An Chúirt Uachtarach

The Supreme Court

Charleton J
O'Malley J
Hogan J
Collins J
Donnelly J

Supreme Court appeal number: S:AP:IE:2023:000121
[2024] IESC 33
Court of Appeal record number: 2022/54
[2023] IECA 199
Central Criminal Court bill number: DUDP0089/2020

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

MB
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Tuesday 23 July 2024

1. On this appeal, the issue is whether the absence of the accused, MB, from the scene of the serious attack upon his daughter by his wife undermines his conviction for the crime of assault causing serious harm? Essentially, can the accused be found responsible for that crime by reason of his participation in a series of assaults immediately before that event on the basis of a plan common to them both? Shortly put, the answer is affirmative.

Foundation of liability

2. Liability for the commission of a criminal offence extends beyond the person who physically perpetrates the action. While incitement and conspiracy are separate offences to the offence commissioned (incitement) or agreed upon (conspiracy), being inchoate in nature such crimes do not depend on the offence ever having been committed, analysis of participation in criminal law where an offence is in fact perpetrated, extends to those who consciously lend practical aid to its commission and to those who encourage its occurrence with the purpose, in each case, of assisting

or promoting the criminal actions of the physical offender. Hence, where a person in Paris commissions another to murder a victim in Clonmel, that action is as much murder by them as by the person who does the killing. Similarly, lending a car to a person to knowingly enable a robbery, constitutes the lender as much an offender as the physical perpetrators. Degrees of involvement are relevant to sentencing but liability extends to knowing aid or encouragement to commit crime.

3. Serious indictable offences, in contrast to regulatory offences, depend upon not only the commission of the defined elements of the externals of the offence but also on that action being the product of a knowing or an intentional or a reckless state or a criminally negligent state of mind. It follows that the extent to which liability for the commission of an offence is imposed will include those who aid or encourage the offence, but only with the appropriate mental element for the crime. Where the crime is one of specific intent, such as murder where under s 4 of the Criminal Justice Act 1964 the accused must have the purpose of killing or causing serious injury, to be liable each accused must not only engage in the enterprise that leads to the death of the victim but must also do so with that intent. Where the crime may be committed by recklessness, engagement in the criminal enterprise is on the same basis, but conscious disregard of a serious and unjustifiable risk suffices for liability. It is the latter that applies in this case.

Circumstances

4. The traumatic background to this case is of the abuse of a small girl in June and July 2019, here called V, by her parents, the accused, here called A, and his wife, here called W. There was a claim later made by them in interview that V believed herself possessed of a malignant spirit and had self-harmed. The accused and W, whether they were responding to perceived conduct or whether they shared this alleged belief, engaged in beating, burning, strangling and rubbing with astringent oils of V. In part, the conviction of the parents was based on evidence from some of the other children of the family, here called X and Y. W was convicted before the Dublin Circuit Criminal Court on 29 October, 2021 on two counts of causing serious harm to another contrary to s 4 of the Non-Fatal Offences Against the Person Act, 1997, and three counts of child cruelty contrary to s 246 of the Children Act, 2001. The particular assault that inflicted irreparable brain injury on V was on 2 July 2019, and was physically perpetrated by W. The form of this assault involved blunt force trauma to V's head when the accused was absent at work. This attack by W on V left her in a severely disabled state. She is permanently unable to attend to any of her bodily needs. W was also convicted of other serious assaults on dates leading up to this particular attack, including battering V, strangling her, burning her and other forms of physical abuse.

5. There were 10 counts on the indictment against the accused and against W. It is counts 6 and 7 of the indictment that are in issue on this appeal. The conviction was founded on the application of the doctrine of common design by the trial judge and the correctness of the direction by the trial judge to the jury is, in that regard, in issue. The accused was tried jointly with W and on 29 October 2021 was convicted on two counts of causing serious harm to another contrary to s 4 of the Non-Fatal Offences Against the Person Act 1997 and three counts of child cruelty contrary to s 246 of the Children Act 2001. The two counts in issue on this appeal are the serious blunt force trauma on 2 July consisting of the attack by W in the accused's absence, which is count 6, and the burning by W of the child on a hot electric hob, which is count 7. Some of the other counts on which the accused and W were convicted are of child neglect whereby they failed to seek medical attention for what had been done to V, including considerable delay in not calling an ambulance on 2 July when V had been rendered senseless by the attack of W and the accused, having been informed of the attack by her, had later returned to their home from work. These counts are not in issue.

6. When an ambulance was eventually called and the paramedics started attending to V, the accused and W gave excuses for the horrendous injuries involving ordinary domestic accidents and an allegation by the accused that she had been self-harming and that her injuries were self-inflicted. These included accounts of V falling off a bicycle, of slipping in a shower: stories that could never be founded in truth.

7. The central point in the case is whether A is responsible for the actions of W in inflicting the brain injury, count 6, and whether there was sufficient evidence before the jury to enable them to come to the conclusion of guilt on that count and on the burning count, count 7. Liability requires analysis of the extent to which a common design as between various individuals renders those who do not do the actual criminal action responsible at law.

The indictment

8. For precision, it is appropriate to set out the counts against both the accused, here for redaction purposes called A, and W with the victim called V. Counts 1 and 2 against W were the brain injury assault incident of 2 July 2019 and the burning on the stove incident. Correspondingly, the counts against the accused that are in issue are counts 6 and 7. The counts laid against both accused in the indictment were:

> Count 1: W, on or about 2 July 2019, at [address] in County Dublin, intentionally or recklessly cause serious harm to V contrary to s 4 of the Non-Fatal Offence Against the Person Act 1997.
>
> Count 2: W, on a date unknown between the 28 June and 2 July 2019, both dates inclusive, at [address] in County Dublin, intentionally or recklessly cause serious disfigurement to V, thereby causing her serious harm otherwise than set out at count 1 contrary to s 4 of the Non-Fatal Offence Against the Person Act 1997.
>
> Count 3: W, on a date unknown between 28 June 2019 and 2 July 2019, both dates inclusive, at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully assault V, in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing contrary to s 246 of the Children Act 2001
>
> Count 4: W, on a date unknown between 28 June 2019 and 2 July 2019, both dates inclusive, at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully caused or procured or allowed the said V to be assaulted, in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing contrary to s 246 of the Children Act 2001
>
> Count 5: W, on or about the 2 July 2019 at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully neglected the said V in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing by failing to provide medical aid for the said V contrary to s 246 of the Children Act 2001.
>
> Count 6: A, on or about the 2 July 2019 at [address] in County Dublin, intentionally or recklessly caused serious harm to V contrary to s 4 of the Non-Fatal Offences Against the Person Act 1997.

Count 7: A, on a date unknown between 28 June 2019 and 2 July 2019, both dates inclusive, at [address] in County Dublin, intentionally or recklessly caused serious disfigurement to V, thereby causing her serious harm otherwise than set out at count 6 contrary to s 4 of the Non-Fatal Offences Against the Person Act 1997.

Count 8: A, on a date unknown between 28 June 2019 and 2 July 2019, both dates inclusive, at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully assaulted the said V, in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing contrary to s 246 of the Children Act 2001.

Count 9: A, on a date unknown between 28 June 2019 and 2 July 2019, both dates inclusive, at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully caused or procured or allowed the said V to be assaulted, in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing contrary to s 246 of the Children Act 2001.

Count 10: A, on or about 2 July 2019, both dates inclusive, at [address] in County Dublin, being a person having charge or care of a child, namely V, wilfully neglected the said V in a manner likely to cause her unnecessary suffering or injury to her health or seriously to affect her wellbeing by failing to provide medical aid for the said V contrary to s 246 of the Children Act 2001.

The determination

9. The determination of this Court, dated 27 November 2023; [2023] IESCDET 142, O'Donnell CJ, Woulfe, Hogan JJ sets out the dates of conviction and the relevant sentences. The issues which were identified as justifying a further appeal by the accused in terms of legal issues of general public importance were stated thus:

> 3. The applicant was convicted in the Circuit Court on 29 October 2021 on two counts of causing serious harm to another contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997, and three counts of child cruelty contrary to s. 246 of the Children Act, 2001. The applicant now seeks leave to appeal in respect of the two counts of causing serious harm and one of the counts of child cruelty. The issues of the serious harm charges and the child cruelty can be dealt with separately.
>
> 4. Count 6 concerned an incident on 2 July 2019 when the child, the applicant's daughter, sustained a serious head injury which was accepted to have been inflicted by the co-accused, the applicant's wife, and leaving the child requiring permanent care for the rest of her life. Count 7 related to a timeframe between 28 June 2019 and 2 July,2019 when the child was disfigured as a result of severe burns to her hands and feet. Again, the injuries were inflicted by the co-accused.
>
> 5. It is not necessary to set out in great detail the distressing facts of this case, already recounted in the Court of Appeal judgment, for the purposes of this application. It is sufficient that in each case it was asserted that there was no evidence that the applicant was present at the time when the injuries were inflicted, either the head injuries inflicted on 2 July, or the severe burns inflicted at some time between 28 June and 2 July. There was evidence that the accused had himself injured the child and choked her, and furthermore, had lied to the Gardaí and the emergency services in relation to the nature of

the child's injuries and their cause. There was evidence that the applicant believed his daughter to have been possessed by a devil or "jinn" and had taken steps to attempt to exorcise her. There is, furthermore, evidence that the applicant, when informed on a video call of the injury on 2 July, appeared shocked, that when he returned home that he said to the co-accused (his wife) words to the effect of "Why did you do that? You went on the wrong path. Why did you – why do you hurt [the injured party] all the time?".

6. Count 9, a charge of child cruelty, relates to the same timeframe as count 7, i.e., between 28 June 2019 and 2 July 2019, and consisted of causing, procuring or allowing the child to be assaulted in the manner reflected in count 7, that is an assault or assault resulting in burns and disfigurement.

7. The applicant was also convicted on counts 8 and 10 which were charges of child cruelty. These are not the subject of an application for leave to appeal. The applicant was sentenced to 14 years imprisonment in the Circuit Court (reduced on appeal to 13 years) on counts 6 and 7 and the remaining counts were taken into consideration.

8. In relation to counts 6 and 7 it is said that the trial judge's direction to the jury in respect of common design was inadequate. It was also said that the case was complicated by the fact that two counts of causing serious harm were tried together with three counts alleging child cruelty. It appears that the applicant seeks leave to appeal in respect of count 9 in the interests of justice because it is said there was inadequate evidence to allow any of counts 6, 7 or 9 to be left to the jury.

9. The Court is not satisfied that it was in the interests of justice to permit an appeal on count 9. The question of the adequacy of the evidence on the child cruelty charge in respect of the injuries sustained between 28 June and 2 July was ultimately a matter for the jury. Although relating to the same incident as a matter of fact, the charge, as a matter of law, was not coterminous with the charge of causing serious bodily harm on the basis of common design. In particular, it was not necessary that the jury be satisfied that there was a common design in relation to the assaults carried out by the co-accused, in order to convict the applicant of child neglect in respect of this incident.

10. The Court is, however, satisfied that the question of the common design, and the correct charge to the jury in a case such as this, does raise a matter of general public importance, and accordingly, will grant leave to the applicant to appeal to this Court against his conviction on counts 6 and 7, solely by reference to the question of common design. If necessary, these issues can be refined or supplemented at case management.

10. The issues, consequently, are:

1) How does a person participate in a criminal offence where they are not present at the scene of that crime and actually doing the physical act that constitutes the crime;

2) Can liability based on foresight of the possible commission of an offence amount to sufficient participation with the principal offender or encouragement to that principal offender and encompass, in addition, the mental element of intention or recklessness in committing that offence;

3) Is foresight, if proven, of the commission of an offence based on prior participation in other similar offences, participation in itself or is it an element of evidence from which liability for the commission of that offence may be proven; and

4) How is a jury to be properly instructed.

The legislation

11. In any analysis of criminal liability, it is the precise definition of an offence, the elements both external and mental, which define the circumstances in which an accused may be found guilty. The standard practitioners' textbook in this regard, the many editions *Archbold on Criminal Pleading, Evidence and Practice*, from the earliest iteration set out the common law or statutory definitions of offences and any case-law that pointed up particular elements, and then required that the prosecution to be successful prove particular elements. Criminal liability differs from offence to offence, especially in jurisdictions which do not have an over-arching code defining the principles of liability applicable to the chapters setting out the offences. Hence, the precise statutory definitions are the starting point. Section 4 of the Non-Fatal Offences Against the Person Act 1997 provides for the offence of causing serious harm, in these terms:

(1) A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both.

12. The elements are: causing serious harm to another person through doing or omitting to do some action; with the purpose in so doing that action to cause harm (intentionally) or, in the alternative, being aware of the real risk of such harm occurring through doing, or omitting to do, some action whereby that serious harm may occur (recklessly). Assault, of its nature, may be a continuing offence, as where a person puts a cruel instrument of torture on another and leaves it in place, or it may be a once off offence, as in a blow, or it may be a series of blows or inflictions of violence. In contrast, the other offence with which the accused and W were charged was of child cruelty. The argument on behalf of the accused is that it was this offence that was alone appropriate to the actions and lack of action of the accused. Hence, in contrast, s 246 of the Children Act 2001 provides:

(1) It shall be an offence for any person who has the custody, charge or care of a child wilfully to assault, ill-treat, neglect, abandon or expose the child, or cause or procure or allow the child to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing.

(2) A person found guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding £10,000 or imprisonment for a term not exceeding 7 years or both.

(3) A person may be convicted of an offence under this section—

> (a) notwithstanding the death of the child in respect of whom the offence is committed, or
>
> (b) notwithstanding that actual suffering or injury to the health of the child, or the likelihood of such suffering or injury, was obviated by the action of another person.
>
> (4) On the trial of any person for the murder of a child of whom the person has the custody, charge or care, the court or the jury, as the case may be, may, if satisfied that the accused is guilty of an offence under this section in respect of the child, find the accused guilty of that offence.
>
> (5) For the purposes of this section a person shall be deemed to have neglected a child in a manner likely to cause the child unnecessary suffering or injury to his or her health or seriously to affect his or her wellbeing if the person—
>
> (a) fails to provide adequate food, clothing, heating, medical aid or accommodation for the child, or
>
> (b) being unable to provide such food, clothing, heating, medical aid or accommodation, fails to take steps to have it provided under the enactments relating to health, social welfare or housing.
>
> (6) In subsection (1) the reference to a child's health or wellbeing includes a reference to the child's physical, mental or emotional health or wellbeing.
>
> (7) For the purposes of this section ill-treatment of a child includes any frightening, bullying or threatening of the child, and "ill-treat" shall be construed accordingly.

13. That offence may be defined as requiring proof that the accused: 1) had custody or control of a child (as in a mother or father or guardian); 2) that the child was subject to assault, ill-treatment, neglect, abandonment or exposure, or causing or procuring or allowing the child to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing; and that this was 3) done by the accused wilfully (that he/she willed it to happen, meaning intended/had the purpose that this wrong to the child be brought about). This may be one cruel event or imposition and it may also encompass a continual offence of neglect or cruelty.

Testimony

14. While there is no doubt that the accused was not at home until about 15.17 on Tuesday 2 July and was therefore not present when W attacked V, causing her the devastating brain injury, the indictment was framed in terms of the relevant timeframe being Friday 28 June to Tuesday 2 July 2019. The reason for this was that the prosecution were in a position to prove images of V on a family outing prior to this which showed that V's body was not bruised or burnt in the manner in which she was found after that time. The irrecoverable injury was caused by blunt force trauma to V's head. This injury involved bleeding on the brain and brain swelling leading to the permanent incapacity outlined. At the hospital where V was treated, the medical team drew up a list of external injuries in addition. These may be summarised:

a. Superficial abrasion to the right side of her head.

b. Bruise-like lesions above her left eyebrow, discolouration of her eyelids, purple discolouration to the right side of her face lateral to her eye.
c. Numerous curvilinear superficial lacerations to her torso and abdomen, the back of her thighs.
d. Five small circular lacerations to her right knee.
e. Deep burns to her flank, her right elbow, left forearm, the palm of her left hand, the back and soles of her feet, the back of her left thigh,
f. Numerous small deep burns to her central upper chest, right shoulder,
g. Bruising and swelling to her right labia majora, 9cm x 3cm spanning clitoris to her anus, and to her perineum.
h. Subcutaneous haematomas at the back of her thighs.
i. Extensive subcutaneous swelling, oedema, and haematoma to the back of her abdomen and pelvis.
j. Extensive bruising all over her arms, and scattered over the back of her thigh and lower legs.
k. Dark lesions on her buttocks.
l. Contusion to one of her lungs.
m. Subconjunctival haemorrhages to her eyes.

15. The accused asserts that he played no part in the attack on V, as to the severe burning causing disfigurement and as to the attack causing the brain injury and as to any other assault on V. His attitude is evidenced in a remark to a garda witness when the authorities stepped in and took the remaining children, including, X and Y, into care. He said that W had "gone crazy over the children". He also claimed that he had said to his wife on seeing V unconscious on his return from work on 2 July 2019, words to the effect of "what have you done" or "you went the wrong path". This all was to the effect, as were his garda interviews, of distance in terms of any encouragement of such assaults or assistance to the actual perpetrator, much less actual engagement physically in the attacks against V.

16. The evidence from X and Y, children of the accused and W testify to a horrific series of events directed at V. While there was expert testimony as to the beliefs in djinn possession and the remedies for this according to superstitions prevalent in the country of origin of the family, this played little part in the trial and was regarded with some disdain in the evidence of X and Y. After the parents, W and the accused, had been granted refugee status, they arranged for V to travel to Ireland from their country of origin. School records, proved V's teacher, showed that she had attended national school locally only for a short time after the principle of refugee law, family reunification, had allowed V to be reintroduced to her family. Prior to that, she had lived varying levels of comfort with grandparents outside of Ireland. V was absent from school from 11 to 14 June 2019. The reason given was "illness". There were absences again on 21, 24 and 25June, with the excuse for the 21-24 June of a fall "in the playground", and no reason given for her absence on 25 June. Her teacher testified that V "was a pleasure to deal with" and had no behavioural issues, and none of the marks noted above, were apparent during her school interactions. The school closed for the summer break on Friday 28 June 2019 and in the normal course would have opened again in late August.

17. X gave evidence of a pattern of events common to both the accused and to W. Some short time after V was reunited with her family, W started hitting her with a phone charger and with the leather strap of a belt and was also biting her. V was responding "No, no, no, I won't do it again" in reference to the ordinary childish mistakes which motivated this conduct. The accused was not distant from this. He also hit V with the strap of a belt on her arms, but as to frequency X could not remember. The accused also choked V. This was described by X as happening "in the living

room" where the accused "was choking her and she was at the wall, and it's like her back was on the wall in a standing position . . . his hands were on her neck . . . [and] She was making a choking sound." In answer to counsel as to where were her feet, he said that they were not on the ground, that they were "Up in the air . . . pointing straight down." Afterwards, V was "like, laying on the ground . . . because of the drop". He said: "You know when my dad – you know when my dad was choking [V], then he just let go and she dropped on the ground." The response of W, who was in the kitchen was: "He's teaching her a lesson", said to X. On occasion the door of the balcony was opened and the "some evil thing or something" was for "something to be gone or something" which X regarded as "all fake".

18. Y gave evidence which also showed a pattern of events in which the accused not only participated fully but was a main actor. Because of a long walk, V wet herself. The response of W was to tape her hands with duct tape "yellow or grey" and burn her hand on the hob. The day before 2 July 2019, W bit V and burned her. On the afternoon of the last day at school, 28 June 2019, the family went to the beach and there V fell and hit her head, but not seriously, and the accused saw this. W also choked V, "beside the bathroom . . . with two hands [for] four or five minutes. V passed out. W said "she's faking it but my dad choked her as well." The accused also hit V with the strap of "the belt and all." She said: "in the sitting room . . . I saw him choking her in the air . . . He was, like, holding her, choking her." In answer to counsel, she described V's feet being off the ground. V passed out and the response of V was "she started slapping her and being like: "She's faking it." This was in the presence of the accused who had engaged in the choking, and he had also hit and punched and kicked V: "She was just walking and then he just kicked her and started making fun of her and all and started making fun of the bruises." V fell and when she could not walk properly, W told her to walk properly. The accused also hit V with a slipper "more than once in that week" when he came home from work. V was also roughly manhandled by the accused and put alone locked in the attic and then: "He was just hitting her and all and made her clean up the whole house." On 2 July 2019, when Y woke up, the time given was variable but when the accused was at work, she heard banging and shouting by W as to wetting the bed. Y was "scared of what happened" and then V "was – fell on the floor and my mam was calling me then . . . [V] said "Don't push me, please don't" and W said "I'll do whatever I want with you". At this point, Y left her bedroom. She saw V on the ground near the bathroom door: "she was like sitting down on the ground, like her back on the wall . . . Passed out . . . she couldn't talk. It was just a sound . . . and I told her to call dad and then she didn't want to call dad." Sometime after there was a video call to the accused by W: "She – she said: "I told you I was going to do it. I told you I was going – I was going to kill her. Why didn't you stop me?" X and Y were told by W to say that V had fallen in the shower and "that we called the ambulance straightaway, but we did and that's not what happened, that's lies."

19. Parents have a positive duty towards their children. That includes a duty to intervene reasonably when a child is ill or has been injured. While this is relevant to the charges of child cruelty, part of the pattern here includes the interchanges as between W and the accused and the failure over 9 or 10 hours to call for assistance.

20. What is important here is the pattern of involvement, the conscious taking of serious risks with the health of V and the interweaving of the actions of the accused and W in chastising and brutalising V to the extent that the argument of the accused that the bashing of V's head and the burning of V cannot be regarded as outside the common design of these parents. The chronology of that day shows:

07.09 CCTV shows the accused leaving for work

07.16 91 second call made by W to the accused
07.18 39 second call was made by W to the accused
07.45 the accused unsuccessfully called W
07.30 neighbour BK awoke to shouting
07.49 CCTV shows the accused arriving at work
08.00 neighbour TH heard shouting
08.00 the accused arrives in his workplace
09.17 the accused received customer's text about a camper van leaking oil
10.00 X woke up to shouting and heard banging for 50 minutes, might be later
13.01 28 minute video call begin from W to the accused
13.36 7 second call by the accused to W
13.49 55 second call by the accused to W
13.58 54 second call by the accused to W
14.08 61 second call by the accused to W
14.37 44 second call by the accused to W
14.40 32 second by the accused to W
14.40 CCTV shows the accused leaving work
14.51 CCTV shows the accused coming closer to home
15.17 CCTV shows the accused around the corner from home
18.52 text received by accused ". . . can you come back to me"
19.45 the accused claimed to a witness he arrived home
20.01 999 called for two seconds
21.30 the accused visited the website adverts.ie
21.31 the accused texted customer in reply to a query
21.55 999 call lasting 14 minutes
22.24 first ambulance arrived
22.53 physical examination began
23.00 gardaí arrived at the home

21. The judge at trial charged the jury in the following manner at p 70, lines 15-2:

> Now we'll move on to a central theme of the State's case. It's the issue of common design. Now, the state's case is that [the Appellant's wife] and [the Appellant] and [the Appellant] tacitly agreed, or agreed that basically because of the behaviour of [the injured party], the little child, they were going to physically chastise her and do violence to her to make her change her ways. There is mention from Inspector McInerney, I think, that basically speaking, in his discussions with them, they seemed to express the view that a djinn had taken over [the injured party]. But in any event, it seems they were upset about her behaviour and it seems, from the evidence of both [X] and [Y], if you accept that evidence, both father and mother did physically chastise the child – that's a very old-fashioned phrase – and do violence to the child and the litany of violence has been outlined. It seems there is actually physical support for those allegations, or that evidence, in the sense that you've had the benefit of the examinations by the doctors on the night of the 2nd July and the morning of the 3rd July.

22. The court then put the prosecution in relation to joint enterprise at p 70, line 31 p 71, line 6:

> Now, [counsel for the DPP] on behalf of the state says it's impossible for you not to believe that they were acting in concert or acting together in relation to this enterprise of changing the behaviour of [the injured party], by reason of the evidence of X and Y and also by the general circumstances of the case. That they lived in close proximity in a house, that it

> seems he was a very good father, that he slept in the house and indeed that I think on the night before the 2nd the child was in their bed. And also by the fact – and obviously it's a matter for you but if you believe the evidence of [X] and [Y], they had witnessed their father choke rather badly the child and kick the child and od other things. They say that – the state says it's incomprehensible that they weren't acting together.

23. The court then referred to the defence case at p 71, lines 6-12:

> [Counsel for the Appellant] on behalf of his client says you should examine that theory very closely and he says you should have doubts about it. That's a matter for you. You've heard [counsel for the Appellant]. He's very eloquent, as is [counsel for the Appellant's wife] and is [counsel for the DPP]. They've all expressed their views to you and I'm not going to intrude. I believe, like [counsel for the Appellant's wife], that there's common sense in the jury. I certainly believe in juries that will apply their common sense to all of the issues.

24. The court then returned to the DPP's case at p 71, lines 14-17:

> So [counsel for the DPP] says that this common design even applies to the 2nd of July when the fateful event occurred, that this behaviour of behalf of the injured party] was a mere continuation of what they were doing.

25. The court then gave examples to assist the jury:

> Now, I should give you a few examples of common design outside this trial. Bank robberies, sometimes there's more than one person involved. You could have people who go in with a shotgun to a bank. Two or three could do that. There could be somebody a mile away watching out to make sure the guards are not coming and there could be another person driving. There could be another person in a house or in another car to get rid of the money, to, let's say, get the money out of the area in a very quick way. They're all involved because they all share a common purpose: To rob the bank and to get rid of the money. Obviously, a participant can go outside of that common design. For instance, say if one of the bank robbers saw somebody in the bank who he disliked intensely and decides to shoot him, obviously the robbers if they're caught couldn't be levied with that crime because nobody could believe that that was in the plan.

26. The court then continued as follows at p 71, line 29 – p 72, line 5:

> Now, you're going to have to work out first of all are you satisfied beyond reasonable doubt that there was plan, a tacit or an express plan, or an agreement or an understanding between the father and mother to use violence and chastisement to bring this child in line, either themselves or to get rid of a djinn. That's a spirit. You're going to have to decide that. If you decide that is the case, obviously one is responsible for the other. Then you should ask yourself were the actions of [the Appellant's wife] on the Tuesday, the 2nd, outside that plan before you can levy [counsel for the Appellant's] client with responsibility for whatever occurred on the 2nd. You must be satisfied beyond reasonable doubt that what [the Appellant's wife] was with the tacit or expressed agreement, or the common design between these two parties, the defendants. That's for you.

The arguments

27. The most relevant cases are: *R v Jogee* [2016] UKSC 8; *The People (DPP) v Gibney* [2016] IECA 336, [2016] 11 JIC 0102; *The People (DPP) v Kelly* [2016] IECA 404; *The People (DPP) v Dekker* [2017] 2 IR 1; *The People (DPP) v Cummins* [2021] IECA 198; *The People (DPP) v Doohan* [2002] 4 IR 463; *Sweeney v Ireland* [2019] IESC 39, 3 IR 431. Further text assistance is derived from *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury Professional 2020) chapter 8 and *Smith, Hogan and Ormerod on Criminal Law* chapter 6 (16th edn, Oxford University Press 2021).

28. On behalf of the accused it is argued that to be liable for cruelty or for assault causing serious harm, the accused had to participate in each such crime and that the accused did not so participate in the harm caused as between 28 June and 2 July 2019 and was not physically present when W battered V and caused her a serious brain injury. It is asserted that there is no doctrine known to criminal law whereby merely foreseeing that prior cruel and violent actions against a child might, or probably would, continue in the absence of the accused, could render that accused liable for such actions. Knowing that cruel and violent actions of an extreme kind had been perpetrated by W and with participation by the accused and primary perpetration by him in actions of beating and strangulation in the very proximate days to the events as between 28 June and 2 July 2019, is not to be construed as participation in the assault causing the brain injury or in the vicious actions against W in count 7, it is alleged. It is argued also for the accused that the formulation in *Anderson v Morris* [1966] 2 QB 110 is wrong:

> Where two persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise and that includes liability for unusual consequences if they arise from the execution of the joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise his co-adventurer is not liable for the consequences of that unauthorised act.

29. The Director of Public Prosecutions points to the serious injuries sustained and which were discovered when, eventually, an ambulance was called for. There was, in addition to the crippling and profoundly disabling brain injury suffered in consequence of the assault of W on V on 2 July 2019, in which the Director asserts the accused participated through a common design, the injuries which have been detailed herein.

30. The Director of Public Prosecutions argues that there was ample evidence for the accused and W forming a plan to attack V and that this was an "ongoing enterprise that preceded 28th of June 2019, and continued until the 2nd of July 2019." That this is not constructive liability, the prosecuting authority contends, but actual participation in a plan. Therefore, it is claimed that the accused is liable for the serious brain injury inflicted by W and is further liable for all vicious actions against V by W whether in respect of the burning or beating or strangulation of V and whether the accused was there with W or not. Thus, it is posited, there was a plan of cruelty of the most extreme kind; there was past participation as evidence of the acts tacitly agreed in the common design; there was a cover-up by both the accused and W; there was the engagement of the most transparent deceit; there was an equivalent level of attack by the accused as by W; and both of them were in an enterprise to savagely attack V. Thus, it is asserted, it does not matter in terms of liability that it was W who inflicted the brain injury and any evidence of serious harm outside that is rightly part of the participation of the accused with W.

Mental element

31. One aspect of the definition of the offence of causing serious harm that was not engaged by the parties in argument is the mental element. That mental element is not exclusively one of intent, meaning that each actor and participant must be proven to have as his or her purpose in encouraging criminal conduct or in assisting a deed specified in the definition of the offence, as in murder to kill or cause serious injury through their actions or those with whom they are in concert for that purpose, be it stabbing or poisoning or use of firearms or explosives, but also includes recklessness; an alternative state of mental culpability. Here, it is useful to state the basic essence of intention and of recklessness.

32. Intention, when it is used in the definition of a criminal offence, requires proof that the accused acted with the purpose of causing the harm or circumstance defined by the offence: that in so acting, for instance in attacking the victim, or in not acting where caring for an invalid in the family, for instance in not plugging a sick person at home into an available oxygen supply, the accused meant to achieve the result defined. This is not motive, which means what drove or inspired the actor towards what he did; *The People (DPP) v FN* [2022] IESC 22. It is pointless here to analyse such cases as *Hyam v DPP* [1975] AC 55 or *R v Hancock and Shankland* [1986] AC 455 since it is apparent from such later decisions as *R v Jogee* [2016] UKSC 8 that in other jurisdictions the law took a wrong turn. Hence, as *Smith, Hogan and Ormerod* put the test, 16th edn, a person intends a result when that result the actor's purpose. Further, intention may, but not must, in fact and certainly not must as a matter of law, be inferred even though the actor is not acting with that primary purpose where the result is a virtually certain consequence of what is done or not done and the actor knows that. Intention may be inferred from foresight, but foresight is not intention in itself. In ordinary cases, there will be no question of people acting with a primary purpose and foreseeing another result. Hence, directions to juries should be kept at the simple primary level.

33. In *The People (DPP) v Clifford* [2010] IEHC 322 at [11] and [12] a simple question arose: did the accused by his actions intend to cause a breach of the peace. His provocations, it was inventively argued, were unlikely to have such a result since only gardaí were present. That judgment is recalled in order to contrast intention with recklessness:

> A person may intend to blow up a plane in flight and so kill the passengers. That is direct intention. A person may claim to intend only to blow up a suitcase in a plane in flight but hope, that through some miracle, all the passengers in the plane will survive. It might usefully be noted, on the relevant case law, that the closer the impugned conduct comes to inevitably causing the consequence charged, as for instance in that example intending the death of the plane passengers, the more readily a court may feel able to infer that intention, in the example given of causing death, against the accused. The more obscure the consequence, the less readily can the inference of an intention in that regard be made. In no instance, whether of direct intention or oblique intention, is the inference that the accused intended either an act or its consequences automatically to be inferred from particular behaviour. In each instance, it is a matter of judgment for the court.

34. It is essential to participation, where the person charged is at one removed from the person doing the act alleged, as where a murder is commissioned or a person lends a car to assist a robbery or where someone cheers on sexual violence, that the prosecution prove the relevant degree of mental element that the definition of the case requires. As to how facts at trial and the inferences therefrom might be adjudicated is less a matter of law but, rather, is a question of good sense:

> The fact that it may be very difficult for a particular accused to achieve the wrong which is the subject matter of the charge does not mean that he did not have the intent to bring it about. To return to the explosion on the plane example, it might be very difficult, for instance, to mix a viable bomb from a number of small vials of liquid, within the current guidelines for what a passenger can carry in their hand luggage, that have been brought onto a plane by a number of persons; but that does not mean that an accused may not have acted with the purpose of combining these liquids together, or with other substances, to make an explosive. His making a bomb on a plane may lead to an inference that he intended to explode it and kill himself and the passengers. That deduction may be made, depending on the facts proven, by the court of fact on all the elements proved by the prosecution but it does not have to be made. There may be evidence suggesting an alternative of a hijacking or a violent protest about some political matter. This may be likely or unlikely, but in considering all of the evidence, the court of trial is looking at what is necessarily to be inferred as to the purpose of the accused from the accused's conduct and is also looking at what possible alternatives may reasonably arise to operate as a doubt in the accused's favour. If he is consciously doing whatever he can to bring about the criminal wrong in question, that means it is his purpose. That constitutes an intent to commit the offence. The fact that the consequence is very difficult, or is very easy, to bring about, on the facts proved in an individual case by the prosecution, is a matter upon which an argument may be made to the court of trial as to whether the accused had that intent, or did not have that intent. All of this is a matter for the construction of the relevant evidence. Again, based on the example given, the fact that the accused did everything logically necessary to cause an explosion on board an aircraft may, but not must, lead to an inference that this was his purpose. The fact that the scale of that explosion was highly likely to destroy the plane may, but not must, lead to an inference that that was his purpose. That fact that people die when a plane explodes in mid-air may, but not must, lead to an inference that he intended to kill. At the other end of the scale, the fact that it was not likely that the accused could, with the materials he and his accomplices had in their hands, cause an explosion may, but not must, be a matter from which an inference may be drawn against his ever having had such an intent or of intending any consequence to such an explosion.

35. In intention, foresight matters but that does not mean its legal equation with purpose; in recklessness, foresight is the key element of culpability. In *The People (DPP) v Murray* [1977] IR 360, Henchy J drew on the Model Penal Code of the American Law Institute. The definition involves the accused being conscious of a risk and notwithstanding foresight of consequences, engaging in the culpable conduct that brings about the wrong defined in the charge. Where the accused commences and engages in an ongoing course of conduct which has in the past involved serious harm, as in strangling V to the point of unconsciousness, and is collaborating with another, here W, in that enterprise, there is more than a serious and unjustifiable risk of such actions continuing. In not intervening to stop that conduct, but in affirming it through beatings and strangulation and in not intervening where severe burns and bite marks and bruises are apparent, as here on V when examined in hospital, there can be no doubt of foresight and of a continuing course of affairs. In *Clifford* at [14] the concept of liability through recklessness is explained in terms of consciousness of a risk and persisting:

> Recklessness consists of an accused subjectively taking a serious risk, involving high moral culpability, that his conduct will bring about the wrong defined by the charge. Here, the wrong defined by the charge in terms of recklessness is as to whether a breach of the peace may be occasioned, that is brought about, by his conduct. Recklessness involves a subjective element in Irish law, and so it is different from criminal negligence which is the

mental element of one aspect of criminal negligence manslaughter. For an accused to be reckless, it must occur to the mind of accused that his conduct will bring about the consequence impugned but, nonetheless, he proceeds to act. Moral culpability is necessary in this context because all life is a risk. To decide to build a major tunnel through a mountain involves a risk of accidental death to the workers. Where all proper precautions are taken, there is no moral culpability should someone die in an accident. Failing to avoid a serious risk of which you are aware can involve a high degree of moral fault. An example incorporating the necessary elements in recklessness of the subjective taking of a serious risk in culpable circumstances is this. A man is driving a car at speed along a country road and sees a stop sign at a crossroads. He knows that a car may cross the road in front of him but, notwithstanding that risk, he powers ahead without stopping, causing death or injury. He may in these circumstances be charged with manslaughter as his mental state is even more serious than the mental element of criminal negligence required for that offence. That man is reckless as to the death or injury caused. Section 2.02(2)(c) of the Model Penal Code is generally accepted as being the definition of recklessness in Irish law: -

> A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree.

36. The judge in this trial, in his instructions to the jury, showed a clear appreciation of the need to find a culpable state of mind that embraced consciousness of a substantial risk through following through on a course of conduct that was already established through the violent actions of the accused and of his wife. Whether his motivation and that of his wife was of ridding V of a djinn is less pertinent. The point was engagement in a pattern of serious attacks. On 2 July serious harm resulting from those attacks came to a point where liability involved a continuation of what had gone before where the strangulations and burnings ran the unjustifiable risk of serious harm. The trial judge instructed the jury:

> Basically, before you can consider convicting [the accused] in relation to the brain damage count, you must be satisfied that both [W] and [the accused] acted in a -- by common design or a concerted action. And this was part of this . . . If it was part of the common design. In other words, the State's case is that both [the accused] and [W] engaged in a course of conduct against a child for whatever reason….And this included physical chastisement and violence. That's what they say. Now, if you say what happened on the second was part of that, if you decide beyond reasonable doubt that was part of it, it's open to you to convict. Obviously, it's for you. But you must be satisfied beyond reasonable doubt that this -- the conduct by [W] was part of this common design."

37. This accorded with the analysis of Henchy J in *Murray* at 403-404 where having quoted the Model Penal Code, he continued:

> What is in issue on this aspect of the case is recklessness not as to the consequences of an act but as to a concomitant circumstance of an act. In dealing with whether simple ignorance will displace recklessness in that context, Professor Glanville Williams (Criminal Law; The General Part; 2nd ed., p. 152) has written:-
>
> > "A person who does not know for certain whether or not a fact exists may think that its existence is probable, or only possible; or he may have given no thought to

> the question of probability or possibility. The last will be particularly likely if he does not know the criminal law and so does not realise the relevance of the fact to his legal responsibility. The proposition to be maintained is that in each of these situations there is recklessness for legal purposes. Simple ignorance is not enough to displace recklessness. It is only where the actor's mind is filled with mistaken knowledge that the act is not reckless (though it may be negligent) as to that circumstance."

38. Here, though, the direction of the trial judge was as to advertent recklessness as to the point to which the joint actions pursuant to the joint plan of the accused and of W might lead. That was correct. This is confirmed by the analysis of Henchy J in *Murray*, where speaking about the elements of proof necessary in a common design, he affirmed that the mental element, as well as participation in the external commission of the crime, by encouragement or assistance, must be proven as against each; in this case Noel Murray and his wife Marie Murray:

> As to the appellant Noel Murray, if the recklessness required for the capital murder charged is held to have been proved in the case of Marie Murray, that recklessness could not be imputed to Noel Murray. In the absence of evidence that a decision to shoot a would-be captor, even if there was a risk that he was a Garda, was an express or implied part of the common design, recklessness in this respect on the part of Marie Murray must be deemed to be personal to her and outside the scope of the common design. The activities of the parties to the bank robbery, particularly the carrying and use of loaded guns, amply support the inference that there was a common agreement to shoot to kill or to cause serious injury if necessary. It may, however, have been the case that it was part of the pre-arrangement that a shot would not be discharged at a Garda. At all events, it cannot be fairly inferred from the evidence that the discharge of a shot at a Garda was part of the pre-arranged scheme of things, and more particularly the discharge of a shot at a Garda in the circumstances in which Marie Murray shot Garda Reynolds.

Common enterprise

39. As a concept, the idea of common enterprise or common design is easily grasped by the usual instruction which judges give to juries. This is put across through practical example: that the getaway driver A and the person waiting to receive the stolen money B as well as, and equally with, C and D who are holding up a bank using a gun are all equally guilty of robbery. In terms of criminal law theory, it is worth repeating that A is participating in what happens because he is lending his aid to that enterprise through driving C and D away and that B is participating through being an integral part of the design. If the car carrying A, B and C is stolen, the owner cannot be responsible. He has lent no aid and is in no way encouraging the enterprise. If the car is borrowed, then the owner can only be liable only if there is a conscious aid to the design; meaning that the owner is aware of the proposed use and thereby offers his aid.

40. By contrast with that one aspect of *Murray* which was deemed to be outside the scope of the common design, namely, the murder of a Garda by Marie Murray, the constant cruel beatings and assaults continuously meted out to V by both the accused and W in the days leading up to 2 July 2019 show that both parents had the common design to cause serious harm to their daughter. To adopt Henchy J's words, these assaults and beatings "amply support the inference that there was a common agreement" to inflict serious harm on V. Even if the accused was not physically present in the house when W inflicted the injuries on V on 2 July 2019, the jury could nonetheless reasonably infer that these injuries were within the scope of the common design. In any event, in view of the circumstances leading up to the traumatic assaults of 2 July 2019 it can reasonably be

inferred that the accused must have adverted to the possibility that, in his absence, W would inflict serious injury on V and that, regardless of that risk, he nonetheless left the house. That, in itself, would be enough in these particular circumstances to establish the mental element of recklessness in respect of these 2 July 2019. The accused must be deemed to have had the requisite degree of *Murray* recklessness: he had, after all, "consciously disregarded a substantial and unjustifiable risk"; [1977] IR 360 at 404.

41. The statement in *Anderson v Morris* is not incorrect in itself but is wrong in the use that has been made of the words to enforce liability through intention onto unexpected consequences. One cannot be liable in any crime where the mental element is intention for unexpected consequences where those assisting the principal actor do not intend, meaning do not have as their purpose, that the criminal action happen. Where there are "unusual consequences" liability will depend on the definitional elements of the offence. Where the consequence is intended, even on a contingency basis, such as if you are confronted in the bank robbery with resistance you may use the firearm to cause serious injury or kill, there is liability. But even foreseeing that there may be trouble and that another acting in the enterprise may react violently and cause serious injury or kill, does not in itself establish intention in that regard. That state of mind is evidence from which a jury may infer that by foreseeing the action of killing or causing serious injury, the accused who is not the actor in killing the victim intended that result. But it is not an inescapable inference or an inference that must be made as a matter of law. Even in *Anderson v Morris* it is made clear that where "one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise his co-adventurer is not liable for the consequences of that unauthorised act."

42. Most authorities derive from crimes of intention. In none of the cases from this jurisdiction has foresight been equated with an automatic finding of intention, which was the analysis in England & Wales up to *Jogee*. Hence, in *The People (DPP) v Roche* [2004] IECCA 24 the accused was one of a gang of men who waylaid a young man with the purpose of beating him up and robbing him. The prosecution case was of common design to cause the victim serious injury and the charge was murder because death resulted. This was the direction approved by the Court of Criminal Appeal to the jury, one where liability is possible only on the basis of each of those in the abduction and beating enterprise intending serious injury to the victim: "if a person is involved in a joint enterprise, that anything that is done in furtherance of that and if that is contemplated at the time of that, embarking on that enterprise, both are equally guilty." This had been illustrated not on the basis of unexpected events establishing liability, which would be a misreading of *Anderson v Morris*, but of guilt only being established on the basis of intentional aid to a scheme involving death or serious injury.

43. Hence, each must participate in a common criminal enterprise and for murder, since the requisite mental element is intention to kill or cause serious injury, each must be proven to have acted against the victim with that purpose: "It must be part of a common design and it must be contemplated that serious injury will take place." And see *The People (DPP) v O'Toole & Hickey* [1990] WJSC-CCA 1662, [1990] 7 JIC 2001 where the trial judge's direction to the jury was approved as correctly stating mental element of intention to kill or cause serious injury: "If you take the view that there was a common design and that the common design included the use of a knife and clearly the use of a knife to overcome any resistance then you have to consider whether it is implicit that serious injury would have been caused and if so there is sufficient mental element against both of them."

44. On behalf of the Director of Public Prosecutions, this written submission was made:

> If one differentiates between secondary participation and joint enterprise, the lending of aid or encouragement is a necessary element of the former. It is not a necessary element of the latter but, where present, may give rise to the inference that an accused that is not the actual perpetrator of the event, was engaged in a joint enterprise and is therefore criminally liable.

45. That submission is incorrect, in so far as it has thereby been submitted that foresight is adequate to establish criminal liability. As Dunne J pointed out at para 40 of *The People (DPP) v Dekker* [2017] 2 IR 1, foresight is capable of being relevant for the jury in considering whether there has been an agreement but cannot alone sustain liability. As a matter of fundamental theory there is no potential way in which participation in a joint enterprise can change the external and mental definitional elements of an offence. To be found guilty of an offence, each offender must have the elements of the crime as defined by law proven against them. Secondary participation could not be differentiated or dealt with on a different basis than participation in a joint enterprise where each actor is a principal but each may have differing roles. The extent of such role, the degree to which each acted, the breadth of any agreement, the knowledge of each, what those individuals either admit to or may be inferred as having predicted, these are elements of evidence from which purpose may be inferred.

46. Nothing changes on the basis of a case being made of common design as opposed to one based on secondary liability of someone who supplies aid to the commission of a crime or who encourages others in the act of perpetration. In *The People (DPP) v Doohan & Others* [2002] 4 IR 463, 477 the conviction of four men was upheld. They had decided to shoot a local community activist in the legs with a shotgun, intending to cause him a crippling injury. When that action was perpetrated by the gunman, the victim quickly bled to death in the driveway of his home. Liability for murder was established on the basis that each actor had participated in this common enterprise with the same intention of causing the victim serious injury: one had prepared the weapon, another had supplied it, another had staked out the victim's home by hiding in a graveyard and spying on him, and another had advanced on him early in the morning and then fired the gun. But each had acted with the requisite intention.

47. Where mis-turnings have been made in the law in other jurisdictions it has thus been on the basis of equating foresight with purpose. There must be evidence of the mental element, be that intention or, as in this charge of causing serious harm, recklessness. The assessment of the mental element and the participation through encouragement or assistance by the party charged who did not actually perpetrate the physical action is by the application of common sense. Aiding an enterprise while knowing what is to happen can be equated with an intention that this happen. In other words, that is evidence from which intention may be inferred. Making oneself blind while being conscious of what is being driven from one's mind does not absolve the accused from foresight, from which intention may be inferred. In *Miller v The Queen* [1981] 55 ALJR 23, the accused and one Worrell drove around looking for girls whom Worrell could pick up. Then, Miller would drive Worrell to a quiet spot and leave the car for sexual congress to take place. Worrell, on one occasion, murdered the girl he had picked up. But the service to Worrell by Miller continued and on six more occasions Worrell murdered young women with many, however, being left unharmed. Miller, charged with the murder of the seven victims, claimed that the only common design had been picking up girls. The jury found him complicit in the murder since after the first such killing he knew that the pick-up enterprise involved the very real contingency of death. This was upheld by the High Court of Australia on the basis that circumstances proven where the real

possibility of an occurrence, here a deadly recurrence of violence, can gives rise to the inference that the accused intended that occurrence through his aid to the principal:

> The scope of the common purpose of the applicant and Worrell, as it applied to each occasion upon which Worrell murdered a girl would, on any view, have included the following: the applicant driving the car throughout the enterprise; Worrell finding a suitable girl and inducing her to get into the car; the applicant driving it to a secluded site and then leaving Worrell and the girl together so they might have sexual intercourse. It was open to the jury to conclude that after the first murder had occurred the scope of the common purpose had altered. Millar now knew that Worrell not only intended sexual intercourse with the girls, but might also murder them, while Worrell knew that when Millar participated in further expeditions he was fully aware of the fatal outcome of the earlier expeditions. Because of their knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair: when Millar would leave Worrell and a girl together, he would no longer be leaving them merely so that they might have sexual intercourse, but also so that, if the mood took him, Worrell might, in Millar's absence, murder the girl. The intended role of the girl was no longer merely that of Worrell's partner in the intercourse, she had become also a possible murder victim. It is significant that Millar's evidence was that he found Worrell's murderous moods to be wholly unpredictable, sudden in their on-set and due to no apparent cause, thus to his knowledge putting each girl at risk of death.

Application

48. In *Miller* the crime was one of intention to kill or cause serious injury; namely murder. The other cases cited analyse the extent to which participation can establish liability. But, just as each crime is defined differently, the mental element required as the element establishing liability on the basis of the act perpetrated, may differ. Intention may be inferred from foresight and wilful blindness may establish that actual intention in a criminal enterprise was behind a cloak of false denial of perpetration. Where the crime is one of intention, the accused, each of them, must have the requisite intention. As in *Miller* where there is participation in repeated actions which are proven to be criminal through the actions of another, the practical application of good sense may enable or drive a conclusion that with each such action the inference of intention that the main actor carry out that deed becomes compelling. On this analysis, the intentional element could have been proven in this case on the facts but as it turns out it was not necessary as the judge's instruction and the prosecution case was of recklessness.

49. Thus, this is a matter of inference from circumstances. In view of the established pattern of conduct of the accused towards V, the jury were entitled to conclude that the assaults perpetrated by W were within the scope of the common design. These were more than merely foreseeable but were integral to a pattern of violent conduct in which the accused and W were participants. Here, though, the prosecution was not merely acting on circumstantial evidence. There was direct evidence of the accused beating the victim and of him strangling her to the point of unconsciousness and leaving her collapsed in a heap without seeking medical intervention. These actions continued over time, coming to a grim peak on the weekend leading to and including 2 July 2019, with severe burning, biting, bruising, degrading treatment and then the infliction of serious harm to V by W in the absence of the accused. From this, as in *Miller* an intention to cause serious injury may be inferred. In this case, however, that purpose is not a necessary element of the crime. Causing harm requires that each accused in a joint enterprise "intentionally or recklessly causes serious harm to another".

50. That was this case. There was a pattern of conduct. When it is asserted on behalf of the accused that the action of W, on 2 July, amounted to an escalation and was therefore unexpected, and thus not a risk contemplated by the accused whereby liability in recklessness is established, that pattern becomes central to the analysis. The accused engaged with W in inhuman acts against V and for each of those actions, death or serious injury was risked with his full knowledge through his full engagement in this brutal series of attacks. On this analysis, intention to cause serious injury could have been inferred by the jury. Recklessness suffices in any event. It is beyond doubt that the accused followed over weeks and in the days after V leaving school a particular path of risking her health through plain brutality. As far as the evidence goes, with V already chastised and beaten, he was content to strangle her and through this pattern of conduct authorised the actions of W as a co-actor in also strangling, beating and burning V.

51. Liability is therefore established.

Jury direction

52. The Director of Public Prosecutions has suggested a jury direction based on a misreading of *Anderson v Morris* while the accused has suggested an over-elaborate reading to the jury of the July 2023 edition of the Crown Court Compendium of England & Wales. Such directions are not necessary in cases where the issue is likely to be well-defined and where the trial judge focuses the parties on the key elements of the case.

53. It is of the essence of criminal law that directions to juries be kept simple. A jury direction is not to be overturned where the essence of the elements of an offence or the basis of liability is correctly explained. Nor is it necessary to dictate particular words. The point is that a jury understand that the accused is liable if that accused participates through lending aid or encouragement to a crime and that to be guilty of that crime where he or she does not physically carry it out, but another does, that aid or encouragement given by the accused was done in order to assist the crime. A crime has elements. Where the mental element is intention, the aid or encouragement of each alleged participant must be proven to be done with the purpose of the commission of the external elements of the crime. Where the mental element is recklessness, then each alleged participant must be proven to have taken a serious and unjustifiable risk that the enterprise in which they participated with others could result in the harm or action defined by the external elements of the crime.

54. It is not wrong to tell a jury that mere presence at the scene of a crime is not an offence. Nor is the bank robbery example given above to be disdained. It is a good summary of a potentially complex analysis through means of an example. Engaging in a criminal enterprise where each person has a defined role makes both the physical perpetrator and those aiding that common design liable: but where the crime is one of intention, since the prosecution is required to establish the liability of each accused, the purpose that this crime be committed must be proven against each. Absent a direct confession to intention, purpose is to be inferred through shrewdness and common sense as against each alleged participant. Where the crime is one of recklessness, that element may be defined as the conscious taking of a real and unjustified risk that the external elements of the crime will be brought to pass. Each accused must be proven to have taken such a conscious risk. Again, absent a direct confession that the accused realised that the course of conduct in question could lead to the external element of the crime, here causing serious harm, recklessness is to be inferred from the evidence.

Result

55. In the result, there is no basis for disturbing the verdict of the jury.