THE SUPREME COURT

Supreme Court Record No: 131/2018

Court of Appeal Record No: 44/2014

Central Criminal Court Bill No: 58/2011

Clarke C.J.
McKechnie J.
Charleton J.
O'Malley J.
Irvine J.

BETWEEN /
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

CELYN EADON

APPELLANT

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 20th day of December, 2019

Introduction

1. On the 5th February, 2014, the Appellant was convicted of the murder of his mother Noreen Kelly on the 9th March, 2011. A plea to manslaughter was offered in advance of trial but was rejected by the DPP. The fact of the killing was not in dispute at trial. In effect, the only two issues for the jury concerned the partial defences of diminished responsibility and intoxication. Both were relied upon by the Appellant; if either had been accepted by the jury, the appropriate conviction would have been for manslaughter rather than murder.

2. The Appellant appealed his conviction to the Court of Appeal, arguing that the trial judge misdirected the jury concerning the issue of his intoxication and its relevance to the jury's assessment of the issues. His appeal was dismissed, but he has been granted leave to further appeal to this Court on two points of law of general public importance. The first concerns the adequacy of the judicial direction instructing the jury on intoxication and specific intention: is it sufficient for the trial judge to charge the jury on the issue of whether the accused had the necessary *capacity* to form the intention, or must the judge stress that the applicable test is whether the accused *in fact* had the necessary intention? The second issue is whether it is permissible to have regard to counsels' closing speeches for the purposes of remedying any deficiencies in the judge's charge.

Factual Background and Trial in the Central Criminal Court

3. There was no real dispute as to the essential facts at trial. As will be seen, it was accepted by all that the Appellant had unlawfully killed his mother by stabbing her multiple times with a knife on the 9th March, 2011. The Appellant was charged with murder. He made an offer to plead guilty to manslaughter ahead of the trial but this plea was rejected by the DPP.

4. At his trial the Appellant raised two alternative defences, either of which, if accepted by the jury, would have resulted in a conviction for manslaughter rather than for murder. He sought to rely, first, upon the statutory defence of diminished responsibility, as provided for by section 6 of the Criminal Law (Insanity) Act 2006, arguing that at the time of the killing he was suffering from a mental disorder which was such as to diminish substantially his responsibility for the act, albeit accepting that it was not such not such as to justify finding him not guilty by reason of insanity. Second, and in the alternative, he raised the defence of intoxication, insofar as that can be a partial defence to a crime of specific intent such as murder, arguing that by virtue of his intoxicated state he lacked the specific intent necessary for the homicide to be characterised as murder rather than manslaughter. These two defences were, in effect, the only live issues in the case.

5. The factual background is set out at paras. 5-15 of the judgment of the Court of Appeal and does not need to be repeated in full here. However, in light of the particular issues on which leave has been granted to appeal to this Court, it is necessary to set out, in perhaps a little bit more detail than would usually be the case, the salient portions of counsels' closing speeches, as well as the learned trial judge's charge, the requisitions of counsel and the re-charge. But first, a summary of the evidence.

The Facts and Evidence

6. The trial was heard before Carney J and a jury in the Central Criminal Court over nine days from the 24th January, 2014 to the 5th February, 2014. As stated, much of the factual background was accepted at trial, and certainly is not in dispute on appeal.

7. In the early hours of the morning of the 9th March, 2011, the Appellant stabbed his mother to death in a frenzied knife attack. She sustained some 19 stab wounds, mostly to the face and chest. The Appellant was 19 years old at the time and had no previous history of violence towards his mother, with whom he lived in the family home together with his younger siblings.

8. The defence case, insofar as it related to intoxication, was that the Appellant was in a drug-induced psychosis at the time of the killing. Evidence was given of his serious and longstanding substance abuse issues. The jury heard that he had abused alcohol and cannabis since he was 13. In the two years prior to this incident he had begun consuming other drugs including amphetamines, cocaine, crystal methamphetamine, ecstasy and methadone. In the 18 months prior to the incident he had been spending approximately €400 per week on drugs and drank large quantities of alcohol almost every day.

9. The evidence was that the Appellant had consumed a large amount of drugs in the days leading up to this incident, and that owing to his methamphetamine use he had not slept for four days. Several witnesses testified as to the effects that these drugs were having on him during this time period; as summarised by the Court of Appeal:

> "During this period he suffered paranoid delusions and engaged in erratic behaviour: spraying deodorant to ward off demons; believing he was being pursued by aliens and making crop circles to communicate with them; asserting that fire

ants and demons were emerging from the walls; imagining that the house was full of smoke; blocking the air vent in his bedroom with coins and stones because he believed the room was being filled with poison gas; and setting on fire an electrical socket and the family cat's bed." (para. 6)

Further examples could be added: he believed that people were spying on him; that the army were looking for him and had used some sort of gas around his house; he poured petrol around the house and was going around with a hatchet; he was seen being cruel to animals; and he believed that there had been a nuclear explosion the previous morning. In interview with the Gardaí he expressed the view that certain people (including, apparently, his mother) had been replaced with imposters.

10. This evidence came from a number of witnesses who saw and interacted with the Appellant during the days prior to the incident. These included his father, Mark Eadon, who was separated from the Appellant's mother and had fallen out with the Appellant some months earlier; the deceased had sought his help in dealing with the Appellant on the 8th March, 2011. When he arrived at the house he found that the Appellant had barricaded his mother and younger brother out of the house and that he came across as paranoid and delusional. The jury heard from the Appellant's uncle Patrick Kelly, brother of the deceased, whom she had also looked to for help on the 8th March, 2011. He was a long-time member of Alcoholics Anonymous and visited the house with a friend, Mr Kevin Mitchell, who was a recovered drug addict. Mr Kelly knew that "there was something seriously wrong". Mr Mitchell gave evidence that the Appellant's mind was gone and that he had never seen anyone that bad before. Diane Macko, a friend of the deceased, also visited the family home on the 8th March and gave evidence as to the Appellant's paranoid state. The jury heard from the Appellant's younger brother, Ferdia Eadon, that he believed that his brother was suffering from heavy delusions, paranoia and hallucinations and that there appeared to be something mentally wrong with him in the days leading up to the 9th March. Finally, a Mr John Scott, whose home was in a neighbouring townland, gave evidence that the Appellant showed up at his house at approximately 7.20a.m. on the 9th March wearing only tracksuit bottoms, with his body covered in cuts and scratches. Mr Scott believed that the Appellant had been outside for some time. He gave evidence that the Appellant had told him that he had been abducted by aliens who experimented on him, that the army were looking for him, and that he thought he had killed his mother.

11. Between them, these witnesses gave evidence that the Appellant was "paranoid", "just in a completely different place", "very scared and … hallucinating", "agitated and disturbed", "behaving abnormally", "hallucinating … tripping out in some way and not knowing what the hell was going on around him", "on edge, irritable, uneasy and over the top", "didn't seem to be sane", "acting very strange … there was something mentally wrong with him … his head wasn't right from the drugs he was on … I think he completely lost it that night". It was said that "his mind was gone" and "it was hard to get any sense out of him at all".

12. It was in these circumstances that the defence relied upon the defence of intoxication. Medical evidence was given by both sides and, on the Appellant's submission, this supported the defence of intoxication. Dr Paul O'Connell, a consultant forensic psychiatrist at the Central Mental Hospital, gave evidence for the defence. He carried out a psychiatric assessment of the Appellant over a period stating in October 2011. In his opinion, at the time of the killing of his mother the Appellant was not simply intoxicated but grossly intoxicated and was experiencing psychotic symptoms as a result of the intoxication. He considered that the Appellant was experiencing a substance-induced psychosis for a week or more before the killing. He stated that someone in this state would not be capable of exercising reasonable judgement or behaving appropriately. He acknowledged in evidence that this was something that could affect the capacity to form specific intent. He stated that in the Appellant's state of mind he would have been so grossly impaired as to have affected his ability to form specific intent. Dr Conor O'Neill, a consultant psychiatrist also based at the Central Mental Hospital, gave evidence for the prosecution. During cross-examination he accepted that being highly intoxicated could possibly have interfered with the Appellant's capacity to reason, his judgment, his ability to control himself and his ability to form a specific intent.

13. The prosecution's case theory, on the other hand, was that the Appellant blamed his mother for the disappearance of his drugs and that this was the trigger for what subsequently transpired. The prosecution placed particular importance on the Appellant's garda interviews, which, it was said, demonstrated that the Appellant had the necessary intent for murder. For example, he said in interview that he had left the drugs in full view in his room, that someone had taken them and that this pissed him off. He acknowledged in interview that he remembered stabbing his mother, but said that at the time he did not know that it was his mother, that she was a danger, an intruder and a "completely different person". He said that "It was my own fault. It was me who done it.", but then added that "I didn't know it was my mother … I didn't realise what I'd done at all." In his sixth interview, when asked about bruising to the hand of the deceased, the Appellant said that "[s]he hit me so I stabbed her to death."

The Closing Speeches, the Judge's Charge, Counsels' Requisitions and the Judge's Re-Charge

14. One of issues on this appeal is whether it is permissible to have regard to the exposition of the law in counsels' speeches for the purpose of supplementing the judge's charge to the jury where the same might fairly be described as terse or lacking in detail. Here, the argument is whether the trial judge's sparse treatment of the issue of intoxication should be assessed in light of what had already been said about that matter by counsel in their closing speeches. For that reason, it is necessary to set out in some detail what was said about intoxication and specific intent in those speeches.

15. The closing speeches were made on Day 8 of the trial. As part of her speech counsel for the prosecution stated thus:

> "Now, on the evidence the prosecution say to you that this man, this young man, Celyn Eadon, was clearly on the night in question, he was intoxicated. And it's clear

that this was also what we call voluntary intoxication; in other words, that he ingested those substances himself, bearing in mind that he had also ingested that type of substance over a period of time and before this date. And intoxication in and of itself is not a defence. But it is relevant and material to the question of whether or not a person had the necessary intention to kill or to cause serious injury. That is the specific intent required for a charge of murder. So it is relevant and it is material to that, and that, ladies and gentlemen, is entirely a matter for you to assess on the evidence. And it is, as I said to you, for the prosecution to prove each and every element of the offence, and of course that includes that the prosecution have to prove to you that he had the necessary intent to kill or to cause serious injury on the night in question." (Transcript, Day 8, Page 4, Lines 19-31)

16. Prosecution counsel then reminded the jury of the relevant evidence in support of the issue of the Appellant's intent. The prosecution's case, as noted above, was that the Appellant became aggressive after the disappearance of his drugs and that this was the trigger for the awful events that subsequently unfolded. In support of this case theory, counsel for the DPP used her closing speech to remind the jury of, *inter alia*, the evidence of the Appellant's younger brother Ferdia Eadon, John Scott and Kevin Mitchell, as well as medical evidence. Counsel also attached considerable importance to the Garda interviews of the Appellant, which were also said to support the view that he was angry over the disappearance of his drugs. Having reminded the jury of the evidence, counsel stated as follows:

> "So, they're all matters for you to consider and to consider the sequence of the interviews and to look to see does he become less and less intoxicated. When the prosecution say to you that he had the necessary intent for murder, but as I said, the question of intent is a matter entirely for you to consider but you can see what he says in your interviews and you can see the accounts that he gives and you can see that he says various things, including at the end indicating that she hit him and that he stabbed her and you have that bruising to the back of her knuckles for your consideration." (Transcript, Day 8, Page 6, Lines 27-34)

17. At the end of her closing speech, counsel for the DPP stated:

> "You consider the entirety of the evidence which you have heard, which include of course the memoranda of interview of the accused man and the progressively coherent way that he addressed matters as those interviews continued and what the prosecution say to you, that the evidence points to a person who was solely acting under the influence of an intoxicant and not a person with a mental disorder and that the prosecution have proved the necessary intent to you for the offence of murder, but these matters are all entirely for you and for your consideration and for your assessment of the evidence, bearing in mind that the burden rests with the prosecution, as I said to you on a number of occasions, to prove the guilt of the

accused man to the standard required which is, for the prosecution, beyond reasonable doubt." (Transcript, Day 8, Page 8, Lines 16-26)

18. Next it was the turn of the defence. In introducing the various topics which he proposed to cover, counsel for the defence stated as follows:

> "I'm going to deal with the issue of voluntary intoxication as it is in this case and I'm going to address you then on what you ought to consider when you're considering the ultimate question as to whether Celyn Eadon can genuinely be said to have intended the death of his mother; that he did what he did." (Transcript, Day 8, Page 9, Lines 16-20)

19. Later, he stated that:

> "You're going to find it hard to determine what in fact happened ... It's, in my submission, impossible, almost impossible for you to discover or decide or elaborate or set out step by step what precisely happened, other than knowing that this young man, in my submission, mustn't have been in any rational state of mind, was in the complete grip of these hallucinating, paranoid-making drugs, and unable to reason in his own mind about what was happening and how he should react and how he should control himself in any way. And in those circumstances it's a matter for you to actually decide this, needless to say; I make no decision, I can only urge you to take a view of the facts, but I would submit to you that on any view of the facts he must have been and you should so regard him as being so completely intoxicated as being not able to form the necessary intent to kill his mother, the statutory intent to kill his mother." (Transcript, Day 8, Page 24, Line 19 – Page 25, Line 1)

20. Defence counsel then referred to the evidence of Dr O'Connell to the effect that the Appellant's intoxication would have been likely to have impaired his capacity to reason, to exercise judgment, to control his actions and to form the intent necessary for murder. Counsel then set out the law in relation to intoxication and crimes of specific intent; if I may be forgiven for the long quotation:

> "Everyone's agreed he was grossly intoxicated and this leads me to the next issue that you have to consider and I just want to be clear to you that this is wholly separate and distinct from the issue of mental disorder and diminished responsibility. It's complete[ly] separate; it's an alternative, as it were. For instance, if there was no question of a mental disorder of whatever nature arising, you'd still be required to face this issue of intoxication. Now, intoxication as a matter of law covers intoxication by virtue of alcohol or drugs, prescription or otherwise, or illegal, and the law relating to voluntary intoxication is quite clear.
>
> Firstly, intoxication in itself is not a mental disorder or a mental illness. Secondly, intoxication isn't and can't ever normally be equated with any form of insanity. As

we all know, intoxication in different forms, it can be temporary and transitory and for the vast bulk of criminal law offences intoxication is not a defence to a crime because it would be a blackguards' and a criminals' charter if it were, people could go out drunk and commit offences and say, 'I was drunk at the time; I can't be held responsible'. But the law is different in one respect in relation to a very small category of offences and they are offences that require something more than the basic criminal act and the law relates to offences which are held to require proof of a specific intent and murder is one of that limited category where the law requires not merely proof of an unlawful killing, voluntarily done by an accused, but proof of the further intent at the time of the killing that the additional, specific intent that it must have been done with the intent to cause serious bodily injury or death and it's in that limited context that intoxication can become relevant and in many cases it won't be relevant but Ms Kennedy, on behalf of the prosecution, has very properly said to you today that it is both material and relevant, the level of intoxication here, on all of the evidence.

And it follows that if, as I suggest you should, you first consider the issue of diminished responsibility based on a mental disorder, if you rule that out, you go ahead and consider the effect in your view of the type of intoxication that you've heard about upon Celyn's ability to form the specific intent required for murder. Obviously, if you, having considered the issue of mental disorder and diminished responsibility, if you find that he had a mental disorder and that that diminished his responsibility, you find him guilty of manslaughter on the basis of diminished responsibility and you don't go on to consider this issue and his lordship may or may not agree that you should decide the things in those sequence, but in my submission to you, it's a logical way to proceed and if you get to this stage you can consider, in my submission to you, notwithstanding the absence of a mental disorder, whether this intoxicated and psychotic episode interfered with his capacity to form an intention to commit the offence in question here. Could it – could it and did it, in your view – have the effect of impairing his ability to make such a decision in relation to what he was doing, in relation to what he thought he was doing, in relation to what he intended to do, in relation to what he sought to achieve and in relation to what he desired as the natural and probable consequences of his actions and in my submission the background is such that on any reasonable consideration of it by you, you will be compelled to the view that he did not intend, in any real sense, to kill or to cause the death of his mother by a serious injury, having regard to the condition he was in.

Now, that doesn't mean he's not guilty of an offence. It means he's not guilty of the offence of murder; he's guilty of the offence of manslaughter because the prosecution at the end of the day still have to prove beyond a reasonable doubt to your satisfaction that he had such an intent before you could convict him of murder. And that's at the heart of the case: what, in reality, was his capacity and

intent at the time." (Transcript, Day 8, Page 32, Line 13 – Page 33, Line 28)

21. Finally, in summing up his speech, counsel stated the following:

> "You'd be mistaken, in my submission to you, to consider that issue on the basis of the memos on their own. Your duty, in my submission, is to consider all of the other evidence in relation to that: the evidence of the two psychiatrists; the evidence of Diane Macko; the evidence of Kevin Mitchell, the evidence of his father, Martin; the evidence of his brother, Ferdia; and his uncle Paddy Kelly. And if you keep a firm and rational grip of everything that they have said to you about his behaviour on the day and leading up to the night in question, you couldn't but be persuaded that this man's, this young man's capacity and intent and actions were undoubtedly affected by the toxic substances, the cocktail of -- the shocking cocktail of drugs that he'd consumed in the lead-up to this: four nights without sleep, it's been said, and drugs all day, consuming whatever he could get his hands on. So, at the end of the day, you have to reach a verdict and, in my submission, both a fair and just verdict is to acquit him of the offence of murder and to convict him of the offence on manslaughter, whether on the grounds of diminished responsibility or otherwise.
>
> In relation to such a crime of murder, it goes, as I've said to you at the outset, it goes against every natural feeling, every fibre of one's body to think that a young man, living with his mother, who appears on the evidence to have been having good relations with her – in fact there's evidence that they shared cannabis joints together even – that he would have wickedly and with full intent to have decided to kill her, to knife her to death, intending that that should happen. In my submission, the only just verdict that you ought to record is one of manslaughter. Thank you for your attention." (Day 8, Page 33, Line 28 – Page 34, Line 16)

22. Enter the trial judge. The learned judge's charge to the jury followed on immediately after defence counsel's closing speech. The judge began his charge to by referring to the closing speeches made on behalf of both sides, stating:

> "If there was any little bit of my charge that [prosecuting counsel] didn't hijack, [defence counsel] certainly captured it. You now have to hear from me and you have to hear from me in relation to matters you've heard of from counsel already perhaps several times over but the law is you must hear these matters from me ..."

23. Thereafter the trial judge proceeded to charge the jury in relation to the burden and standard of proof; the respective functions of judge, jury and counsel; the drawing of inferences; the presumption of innocence; the ingredients of murder; the doctrine of transferred malice; and the rebuttable statutory presumption that a person intends the natural and probable consequences of their actions. Some of the most relevant aspects of

the judge's charge on these issues are set out at paragraphs 19-23 of the judgment of the Court of Appeal in this case. Few, if any, judges in the history of the State can have had more experience charging murder juries on these very issues. The learned judge's charge on such matters was beyond reproach and no issue was taken with any of it at trial or on appeal.

24. The judge then turned to the issue of diminished responsibility, in the context of the statutory definition of a mental disorder for the purposes of the 2006 Act, he charged the jury as follows:

> "'Mental disorder' includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication.' It is the situation of our law that voluntary intoxication or the taking of drugs in the words of the former Chief Justice, 'Does not afford a defence to criminal responsibility or any mitigation in one's responsibility to society.'"

As can be seen, the defence of intoxication was, in a sense, rolled up and dealt with alongside and simultaneously with the defence of diminished responsibility. It is not disputed that this is all that was said by the trial judge on the issue of intoxication in the course of his initial charge to the jury.

25. The trial judge then proceeded to engage in a careful review of the evidence of the Appellant's psychiatrist, Dr Paul O'Connell. This is set out at paragraph 25 of the judgment of the Court of Appeal. He also summarised, in much less detail, the evidence of the prosecution's psychiatrist, Dr Conor O'Neill. Finally, he charged the jury in relation to the available verdicts in the following manner:

> "The first thing that is capable of going into that box is the word 'guilty', and that would mean that the accused was being found guilty of the full grown crime of murder, namely that he killed Noreen Kelly and in doing so had the statutory intent requisite for murder; that he intended to kill her or cause her serious injury. Now, the second thing that's capable of going into that box is the formula 'Not guilty of murder but guilty of manslaughter', and the accused sought to plead guilty on those terms at the start of the trial but the prosecution declined to accept that and proceeded with the murder count. Now, that would arise in the circumstance where you found that Celyn Eadon did kill his mother, and of course that's not in dispute, but the necessary intent had not been proved. And the third thing that is capable of going into the box is 'not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility', and that would arise where you found that he did the act alleged and at the time was suffering from a mental disorder, and the mental disorder was not such as to justify finding him not guilty by reason of insanity but was such as to diminish substantially his responsibility for the act, and you'll recall that Dr O'Connell said, well, he couldn't help you on that, that is a matter for you, and indeed it is."

26. Following the judge's charge, defence counsel made a two-part requisition complaining, first, that the trial judge had dealt together with the issues of diminished responsibility and voluntary intoxication and, second, that the judge had not given the jury any other direction in relation to the issue of intoxication. Counsel asked that the court cure this by referring to the case of *The People (DPP) v. Reilly* [2005] 3 I.R. 111, wherein it had been decided that *DPP v. Majewski* [1977] A.C. 443 should be followed in this jurisdiction. As stated by defence counsel, he wanted the jury to be told "that intoxication can be of such a proportion as to be capable of interfering with capacity to form intent and the formation of intent."

27. In fact, counsel had not finished his full requisition in this regard before the learned replied by stating that "I'm going to deal with this very shortly and simply, I'm not going to make a meal of it." He recharged the jury as follows:

> "Madame Foreman, members of the jury, in relation to what I said to you about intoxication, it's suggested that I ought to have given that direction in a freestanding manner, and not included it when I was dealing with the question of diminished responsibility. So the first thing goes to the architecture of my Charge; treat what I said about intoxication as a freestanding matter, freestanding direction to you, and what I said to you about intoxication is that a former Chief Justice had said that the voluntary taking of drink and drugs does not under our law form a defence or any mitigation in one's responsibility to society, and that is so and that is the law. But it is of course the situation that intoxication is part of the mix in relation to whether a person is capable of forming the necessary intent …"

28. Having done so, the trial judge asked counsel whether they were happy with the recharge. Both prosecuting and defence counsel confirmed that they had no difficulty and no further requisitions were raised. The learned judge therefore directed the jury to continue their deliberations. Later that afternoon the jury returned with their verdict, having deliberated for two hours and twenty-two minutes. They found the Appellant guilty of the murder of his mother Noreen Kelly, for which he received the mandatory sentence of life imprisonment.

Judgment of the Court of Appeal

29. The Appellant appealed his murder conviction to the Court of Appeal. He accepted the verdict of the jury with respect to their rejection of the defence of diminished responsibility; the appeal therefore concerned the intoxication issue only, as does the appeal to this Court. The Appellant contended, in essence, that he ought to have been acquitted of murder because he lacked the necessary specific intent and that the trial judge had misdirected the jury on the issue of his intoxication and its relevance in the assessment of his intent. The DPP, while accepting that the trial judge's charge on intoxication had been succinct, argued that it was accurate and that, when it was taken together with the closing speeches, the jury could have been in no doubt that intoxication was capable of interfering with the capacity of the Appellant to form the intent required for murder.

30. By judgment delivered on the 15th May, 2018, the Court of Appeal dismissed the appeal ([2018] IECA 145). The judgment of the Court was delivered by Edwards J, with whom Mahon and Hedigan JJ agreed. The Court held that it was a correct statement of the law for the trial judge to tell the jury that voluntary intoxication does not provide a defence to criminal responsibility (para. 39). Edwards J pointed out that the learned trial judge properly instructed the jury as to the burden and standard of proof, the ingredients of murder, the rebuttable presumption contained in section 4(2) of the Criminal Justice Act 1964, and the requirement that it is for the prosecution to prove specific intent beyond a reasonable doubt (paras. 41-42).

31. Edwards J acknowledged that the trial judge, in his initial charge, "dealt tersely and only very briefly" with the issue of intoxication (para. 43). He stated that if this had been the extent of the learned judge's charge, the Court of Appeal would have had a concern as to its adequacy. In the view of the Court of Appeal, "it required to be specifically drawn to the jury's attention that evidence of voluntary intoxication was potentially relevant to the issue as to whether the accused had formed the requisite specific intent at the time of the killing" and this was not done initially (para. 44). The Court then observed, however, that in his re-charge the trial judge added that "it is of course the situation that intoxication is part of the mix in relation to whether a person is capable of forming the necessary intent." Edwards J stated that while it may have been better had the trial judge elaborated and added the words "and whether he actually formed that intent", the instruction given was adequate given the overall run of the trial (para. 45).

32. The Court then turned to the issue of counsels' speeches. Edwards J noted that while a trial judge cannot abdicate responsibility for correctly charging the jury on the basis that they have already heard a detailed and correct exposition of the law in the closing speeches, the fact that the jury may have already heard such an exposition from counsel is not wholly irrelevant, particularly where the judge refers to counsels' treatment of the law with ostensible approval. In such circumstances, the Court of Appeal held, a somewhat briefer and less detailed treatment of the law may be justified than the trial judge might otherwise have given (para. 46). Thus, when Carney J had referred to intoxication being "in the mix", this was not a concept being introduced to the jury for the first time: they had been told the same thing, in detail, by counsel. Therefore, while the trial judge's supplemental instruction was "economical and to the point", the jury would have immediately understood and appreciated its import in light of counsels' speeches, and thus the instruction was adequate (para. 47). The Court further observed that defence counsel had expressed himself satisfied with the re-charge at the time, although it noted that, in light of that defence counsel's affidavit explaining why no supplemental requisition had been raised, it would not be appropriate to refuse to entertain the Appellant's complaints on that basis (para. 50).

33. As regards the issue of the appropriate direction to the jury where intoxication is raised as a defence to a crime of specific intent, Edwards J stated as follows at para. 50:

> "While the trial judge did tell the jury in the course of his re-charge that intoxication is part of the mix in relation to whether a person is capable of forming the necessary intent, and that was correct, he did not at any stage suggest, or seem to suggest, that the jury's inquiries should be confined to the issue of capacity, or that they did not have to be satisfied beyond reasonable doubt as to the existence of an actual specific intention to kill or cause serious injury in order to convict. Whether an accused had the capacity at the material time to form the required specific intention will often be a relevant enquiry, but it is not the critical question. For the avoidance of doubt, the critical question will always be whether the accused in fact had the requisite specific intention." (Emphasis added)

34. Accordingly, the Court of Appeal held that in a murder case in which intoxication is an issue, the critical question must always be whether the prosecution have proven beyond reasonable doubt that the accused had the necessary specific intention (para. 52). The Court then reiterated that the trial judge had correctly charged the jury in relation to specific intent, the burden and standard of proof, the rebuttable presumption that a person intends the natural and probable consequences of their actions, and, in his re-charge, had added that intoxication is part of the mix in relation to whether a person is capable of forming the necessary intent. In the Court of Appeal's view, there was nothing wrong with any of this, particularly having regard to the run of the trial.

35. Finally, Edwards J was satisfied that there was evidence before the jury that allowed them to bring in the verdict that they did. The verdict was open on the evidence and could not be considered perverse. The Court of Appeal therefore held that the Appellant's trial was satisfactory and the verdict safe, and dismissed the appeal.

Issues on the Appeal

36. The Appellant sought leave to appeal to this Court from the judgment of the Court of Appeal on the following two points of law:

    a) In directing the jury in a case where intoxication arises, is it sufficient to direct them that the issue is determined on the question of whether the accused had the capacity to form the necessary intent?

    b) In determining the adequacy of the judge's charge and necessarily whether a trial was in due course of law, can regard be had to counsels' speeches for the purposes of supplementing any legal deficiency in the said charge?

37. By determination dated the 16th April, 2019 ([2019] IESC DET 84), the Court granted leave to appeal in respect of both points. In relation to the first point, the Court was satisfied that the law in this jurisdiction is not clear cut and that this is a point of general public importance which should be clarified. As to the second point, the Court observed that although this issue would not have satisfied the constitutional threshold if it was the only point on which leave to appeal was sought, in the circumstances of this case the second issue is so interlinked with the first question that leave should be granted on that question also. Accordingly, both issues now fall to be determined by this Court.

Submissions

38. The Court was greatly assisted by the written and oral submissions made on behalf of both parties, for which it is grateful to counsel. What is presented next is a short summary of the positions adopted by the parties on this appeal; the Court's engagement with these issues appears below.

Submissions of the Appellant

39. The Appellants submits that intoxication was at the centre of this case, and so it was of the utmost importance that the jury received adequate judicial direction as to how they should treat the evidence of intoxication and the effect it could have on their verdict. It is submitted that it was incumbent on the trial judge to direct the jury that before they could convict of murder, the prosecution had the onus of establishing that the Appellant's intoxication did not prevent the formation of the necessary *mens rea* for murder.

40. The Appellant argues in his written submissions that the trial judge erred in law "in singularly failing to instruct the Jury of the legal consequences which would follow if they were of the view that it was reasonably possible that the Appellant's level of intoxication had caused him not to have formed the requisite intent to kill or cause serious injury and in particular in failing to instruct them that the effect of the Appellant's intoxication could in fact be a defence to the charge of murder although not to a charge to manslaughter." It is further said that by directing the jury that voluntary intoxication could not be a defence to murder, the learned trial judge left the jury with the impression that even if, as a result of the Appellant's intoxication, they had a doubt as to his guilt, this would not give them the option of acquitting the Appellant of murder. It is said that in so doing he had nullified counsels' speeches on intoxication.

41. The Appellant refers to the principle that intoxication can never be a defence to a crime of basic intent but may be a defence to a crime of specific intent, such as murder. He refers to the what the UK courts have determined to be the correct charge to the jury in cases of specific intent where the defence of intoxication is raised. There it has been said that the question is not whether the defendant was so intoxicated as to lack capacity to form the specific intent required for the crime, but rather whether he did in fact form the intent. In this regard the Appellant has cited *R v. Sheehan and Moore* (1974) 60 Cr. App. R. 308, *R v. Garlick* (1981) 72 Cr. App. R. 291 and *R v. Brown and Stratton* [1998] Crim. L.R. 485 (Court of Appeal, Criminal Division, judgment of the 2nd October, 1997).

42. The Appellant submits that, prior to the decision of the Court of Appeal in this case, there has been very little authority in this jurisdiction on the issue of how a jury ought to be directed where the defence of intoxication is raised in relation to a crime of specific intent. He submits that the decided cases in Ireland have tended to prefer the "capacity" approach, referring in this regard to *Attorney General v. Manning* [1955] 89 I.L.T.R. 155, *DPP v. McBride* [1996] 1 I.R. 312 and *DPP v. Cotter* (Unreported, Court of Criminal Appeal, judgment of the 28th June, 1999).

43. The Appellant notes that the Court of Appeal, in its judgment herein, has clarified that the capacity approach is not the correct test, with the critical issue being whether or not the

accused actually formed the specific intent required. As such the Court of Appeal has declined to follow the approach in *Manning, McBride* and *Cotter*. This being so, it is submitted on behalf of the Appellant that it is incompatible with this principle for the judge in his charge to the jury to refer only to capacity, as is said to have happened in this case. The Appellant argues that what is required is a charge per the UK case of *R v. Sheehan and Moore*.

44. Given this error, the Appellant submits that the judge's charge in this case, seen against the backdrop of complaints by the trial judge as to counsels' prolixity, was inconsistent with his constitutional right to a trial in due course of law. He notes that the judge's charge had, by implication, cut off the defence of intoxication and submits that a charge which is incomplete or incorrect on a crucial part of the law cannot be "in accordance with law".

45. The Appellant submits that the law requires that a judge in his or her charge must identify correctly and in plain language the relevant law applicable to the issues falling to be determined by the jury. It is submitted that the charge and re-charge did not meet this minimum standard. Moreover, the Appellant argues that such error cannot be cured by "subcontracting" the judge's charge out to counsel in their closing speeches. He submits that counsels' speeches cannot be sufficient to remedy defects in a judge's charge because the trial judge ought to (and did) tell the jury that the judge is the master of the law. Accordingly, the jury could not look to counsel for the law. The Appellant refers, in this regard, to the decision of this Court in *DPP v. Rattigan* [2017] IESC 72. It is therefore submitted that the Court of Appeal erred in holding that counsels' closing speeches could supplement the instruction of the learned trial judge so as to render an inadequate charge satisfactory. For these reasons the Appellant submits that his trial was unsatisfactory, unsafe and not in accordance with law.

Submissions of the Respondent

46. The DPP accepts that it is well-established that intoxication may be a defence to a crime of specific intent, such as murder, but that it can never be a defence to a crime of general or basic intent. It is acknowledged that the Irish courts have emphasised a test of capacity to form the necessary intent (and it is recognised that this test was utilised in the within trial) as opposed to a test based on the actual formation of intent. This preference for a "capacity" test is said to be evident from *Attorney General v. Manning, DPP v. McBride* and *DPP v. Cotter*. Moreover, the Respondent accepts that, by contrast, the UK courts have moved away from the capacity test and favour instead a test based on the formation of intention (see *R v. Sheehan and Moore, R v. Garlick, R v. Brown and Stratton* and *DPP v. Beard* [1920] A.C. 479). It is said that the capacity standard has also been rejected in Australia, Canada and New Zealand.

47. The Director adopts the position on this appeal that it is correct that the "capacity" test be rejected in favour of a standard based on the formation of intent. This, it is submitted, is precisely what the Court of Appeal has – correctly – done at paragraph 50 of the judgment under appeal. Thus the Respondent submits that that court has now placed the formation of intention, rather than the capacity to form an intention, as the critical factor.

It is said that our jurisdiction has therefore joined the trend away from capacity in favour of the actual formation of intention.

48. As regards the judge's charge in this case, the DPP submits that the Court of Appeal was entirely correct in observing at paragraph 53 of its judgment that the learned trial judge dealt not only with capacity to form intent but also with the formation of intent. Thus it is submitted that by stating that intoxication was "part of the mix" in relation to whether a person is capable of forming the necessary intent, the judge was *ipso facto* stating that it is not everything, it is not the critical factor, but that it is in the mix and that proof of specific intent was necessary before a verdict of guilty of murder could be brought in.

49. Furthermore, the DPP has laid considerable emphasis on counsels' closing speeches in the trial. The relevant extracts of the transcript have been set out at some length in the Director's submissions. The DPP accepts that the learned judge's charge on intoxication was "brief" and "to the point" but submits that the charge must be seen in the overall context of the trial and the closing speeches, particularly given that the judge had told the jury that both counsel had "hijacked" his charge by the detail of their closing speeches on the law. This detail covered the issues of formation of intention and capacity to form the necessary intent. The DPP says that it was clear that the judge was taking no issue with any of the points of law stated by counsel or with the content of their speeches. Counsel dealt comprehensively with intoxication and the trial judge in his charge agreed with the enunciation of the law as set out in their speeches.

50. It is therefore submitted that the jury could have been in no doubt that voluntary intoxication could reduce the crime of murder to manslaughter, that specific intention to kill or cause serious injury was required, and that intoxication was relevant to the Appellant's capacity to form the necessary intent. Although to the point, the re-charge made clear that intoxication could reduce murder to manslaughter and this is said, on the run of the case, to have been sufficient. The Director submits that although aware that intoxication could reduce murder to manslaughter, the jury had heard the admissions of the Appellant in interview and these pointed to an intention to kill or cause serious injury. Accordingly, the verdict was in accordance with the evidence at trial.

51. Finally, the DPP points out that the defence raised no further requisitions after the judge's re-charge to the jury. If there had been any remaining difficulties, they ought to have been raised at that point. The DPP argues that the learned trial judge charged the jury that proof of specific intent was necessary before a verdict of guilty of murder could be brought in and in his re-charge he set out that intoxication was part of the mix in relation to whether a person was capable of forming the necessary intention. Thus, although the charge and re-charge were succinct, they were accurate and, coupled with the detailed submissions of counsel, with which the trial judge agreed, no unfairness arose. It is therefore submitted that the trial of the accused on the charge of murder was satisfactory, safe and in accordance with law.

Discussion / Decision

52. The first question on which leave was granted asks whether, in directing the jury in a case where intoxication arises, is it sufficient for the trial judge to direct them that the issue is determined on the question of whether the accused had the capacity to form the necessary intent.

53. It must be observed at the outset that there is, in truth, very little difference between the positions adopted by the two parties to the within appeal in relation to this first issue at the level of legal principle. They have, for the most part, relied in their submissions on the same extracts from the same decisions, have quoted from the same academic commentaries on the law, and are generally agreed on what the law should be. There even appears to be broad acceptance from the parties that the Court of Appeal correctly stated (or perhaps clarified) the law in relation to charging a jury on the issue of intoxication at paras. 50 and 52 of its judgment in this case. The point of contention between the parties is as to whether the trial judge's charge in this case was satisfactory. Before turning to the judge's charge in this particular case, however, it is first necessary to engage at the level of principle with what the appropriate charge ought to be in cases where intoxication is raised as a defence to a crime of specific intent.

54. This judgment does not require a full treatment of the law relating to the defence of intoxication. It is accepted by the parties that intoxication may be a defence to a charge of specific intent but not to a charge of general intent. Having quoted extensively from Lord Birkenhead, L.C. in *DPP v. Beard* [1920] A.C. 479, Lord Elwyn-Jones, in the seminal case of *DPP v. Majewski* [1977] A.C. 443, "[i]t is only in the limited class of cases requiring proof of specific intent that drunkenness can exculpate. Otherwise in no case can it exempt completely from criminal liability" (p. 473). *Majewski* was adopted in *DPP v. Reilly* [2005] 3 I.R. 111 and has since been followed in this jurisdiction.

55. Although it pre-dates *Majewski,* the following statement of Lord Denning in *Bratty v. Attorney General for Northern Ireland* [1963] A.C. 386 is worth reciting because it captures the principle well:

> "If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary …" (p. 410)

56. The first issue on this appeal is as to how the jury should be charged where intoxication is raised as a defence to a crime of specific intent. The Appellant includes, as a helpful appendix to his submissions, a Schedule of what are said to be the relevant aspects of Irish and UK law in this area, together with some academic commentary and criticism. As earlier noted, the Respondent is largely in agreement with the relevance and import of these decisions. Both parties accept that the cited case law demonstrates the contrasting approaches to the proper between charge as between Ireland, on the one hand, and the rest of the common law world, particularly the UK, on the other.

57. Three cases are highlighted in support of the proposition that, prior to the within judgment of the Court of Appeal, at least, the Irish courts have preferred the capacity approach over a charge centred on the actual formation of intent. The first of these cases is *Attorney General v. Manning* [1955] 89 I.L.T.R. 155. The accused was convicted of the murder of a 65-year old woman; the evidence was that he had consumed around eight and a half pints of stout over the course of the day. The Court of Criminal Appeal approved the learned trial judge's charge to the jury, which had been expressed in the following terms:

> "The presumption [that a man intends the natural and probable consequences of his actions] can be rebutted in the case of a man who is drunk, if it is shown that his mind was so affected by drink as to be incapable of knowing that what he was doing was likely to cause serious injury … because, unless … that is the situation, due to drink, you cannot reduce the crime to manslaughter … Drink is no defence if the only effect of drink is the more readily to allow a man to give way to his passions. That is insufficient. The effect of drink has to go much further. It has to go so far as either to render him incapable of knowing what he is doing at all, or, if he appreciated that, of knowing the consequences or probable consequences of his actions.". (Emphasis added)

58. Also pointed to in this regard is the case of *DPP v. McBride* [1996] 1 I.R. 312. The accused was convicted of three separate counts which all related to an alleged assault on his niece with a pickaxe handle. One of those counts was a charge of causing grievous bodily harm with intent. The Court of Criminal Appeal in that case took no issue with a submission that while intoxication is no defence to a criminal charge, it is relevant to whether the defendant was *capable* of forming the requisite intent. The Court of Criminal Appeal upheld a similar direction in *DPP v. Cotter* (Unreported, Court of Criminal Appeal, judgment of the 28th June, 1999). The accused was convicted of the murder of her husband. The Court of Criminal Appeal held that "[t]he evidence was not such that the jury might reasonably have found such drunkenness as materially to impair the capacity of the applicant to have the intent necessary for murder and *a fortiori* for manslaughter" (emphasis added).

59. The DPP accepts that these cases demonstrate a clear willingness to accept a capacity-based charge. However, as the cases from the neighbouring jurisdiction illustrate, this is in contrast with the approach which now finds favour there. The UK courts have moved away from charging on the basis of capacity to form intent, focussing instead now on the formation of intent. It should be noted that this was not always the case. In *DPP v. Beard* [1920] A.C. 479, for some years the leading case on the defence of intoxication, Lord Birkenhead at p. 499-500 stated that:

> "[W]here a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the necessary intention to constitute the particular crime … This does not mean that the

drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter". (Emphasis added).

60. The position is now clear, however, that the question for the jury is not whether the accused was so intoxicated as to lack the capacity to form the specific intent required, but whether he did in fact form the intent. Dillon (*The Law of Intoxication: A Criminal Defence* (Round Hall, Dublin, 2015)) observes at p. 633 that this departure follows from the seminal decision of the Privy Council in *Broadhurst v. The Queen* [1964] A.C. 441, where Lord Devlin stated at p. 463 that:

> "The Crown conceded that it is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this concession. The dictum of Lord Birkenhead L.C. [in *Beard*] cannot be treated as laying down the law on burden of proof and it is therefore unwise to use the dictum in a direction to a jury."

61. The standard charge in the UK is that set out in *R v. Sheehan and Moore* (1974) 60 Cr. App. R. 308. Here the two appellants drunkenly poured petrol over a man and set him alright, causing his death. As stated by the Court of Appeal at p. 312:

> "[I]n cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.
>
> Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

62. The matter is clearer still from the judgment in *R v. Garlick* (1981) 72 Cr. App. R. 291. The accused was convicted of murder. In his defence he had raised the defence of intoxication. In his charge, the trial judge had stated, *inter alia*, as follows:

> "To constitute a defence to this charge of murder the defendant must have been so drunk that either he did not know what he was doing—which is not suggested here—or that he was so drunk that he was incapable of forming the intention to kill or do really serious injury or to realise that what he was doing to Beesley would probably cause him really serious injury at least." (Emphasis added)

The Court of Appeal criticised the trial judge's charge on intoxication, with the error therein being sufficient for the Court of Appeal to quash the conviction for murder and to substitute instead a conviction for manslaughter. Lord Lane CJ stated as follows:

> "The judge was inviting the jury to answer the question whether or not this man was incapable of forming the intent to kill or do really serious injury … The result was that the jury, if they were paying attention to this direction, as we must assume they were, and as they no doubt were, would be asking themselves whether or not this man was capable of forming the intent to do really serious bodily harm and as to that, on the facts as we have briefly outlined, there is only one possible answer. But they were not invited, as they should have been, to answer the real question, the one I have already pointed out, namely may this man, by reason of the drink he had taken, not have formed the necessary intent." (p. 294) (Emphasis added)

63. In *R v. Brown and Stratton* [1998] Crim. L.R. 485, the appellants had been convicted of causing grievous bodily harm with intent. The UK Court of Appeal acknowledged that an over emphasis on the fact that "a drunken intent is still an intent" could cause a jury to fail to give proper consideration to the effect of intoxication on a defendant and the issue of whether or not he had the requisite intent. The Court stated that:

> "In a case requiring a specific intent … it is in our view necessary, as the form of direction in the Crown Court Bench book makes quite clear, to inform the jury that, in deciding whether the defendant had the specific intent, they must take into account the evidence that he was drunk, and that if, because he was drunk, the jury considers that he did not intend or may not have intended to cause the requisite degree of harm, then the defendant is entitled to be acquitted. For the judge simply to make clear to the jury that a drunken intent is still an intent was not sufficient to bring that home to the jury."

64. The DPP, in her submissions, has referred to Dillon's *The Law of Intoxication: A Criminal Defence* (Round Hall, Dublin, 2015), noting that the author observes at p. 634 that most commonwealth jurisdictions have followed suit and rejected the capacity standard, referencing the Canadian Supreme Court in *R v. Robinson* [1996] 105 C.C.C. (3d) 97, the New Zealand case of *R v. Kamipeli* [1975] 2 N.Z.L.R. 610 and the Australian High Court in *Viro v. The Queen* [1978] 141 C.L.R. 88.

65. It should be noted that McAuley and MacCutcheon note that the capacity standard seems to have found favour in some jurisdictions in the United States (McAuley and MacCutcheon, *Criminal Liability*, (Round Hall, Dublin, 2000) at p. 599). This appears,

however, to be somewhat of an outlier approach as common law jurisdictions go, at least on the basis of the materials submitted to the court.

66. Moreover, if the prevailing trend has been away from capacity-focussed charges in favour of charges stressing that the actual formation of intent, the academic literature appears to present cogent reasons as to why this is so. Writing in the *Irish Criminal Law Journal* in 1991, Professor O'Malley wrote that if the principle that it is for the prosecution to prove the necessary intent for murder is to be consistently followed, "the question in all cases in which intoxication is raised should be whether the accused did in fact form the intention … By adhering to the capacity standard as articulated in *Beard* and apparently in Ireland in *Manning*, one puts the intoxicated offender at an unfair disadvantage because while he might have had the capacity to form the intent, he may not in fact have formed it. In the case of a sober person, the question relates to the actual formation of intent" (O'Malley, "Intoxication and Criminal Responsibility" (1991) I.C.L.J. 86 at 95-96). This passage is cited, with apparent approval, in McAuley and MacCutcheon's *Criminal Liability* at p. 599.

67. Dillon discusses the capacity standard at pp. 630-638 of his work *The Law of Intoxication: A Criminal Defence* (op. cit.). At paras. 14–111 to 14–114 the author discusses the impact of this approach on the presumption of innocence. The following passages make clear the author's view on the use of the capacity standard:

> "14–111 The capacity standard results in a considerably lighter standard of proof for the prosecution. For offences of specific intent, a person who is *capable* of forming the specific intention but who *in fact* does not, is nevertheless guilty of the crime of specific intent. Thus, the defendant may be convicted despite the presence of a reasonable doubt as to whether the defendant did in fact form the specific intent.
>
> …
>
> 14–114 In reality, the capacity standard operates as a device to force the defendant to prove he or she did not in fact have *mens rea*. It does this by requiring the defendant to raise enough evidence to meet either an evidential burden of proof or a reasonable doubt as to capacity to form mens rea. This quantum of evidence is onerous, but if met, disproves any case of mens rea. Thus, the defendant's obligation to produce evidence of incapacity releases the prosecution from the obligation to tender evidence of *mens rea* for crimes of specific intent. It forces the defendant to prove that he or she did not *in fact* have the requisite *mens rea* for the crime charged. Thus, the burden of proof relating to *mens rea* has not merely shifted to the defendant; it requires the defendant to disprove the prosecution's case of *mens rea*." (Emphasis in original)

68. Charleton, McDermott and Bolger, in *Criminal Law* (Bloomsbury Professional, Dublin, 1999), state at paras. 17.02 and 17.04 that:

> "Voluntary intoxication is not, as such, a defence to a criminal charge. In certain circumstances, evidence of intoxication can establish the absence of the mental

element of a crime … In some circumstances intoxication may be so severe as to render an accused incapable of forming the requisite mental element. This is not essential however as the issue is whether the accused did in fact form an intent … The issue is not so much his capacity to form an intent … but whether such intent was or was not, as a matter of fact, present. Capacity is evidence on an issue. Clearly however, if the evidence establishes a complete lack of capacity in that regard it is determinative."

69. Coonan and Foley, in their book *The Judge's Charge in Criminal Trials* (Round Hall, Dublin, 2008), note the preference of the UK courts for a charge emphasising the formation of intent, rather than capacity to form intent. In commenting on the Irish authorities, they state as follows at p. 409:

> "It should be noted that in [*Manning*] the Court approved the trial judge's charge generally and offered no express comment on this particular issue. Further, the decision in *People (DPP) v. Reilly* does not appear to address this particular issue in any detail. It might be noted that none of the Irish cases seem to address this point *directly* and it is certainly open to doubt as to whether the Irish courts have expressly meant, without saying it directly, that intoxication should be treated as relevant to capacity rather than to actual intention. It is submitted that the language used in *Cotter* and *Manning* ought to be avoided. However, it must be appreciated that the only authority in Ireland even remotely connected to this point seems to use the language of capacity and a trial judge may well be reluctant to do what may appear to be contrary to even latent suggestions in those decisions."

70. This appears to be a fair and accurate description of the state of play in this jurisdiction, at least until the judgment of the Court of Appeal in this case. As earlier noted, that Court made clear at paras. 50 and 52 of its judgment that while capacity will be relevant, the critical question will always be whether the accused *in fact* had the requisite specific intention. As explained by Edwards J at para. 51 of his judgment:

> "If an accused was incapable at the material time of forming the required specific intention then, of course, it follows that he/she could not, in those circumstances, have actually formed the requisite intention. Accordingly, if a jury, having weighed the evidence, is left with a reasonable doubt on the issue of capacity, then their duty must be to acquit. However, the converse does not obtain. Just because an accused may have been capable of forming the necessary specific intention, it does not automatically follow that he/she did in fact form that intention."

71. On the basis of the foregoing paragraphs, I am satisfied that the Court of Appeal was correct in holding that the critical question is whether the accused *in fact* had the requisite specific intention. To the extent that the previous jurisprudence has suggested that a charge emphasising capacity to intent, rather than actual formation of intent, is appropriate (and, as observed by Coonan and Foley, it does not seem that it could be said that this point was ever previously addressed head on, much less definitively decided), it should not be followed.

72. At the level of legal principle, therefore, I agree with the judgment of the Court of Appeal insofar as it identified the actual formation of intent as being the critical question. This being the core issue, it is essential that the same be reflected in the judge's charge. Thus, in relation to the first question on which leave was granted, the answer is that it is not sufficient, in directing the jury in a case where intoxication arises, to direct that the issue is determined on the question of whether the accused had the *capacity* to form the necessary intent. For the reasons set out in the preceding paragraphs, it is necessary to instruct the jury that intoxication is relevant to the issue of whether the accused *in fact* had the necessary intent for the crime.

73. With that being said, it is necessary to return to the judge's charge in this case. The relevant extracts have been quoted above. It will be recalled that the learned judge initially dealt with intoxication alongside the defence of diminished responsibility. Following requisition, he made clear that his charge on intoxication was to be regarded as a freestanding matter. He added to his original charge that intoxication is "part of the mix in relation to whether a person is *capable* of forming the necessary intent" (my emphasis).

74. This, it will immediately be observed, is not in line with what has been declared in this judgment to be the proper approach to the charge. This was a "capacity" charge, rather than one based on the actual formation, in fact, of the requisite specific intent. Nonetheless the DPP submits, and the Court of the Appeal accepted, that when the judge's charge is taken in its totality, the law in relation to intoxication was set out satisfactorily; succinctly, yes, but satisfactorily. In particular, the Court of Appeal highlighted the correctness of the charge in relation to the requirement that the prosecution must prove specific intent beyond reasonable doubt; this, coupled with the charge that intoxication was "part of the mix" as regards intent, was held to be sufficient, notwithstanding the concession by the DPP and acknowledgement by the Court of Appeal that the charge on intoxication was brief, economical and to the point.

75. Before addressing the fact that the learned judge's charge referred to capacity rather than actual intent, it seems that there is a more fundamental issue with the charge on intoxication which must be highlighted. In his initial charge, the trial judge accredited to "the former Chief Justice" the situation that "voluntary intoxication or the taking of drugs … 'does not afford a defence to criminal responsibility or any mitigation in one's responsibility to society.'" Requisitioned about the fact that he had not addressed intoxication as an issue separate from the defence of diminished responsibility, the learned charge proceeded to charge the jury again in almost identical terms: "treat what I said about intoxication as a freestanding matter … and what I said to you is that a former Chief Justice had said that the voluntary taking of drink and drugs does not under our law form a defence or any mitigation in one's responsibility to society, and that is so and that is the law." He then added that intoxication is "part of the mix."

76. The Court of Appeal was satisfied that this was a correct statement of the law. It may however be questioned whether this is so as a matter of strict legal principle. The

statement being attributed to the former Chief Justice appears to be a reference to the judgment of Murray CJ for the Court of Criminal Appeal in *DPP v. Adam Keane* [2008] 3 I.R. 177. There the learned Chief Justice stated at para. 83 of the report that "[t]he fact that the respondent took drinks and some drugs so that he could not remember afterwards what had occurred does not absolve him from criminal responsibility as the jury correctly concluded in their verdict". A similar point was repeated at para. 85. However, the context of those comments must be appreciated. That judgment concerned sentencing only; it arose out of an appeal by the DPP against what was considered to be an unduly lenient sentence in a rape case. The accused had consumed alcohol and ecstasy prior to the offence being committed. Understood in this light, seems that the comments of Murray CJ are best understood as applicable to intoxication as mitigation, rather than the defence of intoxication.

77. While never a defence to a charge of general/basic intent, the law recognises that voluntary intoxication may be a defence to a crime of specific intent. In this regard the extracts from *R v. Majewski* and *Bratty v. Attorney General for Northern Ireland*, set out at paras. 54 and 55, supra, respectively, set out the general principle. It is true that voluntary intoxication will never operate to exculpate entirely; while it may negate the requisite specific intent where that is a constituent element of the offence (as with murder), it is no defence to a lesser crime not requiring such intent (such as manslaughter) and so even where the intoxication "defence" is made out in respect of the greater offence, that defence cannot be relied upon in respect of the lesser offence. In this sense voluntary intoxication may be considered in one respect to be a partial defence only. Nonetheless, the fundamental point remains, as has freely been acknowledged by the DPP on two occasions in her written submissions, that voluntary intoxication can be a defence to murder, although not to manslaughter.

78. So viewed, it can be appreciated that the learned judge's charge to the jury certainly had the capacity to mislead. As all have acknowledged, his charge on intoxication was, to use just one of the many descriptions offered, brief. One thing he was emphatically clear on, however, was that "voluntary taking of drink and drugs does not under our law form a defence or any mitigation in one's responsibility to society". This, he told the jury, "is the law". The judge did not mention what is, on the Appellant's argument, the fundamental point: that while voluntary intoxication is not a full defence to criminal liability, it could operate to reduce the offence from murder to manslaughter if the jury had a reasonable doubt, stemming from his intoxication, as to his specific intent to kill or cause serious injury to his mother. Thus on one reading of the charge, the trial judge did not adequately (or indeed at all) inform the jury of the vitally important point that intoxication can be a partial defence to murder; indeed, on the basis of the words used it would have seemed reasonable had the jury gotten the impression that intoxication was being ruled out as a defence altogether. That, it seems, is the unambiguous and plain meaning of what they were twice told.

79. There are, therefore, two clear issues of concern with the judge's charge. There is, first, the fact that the jury were directed that intoxication was "in the mix" in relation to the

Appellant's capacity to form consent, rather than his actual consent in fact. More fundamentally, there is the possibility, which cannot be described as remote or fanciful, that the learned judge's charge and re-charge gave the jury the impression that intoxication could not be relied upon as a defence *at all*, whereas the position in law is that it could have operated as a defence to murder, albeit not to manslaughter.

80. With the greatest of respect, I do not consider the fact that the learned judge otherwise charged the jury properly in relation to the onus and standard of proof, the presumption of innocence, the ingredients of murder, section 4(2) of the 1964 Act, the drawing of inferences, diminished responsibility and the functions of judge, counsel and jury, can ameliorate the deficiencies in the charge as regards the defence of intoxication. It is true that a judge's charge ought not readily to be approached with a fine-tooth comb, the individual sentences parsed for any trivial error of law for the accused to cling to and claim that his trial was not one in due course of law. In my view, however, the particular defects with this charge could not possibly be so described.

81. At this juncture I would have no hesitation in stating that the judge's charge, taken alone, was apt to mislead and could certainly have been understood by the jury to mean that intoxication was no defence for the Appellant at all. This, then, leads on to the second issue, which is whether regard may be had to counsels' speeches for the purposes of supplementing any legal deficiency in the said charge. The relevant extracts of the speeches are set out above. It is said that it must have been clear to the jury, on the basis of counsels' speeches, that intoxication could be a defence to murder. In effect: can the charge be supplemented, and saved, by a correct recitation of the law by counsel?

82. In my view, the short answer is 'No'. As a matter of routine practice in criminal trials, counsel for both sides will tell the jury, during their opening (where applicable) and closing speeches, that the judge is the master of the law. They will instruct the jury that they are to take the law from the judge, and that where there is any inconsistency between what counsel says to be the law and what the judge tells the jury is the law, the latter must prevail.

83. This is precisely what happened in this case. In opening the case on Day 1 of the trial, counsel for the DPP stated as follows:

> "The trial judge, Mr Justice Carney, has a different role. Mr Justice Carney is the judge of law and will direct you as appropriate and when matters arise, if they arise, in relation to issues of law and you take the law from the trial judge" (Transcript, Day 1, Page 2, Lines 13-15).

84. She very properly reminded the jury of this in her closing speech on Day 8:

> "You have already heard that the presiding judge in this case, Mr Justice Carney, is a judge of law. He will direct you on all matters of law, and you take the law from his lordship. So <u>if I or [defence counsel] Mr McGuinness say anything which differs on the law from his lordship, you ignore completely what we say, because the law</u>

is for his lordship and only for his lordship." (Emphasis added) (Transcript, Day 8, Page 1, Lines 25-30)

85. Defence counsel too was clear in telling the jury that they were to take the law from trial judge; in closing the case, he said:

> "[I]f I can just start with the remaining procedure in the case: his lordship, at the end of my speech, will give you directions and you've been in court now for more than a week and you have to listen to his lordship and take what he says as gospel as far as matters of law are concerned." (Transcript, Day 8, Page 9, Lines 22-25)

86. Similarly, the judge, in charging the jury in a criminal case, should make this same point perfectly clear to the jury. The judge should tell the jury that he or she will direct them as to the legal principles and rules that they ought to observe and apply. It is true of course that it would be somewhat unusual for the judge to ask the jury specifically to discount what counsel has stated as being the law. However, the general principle is that the trial judge will tell the jury that they must take the law from the judge. Again, that is precisely what happened here. Near the outset of his charge, the learned judge stated as follows:

> "Now, I'm going to start with our functions and I'll start with myself … I'm also the judge of the law in the case. I tell you what the law is and you take the law from me and you take the law from me whether you like it or not. You have taken an oath that that is precisely what you will do. If I wander into error, there is another court in this building that is only poised to put me right …" (Emphasis added) (Transcript, Day 8, Page 35, Line 29 to Page 9, Line 2)

Thus it ought to have been abundantly clear to the jury by this point that to the extent that there was any difference in the statements of the applicable law as between the trial judge and counsel, it was the law as stated by the trial judge which was to be applied.

87. Indeed, the judge and counsel could hardly have been clearer that the jury were to apply the law as stated by the judge, not that as stated by counsel. It is in this context that the second question before the court must be considered. To my mind, it seems inconsistent that all actors involved should (and did) tell the jury that the law is as stated by the judge, and the judge alone, and yet if there is a legal deficiency in the judge's charge, reliance may then be placed on counsel's speeches – which the jury were repeatedly told they were not to look to for the law – to supplement the charge or fill in the gaps. All parties to this case very appropriately told the jury where the law was to come from; that being so, where there is an error or gap in the charge, it is difficult to see how a correct statement of the law can be imported from some other source.

88. Moreover, in my view involving counsel in this fashion would be to create confusion and not clarity. It would diminish the authority of the judge's charge and is inconsistent with the judge telling the jury that he is in charge of the law. Whilst counsel for the DPP generally makes some reference to the law, there is no obligation on defence counsel to do so, other than not to misstate it where they do venture into it. While counsel are of

course bound not to mislead the court, it is well within their ethical bounds to argue to the jury the interpretation of the law which favours their client. The jury look to the trial judge for neutral guidance as to the legal principles which are to be applied. It would be to alter the nature of counsels' role in closing the case if their submissions as to the law were to be elevated to a position alongside that of the trial judge's charge. Counsel have a duty to the court not to misstate the law and no doubt will always endeavour to state it as accurately as possible, but it is in the nature of advocacy that they will state it in a way which advances their client's case. This is inherent in the adversarial nature of the process and it is for this reason that the jury take their law from a neutral judge who states the law impartially, without the need to advance the interests of a client.

89. Thus, counsels' speeches cannot supplant the obligation on the trial judge to correctly state the law, nor should they be used to augment the charge if, in any appellate setting, some legal deficiency becomes clear. If there was to be any change in this regard it would most properly have to be made by statute. Furthermore, to place any reliance on what counsel said as in effect being incorporated into the judge's charge would be to impose an additional obligation or onus on counsel which has had hitherto been the case, and which would sit uneasily with the role of counsel during the trial.

90. It may be, as the Court of Appeal said, that a somewhat shorter charge may appear contextually justified if the law has been accurately set out by counsel and this is endorsed by the trial judge. However, the jury are told that they must take the law from the judge, and that is what must happen: the function of charging the jury on the law cannot be outsourced to counsel. It must come from the judge and so the charge must be able to withstand scrutiny on its own two feet. If counsel have rehearsed the law *ad nauseum* then the judge may fear that the jury will consider it tiresome to hear it again, but that is what must happen. As noted, it may be reasonable in practice if the judge adopts a briefer approach to the law as a consequence of counsels' speeches but only where the charge itself, taken in isolation, is nonetheless accurate, adequate and satisfactory. If the trial judge relies on counsels' speeches to the extent that the applicable law comes from counsel rather than the judge, that is not sufficient. Moreover, if there is an error of law in the charge, it must go without saying that this cannot be remedied by pointing to accurate closing submissions.

91. This last point leads to a further reason, on the run of this particular case, for caution in importing the closing speeches into the judge's charge. For the reasons set out above, I do not consider that this would be permissible even where the hypothetically detailed exposition of the law in counsel's speeches was in perfect harmony with the hypothetically legally accurate but incomplete charge from the judge. That, however, is not what happened here. Counsel – and defence counsel in particular – stated that intoxication can be a defence to murder. However, the judge in his charge twice appeared to give the opposite impression: that intoxication is no defence in law. The jury were twice told this and stating that intoxication was "part of the mix" in relation to specific intent does not, in my view, undo the potential impact of this instruction. Thus, this was not a situation where reliance could be placed on counsels' speeches to put some flesh on the bones of a

thin charge; in fact, the charge appears to have nullified defence counsel's statement of the law, or certainly it was open to that interpretation. If counsels' speeches were permitted to be supplementary to or part of the charge, then the jury in this case were told that intoxication is and is not a defence. That is far from ideal.

92. Of course, in come circumstances it may be that a trial judge's charge will not be found to be inadequate by reason of having failed to mention a fact if it was otherwise covered in counsels' speeches, particularly if the fact was non-contentious or not in dispute. However, whatever latitude exists in this regard cannot extend to matters of law, which are within the sole province of the trial judge.

93. The point was made in the court below that defence counsel did not pursue any further requisitions following the judge's re-charge. The DPP suggested that this meant that defence counsel was to be taken as being satisfied with the law as stated. Somewhat unusually, that counsel (who is not now representing the Appellant in this appeal) has sworn an affidavit explaining why this was so. In short, he avers that, his first requisition having been largely unsuccessful, he considered it a virtual certainty that the learned judge would not go any further if requisitioned again. He also states that the decision not to seek a further re-charge was not intended to gain any perceived tactical advantage.

94. The Appellant, in seeking leave to appeal to this Court, pointed out in his Application for Leave that the issue of the charge, requisitions and re-charge cannot be divorced from a number of interjections which demonstrated some judicial irritation at the length of the trial. The relevant extracts need not be set out again here, but they too contextualise counsel's decision not to seek a further requisition. It will hopefully suffice to say that counsel's belief that he would have gotten short shrift had he sought a further requisition is not unfounded. The learned judge, having been requisitioned once, said that he was "going to deal with this very shortly and simply, I'm not going to make a meal of it." The jury were then re-charged as set out earlier. In the circumstances, the Court does not consider that the fact that the point was not further pursued at that stage precludes the Appellant from advancing the arguments made on appeal.

95. Finally, it should be acknowledged once more that the learned trial judge possessed exceptional knowledge and experience of the criminal law. It may be that there was a degree of judicial over-familiarity with the applicable legal principles, which resulted in the jury not getting as full an explanation of the law from the judge as the circumstances required. Whatever the reason for it, I am not satisfied that the learned trial judge in his charge adequately set out the applicable law for the jury. He directed them that intoxication was "in the mix" in relation to capacity to form consent, whereas he ought to have directed them that it was relevant to the actual formation of intent in fact; more fundamentally, the learned judge instructed the jury that intoxication is never a defence in law. The fact that defence counsel explained that it could be a defence to murder but not manslaughter is not sufficient to save the charge, given the roles of counsel and trial judge and the repeated instructions to the jury to take the law from the judge alone. It

was for the learned judge to explain to the jury that intoxication may be a defence to murder but not to manslaughter, and why this is so.

Conclusion

96. Accordingly, for the reasons set out above, the trial of the Appellant on the charge of murder was unsatisfactory, unsafe and not in accordance with law. I would allow the appeal and quash the Appellant's conviction for murder. Notwithstanding, I remain mindful that this is a case in which a plea to manslaughter was offered and rejected in advance of trial. Whilst it may be that a retrial is now required, the Court will first hear from the parties on the issue of the appropriate order to be made on foot of this judgment.

Post Scriptum: Having discussed the issue with the parties, counsel on behalf of the appellant accepted that the plea to manslaughter, offered on arraignment, constituted a judicial admission and accordingly, stood as valid. Consequently, the indictment has been adjourned to the next list in the Central Criminal Court to await the decision of the DPP as to whether to accept the plea, or to seek a retrial on the murder charge.