of Lord Hutton, ‘*an injurious act*’, in which the two components are indissoluble and only a consideration of all matters provides real meaning to the jury’s verdicts: *Young* and *MB*.
- g. A state of mind which is not directly linked to the outward component of the act — that is, which is not the reason for it — does not form part of the act charged as the offence and, accordingly, will not be a matter for the jury to determine: *MB*.
- h. In a case in which there is objective evidence which raises a prospective defence to the actus reus of the offence charged, albeit one entailing some consideration of the mental state of the defendant, the jury should not find that the defendant did the ‘act’ unless it is satisfied beyond reasonable doubt, on all the evidence, that the prosecution has negated that defence: *Antoine*.
- i. Where a prospective defence does not relate to the actus reus of the offence charged, it is not open to the jury to consider issues of mens rea; hence, on a charge of murder, it is not open to the jury to consider lack of specific intent; diminished responsibility; and provocation (the last of which relevant only when the jury was satisfied that the defendant had the requisite mens rea for murder): *Antoine* and *Grant*.

The offences in this case

29. With those principles in mind, we turn to consider the drug offences the subject of this case. Whilst sections 5(2) and 5(3) of the 1971 Act create distinct offences, each requires the Crown to establish possession, the physical element of which being that ‘the thing’ is in the custody of the defendant, or subject to his control, and the mental element being his knowledge that the thing exists and that it is in his possession (see *R v Lambert* [2002] 2 AC 545, HL, [61] and [120] to [122]). In this case, neither element was in issue.
30. An offence under section 5(3) of the 1971 Act has the further mental element of intent to supply. In the absence of that intent, the offence committed is one of simple possession. We bear in mind that there is no necessary bright line between the actus reus and the mens rea of an offence; that is to say that, for some offences, as in this case, the actus reus will encompass some mental element. Nevertheless, whilst the gravamen, or essence, of an offence contrary to section 5(3) of the 1971 Act is the intent to supply, that intent forms no part of the essence of the actus reus; it is, as its wording clearly signals, the mens rea required for the offence to be established.

Trial of the fact in relation to an offence charged under section 5(3) of the 1971 Act

31. We turn to consider the consequence of that analysis for an enquiry conducted under section 4A of the 1964 Act in relation to an offence contrary to section 5(3) of the 1971 Act. As we have noted, the Respondent accepted below — and maintains before us — that it was appropriate and necessary for the jury to make a finding as to possession, notwithstanding the basic mental element which formed a component of that act. But that is a different matter from the question of intent, to which we consider that *Antoine*, by which this court is bound, affords a complete answer. On an enquiry under section 4A of the 1964 Act, the jury is not permitted to enquire into the intent of the defendant and is simply concerned with ‘the act’, here of possession. Where there is objective evidence which raises a prospective defence relating to that act, the jury should not find that the defendant did it unless it is satisfied beyond reasonable doubt, on all the evidence, that the Crown has negated that defence.
32. We consider that Mr Keliris-Thomas’ submissions wrongly conflate the gravamen of the offence created by section 5(3) of the 1971 Act (which, undoubtedly, is the intent to supply), with the gravamen of the injurious act, being possession. It is the latter which ought to be the focus of attention. As he acknowledged in the course of discussion, the gravamen of the offence of murder is that the act causative of death be carried out with the intention to kill or to cause grievous bodily harm, nevertheless, on an enquiry under

section 4A of the 1964 Act, the jury is not permitted to consider that intention. For current purposes, there is no principled distinction to be drawn between the intention required for murder and that required for an offence contrary to section 5(3) of the 1971 Act. Put another way, for the purposes of an enquiry under section 4A of the 1964 Act, we do not consider intent to supply to be an indissoluble component of the injurious act (possession); it is, as we have noted, the mens rea of the offence.

33. The facts of this case do not give rise to the nuanced questions which arose in *Young* and in *MB*, and it is important that the conclusion reached in each such case be analysed with care and not be overstated. In *Young*, the mental element into which enquiry was held to be proper did not relate to dishonesty, or to the purpose of making the relevant representations, but to the claimant's intention as one of the facts alleged to have been represented to those who were said to have been the victims of his activity (see Rose LJ at [35] and Leveson J at [40]). In *MB*, it was held (per Aikens LJ, at [66]) that it would be improper for the jury to have regard to a state of mind which was not directly linked to the outward component of the act. So it was that the issue of consent was not a matter for the jury to consider in that case. In our judgement, in this case the state of mind which was directly linked to the Appellant's custody/control of the things which were in fact controlled drugs (being the outward component of the act) was her knowledge that those things existed and were in her custody or control. It was that knowledge which turned the custody or control of 'the things' into an 'injurious act', and which was, in the event, not in issue.
34. We consider there to be no injustice in the position which we have set out and that the matters emphasised by Leveson P in *Wells* [9] bear re-emphasising. A hearing pursuant to section 4A of the 1964 Act is not a criminal trial to determine the guilt or otherwise of an accused person. It is the consequence of an inability to conduct a trial with that aim in mind, owing to the mental incapacity of the defendant. It recognises that the part which can be played by the defendant is necessarily limited because, for whatever reason connected with that incapacity, by definition, s/he cannot participate in the trial. Further, if the incapacity was in place at the time of the incident, that which was said then, or which the defendant would now say, cannot be evaluated by a jury in the normal way. The exercise, therefore, is limited to ensuring that the interference with the liberty of the defendant consequent upon whatever order might be made following an adverse finding can be justified by reference to what can be proved about what he or she did, even if intention might have been clouded by delusion or other incapacity.
35. In summary, for the purposes of an enquiry under section 4A of the 1964 Act concerned with an offence contrary to section 5(3) of the 1971 Act, the injurious act in question is

the possession of something which is in fact a controlled drug. It is that act to which the jury's enquiry must be directed. Per *Antoine*, no enquiry into the defendant's intent is permitted, as the Recorder ruled in this case, directing the jury accordingly.

36. The appeal is dismissed.