THE COURT OF APPEAL

Record Number: 3/2019

Birmingham P.
McCarthy J.
Donnelly J.

BETWEEN/

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

RESPONDENT

- AND -

M.X.

APPELLANT

JUDGMENT of the Court delivered delivered on the 2nd day of March, 2020 by by Ms. Justice Donnelly

1. The appellant was convicted by a jury at the Eastern Circuit Criminal Court on 19th July, 2018, on a sole count of the sexual assault of the eldest of his three daughters on 26th July, 2015. This was a re-trial. An earlier trial in 2017 had ended with a disagreement by the jury on a verdict.

2. The sentencing process took place on 31st July, 2018 and 17th December, 2018 and resulted in the imposition of a sentence of four years' imprisonment with the final 18 months suspended on conditions. That sentence was imposed on 17th December, 2018 but backdated to 31st July, 2018.

3. The appellant's appeal is against conviction only. Two issues were argued on appeal:

   (a) whether in her charge to the jury the trial judge had dealt with the defence of intoxication correctly; and

   (b) whether the trial judge had wrongfully admitted into evidence that the appellant was the subject matter of a barring order as a result of a previous incident involving a physical altercation with one of his daughters.

The First Issue on Appeal: The Defence of Intoxication

The Evidence Relating to the Sexual Assault

4. On Sunday, 26th July, 2015 the complainant and her sister, B, were visiting their father's home as part of the appellant's then-weekly access to his children. The appellant was cohabiting with his partner, C, in a house in Dublin where they occupied a room and shared the house with others. On that date, the appellant collected the complainant and her sister from their family home and drove them to his home.

5. The complainant in her evidence-in-chief described events when she arrived at the appellant's home. Feeling tired, she went upstairs to lie down with her sister in the bed her father shares with his partner. The complainant was with her sister watching

something on her phone. Their father got into the bed between them. At some point A fell asleep. A stated:

> *"When I woke up, I didn't really move around much, and the first thing I could remember was I felt his hand in my underwear and he was kind of rubbing it a little bit, and he was touching my vagina, and I kind of -- I didn't -- I was kind of scared, so I just kind of moved around to let him know I was awake. And then when I – when he realised, I was awake he kind of just left and then I called [O] at the time, my boyfriend at the time, and then I asked him to stay on the phone with me, just in case, and he said, that's okay. And then I went to the bathroom just to, like, talk to him for a bit before my dad called me to say we had to go get [B] and [C] at the coffee shop because there was no one else at the house."*

6. A complained to her mother on the same day. This complaint was consistent with a statement which she later made to An Garda Síochána and was consistent with her evidence to the Court.

7. When interviewed by An Garda Síochána, the appellant, as was accepted by him at trial and again on this appeal, gave a false account of the crucial events.

8. The appellant, as he had done at his first trial in 2017, accepted in his evidence at trial the veracity of the account given by the complainant. The following exchange took place during his cross-examination:

> "Q. But I just want to clarify now before we move on to your interview with the guards what do you say, once and for all Mr.[M.X], what do you say happened? Do you accept that [A] is telling the truth or not?
>
> A. Well, I accept that [A] -- what [A] said is true."

9. At issue in the trial, was the appellant's claim that when he engaged in the act of touching A, he believed he was touching his partner. At various stages in evidence, he said he thought he was dreaming, he thought he was dizzy and that he was still drunk. The reference to being drunk was made because he had been out late the night before with other musicians who were celebrating. He said he had left the company of the musicians at around 4-5am. He arrived home. He slept but when he awoke, he contacted the estranged mother of his children to say that he could not collect them at 10am. He said this was because he was still drunk. He collected them later at about 12 noon in the car. When he was at home with the children, he said he was tired. He went up to the bedroom and got into bed between his daughters. His partner gave evidence that he was quite drunk when they left the party and that it was a concern for them in terms of picking up the girls.

10. In his evidence in chief, the appellant told the jury about the party the night before, and how he drank far more than he usually did as he was not a drinker. He described

collecting the girls in the car and wanting to go swimming with them "to ease the alcohol". In relation to the incident itself the examination was as follows:

"Q. And can you tell the jury what happened then when you awoke?

A. Yes. I was awakened by maybe her movement. And then I was traumatised when I saw that it was my daughter beside me. I don't know what what happened. I was so scared. I was so I was so upset. I don't know what to feel. I went downstairs, looking for [his partner, C and his younger daughter, B], texted them where are they. I don't really have a full recollection of what was happening, because I think I was traumatised. On that day I don't know what happened. I was the next thing that I could remember is I was holding my toothbrush."

11. When asked to explain why he told the gardaí in interview that A was moving and he pulled her on top of him, he said he could have been dreaming at that time. He did not recall what happened and he said he was traumatised in the garda station. Overall in his evidence in chief, his defence was equivocal as to whether he was asleep during the course of the sexual incident with his daughter or was waking from sleep when he mistook his daughter for his partner.

12. The appellant was cross examined at length by the prosecution. At various stages he said he was not sure what had occurred as he was asleep, he was dreaming and when asked to tell the truth of what occurred he said "I'm telling you I will never in my life do any sexual assault to anyone, especially to my kids." In relation to the issue of alcohol, the appellant said as follows:

"Q. And were you still awake when [A] fell asleep?

A. I'm not too sure, your honour. Because even when we were downstairs that my [daughter B] was showing me something. I was just looking, but my head was not there. Even when we were in bed she was showing me something on her phone but I was just there to you know say yes to her or something like that, but I couldn't remember what she was showing me.

Q. What do you mean your head was not there?

A. Well I was, I was still dizzy and I still feel tired and still drunk.

Q. Still drunk?

A. Yes, your honour. Still feel dizzy at that time.

Q. You didn't have any drinks since you left the party; did you?

A. No, your honour. We ended up around 5 or something like that, 4 or 5.

The Charge to the Jury with Respect to Proof of Sexual Assault

13. A number of features about the trial and the charge have some relevance to the issue before us. The trial appears to have proceeded on the basis that the defence being raised was one of "mistake as to identity". It also appeared to proceed on the basis that the prosecution was obliged to prove intention as to the various aspects at issue in the case. This is apparent from the following excerpt from the judge's charge to the jury:

> *"So, therefore, the prosecution must prove to you to the required standard of proof the following elements:*
>
> *(1) that the accused intentionally assaulted the complainant, being [A].*
>
> *(2) That the assault, or the assault and the circumstances accompanying it, are proved to be indecent according to the contemporary standards of right-minded people.*
>
> *(3) That the accused intended to commit such an assault as is referred to, that he intended to touch in that indecent or in the sexual manner."*

14. At all times therefore, it was put to the jury that the appellant had to have intended to sexually assault his daughter *i.e.* he had to have carried out the assault with the specific knowledge and intention that he was indecently assaulting his daughter. This was a very high standard. The trial judge's charge appears to have been taken from the judgment of the Court of Appeal in *People (DPP) v. Babayev* [2019] IECA 198 where that Court held:

> *"Sexual assault is a type of assault whereby an individual intentionally or recklessly assaults another which includes the unlawful touching of another without consent and indeed it is not necessary that any physical touching actually take place.*
>
> *A sexual assault is an assault accompanied by circumstances which are objectively indecent, and the requisite elements of the offence are; firstly, that the individual intentionally assault the complainant. Secondly, that the assault itself or the assault and the accompanying circumstances are objectively indecent and thirdly, that the accused intended to commit an indecent assault."*

15. The trial judge in her charge appears to have placed a literal interpretation on the first element stated in *Babayev* to require that the intention is to sexually assault a particular individual and no other person. This error was to the benefit of the appellant as the jury were required to be, and ultimately were, satisfied to a higher standard of proof that he had committed the offence intentionally against this complainant and against no other person.

16. It can be observed that there is some tension between the first and second paragraph cited above in *Babayev*. The second paragraph appears to indicate a change in the *mens rea* for a sexual assault as compared to a non-sexual assault. In a non-sexual assault, the *mens rea* includes recklessness, but the dicta in *Babayev* only refers to an intentional committing of the offence as an element of the offence of sexual assault. That intentional element may refer to the carrying out of the physical act which amounts to an assault and

it may not have been intended to include the required state of knowledge as to whether the complainant was consenting. The point at issue in *Babayev* was not the issue of consent but the question of whether the complainant's view of the assault was to be taken into account in assessing whether the assault was sexual.

17. It should be recalled that in rape, recklessness as to whether the complainant is consenting is sufficient for the offence to be committed: a man commits rape if he has sexual intercourse with another person knowing that she does not consent or being reckless as to whether she consents to the intercourse. With respect to the offence of sexual assault, O'Malley in *Sexual Offences* 2nd Edn., (2013, Round Hall) having quoted from *R v. Kimber* [1983] 1 W.L.R. 1118 in which the English Court of Appeal effectively applied the principles regarding rape set out by the House of Lords in *R v. Morgan* [1976] A.C. 182 to the crime of indecent assault, stated: "*The onus rests on the prosecution to prove the mental element of the offence which is that the accused did not believe that the complainant was consenting. However, there is no reason why recklessness as to the presence or absence of consent should not also suffice for indecent assault, as for rape.*"

18. In our view, recklessness as to whether the person is consenting to the sexual act is sufficient to prove the mental element in the crime of sexual assault.

The defence of intoxication at the trial

19. An issue in the trial was whether intoxication was relevant to the defence of "honest mistake as to identity". We will return to whether that truly was the defence at issue in the course of this judgment. It is noteworthy that the defence of intoxication was only raised at the last possible moment on behalf of the appellant. It is necessary and appropriate to set out the circumstances in which it arose in the following paragraphs.

20. The trial judge invited counsel for the prosecution and defence to raise any issues with her that they wanted addressed in her charge. Counsel for the prosecution raised a number of issues. He submitted the following in respect of the issue of alcohol: "There is a potential for an issue in relation to drinking to arise. It seems to be linked to [M.X.'s] condition on the day where he describes being dizzy and so on and so forth. It's not a clear-cut issue of intoxication, but insofar as it has been raised, it might be worthwhile to mention to the jury that if they are considering that drink is a factor in it, intoxication does not offer a defence to this alleged offence."

21. Senior counsel for the defence was invited by the prosecution at that point to add anything further. He only raised the issue of corroboration but submitted it was "completely unnecessary given that the defence accepts that the act took place"

22. In the course of his closing, senior counsel for the defence referred to the party that the appellant had attended the night before, the drinks he had and to the fact that he arrived home in a taxi at about 5am. Counsel then stated: "[A]nd then you have to ask yourself, well, given that somebody doesn't ordinarily drink, if they're suddenly in a situation where there's a lot of drink involved, what <u>after effects</u> would that have in terms of that person's state of being the following day?" (<u>Emphasis</u> added)

23. Shortly after that, senior counsel submitted the following to the jury with reference to the appellant's decision to collect the children: "So, on this occasion, dealing with that, if that was the position, you're now talking about the spontaneity of the girls, but [M.X.] is hung over, and another happenstance, because of what happened….." (Emphasis added)

24. Senior counsel then went on to address the alleged sexual assault. He contrasted what is alleged to have happened with the behaviour of a paedophile. He made reference to the lack of evidence that his client was awake at the time of the assault. He referred the jury to the dream world between sleep and wakefulness. He stated: "It's also important to remember that, when it happens, that it's only a matter of seconds and he's withdrawing his hand, and, again, it's that sort of consistent with somebody who's deliberately doing it, or is it somebody who, coming out of sleepfulness, is doing something and then realises that, my goodness, what have I done? This is my daughter, [A]." (Emphasis added)

25. After the end of the closing speech for the defence, the trial judge said she had certain concerns about matters raised in the closing by the defence. Some issues were then raised by both her and the prosecution. At that stage, no issue was raised about the defence of intoxication.

26. The trial judge in the course of her charge to the jury stated as follows:

> *"In relation to the case, the defence is that [M.X.] admits touching, but not intentionally touching his child that way as he made a mistake as to the identity of whom he was touching. So, in relation to the defence that's raised, I would also ask you to bear in mind there's been mention of intoxication. That intoxication is not a defence, all right? There's no suggestion that he was intoxicated going to collect the children, he slept in that morning. Intoxication, ladies and gentlemen, does not arise as a defence for you to consider in the case.*
>
> *So, what you must consider then firstly is that if you find beyond a reasonable doubt that he did so intentionally touch her, you must convict. Or if you find that you have a reasonable doubt as to whether he so intentionally touched her, you must acquit. If you find that he had a mistaken belief as to her identity when he was touching her, you must acquit."*

27. At the end of the charge, counsel for the prosecution made the following requisition:

> "There's -- it's really -- it's not something that the Court didn't touch on, you did actually touch on it, but I'm just going to mention it. It deals with the issue of mistake and it deals with the issue of intoxication. And the only reason that I'm just going to invite the Court, perhaps, and it is a matter for the Court because, I say, you have raised the issue and you've informed the jury about the question of mistake and intoxication, and, in fact, you said intoxication does not arise, but and I think, in fact, you said intoxication does not arise as a defence, which is obviously correct. In page 6 of the memo of the interview… [...] Just above the

middle of the page, Judge, there was the question asked: 'So you went to bed with your daughters, how is it possible that you thought you were asleep with your girlfriend just a short time later?' So this really does -- this is the question which I think the Court has put to the jury as the issue here is mistake. And the answer is: 'I fell asleep, and maybe it's because I was so tired and still drunk.' So, I was going to invite the Court to say, well, if the jury arrive at a conclusion that a mistake was made because of drunkenness, well then that does not offer [M.X.] a defence to this charge against him. This is not a crime of specific intent. And I think the law is clear on the fact that voluntary intoxication does not offer a defence in these circumstances. So that's the only -- as I say, the Court has mentioned it, but I suppose I'm asking the Court to, perhaps, clarify that -- in maybe just more specific terms, because they will read this memo of interview, they will see that it's [M.X.] is putting it in there as a potential factor, and if they find that, well, there was a mistake, and giving [M.X.] -- giving [M.X.] the benefit of the doubt on what he said about that, that, potentially, he was drunk at the time, but still, well if they make that finding that doesn't offer him a defence, Judge. That's my submission, Judge."

28. In reply, junior counsel for the appellant made the following submission:

"Two matters I was going to canvas with the Court, one of them is the intoxication matter which my friend mentioned, and the Court's direction that intoxication wasn't a defence, and that I think the Court said to the jury that there was no suggestion that [M.X] was intoxicated at the time that he went to pick up the children. Now, my recollection is that --

JUDGE: He said he was dizzy --
Counsel: Yes.
JUDGE: -- afterwards?
Counsel: Yes, and he was saying that in the interview --
JUDGE: Hung over.
Counsel: Yes, but I think [prosecution counsel], when cross examining [C], asked her did she have a concern when [M.X.] was going to pick up the children in this motor vehicle, that there was intoxication there, I can't remember the exact formula of words that he used, but certainly he asked was there a concern about [M.X.] going to collect the children whilst drunk, or words to that effect, and [C]'s response was in the affirmative, as far as my recollection is concerned, I don't have a convenient note to hand, but that, I think, was the evidence. And I suppose the position is [M.X.]'s evidence -- or --
JUDGE: She said she had a concern about driving.
Counsel: Yes, and I think that was in response to a question which was specifically directed towards [M.X.]'s state of intoxication, so that was in the picture, and, in fairness, and I'm not placing any heavy reliance on this fact, but it was led by the prosecution by that question, so...

JUDGE: Well --

Counsel: But it is there, but either way, wherever it came from it's in the case from [C]'s evidence, it's also there in terms of [M.X.]'s explanation of his condition on the day, particularly given in his memorandum of interview, and obviously as the Court, I think, quite rightly put to the jury, the defence is one of honest mistake, but it's part of the factual matrix that [M.X.], and the reason he was in the bed asleep was that he was tired and he --

JUDGE: Hung over --

Counsel: -- was…

JUDGE: Hung over.

Counsel: Yes, well he --

JUDGE: Not drunk, he said he was hung over.

Counsel: Well, he said drunk I think in the statement. 'I'm still drunk, you see,' I think was one of the phrases used in the interview with An Garda Síochána. And all of this contributed I think to a --

JUDGE: You see, I have a reluctance about going too far near that interview, --

Counsel: Yes, oh, yes, no, I think --

JUDGE: in the context of the fact he admitted he told lies to the gardaí, so what do you want me to dredge up in that regard, because I have a concern -

Counsel: Yes.

JUDGE: that he admitted he lied to the gardaí, and everyone --

Counsel: Yes, no, no --

JUDGE: -- was careful about that because of the fact of how much do you want to pick up was a lie which wasn't in relation to the act and what happened in that bed.

Counsel: No, I see the Court's point there, and I think the position was that [M.X.]'s senses were dulled, in effect, and he was in a sleepy, drowsy state, which is what had him in the bed in the first place. And just one final point on that, my friend says that sexual assault is not a crime of specific intent. I think, in fact, it is, and I think we have a case there, *R v. Couch*, which I've given to my friend.

JUDGE: An English case?

Counsel: It's an English case, yes.

JUDGE: I'm not -- at this point in time, bearing in mind that yesterday it was accepted that intoxication is not a crime is not a defence, in this instance --

Counsel: Yes.

JUDGE: -- I'm leaving it. I wasn't going to go down the specific intent route because I don't -- the legalese -- as utilized in the closing speeches, let alone anything else. I'm trying to keep this simple in the -- no, hear me out, first before your start interrupting me, the legalese required keep it sample. We're talking about intent to touch someone in a sexual manner. That's quite specific. I am not going into specific and basic

intent, and those crimes and to identify when intoxication is involved, whether it be voluntary or involuntary, I'm dealing with the aspect of intoxication as a defence, it doesn't arise in this instance."

29. The trial judge then gave a recharge on that issue as follows:

> *"Just one or two matters that I should have also referred to you, and I just want to clarify to make sure, in relation to the memos of the interview, you're going and remember, linked in with the evidence of [M.X.] there was mention of being drunk and being dizzy and in relation to various matters and how he was on that day, but, if for example, ladies and gentlemen, you make a finding that the mistake he made was due to intoxication, that's not a defence. Voluntary intoxication is not a defence, and I think we all give words their ordinary meaning when you know about voluntary intoxication, it's not a defence, so you must bear that in mind also. And in relation to my references to the summary of the speeches of counsel, I made reference to Mr Finnegan and I made mention, briefly, to what Mr O'Carroll said, because I was summarising it and I should come to the nub of his submissions to you, which was the mistake made by [M.X.], is his defence, is that the person he was touching was he thought he was touching his girlfriend, that is his defence. And in relation to the honest mistake, ladies and gentlemen, as a defence you've got to assess the surrounding circumstances and use all of those facts that are established in the evidence to assist you in regard as to whether or not that's reliable and credit worthy in the context of your assessment of that and all of the evidence in the case. I just wanted to remind you of that and just clarify that should any queries arise in that regard, okay? And now I'm going to send you to resume your deliberations."*

30. From the foregoing, it can be seen that the defence closed its case on the basis that this was a case where he was hungover, lacking sleep and as a result, in an entirely unintentional manner, engaged in sexual touching with his daughter. This was because he made a mistake believing she was his partner. Counsel for the defence did not in any way object to the manner in which the prosecution suggested that intoxication be dealt with. The defence had also been invited to raise any issue and it did not do so. The issue was only raised by them after the requisition by the prosecution as above. Indeed, in the course of that final submission it can be seen that when the trial judge raised the issue of the lies that were told in the interview, counsel backed away from it and returned to the submission that the appellant's senses were dulled and he was in a sleepy, drowsy state.

Was a defence of intoxication actually raised at the trial?

31. Having regard to the history of the trial proceedings set out above, we have grave concerns that a defence of intoxication was actually raised in this case. That he was drunk at the time of the incident was not raised by the appellant in his evidence in chief. He had stated in his garda interviews that he was drunk, but it was accepted by him at the trial that his version of events as to what occurred in the bedroom at the relevant time was not true. Instead, he maintained at the trial that he was asleep or awakening from sleep when this happened. The reference to him being drunk in cross-examination

has to be seen in the context in which it was raised. The issue of being drunk was stated to be *before* he went to sleep. He did not change his version of how he came to have engaged in the sexual act with his daughter.

32. Of particular importance, the appellant's counsel closed the case without reference to him being intoxicated but used his "hung over" state to explain how he could not have had the intention to sexually assault his daughter. Counsel closed the case in that fashion having declined the invitation to contest the prosecution's pre-charge submission to the trial judge that intoxication provides no defence in the case of sexual assault. Moreover, even after it was raised subsequently at the requisitions stage, counsel for the appellant appeared to move away from the issue of his client being drunk when the contradictions and lies in his interviews with the gardaí were raised by the trial judge. It should be noted that the issue of "sonambulism" or any sleep disorder that the appellant might have had was never raised in the trial.

33. In those circumstances, the issue of the appellant being intoxicated was really one that went towards the reasoning as to why he was in a sleepy state; it was not raised by him that he was actually intoxicated at the time he committed the act. It should also be noted that he did not raise a defence of automatism in any direct manner with the trial judge and has not sought to do so on appeal. His defence was that he had never intended to engage in the sexual act with his daughter. This defence was left to the jury. It had the advantage from the appellant's point of view that the issue of recklessness as to the taking of alcohol was never raised with the jury and there was a high onus on the prosecution to prove that he actually had an intention to sexually assault his daughter *i.e.* that he knew that he was carrying out a sexual assault on his daughter.

34. As was acknowledged in *People v. Cronin (No. 2)* [2006] IESC 9, there has to be some error or oversight of substance which is sufficient to ground an apprehension that a real injustice has occurred before the court should allow a point not taken at trial to be argued on appeal. In *Cronin (No.2)*, it was stated that there had to be an explanation as to why the point was not taken at trial. There has been no explanation as to why the defence of intoxication was conceded as not applying to this type of offence at an earlier stage in the trial but raised after the trial judge's charge.

35. This situation is slightly different from *Cronin (No.2)* because the issue was raised at trial although it was conceded at an earlier stage. The reason why that concession occurred was not explained at the trial or indeed on this appeal. Indeed, in this situation there appears to have been a disconnect between the manner in which the defence was run *i.e.* from the appellant's evidence as to not being fully awake, followed by the careful and thorough closing of the case by senior counsel and the subsequent requisition in respect of the defence of intoxication.

36. We are satisfied that even if there was an oversight or error in charging the jury in respect of intoxication, this was not one of substance in the circumstances of this case. A line of defence was chosen; that he never intended to sexually assault his daughter having thought in his hazy, hung over, half-awake state that he was engaging in a sexual

act with his partner. That defence of mistake was left to the jury. It was not an error of substance to rule out intoxication given that his own case was squarely based upon not being fully awake at the time of the incident.

Should the defence of intoxication have been left to the jury?

37. Notwithstanding our conclusion above, we have decided to address the issue of intoxication to assuage any lingering doubt that there may have been a defence properly open to M.X. that was not put before the jury.

38. At the outset, we should address what was really at issue in this trial.

Mistake as to Identity or Mistake as to Consent?

39. The trial judge left the matter to the jury on the basis that the appellant had to have intended to sexually assault his daughter and not any other person. In the present case, it was conceded by the appellant that A had not consented to this sexual touching. It was also conceded that the act of touching A was an indecent act. The trial judge identified the issue for the jury was whether the prosecution had proved beyond a reasonable doubt that the appellant had not made a mistake as to the identity of the person he was touching. This explains the trial judge's focus on the necessity to intend to sexually assault a particular person, but in strict application of the law that is incorrect. For example, a person who deliberately broke into a house intending to sexually assault X, but mistakenly entered the wrong room and sexually assaulted Y, would still be guilty of sexual assault.

40. Of course, in the present case the appellant's defence was not that he intended to sexually assault C, but instead sexually assault A. His defence was that in his sleepy state he thought was engaging in consensual sexually activity with C, but mistakenly engaged in a sexual act with A, his daughter. A did not consent to that sexual activity. From the aforesaid we are satisfied that mistake as to identity is so closely linked to a mistake as to consent of the complainant as to make the defences indistinguishable. The reason the mistake as to identity is relevant is because it leads to a defence of belief in consent. His alleged mistake as to the identity of the person he was engaged in sexual activity with was relevant to consent, because the implication of what he is saying is that if it was his partner she would have been consenting. On that issue of consent of his partner, we would simply comment that little or no thought seems to have been given at the trial as to whether, even if the appellant thought it was his partner, he would have had a defence in any event; if his partner was asleep when he started touching, how could there have been consent? There was nothing in his evidence to suggest either that she was awake or that he believed she was consenting to his touches.

Intoxication as a defence

41. In *People (DPP) v. Reilly* [2005] 3 I.R. 111, the Court of Criminal Appeal held that voluntary intoxication was no defence to the offence of manslaughter even where such intoxication resulted in a state of automatism. The Court of Criminal Appeal referred to the older Irish case of *People (Attorney General) v. Manning* [1955] 89 I.L.T.R. 155 where it was held that the only effect of a defence related to alcohol in a murder case may be to

reduce it to manslaughter even if it had rendered the accused incapable of knowing what he was doing.

42. In the recent case of *People (DPP) v. Eadon* [2019] IESC 98, the Supreme Court confirmed that, where intoxication was a defence to a crime of specific intent, the jury had to determine whether the intoxication was relevant to the issue of whether the accused *in fact* had the necessary intent to commit the act and not whether the accused had the *capacity* to form the necessary intent. In that case, the Supreme Court held that the trial judge's charge had not been sufficiently clear on the issue. Although the distinction between crimes of specific and basic intent was not at issue in that case, it is nonetheless worth noting, the Supreme Court's (McKechnie J.) statement as to the law as follows:-

> *"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)."*

43. The Court of Criminal Appeal in *DPP v. Reilly* said that the decision in *AG v. Manning* was "*a strong affirmation of the general principle that intoxication is not a defence except in the rare cases where a specific intent is required*".

44. The Court of Criminal Appeal, having been addressed in relation to subsequent developments in the common law world, quoted approvingly from the decision of the House of Lords in *DPP v. Majewski* [1997] AC 443. Given the importance of the dicta relied upon, it is worthwhile citing a lengthy passage from the judgment in *Reilly*:

> *"The case primarily relied upon by the prosecution is Director of Public Prosecutions v. Majewski [1997] AC 443. The basic principle in that case was set out in the speech of Lord Elwin Jones at page 150:-*
>
> > *'If a man of his own volition takes the substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding*

him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent.'

In that case, as in the present case, there had been scientific evidence relating to the possibility of automatism brought about by drugs and alcohol. However, it made a clear distinction between crimes such as murder requiring a specific intent, and crimes such as manslaughter which do not require such a specific intent. The House of Lords in the Majewski decision recognised that this was not a particularly logical distinction and Lord Salmon in his speech at page 157 said:-

'There are many cases in which injuries are caused by pure accident. I have already given examples of such cases: to these could be added injuries inflicted during an epileptic fit, or while sleep walking and in many other ways. No one, I think, would suggest that any such case could give rise to criminal liability.

It is argued on behalf of the appellant that a man who makes a vicious assault may at the material time have been so intoxicated by drink or drugs that he no more knew what he was doing than did any of the persons in the examples I have given and that therefore he too cannot be found guilty of a criminal offence.

To my mind there is a very real distinction between such a case and the examples I have given. A man who by voluntarily taking drink and drugs gets himself into an aggressive state in which he does not know what he is doing and then makes a vicious assault can hardly say with any plausibility that what he did was a pure accident which should render him immune from any criminal liability. Yet this in effect is precisely what counsel for the appellant contents that the learned judge should have told the jury.'

He then continued to comment on the question of the logicality:-

'A number of distinguished academic writers support this contention on the ground of logic. As I understand it, the argument runs like this. Intention, whether special or basic (or whatever fancy name you choose to give it), is still intention. If voluntary intoxication by drink or drugs can, as it admittedly can, negative the special or specific intention necessary for the commission of crimes such as murder and theft, how can you justify in strict logic that it cannot negative a basic intention, e.g. the intention to commit offences such as assault and unlawful wounding? The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic.'

The House of Lords in the Majewski case did not seek to justify its decision on the basis of logic, but on far more pragmatic reasons grounded on public policy. The duty of the Courts to protect the public from harmful actions of others was emphasised, and this is undoubtedly a consideration which ought to be in the minds of any Court which is seeking to do justice between the rights of an accused and the rights of the citizens of the State to be protected from violence. While it is certainly to some degree illogical that a person should be afforded a defence of intoxication to crimes regarding one type of intent but not to crimes requiring another type of intent, surely it is equally illogical that a person should be guilty of a crime if they have consumed some alcohol, and yet should be innocent of the crime if they consume a much greater amount of alcohol. It appears to this Court that it is not possible to determine an issue of this nature based on pure logic.

The question of logicality was also considered in the speech of Lord Edmund Davies in the Majewski case at page 167, where he said:-

'Are the terms of logic, then, so compelling that a man behaving as the Crown witnesses testified the appellant did must be cleared of criminal responsibility?'

As to this, Lawton LJ rightly said (in the Court of Appeal in the same case):-

'Although there was much reforming zeal and activity in the 19th century, Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law has ended, without any parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal.

If such be the inescapable result of the strict application of logic in this branch of the law, it is indeed not surprising that illogicality has long reigned, and the prospect of its dethronement must be regarded as alarming.'"

45. The Court of Criminal Appeal in *Reilly* then discussed the situation in Canada and Australia. In Canada, *Majewski* had repeatedly been followed until the enactment of the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court held that fundamental rights would be infringed if an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence. In Australia, the High Court held that if the evidence of intoxication was sufficient to raise a doubt as to the voluntariness or as to the presence of the requisite intent, there was no logical ground for determining its admissibility upon a distinction between a crime which specifies only the immediate result of the proscribed act and a crime which in addition requires a further result dependent on purpose.

46. With regard to the what was said, especially in the Canadian and Australian cases, about the illogicality of the distinction between a specific and a general or basic intent, the Court of Criminal Appeal held:

> *"It can certainly be argued that it is illogical to have such a distinction or to have what appear to be two levels of mens rea in relation to different types of crimes. However, that distinction, both in theory and in practice, has been present in the common law since before the foundation of this State and has been the basis of numerous decisions, particularly in the realm of unlawful killings and unlawful assaults. If such a distinction is to be removed, that can only be done by the Legislature."*

47. The Court of Criminal Appeal concluded:

> *"As has been pointed out the issues in this case cannot be determined by pure logic. The Majewski decision is undoubtedly illogical in that it could be said that it ignores the question of mens rea, although this is an essential element of manslaughter. It is indeed reasonable to ask whether a person should be punished for an action which he was incapable of preventing, whatever may be the reason for such incapacity. It is equally illogical that a person should escape the consequences of an action which he performed while drunk, while he would be liable for the results of such action had he been less drunk, provided of course that his consumption of alcohol was voluntary. However, whatever may be the logic, the Court is here concerned with the commission of actions of violence by one person against another. It is not sufficient to make decisions on such issues in a purely theoretical manner. The Court must have regard to the rights of an accused person, but it must also have regard to the interest of the public at large who are entitled to be protected from acts of violence. If a person by consuming alcohol induces in himself a situation in which his likelihood to commit acts of violence is increased, particularly to the stage where he commits an act which he would not have committed had he not consumed the alcohol, then surely the Courts would be failing in their obligations to the public if they allowed the cause of his violence, namely the alcohol, to excuse his actions. The reasoning behind the Majewski decision appears to this Court to achieve the balance between the rights of the accused, who would be entitled to be acquitted if the jury found automatism which was, in the words of the trial Judge, "Free standing", as against the rights of the public to ensure that the Applicant will be held liable for actions which were induced by alcohol voluntarily consumed."*

48. The rationale of *Reilly* is powerful. There has been a distinction of crimes of basic and specific intent since before the foundation of the State. That distinction is now, post *Reilly*, even more entrenched within the law of this State. There is a balance being struck between the rights of an accused and the rights of the public to be protected from acts of violence. A person who has voluntarily consumed alcohol and commits an act he would

not have performed if not intoxicated, is responsible for the commission of crimes of violence of basic intent.

49. The next issue is whether sexual assault is a crime of basic intent. In order to assess this issue, it is necessary to look at what is meant by a crime of specific intent. The Court of Criminal Appeal in *Reilly* did not provide any definition of crimes of specific or basic intent but accepted that they existed. In *Majewski*, which of course was relied upon by the Court of Criminal Appeal in Reilly, Lord Simon stated as follows:

> *"the best description of "specific intent" in this sense that I know is contained in the judgment of Fauteux J. in Reg v George (1960) 128 Can CC 289, 301-*
>
> > *'In considering the question of mens rea, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.'"*

50. The UK House of Lords decision in *DPP v. Morgan* [1976] AC 182, established that rape was a crime in which the issue of recklessness had to be assessed in light of whether the accused had an honest, even if unreasonable belief that the complainant was consenting to the act of sexual intercourse. Lord Simon reached his conclusion as to this standard upon which the state of mind of the accused had to be addressed by considering whether rape was a crime of specific or basic intent. He stated at p.216: -

> *"By 'crimes of basic intent' I mean those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus: The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus."*

51. In England and Wales, following *DPP v. Morgan*, the position is that rape is a crime of basic intent. The crime does not involve an intent going beyond the *actus reus*, namely the carrying out of an act of sexual intercourse. There does not appear to be any Irish cases directly on this point with regard to either the offence of rape or the offence of sexual assault. O'Malley in *Sexual Offences*, 2nd Ed., (Thomson Reuters, 2013) at p.82, having quoted from the conclusion in *Reilly* at pp. 121-122 cited above, states:-

> *"It follows, therefore, that voluntary intoxication resulting from the consumption of alcohol or dangerous drugs, even if it produced a state of automatism, would be irrelevant for the purpose of establishing liability for an offence of basic intent such as rape or sexual assault."*

52. Again, at p. 112, O'Malley states: "*Sexual assault, like rape, is a crime of basic intent, which means the accused cannot rely on evidence of self-induced intoxication to negative the necessary mental element.*"

53. O'Malley went on to address the type of situation which arose in *R v. Court* [1989] A.C. 28. This is the case raised at trial and in the appeal by this appellant. In that case, the appellant shop keeper had struck a 12 year old girl who attended the shop 12 times on the buttocks for no apparent reason. His reply to police who questioned why the appellant had done so, he replied "I don't know – buttock fetish". He accepted he had committed an assault but denied it was indecent. His appeal against conviction was unsuccessful. In the course of his speech, Lord Ackner distinguished between assaults which are inherently indecent e.g. removing a woman's clothes against her will and those where the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation. In the latter situation, it was necessary to prove that the accused intended to commit an indecent, as opposed to an ordinary assault. It could be said that this final element may require proof of specific intent. O'Malley at p.122 concluded that "*[h]owever, in many cases this latter element will be so obvious as to not need any specific proof.*"

54. We are satisfied that the facts of the present case do not present the type of equivocal act where the purpose of the appellant's actions has to be examined. To put a hand under a girl's clothing and touch her vagina is an inherently indecent act. Indeed, it was never disputed at the trial that this act was such an inherently indecent one if carried out against the consent of another person. We therefore do not have to decide if the dicta contained in *R v. Court* represents the law in this jurisdiction.

55. In England and Wales, in the case of *R v. Heard* [2008] Q.B. 43 , the Court of Appeal was asked to rule upon self-induced intoxication as a defence to the offence of sexual assault set out under the Sexual Offences Act, 2003. That Act had set out in detail that an intentional touching was required. This raised an issue as to whether it could be said that the new offence of sexual assault was no longer a crime of basic intent.

56. The Court of Appeal of England and Wales referred approvingly to the case of *R v. C* saying in respect of it:

> *"The Defendant had penetrated a child's vagina with his finger when drunk. That, like the present, was a clear case of drunken intent, with possible absence of memory. The decision of this Court, presided over by Lord Woolf CJ, was that indecent assault remained a crime of basic intent for these purposes, at least unless the act was an equivocal one so that the purpose of the defendant had to be examined. We are wholly satisfied that there is no basis for construing the new Sexual Offences Act 2003 as having altered the law so as to make voluntary intoxication available as a defence to the allegation that the defendant intentionally touched the complainant."*

57. For the sake of completeness, we refer to the English case of *R v. Fotheringham* [1988] Crim L.R. 846 where the respondent had been charged with raping a 14 year old babysitter. His defence was that, *inter alia*, he was so drunk at the time of the offence that he thought he was having sexual intercourse with his wife. While the Court of Appeal of England and Wales acknowledged that there was nothing in the case of *DPP v. Morgan* which stated that self-induced intoxication in a case of mistaken identity cannot be a defence, they were "*firmly of the view that mistake, as is consent, being a question of fact cannot be raised as a defence if, as here, it arises from self-induced intoxication.*"

Conclusion

58. Having considered the decision in *Reilly*, we are satisfied that a defence of intoxication is not open to a person who commits a crime of basic intent while intoxicated. A crime of basic intent is one in which the mental element required does not go beyond the *actus reus*. Having reviewed the available authorities from the United Kingdom and considered the views of the leading textbooks in this jurisdiction, we are satisfied, that a crime of sexual assault is in essence, a crime of basic intent. The purpose of the act of sexual assault does not go beyond the act itself. Different considerations may possibly but by no means certainly, apply in those rare cases where a specific intent is required to prove the sexual element where the act is equivocal as to whether it is indecent. No such issue arose on the facts of this case and we are not required to decide that issue and therefore do not do so. We are satisfied that all of the elements required to be proven in respect of the mental element of this appellant were closely related to the *actus reus* or physical act of the commission of the offence. Thus, the alleged sexual assault for which this appellant was tried is a crime of basic intent.

59. Not permitting the appellant in this case to rely upon a defence of intoxication is neither illogical or unfair to him. He voluntarily became intoxicated leading him to get into bed with his daughter, resulting in him, if his defence put forward on this appeal is to be believed, falling asleep and in his drunken, sleepy (or even sleeping) and confused state he carried out a sexual act on his sleeping daughter mistakenly believing her to be his partner. Sleeping people, and in particular sleeping children, have a right to protection from sexual violence. A person who engages in a sexual act with a non-consenting person while intoxicated because of mistake as to consent or identity, is not in a similar situation to the accused in the case of *CC v. Ireland* [2006] 4 I.R. 1. That case, which dealt with strict liability for the offence of unlawful carnal knowledge, was relied upon by the appellant. The Supreme Court was of the view that the accused person was lacking in moral culpability. In the situation of a person who commits a sexual assault as a result of being intoxicated, the moral culpability lies in permitting themselves to be in a situation where the alcohol has loosened restraints on their conduct.

60. For the reasons set out above, we reject the issue raised on appeal concerning the refusal of the trial judge to permit a defence of intoxication to go to the jury.

The Second Issue on Appeal: Cross-examination on the Existence of a Barring Order

61. The appellant's submission under this ground is that the trial judge erred in admitting evidence that the appellant was the subject of a barring order under the Domestic

Violence Act, 2018 arising from a previous incident involving one of his children. This, it was submitted was very damaging evidence which suggested that the appellant was a person of bad character. The evidence had no bearing on the proof of the case against the appellant and was thus more prejudicial than probative.

62. Certain background evidence had been given by the complainant in relation to family circumstances. She had stated that her mother and father had lots of fights and they split up in 2013. She confirmed that when they split up, it was her dad who left the family home. At another point under cross examination, the complainant having been asked about suffering from nightmares, was asked about the night of the 25th July and whether it was fair to say that this was one of the rare occasions when her sleep was disturbed. She replied it was because of what happened with B, the youngest daughter.

63. The appellant had been made the subject of a barring order in February 2013 as a result of an incident in that month in which he slapped the youngest daughter. After that evidence, the matter was discussed with the judge in the absence of the jury. At that point the prosecution and defence both appeared to be in agreement that they would say there was no allegation of sexual assault made against the younger daughter or anything like that. The judge also indicated that she did not want to go down the route that a barring order had been obtained.

64. The complainant's mother was led through her evidence in chief. She confirmed that her relationship with the appellant had ended and that he moved out of the family home. She said they were separated and they were having marital issues. Prosecution counsel then said to her "you don't have to explain that to anybody". She also confirmed the access arrangements between the parties which was about once a month. Her evidence had confirmed that it was made pursuant to a court order.

65. In his evidence in chief, the appellant stated as follows:

> "Q. And then I think around 2013, your relationship between yourself and [your wife] soured?
>
> A. Yes, your honour.
>
> Q. And by agreement you moved out of the house, did you?
>
> A. Yes, your honour."

The clear implication of that evidence was that he had left the home by agreement with his wife.

66. That evidence lead the prosecution counsel, in the absence of the jury, to seek leave to cross-examine the appellant on the basis that he had left the house not by agreement, but pursuant to a barring order. In his submission, the evidence of the appellant was leading the jury to believe there were unfortunate difficulties in the marriage and that by agreement he left the family home which she submitted was far from the truth.

67. The appellant submits that the issue of whether he left the home voluntarily or by compulsion of a barring order was therefore in issue. In the course of the trial, the evidence from the appellant in the absence of the jury was that on 14th February, 2013, when he "went home from my job in the evening my family were no longer at home". He said he rang them, they said that they had a sleepover in their aunt's place. He then went on to say "[a]nd then that morning of February 14 I received a phone call from the gardaí that I have to report to them and that they have my passport. I think even my garda card they have. So, when I went there, they told me I have to move out of the house."

68. The appellant also said that the gardaí did not give him any documentation and he was never made aware at that stage that any orders, such as a barring order had been made in respect of the home. He said he was only made aware of the barring order at a later stage. It appears from the evidence that the interim barring order was not obtained until the 15th February whereas the appellant contends that his evidence supports the view that he left the family home on 14th February.

69. In our view, this contention that he left on 14th February does not bear scrutiny. It seems that it was the morning after the appellant had arrived home that he got the call from the gardaí. As he indicated, it was the 14th February that he arrived home to find his family gone, it was the next day, the 15th February that he left the home. Moreover, when later questioned by the trial judge, he again confirmed that he had been told to move out of the house by the gardaí although he said he was not told that it was because of the incident with his youngest daughter. When asked why, he did say however that he didn't ask why "because I know that I did a mistake with [B]". Importantly, the following exchange took place in cross-examination:

> "Q. Yes. And after that happened, your wife…, obtained an interim barring order to keep you out of the family home; isn't that correct?
>
> A. Yes your honour.
>
> Q. And then a week later that interim order became a full barring order against you; isn't that correct?
>
> A. I think so, your honour, yes.
>
> Q. Yes. And isn't that the reason that you left the family home in February 2013?
>
> A. Yes, your honour.
>
> Q. Yes. It was not by agreement; was it?
>
> A. Yes, your honour."

In the above exchange, he accepted that the reason he left was because of the interim barring order.

70. Most importantly, the evidence establishes that he did not leave the home by agreement with his wife. At a minimum he says that he left because he was told to move out by An Garda Síochána. It is difficult to understand how it can be asserted he left by agreement when in fact he left because the gardaí told him to leave.

71. Counsel asked the trial judge not to admit this evidence. Again on the appeal, counsel strongly objected to the admission of this evidence. It was submitted at trial that it would be explosive and highly prejudicial to his case. Counsel also submitted that it would not be true to say that the coming into existence of the barring order had precipitated his departure because he had already left the home at that time. Despite objections, the trial judge clarified that she was allowing the questions to be asked of him because they correct the record and are relevant to the issue in being concerning his credibility.

72. Following from the ruling of the trial judge, the appellant was cross examined in the presence of the jury. It was put to him that the reason he left the family home was after an interim barring order had been obtained by his wife. It was also confirmed that the reason for the barring order was because of a physical incident in the family home. Counsel for the prosecution agreed that the incident was in no way related to any sexual assault of any kind, nothing of a sexual nature in respect of anybody in the house. It was then stated that subsequent to that, himself and his wife agreed access terms for the three girls. The access that was agreed was supervised access once a month.

73. In the course of her charge, the trial judge reminded the jury that the appellant had given evidence that the parties had separated by agreement and that they had heard that this was corrected and that in relation to the barring order he had seen the children on a once monthly basis of supervised access and that in June 2015, access to them was by agreement once a week on Sundays. The trial judge then said *"[s]o again, in relation to the matter that you have before you, you're dealing with the facts as they are in this instance."*

74. The appellant did not make any requisition on that aspect of the charge to the jury. The appellant however maintained in submissions that there was no correction of the appellant's evidence to be made because it was correct in the first place. Counsel also submitted that that the reference to the barring order and supervised access was excessive and likely to compound the prejudice caused by its introduction into evidence. In written submissions, counsel also submitted that she also failed to charge the jury as to the purpose of the evidence. This left open the possibility that the jury would attach weight to the evidence in question as being probative of the guilt of the appellant in respect of the charge before the court. The complaint about the failure to charge was not addressed further at the oral hearing of the appeal.

75. At the appeal, counsel for the appellant submitted that this had been an inappropriate use of s.1 of the Criminal Justice (Evidence) Act, 1924. Section 1 of that Act states that "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any questions tending to show that he has

committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character, unless –

(i) the proof that he is committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence."

76. In the view of the Court, this was a case where the evidence put before the jury by the appellant was misleading. Regardless of whether the appellant knew of the interim barring order or not, his evidence in the *voir dire* on why he left the family home established beyond reasonable doubt that it was not by agreement. The appellant submitted that the reference to the barring order was excessive but the same if not worse import would have resulted from a direct reference to the fact that he had been told by the gardaí to move out of the family home. This was a matter with which it was appropriate to "correct the record" by allowing the prosecution to cross-examine in respect of it. The appellant had opened himself up to this cross-examination by presenting an incorrect reason as to why or how he left the family home. It was a situation that had been handled with delicacy by counsel for the prosecution in dealing with his own witnesses and required similar delicacy on the part of the appellant and his counsel. The fact that he had not left by agreement but as a result of an incident which resulted in a barring order was an appropriate matter to raise in cross-examination.

77. We are also satisfied that the trial judge addressed the issue with a minimum of fuss, in circumstances where it had already been clarified to the jury that there was no sexual misconduct relating to this barring order. That there was nothing improper in her charge, as evidenced by the fact that counsel did not challenge that aspect of her charge at trial and it was not pursued at the oral hearing.

78. In all the circumstances, we also reject this second ground of appeal.

Conclusion

79. For the reasons set out in this judgment, the Court rejects the two issues that were raised by the appellant in this appeal.

80. Accordingly, the Court therefore dismisses this appeal.