CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

LEVEL 6 - UNIT 3 – CRIMINAL LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2021 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Overall, this was a creditable performance by most of the candidates; 35 from 47 either achieved the pass mark or above. Where the candidate provided good and comprehensive answers there was evidence of a good knowledge of the substantive law and relevant case authorities.

Time taken in answering questions appeared to be managed well, giving themselves sufficient opportunity to answer each question adequately (only 2 candidates failed to answer 4 questions)

Candidates generally recited relevant case authorities, applying them to the facts of each case.

Candidates will not be credited each time they recite a case but only when it is applied correctly to the facts. Credit can be given if additional cases can be recited which support the ratio of an earlier case or show a development in the law. Authorities should where possible provide the year of the decision to put it into context, but candidates will not normally be penalised if naming the case is applied accurately to the facts.

Although the issue did not arise on a regular basis in this examination, but for the avoidance of doubt if a candidate recites a provision of a statute there must somewhere within the text of the answer be the complete (and correct) version of the applicable section /sub section eg "Section 1(1) Criminal Damage Act 1971 (CDA). Reference to CDA/Basic Offence can be credited if used in the correct context.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Some papers were reasonably well answered, and candidates were able to explain the difference between voluntary and non-voluntary intoxication and its application as a potential defence to offences which required proof of the *mens rea* where either basic or specific intent was required. Most answers did not fully evaluate the Majeski Rule as to whether it was "fit for purpose".

Question 2(a)

Most candidates were able to demonstrate the elements of GNM and its root in Adomako. The question was answered reasonably well, and the majority of candidates were able demonstrate at least their understanding of the need for the existence of a Duty of care, its breach and the need to show that the negligence was "gross". Better answers provided good examples of each element.

Question 2(b)

This question was well answered in most cases with evidence of an understanding of the evolvement of recklessness, both subjective and objective from Cunningham to R v G and another. The depth of the evaluation as per question however was not so well demonstrated.

Question 3

This question had limited participation and reflected the candidate's knowledge of the effect of R v Jogee and the law of joint enterprise. It was probably the hardest question in Section A and those that did reasonably well knew the case and its effect; otherwise, it was poorly answered.

Question 4 (a)

This was reasonably well answered, and most candidates were able to demonstrate their understanding of the elements of the offence of theft and how particularly the examples of appropriation were relevant to the need to find the *mens rea* element for the offence to be complete.

(b) well answered question - consistent demonstration of the test in Ghosh and the cases that followed to show change to sole objective test as per Ivey etc.

Section B

Question 1

Most candidates correctly identified the offence of murder but did not initially mention VM as a possibility if an arguable partial defence exists eg loss of control (albeit some referred to it later in the answer, so credit was given). Application of law to facts in this case reasonably well understood and applied. (Although the facts directed itself at murder and the possible defences, some credit was given for reference to Olivia causing criminal damage to the glass).

Question 2(a)

Most candidates correctly explained both potential offences of burglary, although not all recognised and explained the attempt element in the question. Where attempt was discussed most candidates correctly identified elements of offence including "more than merely preparatory", as well as a correct recital of the CAA81. Most candidates identified the appropriate application of the law to the facts but not in any great detail - tended to be average response to this aspect of the question.

(b)

Many candidates read the question as murder (although no suggestion in the question that Nick had died - just "shot"). However, whilst some candidates were confused by the substantive offence, all were consistent in recognising "transferred malice" and the potential defence of duress by threats. The latter however was not always correctly explained and there was some confusion between duress by "threats" and "circumstances".

Question 3

Overall, this was a popular question and most answered it well. There was clear evidence from most answers that candidates were able to recognise and explain Battery in S39CJA88, and then ABH in S47OAPA1861 in relation to the facts of the case. Intoxication as a defence was overall well explained and whether it could apply to basic intent offences.

Use and appropriate application of authorities well used in this question.

Question 4

This question was mostly well answered with the key substantive offences ie the elements of Theft, Criminal Damage and relevant defences adequately identified and applied.

Overall, the questions within both Sections A and B were in part challenging but provided sufficient scope to enable candidates to obtain reasonable marks on each chosen question. The content of each of the questions were within the parameters of the Unit Specification and a well-prepared candidate should not have difficulty in answering any of the questions to an appropriate level.
It is important for centres to remind themselves that whilst knowledge and understanding of the substantive law is fundamental, the candidates must be able to demonstrate their ability to "critically evaluate" a given issue in order

to provide evidence of their understanding of the legal principle in that case and its application.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 3 – CRIMINAL LAW

SECTION A

Question 1

The issue which has caused concern here is that the courts cannot be seen to condone drunken behaviour which results in the commission of an offence by allowing a defendant (D) to escape liability due to intoxication. Therefore, intoxication is said not to be a defence *per se*, but evidence of intoxication may be sufficient to negate the *Mens Rea* (MR) of an offence: DPP v Majewski (1977).

Majewski is the leading authority on voluntary intoxication and sets down the principles in respect of voluntary intoxication which is known as the Majewski Rule. Simply put, the rule states that voluntary intoxication is no defence to crimes of basic intent, but it may be a defence to crimes of specific intent if D lacks the requisite intention for the offence.

The decision taken in Majewski has been criticised for a number of reasons.

The difference between basic intent offences and specific intent offences has never been clearly defined but they are distinguished by the MR of the offence committed. A basic intent offence can be committed intentionally or recklessly, whereas a specific intent offence can only be committed intentionally.

This means that a voluntarily intoxicated D will automatically be reckless and will therefore have the MR for every basic intent crime. A more recent approach in relation to basic intent offences was taken in Aitken and others (1992) where the D pleaded intoxication to a basic intent offence and the jury were directed to ask themselves whether D had appreciated any risk that he would have appreciated had he been sober. This approach was also followed in Richardson and Irwin (1999).

In relation to specific intent offences, intoxication can be a complete defence if it was found that the D was so intoxicated that he was incapable of forming the requisite MR and that there was no basic intent alternative to the offence committed such as theft: Beard (1920).

If a D is intoxicated but still able to form the requisite intent for the offence, he will still be liable for the offence as a drunken intent is still an intent: Sheehan & Moore (1975). The same applies to a person who forms the intention to commit a specific intent offence when sober and then becomes intoxicated to give himself Dutch courage to carry out the offence. He cannot rely on the defence of intoxication: A-G for Northern Ireland v Gallagher (1963).

The decision in Majewski has also been criticised for compromising the principles of law for reasons of public policy.

A fundamental principle of criminal law states that for a D to be convicted of an offence there has to be a guilty act, *Actus Reus* (AR) which has to coincide with a guilty mind (MR). The Majewski rule ignores this principle as, according to the rule, a D who voluntarily becomes intoxicated is automatically reckless. This means that the MR is formed when D becomes intoxicated, which is prior to the AR of the offence being committed.

It could also be argued that the presumption that a D who is voluntarily intoxicated must also be reckless, contravenes s8 of the Criminal Justice Act 1967 (CJA1967) which requires a D to foresee the result of his actions by reference to all the evidence.

In respect of the Majewski rule it could be said that the principles above have been compromised in the interest of policy considerations – the courts being seen not to condone drunken behaviour. However, the policy aims that the rule was designed to tackle remain problematic in cases where there is no lesser basic intent offence of which to convict the D.

In the report entitled *Intoxication and Criminal Liability,* Law Com No. 314 (2009), the Law Commission (LC) proposed that whilst the distinction between specific intent and basic intent offences should remain, the terminology should be dropped. It also proposed a number of fault requirements where the prosecution would have to prove the state of mind regardless of D's intoxication, which would also incorporate the approach in Richardson.

To date none of the LC's proposals have been incorporated and the defence of voluntary intoxication could be said to be in an unsatisfactory state. The criticisms of the Majewski rule are well founded as it compromises the fundamental principles of criminal law in the name of public policy and provides an unclear and confusing manner of distinguishing offences which is inappropriate for today's offences.

Question 2(a)

Gross negligence manslaughter (GNM) refers to a situation where a death has occurred due to a grossly negligent breach of a duty of care involving a risk of death.

GNM is a conduct based crime which means that D could be convicted of GNM without having any MR at all. If D's conduct is so bad that it is judged as gross, he will be found guilty and his lack of MR will not make any difference.

The AR elements that satisfy criminal liability in this situation are that there has to be an existence of a duty of care, a breach of that duty which causes death and D's behaviour is grossly negligent and goes beyond civil liability: Adomako (1995).

As far as the duty of care is concerned the meaning is the same as in civil law: Caparo v Dickman (1990), the three-stage test. There are a number of situations that could impose a duty to act, duty under contract – Pittwood (1902), Adomako (1995), voluntary assumption of care – Stone and Dobinson (1977), duty of landlord to tenant – Singh (1999), duty of driver to other road

users – Andrews (1937), Wacker (2003), and duty of a captain of a ship to his crew – Litchfield (1998).

The breach of duty could be a positive act or an omission and D would be judged against the standard of a reasonably competent person performing the duty involved. A breach of duty *per se* may not always lead to criminal liability even if D is responsible for the person's death.

It was decided in Adomako (1995) that something more should be required to satisfy criminal liability, and this had to be conduct so bad in all the circumstances as to amount to a criminal act or omission. Prior to this, in Bateman (1925), Lord Hewart CJ explained gross negligence as going beyond a matter of mere compensation … showing such disregard for the life and safety of others as to amount to a crime. This was followed by Andrews (1937) in which gross negligence was described as a very high degree of negligence.

These tests were considered unsatisfactory as they were circular, in that the jury were directed to convict if they thought a crime had been committed. Adomako remains the leading case in this area. Gross negligence relates to nothing less than a risk of death: Misra & Srivastava (2004). It was held in A-G's Reference (no.2 of 1999) [2000] that D does not even have to foresee death or personal injury to have perpetrated a gross breach. The offence is objectively judged on D's conduct and whether it was sufficiently bad to be termed 'gross'. The factors to be considered when deciding the grossness of the breach are:-

- How far below the standards of a reasonable person did D fall?
- Did D foresee the risk of death?
- What were the motives behind D's conduct? and
- Was D exercising a special skill that was relevant to the question of breach?

In the recent case of Rudling (2016), the Court of Appeal (C of A) held that the Crown Court had been right not to convict D (a GP) of GNM when she refused to go and see the victim (V) on her way home from the surgery on Friday evening. D told V's mother to bring him to the surgery on Monday morning. V died on Saturday.

Dismissing the appeal, the C of A held that a recognisable risk of the possibility that V might be suffering from a serious condition was not the same thing a recognising a serious risk of death. For there to be a gross breach of duty, it is necessary for the prosecution to show that there was a serious risk of death that would be obvious to a reasonable GP at the time of the breach. This decision was followed by the case of Rose (2017).

In the recent case of Zaman (2017), D's conviction for GNM was upheld by the C of A as, in this case, even though D (a restaurant owner) had been advised by his supplier to advertise the presence of peanuts in some of the meals on his menu, he declined to do so.

There were two instances where customers were told that the food did not contain nuts. In the first case there was a severe allergic reaction but in the second case, the customer died after suffering a severe allergic reaction to the peanuts contained in the food.

It could be said that there is a need for criminal sanctions that can be applied to situations where a breach of duty of care is so bad that D deserves to be

punished over and above the civil remedies that would ordinarily be available. This does not mean that everyone who is in a position where they owe a duty of care could be liable for a criminal offence. The important element of this offence is that D's conduct must be so negligent that it should be characterised as criminal.

2(b)

Prior to the decision in R v G and Another (2003) there were two tests of recklessness.

Subjective recklessness is defined as the conscious taking of an unjustified risk and was established in the case of Cunningham (1957). The question to be asked when considering subjective recklessness is "was the risk in Defendant's (D) mind at the time the crime was committed?" In other words, did D foresee the risk of his actions? The key point to note about this approach to recklessness is that there would be no liability if the risk had never occurred to the defendant: Stephenson (1979).

Objective recklessness is the conscious or unconscious taking of an obvious risk and was established in the case of Caldwell (1981) and related to criminal damage offences. The question to be asked when considering objective recklessness is "Would a 'reasonable man' have recognised the risk?"

Critics of the existence of objective recklessness argued that Caldwell left a lacuna or loophole in the law which meant that a D could avoid conviction by arguing that he was not reckless either subjectively or objectively.

The objective test was also heavily criticised and it was said to be too harsh particularly in respect of juveniles or D's of low intelligence who were unable to see the risk: Elliott v C (A Minor) (1983). This was the standpoint until G and Another (2003) which overruled Caldwell and changed the law in respect of the MR required for criminal damage, which is now subjective recklessness.

Having two tests for recklessness was illogical and problematic as it over complicated the law and was confusing for juries. The objective test for recklessness overlapped with the test for negligence and blurred the boundaries between recklessness and negligence.

These criticisms led to the decision in G and Another (2003) which restored the subjective recklessness test for criminal damage and established that all recklessness is subjective. This decision was a turning point for the courts in this area and made the definition of recklessness clear. The decision has also clarified the law in relation to defining the concept of recklessness as the criticisms levelled at the objective test are now redundant and the law is much simpler.

Question 3

Secondary liability for a criminal offence requires a principal (P) who is the person who commits a crime, and a secondary participant (SP) who encourages or assists P in the commission of the crime. If the encouragement or assistance was intentional then the SP will be guilty of the same offence as the P. In this situation the encouragement or assistance forms the AR and the intention to encourage and/or assist forms the MR. This is also known as joint enterprise (JE) or parasitic accessorial liability (PAL).

The basis for liability in cases of JE was set down in case of Chan Wing-Siu (1985). Until recently, JE involved a prior agreement between the P and the SP to commit an offence. In agreeing to the participation in the offence the SP automatically satisfied the AR of secondary participation. There was no need to prove aiding, abetting, counselling or procuring for JE: Petters and Parfitt (1995). The SP was also liable if he helped to plan the offence even if he was not present when it was committed: Rook (1993), A,B,C and D (2010).

The relevant MR required knowledge that one of several offences may be committed: Maxwell (1978), that P intended to commit any type of offence even though details were not specified: Bryce (2004) and there was the potential for a conviction where P deliberately committed a different offence to that agreed ie GBH agreed but murder committed: Rahman (2008).

The SP would not be guilty if P's conduct was outside the scope of the agreement and the agreed result occurred by different means than those discussed: Powell and Daniels; English (1997), or where P committed an offence which was different from the one agreed: Gilmour (2000) Rafferty (2007) Campbell (2009), or a weapon was used in a different way to that agreed or a different weapon was used: Gamble (1989) English; Yemoh (2008).

It was unclear whether the SP should be convicted of a lesser offence when P committed murder but the SP was not aware that death or serious harm may result. In Uddin (1998) and Mitchell and King (1999) it was held that an alternative conviction for manslaughter would not be possible in respect of the SP. However, the later cases of Gilmour (2000) and Roberts, Day and Day (2001) decided that it was possible to convict the SP of manslaughter when P had been convicted of murder. The most recent decision in this area Rahman (2008) decided that the SP should be acquitted.

The decisions above raise the question of whether the SP must intend the P to commit the crime, or whether he must simply be aware of the possibility that a crime might be committed. Until recently, the common law position was that foresight or knowledge was sufficient to convict the SP of murder, when P was convicted of murder.

The recent decision of the Supreme Court in R v Jogee (2016) reversed the common law position and legal position is now that, in order to be convicted of murder, the SP must intend to assist or encourage the commission of the offence This decision weakens the doctrine of JE. In Jogee it was held that the law had taken a wrong turn in the cases of Chan Wing-Siu and Powell and Daniels: English. In the case of Jogee it was decided that in respect of murder, if foresight is not sufficient to convict a single D, it should also not be sufficient to convict an SP.

The decision in Jogee did not take account of other important cases on JE, and it concluded that the SP's will only be guilty of the crime if he intended that the crime be committed or if he intended to encourage and assist in its commission.

Their Lordships said that the cases of Chan Wing-Siu and Powells and Daniels: English were merely part of the history of this area and should not be relied upon. Foresight and authorisation are not the same and the SP should have the same MR as the P in relation to the commission of the offence. The law

should, therefore, be returned to the position it was in before the aforementioned cases.

The impact of the decision in Jogee is huge as it completely overturns the previous law in relation to secondary liability. It could be argued that the law relating to secondary participation was unfair and that in overturning it, the Supreme Court made the correct decision. To allow an SP to be convicted of murder when he only foresaw the possibility of death or injury but did not intend it, undermines the principles of MR. It could also be argued that the decision in Chan Wing-Siu created an incorrect principle which became embedded in law.

The law in relation to secondary liability has been clarified as a result of the decision in Jogee. The current situation is that in order for an SP to be found guilty of murder, he must intentionally assist and/or encourage the P to act.

Question 4(a)

It could be argued that the AR elements of theft have been widely interpreted by the courts. This renders the MR of theft particularly important as liability for theft is generally determined by the MR elements.

Theft is defined in s1(1) of the Theft Act 1968 (TA) as the dishonest appropriation of property belonging to another with the intention to permanently deprive the other of it.

The AR of theft is the appropriation of property belonging to another. Appropriation is partially defined under s 3(1) and is, essentially, an assumption of any of the rights of the owner over the property: Morris (1983).

To determine whether appropriation has been widely interpreted, its relationship with consent must be considered. There are a number of cases which explore the question of whether an authorised assumption of the owner's rights could amount to appropriation.

In Lawrence (1971) the House of Lords (H of L) held that even though a student had consented to D taking money from his wallet, it was still an appropriation of the student's property. The H of L also held that the absence of any words in s3(1) requiring appropriation to take place without consent meant that consent was unequivocally deemed to be irrelevant to appropriation.

A different conclusion was reached by the H of L in Morris. In this case, it was held that an authorised act could not amount to appropriation. This would mean that the act in Lawrence would not have been an appropriation. This provided a clear conflict on the issue of consent in appropriation between H of L decisions. However, the decision in Lawrence was a binding *ratio decidendi,* whereas the comments in Morris were only a persuasive *obiter dictum*.

The conflict between these authorities was resolved by the H of L in Gomez (1993). The H of L in this case followed Lawrence and held that consent was irrelevant to appropriation. Consequently, the element of appropriation has been widely construed.

There then followed a number of cases which related to D's who had received a gift/gifts from a vulnerable donor and whether receipt of such gifts was dishonest.

In Mazo (1997) it was held that property given D with the consent of the owner could be appropriated if the consent was obtained by fraud. The position in relation to gifts was finally considered by the H of L in Hinks (2001) where it was decided that, following Gomez, a valid gift could be appropriated even where the owner truly consented to it. Following Hinks it is clear that appropriation is a neutral concept and so the only thing that distinguishes a thief from an honest recipient of a gift is the presence of dishonesty.

It is clear that the AR of theft has been widely interpreted, this means that liability for theft often hinges on the ability to prove MR which is that D was dishonest and had the intention to permanently deprive.

4(b)

The issue of dishonesty has caused the courts numerous problems over the years. For the purposes of the offence of theft, s2(1) TA specifies three instances of states of mind which, as a matter of law, are to be regarded as honest. Therefore, D is not dishonest if:

i) he honestly believes that he had a right in law to the property;
ii) he honestly believed that he had or would have had the owner's consent had the owner known about the circumstances; or
iii) he honestly believed that the owner could not be found even if all reasonable steps had been taken to try and find him.

Where s2(1) does not apply, the issue of dishonesty is left to the jury to determine as a question of fact. In Feely (1973), the Court of Appeal held that dishonesty was an 'ordinary' word and that the jury would be expected to decide the issue by reference to the 'current standards of ordinary decent people'. This approach was widely criticised.

A number of other cases followed: Gilks (1972), McIvor (1982) and Landy (1981), all of which were criticised in the way that the issue of dishonesty was resolved.

The case of Ghosh (1982) provided a positive aspect to the determination of dishonesty. The Ghosh test has two limbs. The first, objective limb requires the jury to consider whether the honest and reasonable person would regard what D did as dishonest. Only if the answer is 'yes' to this question can the second limb be considered. This preserves the principle that the issue of dishonesty is a matter of fact for the jury and not the judge. The main danger of this approach is the variation in standards from one jury to another.

The second, subjective limb requires the jury to question whether D himself realised that the honest and reasonable man would regard what he did as dishonest. Whilst this is referred to as the subjective limb, it contains an objective element and calls for D's recognition of his objective dishonesty. Only if the answer is 'yes', to both the objective and subjective questions, can D be found to be dishonest.

Even though there have been criticisms of the Ghosh test over the years, as a matter of strict precedent, the court is still technically bound by Ghosh.

However, in the recent civil case of Ivey v Genting Casinos (UK) Ltd (2017), the *obiter* observations of The Supreme Court were that the second (subjective) limb of the Ghosh test was significantly flawed and needed to be removed.

The Supreme Court's view was that the second limb of the test gave rise to the inequitable scenario where the more warped a person's standard of honesty, the less likely it was that he/she would be found to have acted dishonestly.

The Supreme Court made it clear that this amended legal test for dishonesty was to have universal application within the English Courts stating that, "There can be no logical or principled basis for the meaning of dishonesty to differ according to whether it arises in a civil or a criminal prosecution."

Had the original Ghosh test been applied to Ivey his actions may not have been found to be dishonest as he believed that he was using a legitimate gambling technique so the second limb of the Ghosh test would probably have failed.

In the recent case of DPP v Patterson (2017) Leveson LJ gave a clear indication that the Court of Appeal (CA) will adopt the *obiter* comments of the Supreme Court in Ivey in respect of the Ghosh test. He observed that as a matter of precedent the court is bound by Ghosh, however, the CA may depart from Ghosh without the matter returning to the Supreme Court.

Whilst the current impact of Ivey is uncertain, the potential impact is significant in that it would simplify the law in relation to dishonesty and the new test should be easier for a jury to understand and apply.

It could be argued that the test is fit for purpose as it has evolved through caselaw. On the other hand it could be argued that, due to the inconsistent decisions in these areas, it is not fit for purpose as it stands, but a better statutory definition of each element may avoid these problems.

SECTION B

Question 1

Olivia's Liability

In relation to Olivia's liability for the death of Ioan, she has unlawfully caused Ioan's death within the Queen's peace with the intention to kill or cause grievous bodily harm (GBH): Vickers (1957). She is the factual: White (1910) and the legal: Cheshire (1991) cause of Ioan's death. Therefore, the AR for murder is made out.

The MR for murder may also be made out as it could be said that even if she did not have the direct intention to kill Ioan, she obviously intended to cause GBH, and death or GBH was virtually certain to occur as a result of her actions. Olivia would be liable for the murder of Ioan.

Olivia may be able to rely on one of the partial defences to murder. If this is the case her liability could be reduced to voluntary manslaughter. The partial defences to murder are diminished responsibility and loss of control.

She would not be able to rely on diminished responsibility as there is no evidence of an abnormality of mental function or a recognised medical condition that may have provided an explanation for her actions.

Olivia may be able to rely on the defence of loss of control under s54(1) of the Coroners and Justice Act 2009 (CJA 2009). There are three main elements to the defence: a) at the time of the killing, Olivia must have suffered a loss of self-control; b) There must have been a qualifying trigger under s55 CJA 2009; and c) someone of the same age and sex as Olivia, with a normal degree of tolerance and self-restraint and in the same circumstances of Olivia, might have reacted in the same or similar way.

Whether Olivia lost control or not is subjectively assessed. Under s54(2), it does not matter whether the loss of control was sudden or not Ahluwalia (1992). On the facts, there appears to be sufficient evidence to suggest that Olivia might have suffered a loss of control. Next we have to consider whether there was a qualifying trigger under s55.

The qualifying triggers are:-

Section 55(3) that D's loss of control was attributable to D's fear of serious violence from V against D or another identified person;

Section 55(4) that D's loss of control was attributable to a thing said or done (or both) which either a) constituted circumstances of an extremely grave character, and b) caused D to have a justifiable sense of being seriously wronged.

Olivia will not be able to claim that there was a qualifying trigger under s55(4), if it is found that Ioan's confession that he was having an affair with Rochelle constitutes an exclusion under s55(6)(c) which sets out that the defence is not available to a defendant who lost control and killed another, when the thing said or done that caused D to lose control was sexual infidelity.

In the case of Clinton (2012) it was found that where a D's loss of control was based solely on sexual infidelity, then the defence could not be used. If, however, sexual infidelity is considered alongside other evidence which is admissible in support of a qualifying trigger, it would be unjust to exclude it when it was integral to the facts as a whole.

Applying this to the facts, it would appear that Olivia would not be able to rely upon the defence of loss of control as her loss of control was caused solely by Ioan's confession of sexual infidelity, therefore she would be liable for the murder of Ioan.

Olivia could also potentially rely on the private defence of self-defence and/or possibly a public defence under s3(1) of the Criminal Law Act 1967 (CLA 1967). Both of these defences are now governed by the guidelines established under s76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008).

The public defence created by s3(1) CLA 1967 permits the use of reasonable force to prevent the commission of an offence. CJIA 2008 confirms that the same principles apply to both the private and public defences in relation to the concept of reasonable force and mistaken belief.

Self-defence is a common law defence which permits a person to use reasonable force in protection of himself or others if he honestly believes the use of force is necessary: Rose (1884), Duffy (1967), Palmer (1971). The issue with this defence is usually whether the force was 'reasonable' in the circumstances.

The evidence indicates that Ioan furiously asked Olivia what she was doing as he strode towards her. Olivia could say she was motivated in her actions by a desire to defend herself from a physical assault as she feared that Ioan may assault her; she was not looking for a fight and the facts do not support the notion that she was motivated by any desire for revenge.

Mistake of fact occurs in situations where, if the facts had been as D believed them to be, he would have had a defence.

Even if Olivia was mistaken in her belief that she was going to be assaulted, she is entitled to be judged on the circumstances that she genuinely believed to exist: Williams (1987), Owino (1995). A jury should be objective in deciding whether Olivia's actions were 'reasonable'. It would have to consider whether Olivia honestly believed that it was necessary to defend herself and, if so, on the basis of the facts and the danger perceived by Olivia was the force used 'reasonable'? If the jury answers 'yes' to both points then it must acquit Olivia. However, if the jury accepts that, whilst her actions were to protect herself, she went beyond the use of reasonable force, Olivia would have no defence under common law: Clegg (1995) anyway.

Question 2(a)

Katie's Liability

Attempted Burglary

For there to be an attempt, there must be a substantive offence that D was attempting to commit. In this case the substantive offence was burglary contrary to s9(1)(a) of the Theft Act 1968 (TA). Under s9(1)(a) of the TA a person will be guilty of burglary if he enters any building or part of a building as a trespasser with intent to steal, inflict GBH on any person therein or to cause criminal damage to the building or anything therein.

Under s1(1) Criminal Attempts Act 1981 (CAA) to be guilty of attempting to commit an offence a person must perform an act which is more than merely preparatory to committing the offence, intending to commit the offence and intending to bring about the result, and knowing that the surrounding circumstances would be in existence or being reckless as to this. The AR of attempted burglary is therefore doing an act which is more than merely preparatory to entry of the building.

At common law the act had to be sufficiently proximate to the crime: Eagleton (1835). The CAA requires an act to be more than merely preparatory to the commission of the crime: Gullefer (1990), Jones (1990), Litholetovs (2002), Tosti (1997), Moore (2010).

When Katie was about to climb into her grandmother's flat, she did an act which was more than merely preparatory as the only part of the act left was to enter the flat with the intention to steal. It appears that there is no effective

entry as the scenario does not say that any part of Katie's body actually entered the building.

The MR for an attempt is an intention to commit the full offence and recklessness in respect of any circumstances surrounding it: Khan (1990). The fact that Katie intended to commit burglary was sufficient for the offence. Katie would be liable for attempted burglary contrary to s1(1) CAA.

Burglary

When Katie managed to climb all of the way into the flat, she entered the flat with intent to steal, so would be guilty of burglary contrary to s9(1)(a) of the TA as set out above.

Katie may also have committed an offence under s9(1)(b) TA. To prove a s9(1)(b) offence, theft or GBH has to be committed or attempted after having entered the building as a trespasser.

This would be made out in this scenario as after having entered her grandmother's flat as a trespasser, Katie then stole money from her grandmother's biscuit tin, so she would be guilty of burglary contrary to s9(1)(b) TA. Katie also satisfies s1 TA, as she entered the property and once inside she appropriated money which belonged to her grandmother, with the intention to permanently deprive her grandmother of the money by using it to buy alcohol.
By applying the Ghosh/Ivey test we can also show that she was dishonest. The first (objective) limb of the Ghosh test is satisfied as her ultimate aim was to steal her grandmother's money which the reasonable person would find dishonest.

2(b)

Jonas's Liability

Jonas could be charged with GBH contrary to S18 or s20 of the Offences Against the person Act 1861 (OAPA).

Section 20 OAPA 1861 is the unlawful and malicious wounding or inflicting of grievous bodily harm (GBH) upon any other person, either with or without any weapon or instrument. A wound consists of a break to both layers of skin: Moriarty v Brookes (1834), M'Loughlin (1838) and Eisenhower (1984). GBH means 'serious harm': Smith (1961), Wood (1830), Saunders (1985) and Bollom (2004). There must be foresight (or intention) of causing some harm: Mowatt (1968).

Section 18 OAPA 1861 says that D unlawfully and maliciously by any means whatsoever wounds or causes any GBH to any person with intent to do GBH. The offence is virtually the same as that for S20 OAPA 1861 except that there must be an intention to cause GBH for a S18 OAPA 1861 offence whereas a S20 OAPA 1861 offence can be committed recklessly.

When Jonas shot Nick it was an assault. The injury sustained by Nick would substantiate an offence under s18 or s20 OAPA. As we are told that Jonas intended to shoot Tommy, direct intention to cause GBH would be present so Jonas would be liable for the more serious s18 offence.

Attempted murder may also be considered as Jonas has intentionally caused GBH to Nick. However, for attempted murder there has to be the intention to kill the V even though an intention to commit GBH is sufficient for actual murder. Jonas is not told to kill Tommy just to shoot him. There is no evidence that Jonas intended to kill Tommy so attempted murder would not be applicable.

Transferred malice is the doctrine which allows MR, whether intention or recklessness, to be transferred from an intended victim to the actual victim against whom the AR was accidentally committed. The malice must transfer within the same offence, if the MR is for a different offence, then malice cannot be transferred: Latimer (1986), Mitchell (1983).

Applying this to the facts, it is obvious that Jonas intended to shoot Tommy but instead he shot Nick. Jonas's intention was to shoot Tommy and that is what he did, the malice was transferred from is intended victim (Tommy) to the actual victim (Nick), it doesn't matter that he shot Nick instead of Tommy, the offence was the same and the MR would be transferred to Nick.

The defence of duress of threats may be available to Jonas.

To successfully plead a defence of duress of threats the defence must be able to adduce evidence that the threat was of serious personal injury or death: Hudson and Taylor (1971), DPP v Rogers (1998), the threat must be towards D or a member of his immediate family or some other person for whose safety D would regard himself responsible: Wright (2000), the threat must be immediate: Hasan (2005) not imminent, D must take advantage of any reasonable opportunity to escape or to raise the alarm: Gill (1963), D should seek police protection if possible: Hudson (1971).

The defence is not available if D just reacted to the threats and the threat must be one that the ordinary man could not have resisted: Graham (1982). D's belief in the threat must be reasonable: Nethercott (2001), Safi and others (2003). An objective test will also be applied which is, if the ordinary person sharing the same characteristics as D would have resisted the threats, the defence is unavailable: Hegarty (1994), Horne (1994), Bowen (1996). If D voluntarily associates himself with a violent criminal gang, the defence will fail, for this reason: Hasan (2005). The defence of duress does not apply to murder: Howe (1987).

A successful plea of duress of threats will result in a complete acquittal. In this case, there has been a threat of serious personal injury to Jonas's family, however, the defence would fail as the threat was not immediate and Jonas has been at fault by voluntarily associating himself with a violent criminal gang.

Question 3

Assault on Al

The offence to consider in respect of Al is Battery contrary to s39 Criminal Justice Act 1988 (CJA). Bobby intentionally or recklessly: Venna (1975), Savage; Parmenter (1989) inflicted personal violence on Al by barging roughly past him, causing him to stumble and fall heavily against the wall: Rolfe (1952). Al did not give Bobby permission to assault him, therefore the contact was both physical: Ireland; Burstow (1998) and unlawful.

Bobby carried out an unprovoked assault on Al. He shoved Al, which means that he either intended, or was at least reckless, as to causing unlawful violence. There is no suggestion of any resulting injury, therefore Bobby is likely to be found guilty of battery contrary to s39 CJA in respect of the unprovoked assault on Al.

Assault on Wally

The offence to consider in respect of Wally is assault occasioning actual bodily harm (ABH) contrary to s47 OAPA. S47 OAPA is the intentional or reckless infliction of unlawful violence upon someone without consent: Savage; Parmenter (1991). ABH refers to an assault which interferes with the comfort of the victim and is more than transient or trifling: Miller (1954) and T v DPP (2003), and there has to be an injury: Chan-Fook (1994).

When Bobby headbutted Wally it was an assault. The injuries sustained by Wally were a black eye and severe bruising to his nose. This would constitute an injury which was more than transient or trifling and would interfere with his comfort. Bobby should have been aware that there was a risk that his actions towards Wally could cause him injury.

Bobby is likely to be found guilty of ABH in respect of the unprovoked assault on Wally.

Potential defence/s

Consent
In respect of the assault on Al, the only defence that may be available to Bobby is consent.

The law dictates that we impliedly consent to physical contact in everyday life: Collins v Wilcock (1984), where touching someone to get their attention was held to be 'everyday' contact.

The general rule is that consent can be a defence to assault or battery: Donovan (1934), A-G's Reference (No 6 of 1980) (1981). These are both offences which require no proof of any harm being caused to the victim.

In this case, Al was acting in the course of his employment to ensure that Bobby left the premises after being sacked. Al did not consent to being assaulted; therefore Bobby will not be able to raise consent as a defence to the assault on Al.

Voluntary intoxication

In relation to the s47 ABH offence, the defence of intoxication may be relevant. There are two types of intoxicants, dangerous and non-dangerous: Bailey; Hardie (1984). Dangerous intoxicants such as alcohol, heroin and amphetamines, are those that are known to cause the taker to become aggressive or unpredictable. Bobby took a dangerous intoxicant in the form of alcohol.

Next, we must consider whether Bobby's intoxication was involuntary or voluntary.

Involuntary intoxication occurs when a drink is spiked, prescribed drugs are taken in excess or non prescribed but non dangerous drugs are taken: Bailey; Watkin Davies (1984). This is not the case here. Voluntary intoxication occurs when there has been voluntary taking of dangerous drugs or drinking alcohol to excess. Bobby was voluntarily intoxicated by choosing to drink a large amount of beer.

Whether he can use the defence will depend on whether the crime was one of specific or basic intent. As S47 ABH is a crime of basic intent (it can be committed recklessly) the defence would not apply as, applying the Majewski Rules, Bobby's act of drinking alcohol to excess was reckless in itself: Majewski (1977), and he would also not be able to argue that he would not have formed the MR for the offence if he had not been drunk as a drunken intent is still an intent: DPP v Beard (1920).

Question 4

Pablo's Liability

Pablo was not a trespasser in the house, therefore, the relevant offence to consider in respect of the trophy is theft.

Under s1 TA a person is guilty of theft if he/she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Under s3 appropriation is any assumption of the rights of an owner. An assumption of one of these rights is sufficient for appropriation; in Morris (1983) it was changing the labels on goods, which only the owner could do. The trophy would constitute property under s4 and it belonged to another – Cormack.

For the purposes of the offence of theft, s2(1) TA specifies three instances of states of mind which, as a matter of law, are to be regarded as honest. None of these would apply to Pablo's case.

Next, we must consider Ghosh (1982) which provided a positive aspect to the determination of dishonesty. The Ghosh test has two limbs. The first, objective limb requires the jury to consider whether the honest and reasonable person would regard what D did as dishonest. Only if the answer is 'yes' to this question can the second limb be considered.

The second, subjective limb requires the jury to question whether D himself realised that the honest and reasonable man would regard what he did as dishonest. Only if the answer is 'yes', to both the objective and subjective questions, can D be found to be dishonest. Even though there has been *obiter* commentary recently in relation to this test by the Supreme Court, the Ghosh test is still good law and has not been overruled by Ivey v Genting Casinos (UK) Ltd (2017).

In the recent case of Ivey, the refinement made by the Supreme Court to the Ghosh test was to remove the second limb, so that the subjective state of D's belief would no longer be taken into account.

Pablo's conduct is likely to be dishonest according to the both Ghosh test and the Ivey test because the honest and reasonable person would regard taking someone else's trophy from their own home as acting dishonestly and Pablo should have realised the honest and reasonable person would regard stealing someone else's trophy from their own home as dishonest.

Under s6 it is sufficient that D has the intention to permanently deprive: Morris (1983), Wheatley and another (2006). Intention can be inferred if D intended to treat the property as his own by disposing of it regardless of V's rights: Cahill (1993), Lloyd (1985). Pablo's intention was to keep the trophy for himself.

Pablo would be liable for theft contrary to s1(1) TA.

There appears to be no defence that would be available to him.

Dan's Liability

In respect of setting fire to Cormack's sofa, Dan could be liable for an offence of simple criminal damage contrary to s1(1) of the Criminal Damage Act 1971 (CDA). This offence requires proof that D intentionally or recklessly destroyed or damaged property belonging to another without lawful excuse. The damage need not be permanent: Gayford v Choulder (1898) but must be more than trivial: Fiak (2005), A (a juvenile) v R (1978) and the victim must be put to some expense in rectifying/repairing it: Roe v Kingerlee (1986).

It was held in Hardman v Chief Constable of Avon and Somerset (1986) that painting on a pavement in soluble paint was sufficient to constitute damage. Therefore, setting fire to the sofa would constitute damage. The sofa was the property of Cormack: s10(2) CDA and Dan would have no lawful excuse to destroy it. Thus, the AR for the offence is satisfied. The MR for a s1(1) offence requires proof that D intended or was reckless in causing the damage. In this case it should be obvious to Dan that his actions would cause damage, in any case his actions would be deemed to be reckless.

The situation is made more serious by the fact that the damage was caused by fire. Dan could also be liable contrary to s1(1) and (3) of CDA 1971 of causing simple criminal damage by arson. The AR and MR are the same as for s1(1), the difference is that for this offence the damage has to be caused by fire.

Setting fire to the sofa would amount to the destruction of property by fire. As previously mentioned, the sofa was the personal property of Cormack s10(2) CDA and Dan would have no lawful excuse for destroying it. The MR would be satisfied as Dan either intentionally or recklessly caused damage to the sofa.

Dan could also be liable for an offence of aggravated criminal damage contrary to s 1(2) CDA. This offence contains an extra MR element. In order to convict Dan of a s1(2) offence the prosecution must be able to prove that Dan thereby intended to or was reckless as to endangering the life of another. The inclusion of the word 'thereby' is crucial to the uplifted MR.

When considering whether Dan was reckless the subjective test as set out in G and Another (2003) must be applied. This requires Dan to have considered

the risk that the lives of the people sitting on the sofa might be endangered by his conduct, but to have taken that risk anyway.

In this case it is unlikely that Dan intended to endanger the lives of the people sitting on the sofa, but he should have considered that by setting fire to the sofa , would have endangered anyone's life who was sitting on the sofa at the time. If his actions are found to be reckless, he could be liable for aggravated criminal damage.

Potential defence/s

Dan may be able to rely on the defence of intoxication. There are two types of intoxicants that need to be considered: dangerous and non-dangerous: Bailey; Hardie (1984). Dangerous intoxicants such as alcohol, heroin and amphetamines, are those that are known to cause the taker to become aggressive or unpredictable. Non-dangerous intoxicants are those that are expected to be merely soporific or sedative. Anti-depressants are non-dangerous drugs.

D can be voluntarily or involuntarily intoxicated. Voluntary intoxication occurs when there has been voluntary taking of dangerous drugs or drinking alcohol to excess. This is not the case here. Involuntary intoxication occurs when a drink is spiked, prescribed drugs are taken in excess or non-prescribed but non-dangerous drugs are taken: Bailey; Watkin Davies (2001).

Consideration must be given to whether Dan was reckless in taking the tablets and whether he was able to form the MR of the offence. Dan was unaware that he had taken LSD as his drink was spiked by Ellis. Therefore this appears to be involuntary intoxication.

It does not matter with what offence Dan has been charged, as his drink was spiked without his knowledge, he will have a defence to all offences and should be acquitted of any wrongdoing, if it is accepted that his drink was spiked with LSD.

Dan could also rely on the defence of automatism as an alternative to involuntary intoxication as an external factor (the LSD tablet) was taken by Dan without his knowledge. This resulted in his conduct which it could be said was involuntary and he would not have been at fault. The obvious defence to rely on, however, would be involuntary intoxication.