

Sexual assault of a child under 13

This file contains three directions;

- 1, Did the defendant do it?
- 2, Did the defendant do it? Issue of intoxication)
- 3, Issues as to whether the touching was sexual, with an alternative of common assault.

Sexual assault of a child under 13 (Did the defendant do it?)

Someone is guilty of sexual assault of a child under 13 if:

- he intentionally touches another person;
- that other person is under 13; and
- the touching is sexual.

“touching” includes touching clothing. It must be intentional.

The prosecution case is that D** placed the palm of his right hand on C**, a little below her breast, and then, moving his hand upwards, brushed it past her breast. He denies that he touched her breast. It is not part of the defendant’s case that he touched C**’s breast accidentally.

Again, no one suggests that touching a girl’s breast in these circumstances is anything but “sexual”.

Nor is there any doubt that C** is now, and was at the time, aged **, and so was under 13.

So, the only question you have to answer in relation to Count * is

Did D** intentionally touch C’s breast?

If you are sure that the answer is “yes”, he is guilty. If the answer may be “no”, he is not guilty.

Sexual assault of a child under 13 (Did the defendant do it? Issue of intoxication)

Someone is guilty of sexual assault of a child under 13 if:

- he intentionally touches another person;
- that other person is under 13; and
- the touching is sexual.

“touching” must be intentional.

The prosecution case is that D***. He denies this.
He says that ***

It is not part of the defendant’s case that he ** her accidentally or platonically.

However, touching is “sexual” if a reasonable person would consider that either

- whatever its circumstances or the defendant’s purpose in relation to it, it is because of its nature sexual; or
- because of its nature, it may be sexual and because of its circumstances or the purpose of the defendant, it was sexual.

No one suggests that if a man kisses a girl and tries to put his tongue in her mouth that that is anything but “sexual”.

Nor is there any doubt that C** was at the time, aged **, and so was under 13.

Intoxication

D** gave evidence that on the day in question he had been **drinking and smoking cannabis**. He denies that this affected him, but even if it did, the mere fact that a defendant’s mind might have been affected by alcohol and cannabis so that he acted in a way in which he would not have done had he been sober, is not a defence, provided that the necessary intention was there. A drunken intent is nevertheless an intent.

So the only question you have to answer having regard to all the evidence and the directions I give you is

Did the defendant ***?

If you are sure that the answer is “yes”, he is guilty. If the answer may be “no”, he is not guilty.

Sexual assault of a child under 13 (alternative common assault)

The prosecution case is that:

- In relation to count 1, D** sat next to C**, put her hand round her shoulder and started squeezing her chest.
- In relation to count 2, D** pulled down C**’s towel, squeezed her chest and then rubbed her private part between her legs with her hand.

D** denies that she did any of these things. She says that C** has been persuaded to fabricate, to make up, these allegations by her father X**.

Someone is guilty of sexual assault of a child under 13 if:

- she intentionally touches another person;
- that other person is under 13; and
- the touching is sexual.

“touching” includes touching clothing. It must be intentional – not accidental.

“under 13” There is no doubt that C** was under 13. She was aged 12 at the time.

“the touching was sexual” The mere fact that a person touches a sexual part of another person’s body does not automatically mean that the touching was sexual. For example, a doctor may touch the private parts of a woman because he needs to conduct a medical examination. A parent may wash the private parts of a young child. Such touching would not be “sexual”.

So, you have to decide whether any touching was “sexual”.

This is a two-fold test.

Firstly, was any touching, whatever its circumstances, because of its nature sexual? For example, it is hard to imagine any circumstances in which a man licking a woman's vagina would not be sexual. Such touching would automatically be "sexual".

If you are sure that D** intentionally touched C** and that touching, whatever its circumstances, was, because of its nature sexual, the defendant is guilty.

However, if you are not sure of that, there is a second way in which intentional touching may be sexual - where because of its nature it may be sexual and because of its circumstances or the purpose of the person doing the touching, it was sexual. So, to take the earlier examples, if the doctor touches the private parts of a woman, not because he needs to conduct a medical examination, but because he fancies her, that touching would be sexual. Similarly, if someone is washing the private parts of a young child, not because the child needs washing, but because he gets sexual pleasure from touching a child's private parts, such touching would be sexual.

The test is not whether any person doing the touching, or any person being touched, thought it was sexual.

The test is whether a reasonable person would have thought that it was sexual.

So, the questions you have to answer, having regard to all the evidence and the directions which I give, separately in relation to Counts 1 and 2 are

- (i) Did D** intentionally touch C** in the way she said? and if she did
- (ii) Was the touching sexual?

If you are sure that the answer to both questions is "yes", D** is guilty of sexual assault. If the answer to either question may be "no", she is not guilty of sexual assault.

Alternative of common assault not on indictment

However, if you are sure that D** did intentionally touch C**, as she said she did, but you are not sure that the touching was sexual, you should find her guilty of the lesser offence of common assault. A common assault is committed when someone touches another person without the consent or agreement of that other person.

So, if you are sure that the answer to the first question is "yes" (i.e. D** did intentionally touch C**) but the answer to the second question may be "no" (i.e. the touching may not have been sexual), she is guilty of the lesser offence of common assault.