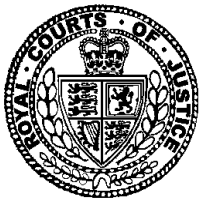

Neutral Citation Number: [2019] EWCA Crim 1332

Case No: 201804439 B4
201804654 B4
201803741 A3
201902074 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
The Crown Court at Bournemouth T20187055 (HH Judge Fuller QC)
The Crown Court at Leeds T20197221 (HH Judge Khokar)
The Crown Court at Sheffield T20187302 (HH Judge Dixon)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE CHOUDHURY
and
HIS HONOUR JUDGE PATRICK FIELD QC

- -

Between:

BARRY TERRENCE VEYSEY

DAMIEN MUNROE

JAMIE BEARDSHAW

-and-

THE QUEEN

- -

Philip Rule (instructed by **Davies Blunden Evans Solicitors**) for **Veysey**
Richard Thyne (assigned by **Registrar of Criminal Appeals**)) for **Munroe**
Howard Shaw (assigned by **Registrar of Criminal Appeals**) for **Beardshaw**
Timothy Cray QC (instructed by **CPS**) for the **Respondent**

Hearing date: 11th July 2019

- -

Approved Judgment

Lord Justice Holroyde:

1. These three cases, otherwise unconnected, were listed together because each raises issues as to a form of assault which is colloquially referred to as "potting". That unattractive name is given to a prisoner either throwing at a prison officer, or smearing a prison officer with, urine, faeces or a mixture of the two. Misconduct of that nature is sometimes dealt with as an offence against prison discipline, for which a Governor's punishment is imposed. In each of these cases, however, and in other cases, the prisoner has been prosecuted for an offence, contrary to section 24 of the Offences Against the Person Act 1861, of unlawfully and maliciously administering a noxious thing with intent to injure, aggrieve or annoy (hereafter, for convenience, "a section 24 offence"). At paragraphs 25 and 26, we give our conclusion on the issue of whether urine is capable of being a noxious thing in this context. At paragraphs 41 to 46 we give guidance as to the appropriate level of sentencing in "potting" cases.

2. The applicant Barry Veysey was convicted of three section 24 offences, and a further offence of racially aggravated intentional harassment, alarm or distress contrary to section 31(1)(b) of the Crime and Disorder Act 1998. He was sentenced to a total of 4 years 6 months' imprisonment. His applications for leave to appeal against conviction and sentence were referred to the full court by the Registrar. The appellant Jamie Beardshaw pleaded guilty to a section 24 offence and was sentenced to 3 years' imprisonment, consecutive to a sentence which he was already serving. He appealed against his sentence by leave of the single judge. The applicant Damien Munroe pleaded guilty to a section 24 offence and was sentenced to 16 months' imprisonment, consecutive to a sentence which he was already serving. His application for leave to appeal against sentence and for a short extension of time, was referred to the full court by the Registrar.

3. For convenience, and meaning no disrespect, we shall refer to the appellant and applicants by their surnames.

4. At the conclusion of the hearing on 11th July 2019 we refused the applications of Veysey and Munroe, and allowed Beardshaw's appeal to the limited extent necessary to correct an arithmetical error which had been made in the court below. We indicated that we would give our reasons in writing at a later date. This we now do.

5. We begin by summarising the essential facts of the respective cases.

6. Veysey is now 61 years old. He has previously been sentenced on a total of 39 occasions for 111 offences, including "potting" and other assaults against prison officers. On 29th July 2015 he was sentenced to a term of 4 years' imprisonment for offences of making a threat to kill and harassment, the victim of those offences being a female prison doctor. His conditional release date, taking into account a period of remand in custody prior to sentence, was 21st March 2016. Whilst serving his sentence, however, he committed repeated offences against prison discipline which attracted various sanctions, including the imposition of many additional days of custody. As a result, his sentence did not end until 19th February 2018. By that date, he had committed the four offences with which this appeal is concerned.

7. Count 1 of the indictment against Veysey charged him with racially aggravated intentional harassment, alarm or distress on the 4th June 2016. James McGowen, a

prisoner governor at HMP Guys Marsh, went with another officer to Veysey's cell. Mr McGowen indicated in his witness statement that he is "one of the few British BAME Governor grades in the country". The other officer spoke to Veysey through the observation panel in the cell door and announced that the governor was there. Veysey replied "that dirty black bastard, I don't want to talk to him". When the governor then approached the observation panel, Veysey – who appeared to be in a rage - repeatedly called him a "dirty black bastard" and threatened to shoot, or to arrange for someone else to shoot, both the governor and his children. The judge when sentencing found that Veysey had been trying to intimidate the governor as much as he could. Despite his 22 years of experience in the prison service, the governor was sufficiently concerned for the safety of his family that he sought advice and varied his daily routine.

8. Counts 3 and 4 of the indictment charged section 24 offences, the particulars being that on the 11th and 13th July 2016 Veysey had administered a noxious thing, namely urine, to a prison officer Steven Holmes with intent to injure, aggrieve or annoy him. This officer had some 12 years' experience in the prison service, but had only recently started to work at HMP Guys Marsh. On 11th July he had refused a request by Veysey for a smoker's pack. Later that day he heard the bell ring in Veysey's cell, and went to speak to him via the observation panel. As he did so, Veysey threw a cup full of urine into his face. The urine went into the officer's eyes and mouth. Veysey at the same time was shouting abuse and making threatening remarks to the effect "This isn't over" and "I'll have you". The officer's shirt was covered in urine, and his eyes were stinging. He felt violated. Two days later, when Veysey is said to have been in a very bad mood, the officer again responded to Veysey sounding his bell. On this occasion, the officer carried a protective shield. As he and a colleague approached the cell, Veysey again threw urine through the observation panel. It went onto the officer's shirt. Veysey was again abusive, shouting words to the effect "It's not over".

9. Count 5 was a further charge of a section 24 offence, this time committed at a different prison to which Veysey had been moved. A prison officer, Michael Foley, went to Veysey's cell in response to a fire alarm. Veysey threw urine in his face, and laughed at what he had done. The officer was worried that Veysey may have some infectious disease and attended hospital in case that was so, but did not require any treatment.

10. Veysey denied these charges. In relation to the section 24 offences, his defence was that he had not thrown urine on either of the occasions charged in counts 3 and 4, though he had thrown urine at the officer on other occasions. His defence to count 5 was that he had no recollection of ever having seen the officer concerned, and he denied that he had ever occupied the relevant cell. He was, as we have said, convicted of all offences.

11. Beardshaw, now 32 years old, has been sentenced on 27 occasions for 84 offences, including offences of violence and disorder. He committed the offence which is the subject of his appeal whilst serving sentences totalling 7 years' imprisonment imposed on 1st September 2016 for offences of robbery, dangerous driving and driving whilst disqualified. The circumstances were that on 30th November 2017 a prison officer Richard Woolgrove was going about his duties when a prisoner shouted at him "I can't wait to see what happens to you". Shortly thereafter, Beardshaw

shouted to him by name. As the officer turned in response to that call, Beardshaw threw into his face a cup containing a mixture of urine and faeces. Beardshaw then went to his cell followed by the officer: he held a broom handle and shouted "Come on then", but the incident soon ended. The officer was advised to go to hospital, where he received an injection in case of hepatitis. His witness statement indicated that the incident had unnerved him: his sleep had been impaired, and when on duty alone "it is all that I am thinking about, waiting for this to happen again".

12. When asked if he had deliberately targeted the officer, and if someone had put him up to it, Beardshaw nodded. When interviewed, he initially made no comment, but later admitted what he had done and said he would plead guilty. He did not in fact plead guilty at the first opportunity, but did so when he appeared before the Crown Court at a plea and trial preparation hearing.

13. Munroe, now 39 years of age, has previously been sentenced on 21 occasions for 39 offences, including offences of violence and disorder. He committed the offence which is the subject of his appeal on 12th September 2018, whilst he was on remand at HMP Leeds on a charge of wounding with intent for which he was sentenced in January 2019 to an extended sentence comprising a custodial term of 10 years' imprisonment and an extended licence period of 5 years. A senior prison officer David McPherson went to Munroe's cell to speak about Munroe's behaviour towards other staff on the previous night. The officer opened the observation hatch to introduce himself, and Munroe shouted at him to leave. The officer asked if Munroe had previously been detained at that prison and Munroe said he had. The officer then went to collect an induction package for Munroe. On his return he found Munroe speaking to a nurse through the observation hatch. As the officer went to pass the induction pack through the hatch, Munroe threw a cup containing urine into the officer's face. Some of the urine went into the officer's mouth, and some went onto the nurse. The officer had been assaulted before in the course of his duties, but found this incident "absolutely horrific and disgusting", and felt unclean.

14. When interviewed about this offence, Munroe said that he had committed it because he had found upon his arrival at HMP Leeds that a man who had previously shot him was also detained there. As a result, he said, he feared for his life.

15. We turn to consider Veysey's appeal against conviction. His first ground of appeal raises this issue: can a jury properly find urine to be a noxious thing within the meaning of section 24 of the 1861 Act?

16. Section 24 of the 1861 Act provides:

> "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude."

The maximum penalty for such an offence is 5 years' imprisonment.

17. On Veysey's behalf, Mr Rule submitted that as a matter of law, urine is not capable of being a noxious thing for this purpose. Alternatively, the liquid thrown on three occasions by Veysey was not proved on the evidence to have been a noxious thing. Submissions to a similar effect were initially made by Mr Rule in an application to dismiss which was refused by Her Honour Judge Miller QC on 9th August 2018. Similar submissions were also made, this time by trial counsel Mr Wilshire, on a submission of no case to answer which was refused by Judge Fuller QC on 26th September 2018. We do not think it necessary to refer in detail to either of those rulings, as the same arguments have been advanced before us, and Mr Rule's submission is that each of the judges below was in error and that each of the applications below should have succeeded.

18. The essence of Mr Rule's submission is that a substance cannot be a noxious thing within the meaning of section 24 of the 1861 Act unless it has the capacity to cause some impairment or harm to a person's faculties or functioning, whether because of its intrinsic quality or because of the quantity in which it was administered. He pointed to the fact that the prosecution adduced no expert evidence as to the nature of urine, and no evidence of any harm being caused by Veysey's actions beyond the evidence of the prison officer Stephen Holmes that his eyes were stinging after urine was thrown in his face on 11th July 2016. Mr Rule further pointed to the evidence of an expert witness Dr John Douse, a forensic toxicologist called by the defence at trial. His evidence was that the composition of urine is 95% water, with urea and salts contributing only a small percentage. It is not intrinsically harmful in a healthy person. Bacteria are present in it, but are not pathogenic and there is no possibility of microbiological infection. When first excreted it is very slightly acidic. Over time, the urea in the urine is broken down and converted into ammonia, with the result that the liquid becomes slightly alkaline. However, the concentration of ammonia never reaches a level at which it could cause any harm. Urine is unlikely to cause tissue damage, although it might do so in an extreme situation: it cannot cause tissue damage by splashing into the eye or by swallowing, though splashing into the eye can cause irritation. Swallowing urine is unlikely to have any effect.

19. Mr Rule pointed to the etymology of the word "noxious", which has its root in a Latin word meaning hurt, damage or harm, and to the context in which the word appears in section 24 of the 1861 Act, namely "any poison or other destructive or noxious thing". He drew a distinction between disgust on the one hand, and actual harm on the other hand. He referred to other, more recent, statutory provisions referring to noxious things, such as section 2 of the Wild Mammals Act 1996, section 113 of the Anti-Terrorism, Crime and Security Act 2001 and section 6 of the Terrorism Act 2006, all of which he submitted show a consistent use of the word "noxious" as requiring a capacity for the substance concerned to cause harm. He noted that "potting" incidents have in the past been dealt with, if subject to prosecution at all, as offences of common assault or battery. He submitted that to interpret "noxious thing" as including substances which are not harmful would have very wide implications for many other situations: for example, the wider interpretation for which the prosecution contend would make it possible to charge spitting as a section 24 offence.

20. Mr Rule relied on *Hennah* (1877) 13 Cox CC 547, as authority that the relevant substance, even if administered with intent to injure or annoy, must be noxious in itself and not merely noxious if taken in excess. He similarly relied on *Cramp* (1880)

5 QBD 307, a case in which oil of juniper had been administered in such a quantity as to be noxious. Mr Rule also referred us to the more recent case of *Cato* [1976] 1WLR 110 at page 119G, where Lord Widgery CJ said:

> "The authorities show that an article is not to be described as noxious for present purposes merely because it has a potentiality for harm if taken in an overdose. There are many articles of value in common use which may be harmful in overdose, and it is clear on the authorities when looking at them that one cannot describe an article as noxious merely because it has that aptitude."

21. For the respondent, Mr Cray QC submitted that the judges below were correct to refuse the submissions, and that Mr Rule's argument is contrary to authority. Mr Cray particularly relied on the case of *Marcus* [1981] 1 WLR 774. The defendant in that case had introduced powdered sedatives into bottles of milk which had been delivered to the doorstep of her neighbour's home. The quantity found in each milk bottle was sufficient to cause sedation and even sleep, with a consequent danger to anyone who had consumed the milk and then performed an activity such as driving a car. On appeal against conviction, two submissions were argued on behalf of the appellant. First, that the substance concerned in a charge under section 24 of the 1861 Act must be noxious in itself: something which is intrinsically harmless cannot become noxious or harmful because given in excess quantity. Secondly, that "noxious" means harmful, and that injury to bodily health must be proved. The court rejected both submissions. As to the first, Tudor Evans J, giving the judgment of the court, said at p779G:

> "We are of the opinion that for the purposes of section 24 the concept of the "noxious thing" involves not only the quality or nature of the substance but also the quantity administered or sought to be administered. If the contention of the defendant is correct, then, on the assumption that the drugs were intrinsically harmless, it would follow that if the defendant had attempted to administer a dose of 50 tablets by way of the milk, an amount which, if taken, would have been potentially lethal, she would have committed no offence. We do not consider that such a result can follow from the language of section 24. The offence created by the section involves an intention to injure, aggrieve or annoy. We consider that the words "noxious thing" mean that the jury have to consider the very thing which on the facts is administered or sought to be administered both as to quality and as to quantity. The jury has to consider the evidence of what was administered or attempted to be administered both in quality and in quantity and to decide as a question of fact and degree in all the circumstances whether that thing was noxious. A substance which may have been harmless in small quantities may yet be noxious in the quantity administered."

The court indicated that the decision in *Cato*, a case which was concerned with a plainly dangerous substance namely heroin, did not lay down a general proposition

that a substance harmless in itself and in small quantities could never be noxious if administered in large quantities.

22. As to the second submission, the court, whilst finding that on the evidence the adulterated milk was capable of causing injury to bodily health, specifically decided that the word "noxious" did not bear the restricted meaning for which the appellant had contended. At page 780G, Tudor Evans J said:

> "In the course of his summing up, the judge quoted the definition of "noxious" from the Shorter Oxford English Dictionary, where it is described as meaning "injurious, hurtful, harmful, unwholesome". The meaning is clearly very wide. It seems to us that even taking its weakest meaning, if for example a person were to put an obnoxious (that is objectionable) or unwholesome thing into an article of food or drink with the intent to annoy any person who might consume it, an offence would be committed. A number of illustrations were put in argument, including the snail said to have been in the ginger beer bottle (to adapt the facts in *Donoghue v Stevenson* [1932] AC 562). If that had been done with any of the intents in the section, it seems to us that an offence would have been committed."

23. Mr Cray went on to submit that the judges below were correct to conclude that, in the circumstances of this case, it was for the jury to decide whether or not Veysey had been proved to have administered a noxious thing to the prison officer concerned on all or any of the relevant occasions. He pointed out that Veysey could only succeed on this aspect of his appeal if he could show that the trial judge should have ruled as a matter of law that urine was not capable of being a noxious thing. Mr Cray acknowledged that in the absence of any need to establish that the substance concerned was harmful to health, a range of substances may arguably come within the ambit of section 24 of the 1861Act. But, he argued, all depends on the circumstances, including not only the quality of the substance concerned but the quantity in which and the manner in which it is administered. The important point, he submitted, is that it would be wrong in law to say that urine can never be found to be a noxious thing.

24. Mr Rule submitted that the court's decision on the second submission advanced in *Marcus* was *obiter*, as the basis of the decision was that the adulterated milk was in fact harmful. He went on to submit, consistently with his primary submission as to the need for the substance to be harmful, that the element of "administering" the noxious thing required proof that the substance had been administered in a manner which made it capable of causing harm: thus, for example, the splashing of urine onto the shoe of another person could not be regarded as the administering of a noxious thing, even if (contrary to his primary submission,) urine was in other circumstances capable of being a noxious thing.

25. Skilfully though Mr Rule argued this ground, we are unable to accept his submissions. In each of the cases on which he relied, the relevant substance had in fact been harmful in the sense of being capable of causing injury to health. It is not possible to regard those cases as authority for the proposition that no substance can be considered noxious for this purpose unless it is capable of being injurious to health. In our view,

the matter is concluded by the decision of this court in *Marcus*. That decision makes clear that, where a substance is administered in a manner and a quantity which is in fact harmful, and the requisite intent is proved, then the offence will be made out even though the same substance in a lesser quantity, or administered in a different manner, may not have been harmful. Importantly, however, that was not the only basis for the court's decision, and we reject the submission that the court's ruling on the second argument advanced in that case was merely *obiter*. In the passage which we have quoted from page 780G, the court plainly accepted the dictionary definition of "noxious" which extends to a substance which is "unwholesome".

26. In our judgment, where an issue arises as to whether a substance is a noxious thing for the purpose of section 24 of the 1861 Act, it will be for the judge to rule as a matter of law whether the substance concerned, in the quantity and manner in which it is shown by the evidence to have been administered, could properly be found by the jury to be injurious, hurtful, harmful or unwholesome. If it can be properly so regarded, it will be a matter for the jury whether they are satisfied that it was a noxious thing within that definition. In the present case, the judges below were entitled to find that a cupful of human urine, from an unknown source, thrown at the face of a victim is capable of being regarded as an unwholesome, and therefore a noxious, thing. It follows that they were correct to dismiss the applications made, and that the jury were entitled to conclude that Veysey had on three occasions administered a noxious thing to prison officers.

27. Veysey's second ground of appeal against conviction is that Judge Miller QC was wrong to refuse to stay the proceedings against him in respect of the section 24 offences. It was submitted that there are three reasons why a stay should have been granted. First, there was unfair prejudicial delay in bringing the proceedings, and/or a breach of the "reasonable time" guarantee in article 6 of the European Convention on Human Rights. Secondly, the case ought never have been brought before the criminal courts at all, and only did so as a result of a procedural irregularity or an improper exercise of a prosecutorial discretion. Thirdly, Veysey was a victim of oppression on the basis that the proceedings were deliberately delayed until his release from a previous sentence in order to maximise his loss of liberty, or alternatively, the criminal process was used in an arbitrary and unjustified manner.

28. We have already referred to the sentence imposed on Veysey on 29th July 2015, to the fact that the present offences were committed whilst he was serving that sentence and to the fact that the sentence ended on 19th February 2018 after Veysey had served many additional days. Following his completion of that sentence, he was held in custody whilst awaiting a trial which on 15th March 2018 resulted in his acquittal. He was at that point entitled to be, and was, released from custody. He was however immediately arrested pursuant to a warrant which had been issued by a magistrates' court on 7th April 2017 when Veysey had failed to appear in relation to at least some of the present charges. Having been arrested, Veysey was again remanded in custody. He appeared before a magistrates' court on 23rd March 2018, when charges of common assault were amended to charges of section 24 offences. He remained in custody on remand until his trial in September 2018.

29. Mr Rule advanced a number of submissions in support of this ground of appeal. First, he pointed to the fact that Veysey had in the past been dealt with for incidents of this nature, as other prisoners in other prisons have been, by proceedings within the prison

in which he was charged with a breach of the Prison Rules and faced a range of penalties up to and including an award of additional days not exceeding 42 days (see rule 55A of the Prison Rules 1999). Each of the incidents which were eventually charged in counts 3, 4 and 5 of the indictment could have been dealt with under the Prison Rules. Mr Rule submitted that where an incident could either be dealt with by internal prison procedures, or be referred to the Crown Prosecution Service with a view to prosecution, it is on conventional public law principles necessary for the appropriate person, namely a prison governor, to give proper consideration to the circumstances of the individual matter and to make a reasoned decision if there is to be a prosecution. He submitted that in the present case, the decisions to refer each of the three section 24 offences for prosecution were irrational, or unreasonable in *Wednesbury* terms; alternatively, the decisions showed bias against Veysey; alternatively, there was either a failure properly to exercise a discretion or an improper fettering of discretion. He pointed to the lack of contemporaneous records of the decision-making process.

30. In a witness statement dated 18th November 2016, Mr Andrew Graham, a governor and head of security and operations at HMP Guys Marsh, explained the reasons why prosecution was appropriate in relation to each of these incidents. He referred to a recent increase in incidents of violence and indiscipline on the part of prisoners, to Veysey's frequent offending and constant risk of violence to prison staff and to the seriousness of his premediated attacks which were the subject of the charges. He further explained that, as a result of the additional days awarded against Veysey following his many previous breaches of prison discipline, the stage had been reached at which any further adjudication could result at most in the award of 30 additional days, as after that period the sentence would have ended. He did not believe that to be an adequate penalty for the offences under consideration.

31. Next, Mr Rule submitted that there was no good reason for the long delay in the prosecution of these offences, and that the delay prejudiced Veysey in his defence to the charges. Mr Rule helpfully prepared a detailed chronology of relevant events, which included a number of occasions when Veysey should have appeared before magistrates' courts in relation to these matters, but did not. In relation to at least some of those occasions, there is a dispute as to whether the non-appearance was due to the fact that Veysey was either conducting, or threatening to conduct, a "dirty protest", or whether the true explanation lay in a failure on the part of prison authorities to notify Veysey of the relevant dates and to arrange his attendance at court. Mr Rule placed particular emphasis on the fact that a warrant was issued by one of the magistrates' courts in April 2017 but no action was taken upon it for almost a year, despite the facts that Veysey was in custody throughout that period and was making various court appearances in relation to other matters. Allied to that delay, Mr Rule pointed to the fact that Veysey was never interviewed about any of the incidents, and therefore had no opportunity to give his account at a time when matters were fresh in mind. Nor was there any opportunity to make prompt investigations into matters such as the scene of the alleged incident or the possibility of witnesses being available.

32. Next, Mr Rule pointed to the fact that Veysey had completed the sentence imposed in 2015, including the many additional days awarded, and had spent a further period remanded in custody in respect of the charge of which he was ultimately acquitted, and was not arrested for these matters until a date when he would have otherwise been

at liberty. He submits that it was unfair to prosecute Veysey in such circumstances, and reiterates the submission that in the event Veysey was prejudiced in the conduct of his defence.

33. On behalf of the respondent, Mr Cray submitted that Mr Rule was driven to argue that this is a case in which Veysey could have a fair trial, but that it was not fair to try him. He submitted that there was no evidence of serious bad practice by the state, and that the circumstances fall well short of the level at which a defendant would be able to discharge the burden of showing that proceedings against him should be stayed. Mr Cray argued that all relevant matters were properly considered by Judge Miller QC, who was entitled to conclude as she did that there was no bad faith or oppression, and that although the delay had been unfortunate it was not unfair for the prosecution to continue. Any prejudice said to arise from the delay could properly be dealt with as part of the trial process, and the jury could be directed to make due allowance for any difficulty in which the defence was placed by reason of the delay. Mr Cray submitted that Judge Miller QC was correct also to look at the matter in the round and to conclude that whilst there would be no unfairness in prosecuting Veysey, there would be unfairness to the victims of the alleged offences if the proceedings against him were stayed.

34. In relation to the decision to prosecute Veysey, both counsel referred us to the decision of this court in *R v A (RJ)* [2012] EWCA Crim 434, [2012] 2 Cr App R 8. The court in that case emphasised that where the prosecuting authority has conscientiously exercised its discretion as to whether a prosecution should be brought, the court has no power to substitute its own view for that of the Crown as to whether there should be a prosecution, and the sole question for the court is whether the offence has been committed. If there is evidence on which a jury might properly convict, it would only be in the rarest circumstances that the prosecution might be required to justify the decision to prosecute.

35. We are grateful to Mr Rule for his detailed written and oral submissions, but we can express our conclusion briefly. In our judgment, there is no possible basis for challenging the decision of the governor to refer these offences for prosecution rather than dealing with them under the Prison Rules. Whatever deficiencies there might have been in the contemporaneous paperwork, Veysey has shown no basis for challenging the later evidence of the governor as to the reasons why internal disciplinary sanctions would not meet the seriousness of the case. Those reasons are in reality obvious, and no lengthy or detailed consideration was needed to reach the conclusion that the incidents should be referred to the CPS. The extraordinarily long record of adjudications against Veysey, who had committed breach after breach of prison discipline, coupled with the seriousness of the present offences and the modest period of time still remaining before the existing sentence was completed, made this an overwhelming case for prosecution rather than internal discipline. The delay which subsequently occurred was certainly unfortunate, though we share the view of Judge Miller QC that the explanation is likely to lie in the frequent moves between prisons which were made necessary by Veysey's repeated offending, and by the fact that initially prosecutions for the offences at different prisons were proceeding in different areas and before different magistrates' courts. Be that as it may, and whatever the explanation may be for the various occasions when Veysey did not attend a hearing, Judge Miller QC was entitled to reach the conclusions she did. Mr

Rule has not been able to identify to the court any actual prejudice which significantly affected Veysey's ability to defend himself against the allegations or any actual disadvantage which he suffered in his trial by reason of delay. Had any significant difficulty arisen, the trial process was well equipped to cope with it, and there is no submission of any actual unfairness in this regard.

36. It was for those reasons that we concluded that there was no arguable ground for contending that Veysey's convictions were unsafe. His application for leave to appeal against conviction was accordingly refused.

37. We turn to consider the issues relating to sentence.

38. There is no definitive sentencing guideline specific to section 24 offences. The evidence in the cases which we are presently considering shows that "potting" occurs quite frequently. We do not say that the evidence in any of the cases established prevalence such as to make it a material factor in sentencing. We are however satisfied that a sufficient number of these cases are coming before the courts to make it desirable for some guidance to be given by this court. We therefore accede to the invitation made by counsel that we should give guidance. In doing so, we emphasise that we are doing no more than giving guidance as to broad levels of sentencing which seem to us appropriate in cases of this specific nature, namely assaults by prisoners on prison officers (and others employed in or providing services to prisons, whether publicly or privately-run) by the throwing and/or smearing of urine and/or faeces. We are not concerned with any other form of assault upon a prison officer, or with any of the other circumstances (of which there is a wide range) in which a charge under section 24 of the 1861 Act may be appropriate.

39. The Sentencing Guidelines Council's guideline "Overarching Principles: Seriousness" currently provides guidance in cases in which there is no relevant offence-specific guideline, though we note that it will shortly be replaced by a Sentencing Council guideline. It is appropriate to start by having regard to the statutory maximum penalty for the offence, namely five years' imprisonment, and to bear in mind that the maximum has to accommodate the full range of seriousness which section 24 offences may cover. It is then necessary, in accordance with the current guideline, to have regard to the five purposes of sentencing which are set out, though not in any hierarchy, in section 142 of the Criminal Justice Act 2003. In this regard, it seems to us that the statutory purposes of the punishment of offenders, the reduction of crime (including its reduction by deterrence), and the protection of the public, or that part of the public which works in prisons, are of the greatest importance when sentencing for section 24 offences. The court is then required pass a sentence that is commensurate with the seriousness of the offence, and in doing so to comply with section 143 of the 2003 Act, which so far as material provides –

> "(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.
>
> (2) In considering the seriousness of an offence ("the current offence") committed by an offender who has

> one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to –
>
> a) the nature of the offence to which the conviction relates, and its relevance to the current offence, and
>
> b) the time that has elapsed since the conviction."

40. The guideline goes on to identify four levels of criminal culpability, the most serious of which is an intention to cause harm, especially when an offence is planned. It refers to different categories of harm and to the gradations of harm within the various categories. It identifies factors which indicate higher culpability or a more than usually serious degree of harm, and mitigating factors which indicate a reduced level of culpability or harm.

41. In our view, offences of this nature will generally involve a high level of culpability, for the following reasons. First, they are committed by persons who have with just cause been detained in a prison, whether because serving a sentence or because remanded in custody, against public servants performing a difficult and important role. Secondly, it is a necessary ingredient of the offence that the offender intended to "injure, aggrieve or annoy" his victim. Thirdly, there will in almost all cases be a significant element of planning and premeditation: a cup or other container of urine or faeces must be prepared in advance of the throwing or smearing of those substances. Fourthly, the offence being a form of assault, it is relevant to consider the use of urine and/or faeces as similar to the use of a weapon. Fifthly, the repellent and unhygienic nature of the offence shows a desire to humiliate, demean and distress the officer concerned, to inhibit him or her in the proper performance of his or her public duties, and thus to undermine good order and discipline within the prison. Such conduct, targeted at an officer in a custodial environment, carries the obvious and serious risk of giving rise to wider disorder and/or disobedience, and the offender is at the very least reckless as to that risk.

42. As to harm, we recognise that in many cases of this nature – and in contrast to other forms of assault, and indeed to section 24 offences involving poisons or other toxic substances - the victim will not suffer actual physical or psychiatric injury, though clearly he or she is likely in every case to be very distressed, to feel degraded and unclean and to worry about the possibility (even if it may be remote medically) of some adverse consequence of being attacked with urine and/or faeces. We do not, however, regard that as a reason for concluding that the harm caused by these offences is anything less than serious. The effect on the victim is in itself significant. But in addition, the particular seriousness of the harm lies in the intended or likely effect of such offences on prison discipline and order, and on the deployment of resources. The victim of the offence is likely to be inhibited in the future performance of his or her duties. More generally, the authority of those responsible for maintaining order within the prison is undermined and jeopardised by the risk of wider disorder. The impact on resources may be significant, because a prisoner who

has committed such an offence may in future have to be dealt with by officers acting in combination and/or wearing protective equipment. As the facts of these appeals show, at least some of these offences are committed against an officer who has attended a prisoner's cell in response to a request for assistance, or in response to a fire alarm, or for some other purpose broadly connected with the safety and welfare of the prisoner. The risk of repeat offending is therefore not one which can be avoided easily, and resources have to be deployed with that risk in mind.

43. Both in the courts below and in this court, reference was made to the Sentencing Council's definitive guidelines for offences of common assault, assault occasioning actual bodily harm contrary to section 47 of the 1861 Act and inflicting grievous bodily harm/unlawful wounding contrary to section 20 of that Act. It is not inappropriate to consider those guidelines, but in doing so it is essential to bear in mind the feature of offences of this nature which we have already mentioned, namely that the harm caused by them is not, or is not solely, physical and/or psychiatric injury. For that reason, whilst the guidelines may be considered in order to identify relevant factors and to compare the appropriate levels of sentencing for offences which (in a different way) may be of broadly comparable seriousness, it is not helpful to treat a comparison with those guidelines as if it were an equation of like with like.

44. We conclude, with all respect to these submissions made to us, that it is wholly unrealistic to treat offences of this nature as if they were no more than a common assault, or a minor offence of assault occasioning minimal bodily harm. Nor is it realistic to suggest that a case of this nature, properly prosecuted before the criminal courts and liable to a maximum sentence of five years' imprisonment, should be sentenced in a way which is not much different from the limited range of penalties available under the Prison Rules. Section 24 offences of this kind are serious offences which are intended or likely to undermine discipline and good order in prisons and which add significantly to the burdens already faced by those charged with assisting prisoners and maintaining discipline. The need to punish and deter makes it necessary to impose severe punishment. In our judgment, offences of this nature will generally attract a starting point after trial in the range of two to three years' imprisonment, with offences involving urine falling at the lower end of that range and offences involving faeces at the upper end.

45. There will of course be variations in the details of individual offences, and upward or downward movements must be made from the starting point to reflect any aggravating or mitigating factors which arise in a particular case and which are not already taken into account in the general considerations which we have mentioned. In addition to the statutory aggravating feature of relevant previous convictions, it seems to us that a record of adverse adjudications within the prison estate involving similar misconduct will also be relevant. Actual physical or psychiatric harm will be an aggravating feature, as (to a lesser extent) will be a need for the officer concerned to seek medical advice and/or treatment even if no actual injury can be shown, and these factors may justify a significant uplift above the level of sentence which would otherwise be appropriate. Evidence that the offence was motivated by a particular grudge or grievance against the officer concerned, or by a desire to manipulate the system to the advantage of the prisoner (for example, by securing his transfer to another wing or to another prison) will be aggravating features, as of course will be any element of hostility based on race, religion or sexual orientation. Potential mitigating factors are

young age and/or lack of maturity, mental disorder or learning disability relevant to the commission of the offence and, in some instances, the fact that the offender acted under severe pressure from others, amounting almost to duress, or had been taken advantage of by others preying upon his weaknesses. We would emphasise, however, that it will not generally be a mitigating factor that the offender was put up to the commission of the offence by others or felt obliged to act at the bidding of others because he had, for example, incurred a prison debt to them.

46. It is in the nature of the offence that it is committed by either a remand prisoner or a convicted prisoner serving a sentence. Where the prisoner is serving a sentence at the time of conviction, a consecutive sentence will usually be necessary. Where he has been released by the time of his conviction, a further sentence of imprisonment will usually be necessary. The sentencer must have regard to totality, but in circumstances such as these, and consistently with the Sentencing Council's Definitive Guideline on Totality at p9, we think that in general only minimal weight can be given to that consideration: a prisoner who chooses to offend in this way must expect to receive an appropriate sentence for it, notwithstanding that his time in custody will thereby be substantially prolonged, or that he will be required to return to custody after completing a previous sentence.

47. With those general considerations in mind, we turn to consider the individual grounds of appeal against sentence.

48. In Veysey's case, Mr Rule reiterated the chronology of events which, even if it did not assist him in his appeal against conviction, should, he submitted, carry weight in considering the total sentence. He submitted that although Judge Miller QC had indicated that the significance of the delay might be reflected in sentence should Veysey be convicted, Judge Fuller QC at the conclusion of the trial did not expressly make any reduction on that ground. Mr Rule further submitted that the sentence on count 1, which carries a maximum sentence of two years' imprisonment, was manifestly excessive, possibly because the judge was initially told in error that the maximum sentence was five years.

49. We accept that the judge did not specifically refer to delay in his sentencing remarks. He did however make clear the seriousness of each of the offences, and he made clear that he had in mind the submissions that section 24 offences involving the use of urine were less serious than those involving the use of faeces. He also expressly referred to totality. He concluded however that the seriousness of the offences, together with the record of previous convictions and "the fact that nothing seems to deter [Veysey] from such conduct" made it necessary for him to impose the sentences of 18 months' imprisonment on count 1; 18 months' imprisonment on counts 3 and 4, those sentences being concurrent with one another but consecutive to the sentence on count 1; and 18 months' imprisonment on count 5, consecutive to the other sentences.

50. We acknowledge that that is a substantial total sentence. It is however in our judgment an appropriate sentence, for the reasons which we have explained in our general observations above. Veysey has a very bad record of offending in general, and offending against those in positions of authority in particular. Having breached prison discipline time and again, he can have no legitimate complaint that on this occasion the seriousness of his offending was reflected in the way the judge felt appropriate. There is no arguable ground on which that total term can be said to be

manifestly excessive. It was for those reasons that we refused Veysey's application for leave to appeal against sentence.

51. On behalf of Beardshaw, Mr Shaw acknowledged the seriousness of the offence but submitted that the sentence of 3 years' imprisonment was manifestly excessive in length. He submitted that the judge paid too close a regard to the level of sentencing under the guideline for offences contrary to section 20 of the 1861 Act. He relied on the fact that Beardshaw had made admissions in interview, and was entitled to have that factor treated as a matter of mitigation tending to reduce the length of sentence before giving credit for the guilty plea. He further submitted that mitigation was to be found in the fact that Beardshaw had been acting under pressure from other prisoners, and had expressed remorse. As to the level of credit, he submitted that the judge fell into arithmetical error, which ought to be corrected.

52. The judge in his sentencing remarks did indeed express the view that a comparison with the level of sentencing appropriate to a section 20 offence was more appropriate than a comparison with section 47 offences. He indicated that the offence clearly involved higher culpability. He said that throwing faeces into the face of another person created a high risk of disease transmission, and that the psychological effect on the victim should not be underestimated. Prison officers, said the judge, were vulnerable to attacks of this nature. In all the circumstances, he concluded, the appropriate sentence before giving credit for the guilty plea was 42 months. The judge then said that the appropriate credit, having regard to the time at which the guilty plea was entered, would be 25 per cent. Making a further minor reduction for totality, he said, the sentence would be three years' consecutive to the term which Beardshaw was already serving.

53. We agree that the judge made an arithmetical error. We do not however accept that his sentence can be criticised in any other way. A sentence before credit for plea of 42 months was a stiff one, but was within the range which we have indicated as appropriate, bearing in mind that Beardshaw's victim had faeces thrown into his face and received a precautionary injection against hepatitis B. The evidence indicates that there had been significant premeditation here, and – whether or not Beardshaw was acting at the behest of another – it is clear that the attack on the officer was planned. All that said, however, a sentence before credit for plea of 42 months was at the upper end of the appropriate range, and we accept that the making of the arithmetical error had the consequence that the sentence pronounced by the judge was not the sentence he had intended to pass. In those circumstances, we concluded that fairness required that the arithmetical error be corrected, with some rounding down. It was in those circumstances that we allowed Beardshaw's appeal to the limited extent that we quashed the sentence imposed below and substituted for it a sentence of 30 months' imprisonment, again consecutive to the sentence which Beardshaw had previously been serving.

54. In his helpful and focussed submissions on behalf of Munroe, Mr Thyne submitted that the sentence of 16 months' imprisonment was manifestly excessive because the judge took too high a sentence before giving credit for the guilty plea, and failed to give sufficient weight to totality. He sought a comparison with the sentencing guideline applicable to offences of assault occasioning actual bodily harm. He argued that the judge had neither expressly mentioned, nor clearly taken into account, the principle of totality. At least some allowance should have been made in that regard.

Mr Thyne pointed out, on the authority of *Hibbert* [2015] EWCA Crim 507, that the effect of the sentence of 16 months, imposed consecutively to the custodial term of the extended sentence which Munroe was already serving, is that Munroe cannot be considered for release on licence until he has served two thirds of the custodial term of his extended sentence followed by one half of the present sentence: a total of 7 years 4 months.

55. Those submissions were attractively made, but we are unable to accept them. The judge in his sentencing remarks acknowledged that Munroe had a legitimate concern at being detained in a prison that also held a man who had previously shot him, and that it was unfortunate that no immediate action had been taken when he first raised those concerns, though that could not excuse the throwing of urine at an officer. The judge went on to say, at page 2A:

> "Your starting point in my judgment is two years, but instead of giving you credit of twenty five percent, I am going to give you credit of one third on the basis that I am prepared to accept that there are genuine concerns which were entertained by you at the material time about your welfare in this particular institution."

Thus the judge did make some reduction from the sentence which would otherwise have been appropriate, in addition to giving full credit for the early guilty plea. Whilst it is true that the judge did not explicitly refer to totality, we have already indicated that only minimal weight can be given to that consideration in circumstances such as these. Moreover, it seems to us that the judge was more generous than other judges might have been in making a reduction on the basis of a legitimate sense of grievance, given that the judge had also said – quite rightly – that that sense of grievance could not excuse the offence. In those circumstances, we are satisfied that there is no ground on which the sentence of 16 months' imprisonment can be said to be manifestly excessive. It was for those reasons that we refused the application for leave to appeal against sentence.

56. We conclude by reiterating our thanks to all counsel for their submissions.