THE COURT OF APPEAL

Ryan P.
Sheehan J
Edwards J.

Appeal Number : 165/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Joseph Heffernan

Appellant

Judgment of the Court delivered on 21st December 2015, by Mr. Justice Edwards

Introduction
1. This is an appeal by the appellant against his conviction for murder following a nine day trial before the Central Criminal Court. It was common case during the trial that on the 7th day of June, 2011 in Cappabeg, Barefield, Ennis he unlawfully caused the death of the deceased, Mr. Eoin Ryan. The main issue in the case centred around whether the appellant's mental state was such that he intended to kill or cause serious injury to some person, such that he should be convicted of murder; or whether by reason of suffering from a mental disorder at the time his responsibility for the act was substantially diminished such that he should be found not guilty of murder but guilty of manslaughter on the ground of diminished responsibility, as provided for in 6 of the Criminal Law (Insanity) Act, 2006.

2. Though the Notice of Appeal lists five grounds of appeal, four of these may be grouped together. Accordingly, the appellant appeals his conviction essentially on two grounds. The first ground, and main ground, is that the trial judge misdirected the jury in various respects with regard to how they should approach the issue of diminished responsibility raised by the defence, and particularly concerning where the burden of proof lay, and concerning what was the required standard of proof, where a defence of diminished responsibility was being relied upon.

3. The second ground is that the trial judge erred in ruling that certain text messages adduced as part of the prosecution case were admissible in evidence as exceptions to the hearsay rule. While this ground was not addressed in oral argument at the appeal hearing, in circumstances where counsel for the appellant indicated he wished to concentrate on the diminished responsibility issues, it was not abandoned. The Court will therefore proceed to deal with the second ground on the basis of the written submissions it has received.

The evidence at trial
4. The evidence adduced at trial has been helpfully and succinctly summarised in the appellant's written submissions, and the Court will, for the most part, adopt that summary in circumstances where no issue is taken with it by the respondent.

5. The facts leading up to the death of the deceased were that on the evening of the 6th June, 2011 and into the early morning of the 7th June, the deceased was drinking with friends in Cruises bar in Ennis. There he met the appellant and they had a brief conversation. Without saying goodbye to his friends the deceased left the bar and then shortly afterwards the appellant left also. A taxi driver described bringing two men to the appellant's house after stopping briefly at a shop on the way. He noted that the deceased's behaviour was somewhat unusual after the journey.

6. At approximately 6am the following morning the Gardaí received a phone call from the appellant stating that he had killed a man, that the devil was in him and that he came on to the appellant and he killed him. Gardaí arrived to find the appellant in a distressed state and he brought them up into his field where he showed them a water barrel containing the remains of the deceased. Upon interview, the appellant accepted that he had killed the deceased but denied intending to kill a person, stating that the devil had taken over the deceased and that it was only after he had beaten the deceased to death that the devil had left him and he had then realised what he had done to the young man. The appellant then asserted that he had spoken to Jesus and that Jesus had told him to ring the Gardaí.

7. The appellant was seen initially by Dr. John O'Mahony, a local consultant psychiatrist, who attended at the Garda station on the same day. He gave evidence that in his view the deceased was delusional, and explained:

> *"When his mood state is informed by the disturbances in his thought, that's what that means, yes. And he believed that he had met and killed the devil. That he was also in contact with Saint Simon of Stylites and Jesus Christ and that also he'd been in contact with his father, who'd been asking him to bring him back to the home."*

8. He also gave evidence that the appellant suffered "perceptional disturbance", stating:

> *"Perceptional disturbances in perception are termed hallucinosis, so that he had heard the devil. He had received communication in the form of speech, all from Saint Simon of Stylites. He advised me also that Jesus Christ had spoken to him that very morning and Jesus had advised him to call the Gardai and tell them that he had killed the devil. He also said that his late father had spoken to him on several occasions since his death, the father's death, and advised me also that he had seen a demon come under the door of the interview room in the Ennis Garda barracks that very morning."*

9. Under cross examination, Dr O'Mahony described the effect on the appellant as follows:

> *"[He] was perplexed, and [he] was at various times anxious and angry, because he believed that he had – or in fact he told me that he believed that he had killed the devil and that he couldn't understand why he was being charged with the killing of a man and felt that he had, in fact, done the world a service by removing the devil. This was his firm belief at the time. I questioned him several times about this. And that is what we call a delusional belief, which is a fixed false belief, out of keeping [with the] patient's or the person's social, cultural educational and religious background."*

10. Finally, Dr. O'Mahony concluded that he was *"firmly of the [belief] that this was true and had no insight into the reason why, indeed, he was being arrested"* and that his *"insight or understanding of it was impaired, was not real."*

11. Later, the appellant was reviewed by Dr. Sally Linehan on behalf of the respondent. Dr. Linehan gave evidence that between her interviews with the appellant, there was *"a discrepancy of more than 10 years in terms of when he reported first having heard voices"*. She also pointed out a discrepancy between how Jesus appeared to him - *"in a bright light"* versus *"he heard Jesus' voice in his head"* – and he had not offered any explanation for this inconsistency.

12. Dr Linehan also gave evidence that he gave inconsistent accounts of his level of drink/drug use during the night and also concerning sexual activity between himself and the deceased. She concluded that:

> *"I found no evidence of formal thought disorder. That's a symptom of a psychotic disorder which is characterised by a loss of the meaningful connections between sequential ideas. I suppose put simply, if somebody has formal thought disorder which is characterised by a loss of the meaningful connections between sequential ideas and their conversation may be difficult to follow. But I found no evidence that Mr. Heffernan was showing signs of that at that time of that interview."*

13. In terms of tests designed to ascertain whether the appellant was "malingering", the jury heard evidence from Dr Linehan that when assessed by a psychologist Dr Coyle, the appellant was found to have an elevated level on the M-Fast test but not on a structured interview, which suggested that he might be exaggerating but not feigning his symptoms. She concluded, inter alia, that he was an *"inconsistent historian"* and that he had *"symptoms of an adjustment disorder characterised by depressive symptoms following the death of his father".* She noted that there were some symptoms that supported a diagnosis of schizophrenia and in some other tests he performed poorly, which was not inconsistent with schizophrenia. However, there were others which did not support such a diagnosis, including the lack of any symptoms of a psychotic illness, or at least none prior to the offence, and that he was unusual in drawing attention to his symptoms. Moreover, there was no evidence of deterioration in his condition after he was taken off anti-psychotic medication.

14. Ultimately, Dr. Linehan expressed the opinion that while the appellant was suffering from a mental disorder within the meaning of the Act, it was not such as would in her opinion render him *"unable to refrain from committing the act",* nor was she satisfied that it was such as would *"substantially diminish his responsibility for the act".* Under cross examination, Dr. Linehan expressed the conclusion that the killing was explicable by intoxication.

15. The defence did not go into evidence.

The main legal issues at trial

16. As stated already, the main issue in the case centred around whether the appellant's mental state was such that he intended to kill or cause serious injury to some person, such that he should be convicted of murder; or whether by reason of suffering from a mental disorder at the time his responsibility for the act was substantially diminished such that he should be found not guilty of murder but guilty of manslaughter on the ground of diminished responsibility.

17. At the close of the prosecution case counsel for the appellant informed the trial judge that while *"I would be 100% within my rights to close on insanity and insanity only",* that *"having reviewed the matter, I am content to submit that the issue of diminished responsibility is the only defence that I would intend to traverse on the insanity side".*

18. However, in light of the opinion expressed by Dr Linehan the trial judge was asked to, and agreed, to also leave to the jury the issue of intoxication as an alternative ground for finding manslaughter.

19. Counsel for the defence had flagged to the trial judge during discussions concerning what issues ought to be left to the jury that, although it was accepted that the case of *The People (Director of Public Prosecutions) v Smyth* [2010] 3 I.R. 688 was against him, he wished to make the case on behalf of his client that when dealing with issues of insanity and, more particularly, diminished responsibility, under the Act of 2006, the burden of proof still rested with the prosecution and the appellant needed only to raise a doubt. Before the trial judge proceeded to charge the jury counsel for the appellant addressed him again briefly to remind him of this, stating:

> "MR GAGEBY: Your lordship might recollect that I had indicated that I wished to keep open the issue as to the standard of proof which your lordship probably has to charge the jury on
>
> JUDGE: Indeed, indeed.
>
> MR GAGEBY: in relation to the diminished responsibility aspect.
>
> JUDGE: Correct.
>
> MR GAGEBY: And while I am aware that the authority of Smith is against me, for practical purposes I wish to keep the argument open, although I know that the Court has to rule against me insofar as I make the case that the legal burden cast under the act of 2006 ought to be to raise a reasonable doubt. The authorities are against me in that respect.
>
> JUDGE: Against you. Thank you, Mr Gageby.
>
> MR GAGEBY: And so I assume your lordship rules against me.
>
> JUDGE: I am ruling I'm against you.
>
> MR GAGEBY: Yes. Thank you, my lord.
>
> JUDGE: I will charge them on the basis that on that issue then you must prove on the balance of probabilities
>
> MR GAGEBY: May it please the Court.
>
> JUDGE: the fact in issue. Thank you."

The judge's charge on diminished responsibility
20. In the course of his charge the trial judge gave the jury the standard directions with respect to the burden and standard of proof generally in a criminal trial, namely that the burden of proof rests on the prosecution and that the standard of proof is proof beyond reasonable doubt. However, he then went on to deal with these issues in the context of the defence having raised an issue either of insanity or of diminished responsibility. In doing so, he further stated:

> *Okay. But the position is different as to proof in relation to insanity or diminished responsibility. When that issue of diminished responsibility arises it's the responsibility of the defence to prove as a probability that there was such diminished responsibility. So, I'll put it to you this way. Let's suppose you were in a case where the fact of whether or not the accused had killed the deceased was in debate, so to speak. The prosecution would have to prove obviously beyond a reasonable doubt that the accused killed the deceased. The prosecution would have to go on then and prove the mental element of the crime. If no question of diminished responsibility had arisen you would be dealing with issues pertaining to the accused's state of mind on the basis of the totality of evidence, including, for example, in this case an issue of intoxication as a potential defence, the prosecution of course having the responsibility at all times to negative the proposition that by reason of the consumption of alcohol he was incapable of forming the relevant state of mind at the time. In a sense, if I could put it to you this way, I don't know how well I'm explaining it, so far so straightforward. On all of that the prosecution would have the burden of proof to the standard to which I have referred. But when insanity, indeed, or diminished responsibility is raised it's a different situation. The prosecution or the defence rather must prove that that arises on the balance of probabilities. So, if you like, the way I would suggest to you, and you have to, if you like, start somewhere, is to if I could suggest it, to decide the case, so to speak, to a certain point bearing in mind the standard of proof and the prosecution's responsibility, and only when you turn to the issue and only in relation to the issue of the diminished responsibility does the question of where of the defence having a burden of proof arises. So, a different standard pertains where that topic is concerned but, if you like, on all other topics the responsibility remains with the prosecution. Now, in relation to yes. All right, ladies and gentlemen. Now, so that is I hope of some assistance to you in terms of how you approach the issue. Different principles in relation to diminished responsibility. The defence has to prove that as a probability the accused was suffering that any verdict on that basis ought to be one on the balance of probabilities."*

The burden and standard of proof in cases of diminished responsibility
21. Counsel on behalf of the appellant submitted that the passage just quoted amounted to a material misdirection on the part of the trial judge in two essential respects. First, in suggesting that the appellant was required to discharge a legal burden of proof in order to avail of the defence of diminished responsibility and, secondly, in suggesting that the standard of proof to be satisfied by the appellant was proof on the balance of probabilities.

22. While this case is only concerned with the statutory defence of diminished responsibility as created by s. 6 of the Act of 2006 the arguments advanced, particularly on behalf of the appellant, extensively refer to and to some extent link the provisions of s. 5 of the same Act relating to insanity. It is therefore convenient at this point to set out the terms of both s. 5 and s. 6, respectively, of the Act of 2006.

23. Section 5 of the Act of 2006 provides:

> "5.— (1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that—
>
> (a) the accused person was suffering at the time from a mental disorder, and
>
> (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—
>
> (i) did not know the nature and quality of the act, or
>
> (ii) did not know that what he or she was doing was wrong, or
>
> (iii) was unable to refrain from committing the act,
>
> the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.
>
> (2) If the court, having considered any report submitted to it in accordance with subsection (3) and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under section 13 .
>
> (3) (a) For the purposes of subsection (2), if the court considers that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and may be in need of in-patient care or treatment in a designated centre, the court may commit that person to a specified designated centre for a period of not more than 14 days and direct that during such period he or she be examined by an approved medical officer at that centre.
>
> (b) The court may, on application to it in that behalf by any party and, if it considers it appropriate to do so, after consultation with an approved medical officer, extend the period of committal under this subsection, but the period or the aggregate of the periods for which an accused person may be committed under this subsection shall not exceed 6 months.
>
> (c) Within the period of committal authorised by the court under this subsection the approved medical officer

concerned shall report to the court on whether in his or her opinion the accused person committed under paragraph (a) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre.

(4) Where on a trial for murder the accused contends—

(a) that at the time of the alleged offence he or she was suffering from a mental disorder such that he or she ought to be found not guilty by reason of insanity, or

(b) that at that time he or she was suffering from a mental disorder specified in section 6 (1)(c),

the court shall allow the prosecution to adduce evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence."

24. Section 6 of the Act of 2006 then provides:

"6.— (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person—

(a) did the act alleged,

(b) was at the time suffering from a mental disorder, and

(c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,

the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

(2) Subject to section 5 (4), where a person is tried for the offence specified in subsection (1), it shall be for the defence to establish that the person is, by virtue of this section, not liable to be convicted of that offence.

(3) A woman found guilty of infanticide may be dealt with in accordance with subsection (1)."

Submissions on behalf of the appellant

25. Counsel for the appellant has contended that s.6 of the Act of 2006 imposes an evidential burden only on a person in the position of his client. It was submitted that the section was engaged once the appellant could point to some evidence in support of his contention that his responsibility for the killing was substantially diminished by reason of the fact that he was suffering from a mental disorder at the material time. It was further contended that in order to successfully avail of the defence, all that the appellant had to do, once he could point to some evidence in support of it, was to raise a reasonable doubt as the killing being murder on account of the possibility that his responsibility for it may have been substantially diminished by reason of the fact that he was suffering from a mental disorder at the material time.

26. Counsel for the appellant submitted that it was misdirection for the trial judge to have told the jury, as he did, that in order to establish a defence of diminished responsibility the appellant was required to discharge a burden of proof. It was further submitted that to have also told the jury, as the trial judge did, that the appellant was required to establish the ingredients of the defence on the balance of probabilities amounted to a further misdirection.

27. Counsel for the appellant acknowledges that a relatively recent decision of the Court of Criminal Appeal contains a strong obiter dictum that leans against his position. In *The People (Director of Public Prosecutions) v. Smyth* [2010] 3 I.R. 688 that court was concerned with construing s. 29(2)(a) of the Misuse of Drugs Act, 1977 which has created an exception to the general rule as to the burden of proof in drug possession cases and has reversed on to a defendant the burden of proving that the second element of possession, namely mental awareness of physical control of the drugs in question, did not exist. In construing this provision Charleton J, giving judgment for the Court of Criminal Appeal, referred several times to the insanity defence both at common law and as restated in s. 5 of the Act of 2006, and to the new statutory defence of diminished responsibility as provided for in s. 6 of the Act of 2006, and appeared to indicate a view that the "special defences" of insanity and diminished responsibility, respectively, cast a legal burden of proof on a defendant to prove the existence at the material time of the state of affairs contended for, be that insanity or diminished responsibility, and to do so on the balance of probabilities.

28. In *The People (Director of Public Prosecutions) v. Smyth* Charleton J had stated, *inter alia:*

"[14] A burden of proof on the accused, as set out in s. 29 of the Misuse of Drugs Act 1977, as amended, is not unique as to its form in criminal statutes. In making these comments, however, the court confines itself to that specific provision. It is not, for instance, making any wider declaration as to how any particular reversed burden of proof is to be approached. In particular, it makes no comment on the historical feature of the insanity defence whereby it has always been the law that those who plead the defence must prove clearly that they did not know the nature and quality of their act, or that they did not know that what they were doing was morally wrong or that they could not control their actions. The re-statement of the law in s. 4 of the Criminal Law (Insanity) Act 2006 as to insanity, and the introduction of the defence of diminished responsibility in s. 6 of that Act, carries with it a burden of proof on the defence which is discharged on the balance of probabilities. The prosecution carries the entire burden of proving the commission of the crime. Sound reasons of policy may indicate that a defence should be proven by the accused as a probability. One reason arises in relation to the special defence of insanity. A person who is found to have committed an intentional killing, for instance, and who might make out a plea of insanity on the basis of merely raising a reasonable doubt would, if not insane, be in danger of being discharged almost immediately by the Central Mental Hospital. A decision to reverse on to the accused an element of the proof of the commission of a crime that might normally be expected to be borne by the prosecution, or to set up a special defence such as insanity, is a matter of legislative competence. It is for the

> Oireachtas, in each case, to set the parameters of proof in a criminal charge; to decide whether there should be a reversed burden of proof in respect of any element of a crime; and to indicate expressly, or by implication, the nature of the burden of proof that is to be discharged by the defence."

29. Later on in the same judgment Charleton J referred again to the burden arising where a defendant seeks to rely on insanity or diminished responsibility, and added, *inter alia:*

> ` "[20] The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. …"

30. Counsel for the appellant approaches his argument in the present case from first principles, starting with the principle that the presumption of innocence requires that it is for the prosecution to prove the guilt of the accused person and the accused must prove nothing. This principle, as every law student learns, was characterised by Viscount Sankey in *Woolmington v DPP* [1935] A.C. 462 as the "golden thread" running through the criminal law of England. The same principle was acknowledged as being part of Irish law by Murnaghan J in *McGowan v Carville* [1960] I.R. 330. Unless expressly provided for in law, there is no obligation on an accused to prove his defence. He need only raise a doubt as to his guilt. Consistent with this, Walsh J stated in the Supreme Court in *The People (Attorney General) v Quinn* [1965] IR 366 that:

> "When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury."

31. It has been submitted on behalf of the appellant that at common law, the onus was on the defendant to prove that he was insane. This was because there is a presumption of sanity. In *M'Naghten's case* (1843) 10 Cl. & Fin. 200 the rules for the defence of insanity were set out, the second of which was that it is for the accused to prove insanity on the balance of probabilities.

32. This was accepted by the Irish Courts in *People v Messitt* [1972] I.R. 204, although it was allowed that where an accused was unrepresented and there was evidence from which a defence of insanity could arise, the duty was on the prosecution to adduce such evidence. Moreover, Fennelly J, giving judgment in the Supreme Court *in D.P.P. v. Redmond* [2006] 3 I.R. 188 noted, *obiter dictum*, that:

> "It is true that the Court of Criminal Appeal, in *The People (Attorney General) v. Messitt* [1972] I.R. 204 stated, *per* Kenny J. at p. 213, that it is "the duty of the prosecution to give any evidence which they have on which the jury might reasonably come to the conclusion that the accused was insane". This statement was made in the context of an acknowledgement that "the onus of establishing insanity… rests on the accused". This proposition has been long established. The second of the M'Naghten Rules is that:-
>
> > 'Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved.'
>
> "It has always been the law that a person is presumed to be sane and responsible for his acts and, by corollary, that any person asserting the contrary must prove it. This matter is fully discussed in McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell, Dublin, 2000) at para. 14.15, where the authors state:-
>
> > 'It is clear from rule 2 of the M'Naughten Rules that the judges intended to put the onus of proving insanity on the accused, and there is a long line of authority supporting this conclusion.' "

33. In *The People (Director of Public Prosecutions) v. O'Mahony* [1985] I.R. 517, which predated the enactment of the Act of 2006 by more than a decade, it was held by the Supreme Court that diminished responsibility did not exist in Irish law at common law or otherwise. Finlay C.J., with whose judgment the other four members of the Supreme Court agreed, stated:

> "Under our law a person found not guilty by reason of insanity can only be detained so long as the court is satisfied that his mental condition persists in a form and to the extent that his detention in an appropriate institution isnecessary for the protection of himself or of others. He is not, in the view of our law, a criminal nor has he been convicted of a crime. A person charged with murder, on the other hand, in our law, and convicted of manslaughter may be sentenced to a period of detention in prison whether long or short and must be released at the termination of that sentence. He is, of course, branded as a criminal.
>
> It seems to me impossible that, having regard to these considerations, there could exist side by side with what is now the law in this country concerning a defence of insanity a defence of diminished responsibility such as has been contended for in this case which would, in effect, leave to an accused person and his advisers the choice as to whether to seek to have him branded as a criminal or whether to seek on the same facts the more humane and, in a sense, lenient decision, that he was not guilty of a crime by reason of insanity."

34. Counsel for the appellant has submitted that while rules of such longstanding acceptance as the M'Naghten Rules are difficult to displace, it should be borne in mind that at the time of *M'Naghten's case* the sentence for murder was usually death. Following the enactment of the Offences against the Person Act, 1861, there was then a mandatory death sentence for murder, although in practice this was often commuted to life imprisonment. Following the enactment in this jurisdiction of the Criminal Justice Act 1964 the death penalty for murder was restricted to cases of capital murder as defined in that Act, and in practice was invariably commuted to life imprisonment in such cases (on the understanding that the defendant would not be considered for release on licence

until he had served a specified minimum term in prison, typically 40 years in prison). Since the Criminal Justice Act, 1990, the death penalty has been abolished in Ireland for all forms of murder and has been replaced with a mandatory life sentence.

35. Counsel for appellant has submitted that the reasoning behind the reverse onus in insanity cases is that it is difficult, if not impossible, to prove that someone was not insane. It was further submitted that this reason in itself, while no doubt a strong basis for placing an evidential burden on an accused, is not sufficient to require him to prove that he was insane at the time, and to prove it on the balance of probabilities. It was further contended that at least part of the justification for the second McNaghten rule is that, in circumstances where an accused person is faced with the alternatives of death or detention in a mental health hospital, there was a very strong incentive for someone to feign insanity and so a high standard of proof was needed.

36. Counsel for the appellant has posed the question as to whether this latter justification still persists in circumstances where the difference in sentences is between life imprisonment and detention in the Central Mental Hospital for an indefinite period i.e. until a successful review is carried out in accordance with section 13 of the 2006 Act.

37. This Court has also been asked to note that there has not been unanimity across the common law world in relation whether an onus of proving insanity is properly to be reversed on to a defendant. In *Davis v. United States* - 160 U.S. 469 (1895) the U.S. Supreme Court held that a doubt as to a person's mental capacity would be sufficient to acquit of murder.

38. Turning then to address the relevant provisions of the Act of 2006, counsel for the appellant has submitted that the first issue to be determined by this Court is whether the Act of 2006 was intended to codify or make minor changes to the law on insanity, or whether it was intended to create an entirely new statutory basis for the "special verdict" of not guilty by reason of insanity. The long title to the Act states:

> "An Act to amend the law relating to the trial and detention of persons suffering from mental disorders who are charged with offences or found not guilty by reason of insanity, to amend the law relating to unfitness to plead and the special verdict, to provide for the committal of such persons to designated centres and for the independent review of the detention of such persons and, for those purposes, to provide for the establishment of a body to be known as An Bord Athbhreithnithe Meabhair-Shláinte (An Dli Coiriúil), or, in the English language, the Mental Health (Criminal Law) Review Board, to repeal the Trial of Lunatics Act, 1883, to amend the Infanticide Act, 1949, and to provide for related matters."

39. It has been submitted that on one reading of the long title thereto, the Act of 2006 is intended to modernise and revamp the law relating to the trial and detention of persons suffering from mental disorders. Counsel for the appellant contended that it is beyond question that at least part of the intention was to allow for diminished responsibility as a separate defence or possibly as part of the insanity defence. It was submitted that, curiously, s. 5 of the Act of 2006 sets out the defence of insanity but does not state that the accused is to bear an onus of proof in that regard, or that the standard to which he or she must prove his or her insanity is proof on the balance of probabilities. In fact, the wording refers to a court or jury which is required to return a special verdict to the effect that the accused person is not guilty by reason of insanity where, on the basis of the evidence of a consultant psychiatrist, it *"finds that"* the accused person was at the time suffering from a mental disorder, and the mental disorder was such that he or she ought not to be held responsible for the act alleged by reason of the fact that he or she did not know the nature and quality of the act, or did not know that what he or she was doing was wrong, or was unable to refrain from committing the act.

40. Thus, the appellant argues, on one reading at least, it leaves it open to the jury to decide, based on the consultant's evidence, whether it "finds" that the accused was insane or not. It was submitted that in circumstances where the legislation does not expressly shift the onus of proof onto the accused, it must be interpreted as not having adopting the common law insanity rules which do shift the onus of proof onto the accused . Alternatively, even if the onus does shift onto the accused in accordance with the common law principle, it is far from clear that there is still the requirement to prove it to the standard of the balance of probabilities, and a jury is entitled to hear the evidence and make their own mind up as to whether they find the person insane or not, having regard to the onus on the prosecution to prove all elements of the case beyond reasonable doubt.

41. Turning then to the statutory defence of diminished responsibility created by s.6 of the Act of 2006, the appellant submits that the legislation is unclear in its meaning. While s. 6(2) of the Act of 2006 does say that it is *"for the defence to establish"* that the accused is not liable to be convicted of the offence of murder by reason of diminished responsibility, this is subject to the provision in s.5(4) of the Act of 2006 permitting the prosecution to call evidence tending to prove the opposite. It was submitted that there are no clear words suggesting that the legal onus of proof shifts to the accused, simply that it is up to the defence "to establish" that the accused is not liable to be convicted.

42. Counsel for the appellant contends that, on one reading of the s. 6 of the Act of 2006, it goes further than simply requiring the defence to establish that there should not be a conviction by reason of section 6(1). That is to say, the defence must establish the three ingredients of diminished responsibility, namely that the accused:

> *(a) did the act alleged,*
>
> *(b) was at the time suffering from a mental disorder, and*
>
> *(c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,.*

43. It was submitted that on this construction, the onus is on the defence to establish that the accused killed the deceased, a matter otherwise invariably to be proven by the prosecution. Likewise, the onus of proving that he or she was not insane would also rest on the accused.

44. It was submitted that the Court must interpret the provision in controversy strictly but in a constitutional manner. Applying the double construction rule expounded in *East Donegal Co-Operative v Attorney General* [1970] 1 I.R. 317 the Court is obliged, where there are two possible interpretations of a statute, one of which is constitutionally permissible and the other of which is not, to adopt the constitutionally permissible interpretation. The appellant argues that the constitutionality of a provision that shifts the burden of proof in a criminal case on to the accused must be regarded as doubtful, and reserves his right to challenge the constitutionality of the provisions in controversy if necessary.

45. However, it was submitted that a constitutional challenge is in fact unnecessary because the section can be given a strict and constitutionally permissible interpretation by construing it as merely imposing an evidential burden on the accused to establish the possibility of diminished responsibility, while at the same time leaving the legal burden on the prosecution to prove that he or she did

the act, was not insane, was not suffering a mental disorder and/or that such mental disorder did not diminish the accused's responsibility for the act.

46. In support of this argument the Court's attention was drawn *to O'Leary v Attorney General* [1995] 1 I.R. 254, in which the Supreme Court was being asked to condemn s. 24 of the Offences Against the State Act, 1939 as infringing the constitutional right to trial in due course of law, and in particular the presumption of innocence, by placing upon an accused the burden of disproving his guilt. The impugned section provides:

> "24.— On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such a person was a member of the said organisation at the time alleged in the said charge"

47. In holding that the provision at issue, properly construed, was capable of a constitutionally permissible interpretation, the Supreme Court held, at p. 265 that:

> "In the opinion of the Court, the section permits no more than the following: if an incriminating document is proved to be in the possession of a person (and that is all that the Court has to consider in this case because actual possession of the documents was proved and, indeed, admitted by the accused) that shall, without more, be evidence until the contrary is proved that such person was a member of an unlawful organisation. It is clear that such possession is to amount to evidence only; it is not to be taken as proof and so the probative value of the possession of such a document might be shaken in many ways: by cross-examination; by pointing to the mental capacity of the accused or the circumstances by which he came to be in possession of the document, to give some examples. The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage."

48. Counsel for the appellant has argued that while an analogous approach can be taken in this case, it is only possible if the Court adopts the construction of s. 6 of the Act of 2006 that his client contends for.

49. It was further submitted on behalf of the appellant that although there is a presumption that a person intended the natural and probable consequences of his action, it still remains on the prosecution to show beyond reasonable doubt that this has not been rebutted. The trial judge's direction must be considered in that context. The prosecution cannot merely rely on this presumption to negative any possibility of diminished responsibility. Absent clear words to suggest that the burden of proof shifts to the accused, or that the presumption of innocence does not apply in the special circumstances of diminished responsibility, the prosecution still bear the onus of proving their case beyond reasonable doubt and that includes negativing any evidence adduced by the accused which suggests the possibility of diminished responsibility.

50. Counsel for the appellant submits that in this case, there was clear evidence from which a jury could decide that the defence had been established. The trial judge needed do no more than simply instruct them that they had to determine whether the medical evidence had "established" diminished responsibility, based on matters put in issue by the defence, and having regard to the fact that the prosecution still bore the onus of proof of the guilt of the accused. However, his direction that the onus shifted onto the appellant to prove diminished responsibility was arguably incorrect in the absence of clear wording in s. 6 to suggest that a legal burden of proving diminished responsibility had in fact shifted onto the appellant, and in any event had the potential to confuse the jury in circumstances where all medical evidence and other evidence suggesting diminished responsibility was adduced by the prosecution.

Submissions on behalf of the respondent

51. In response to the arguments advanced on behalf of the appellant, counsel for the respondent has referred to Blacks Law Dictionary (10th edition) which defines the word "establish" as follows:

> "1. To settle, make, or fix firmly,….2. To make or form; to bring about or into existence … 3. To prove; to convince."
>
> Further, it defines "prove" as follows: -
>
> "To establish or make certain; to establish the truth (of a fact or hypothesis) by satisfactory evidence."

52. It was submitted that using the ordinary meaning of the word "establish", and also the word as defined by Blacks Law Dictionary, s. 6 of the Act of 2006 can only mean that an accused person bears the onus, by the introduction of satisfactory evidence, of proving to a jury that he was, at the time of the homicide, suffering from a mental disorder which diminished substantially his responsibility for the act of killing and such evidence would permit a jury to find a person not guilty of murder but guilty of manslaughter on the ground of diminished responsibility. It was submitted that the section reverses the burden of proof on the issue, so that the onus of proving a mental disorder which establishes diminished responsibility such as would permit a jury to return a verdict of manslaughter in the case of an unlawful killing rests with an accused. Moreover, the burden shifted is a legal burden rather than an evidential burden, and therefore it requires to be discharged on the balance of probabilities.

53. Counsel for the respondent also relies upon the judgment of Charleton J in *The People (Director of Public Prosecutions) v. Smyth* as supporting his case. He has particularly drawn this Court's attention to Charleton J's remarks (at paragraphs 15 to 17 of the judgment) concerning the nature and operation of a burden of proof, where he states:

> "[15] How the burden of proof is borne depends upon the substantive law. At a criminal trial, the burden of proof is borne by the prosecution in respect of every issue; except on those issues on which the burden of proof is cast on the accused by statute. This burden is not to be confused with the burden of adducing evidence. Criminal trials would be chaotic were the accused entitled to run any potential defence which might be hypothetically open on the facts of the prosecution case. The accused must engage with the evidence. Where the defence of the accused to a murder charge is that he was defending himself, or that he was provoked, or that he was acting in an automatous state, he carries the burden of adducing evidence on those issues in order to allow that defence to be argued by defence counsel in a closing submission to the jury. As it was put by Devlin J. in Hill v. Baxter [1958] 1 Q.B. 277 at p. 284:-
>
> > "It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober,

or not sleepwalking or not in a trance or black out."

> [16] Consequently, there must be some evidence to which the accused can point whereby a particular defence to a crime becomes open. This is not a legal burden of proof; it is merely the burden of adducing sufficient evidence to allow a defence to be argued in closing and then included as part of the relevant legal directions in the charge of the trial judge.
>
> [17] A legal burden of proof is different. This places upon the party bearing that legal burden the obligation to prove the issue that he is required to prove. The standard of proof may vary. As already mentioned, policy reasons have dictated that the defences of insanity and diminished responsibility should be clearly proven by the accused. For these defences, the burden of proof is for the accused to show that he has discharged the burden of proof by showing, as a probability, that he acted within the terms of one or other of those defences. The defence of insanity, as with other defences, is not, however, part of the elements of proof borne by the prosecution in establishing the crime. It is not incumbent on the prosecution to prove that in killing the deceased that the accused was not insane. It is for the accused to raise that defence and to prove it."

54. It was submitted that the appellant was tried in accordance with law and retained the presumption of innocence for the duration of his trial. The onus of proving the murder beyond reasonable doubt rested firmly with the prosecution. There was no issue as to responsibility for the killing and it was agreed and accepted that the accused had killed the deceased. The only issue was whether the appellant came within s. 6 of the Act of 2006 and at the time of the killing he was suffering from a mental disorder that would permit the jury to return a verdict of guilty of manslaughter on the ground of diminished responsibility. The Appellant did not call any evidence in his defence but, as is his right, sought to adduce evidence of diminished responsibility by means of cross-examination and relying on the medical opinion evidence called on behalf of the prosecution.

55. The jury rejected the appellants contention and returned a majority verdict of guilty of murder by 11 to 1 on the 9th day of the trial. The issue was resolved on the facts of the case and it was submitted that the trial judge did not err in his charge to the jury in his definition of diminished responsibility or in his summation of the facts. Rather, it was submitted, the jury rejected the appellant's argument on a factual basis.

The Court's Analysis and Decision
56. Having considered the submissions, both written and oral, presented by both sides on the matters in controversy this Court has concluded that the appellant's contentions are not well founded, and that the construction of s. 6 of the Act of 2006 contended for by the respondent is the correct one.

57. The starting point is Viscount Sankey's "golden thread". What the Lord Chancellor actually said in *Woolmington v DPP* [1935] A.C. 462 was as follows:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Two points require to be made in relation to this quotation.

58. The first is that the Law Chancellor's focus was on the burden of proving *"the prisoner's guilt".*

59. The second is that the Lord Chancellor expressly qualified his remarks, stating that they were *"subject to what I have already said as to the defence of insanity and subject also to any statutory exception".*

60. What the Lord Chancellor had already said about the defence of insanity was as follows:

> *"M'Naughton's case* stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughton's case* the onus is definitely and exceptionally placed upon the accused to establish such a defence. See *Rex v. Oliver Smith* (1910) 6 Cr App R 19 , where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. See also Archbold, 29th Edition. (1934) 18, 874 , It is not necessary to refer to *M'Naughton's case* again in this judgment, for it has nothing to do with it."

61. The requirement that the prosecution must prove the guilt of an accused is inextricably bound up with the presumption of innocence. In a foreword written to *"The Presumption of Innocence and Irish Criminal Law – Whittling the Golden Thread"* by Claire Hamilton (Irish academic Press, 2007) Hardiman J describes the presumption of innocence as having an almost totemic status in our system of justice, stating "[i]t is the foundation of the rule that guilt must be established beyond reasonable doubt, and that the onus of proof normally rests on the prosecution. It is not a mere shibboleth: in the ringing words of O'Dalaigh C.J. in *Attorney General v. O'Callaghan* [1966] I.R.501, the Courts owe more than verbal respect 'to the principle that punishment begins after conviction and that every man is deemed to be innocent until tried and duly found guilty'."

62. Accordingly, the well recognised general rule is that the prosecution bears the burden of proof on every issue in a criminal case. While exceptions to that general rule are possible, they must be expressly created by statute. That having been said it has long been acknowledged that an "exceptional exception", so to speak, exists at common law in respect of the defence of insanity where the burden is on the person who alleges that he was insane at the time of committing the relevant offence to prove to the satisfaction of the jury, his lack of criminal responsibility.

63. Ignoring momentarily the implications of s. 5 of the Act of 2006, this burden was traditionally been discharged by proving, on the balance of probabilities, that at the material time the accused was suffering from a disease of the mind that prevented him (or her) from (a) knowing the nature and quality of his (or her) act, or (b) from knowing that the act was wrong. These represent, in précis, the requirements demanded by the M'Naghten Rules which according to their traditional interpretation in the English common law only

covered insane delusions. However, following *Doyle v Wicklow Co Council* [1974] I.R.55 a third possible basis for establishing insanity, namely volitional insanity, otherwise sometimes referred to as "irresistible impulse", was recognised. Thus, on one view of it, the Irish Courts added to the M'Naghten Rules so as create another basis for establishing insanity in addition to them. The alternative view, though it is something of a nice distinction, and at a practical level amounts to the same thing, is that the Irish Courts by-passed the M'Naghten Rules altogether and created a separate insanity defence at Irish common law operating instead of them.

64. Regardless of which view is taken, it is clear that the common law insanity exception, whether of the original English or modified Irish variety, to the general rule that the prosecution bears the burden of proof on every issue in a criminal case, , is "exceptional" in itself in not having been expressly created by statute.

65. The Act of 2006 is a domestic statute and as such falls to be construed according to the conventional canons or principles governing the interpretation of such statutes. These are for the most part either expressly set out, or otherwise reflected, in the Interpretation Acts 1937 to 2005 and in the jurisprudence of the Superior Courts applying them. They may be summarized as follows. Where a provision is clear on its face it must be given its natural and ordinary meaning. However, where a provision is obscure or ambiguous, or a literal meaning would lead to absurdity, one of two different approaches may be required depending on the nature of the provision at issue. If the provision under scrutiny imposes a penal or other sanction, then it must be interpreted strictly and in favour of the person affected. If, however, the provision does not impose a penal or other sanction then it may be given a purposive or teleological interpretation so as to reflect the intention of the legislature, where that intention can be ascertained from the Act as a whole. Moreover, where there are two possible interpretations of a statute, one of which is constitutionally permissible and the other of which is not, the Court is required to adopt the constitutionally permissible interpretation.

66. In seeking to construe s. 6 of the Act of 2006 this Court has considered the Act of 2006 as a whole, and the place of s. 6 dealing with diminished responsibility within the scheme of the Act. Given its direct connection to, and interrelationship with, s. 5 of the Act of 2006, dealing with insanity, it has also been necessary to consider the place of s. 5 within the scheme of the Act, and further its significance in terms of the common law rules on insanity.

67. It may be convenient to start with the long title of the Act, previously recited at paragraph 38 above. It is expressed to be directed to four objectives. These are: (i) to amend the law relating to the trial and detention of persons suffering from mental disorders who are charged with offences or found not guilty by reason of insanity, (ii) to amend the law relating to unfitness to plead and the special verdict, (iii) to provide for the committal of such persons to designated centres and for the independent review of the detention of such persons and, for those purposes, to provide for the establishment of a body to be known as An Bord Athbhreithnithe Meabhair-Shláinte (An Dli Coiriúil), or, in the English language, the Mental Health (Criminal Law) Review Board, and (iv) to repeal the Trial of Lunatics Act, 1883, to amend the Infanticide Act, 1949, and to provide for related matters. These objectives though separately expressed are all inter related, and the modifications provided for are far reaching.

68. The "law" referred to must in this Court's view be the common law of Ireland and accordingly embrace the expanded basis for claiming insanity recognised in *Doyle v Wicklow Co Council,* namely volitional insanity in addition to insanity based on insane delusions

69. The appellant raises an interesting question as to whether the changes effected by Act of 2006 create a wholly new statutory defence of insanity in place of the former common law defence of insanity, or merely modified the common law defence of insanity albeit significantly. He contends that if it is the former, it cannot be readily inferred that the Oireachtas automatically adopted as still valid the policy considerations underpinning the reverse onus in relation to the burden of proof that applies in the case of the common law defence of insanity. His argument is that, if the common law defence of insanity is in effect being supplanted and replaced by a new statutory defence of insanity, then the replacement provisions in the Act of 2006 must strictly construed, and absent express words to the contrary, must be regarded as imposing no more than an evidential burden of proof on an accused, one that may be discharged by the raising of a reasonable doubt on the issue of whether the accused was suffering at the time from a mental disorder such that he or she did not know the nature and quality of his or her act, or did not know that what he or she was doing was wrong, or was unable to refrain from committing the act. However, if the changes effected merely modified the common law defence of insanity that case is much more difficult to make and sustain, though by no means impossible.

70. It is perhaps of some significance that the long title to the Act of 2006, in terms of the first of it's stated objectives, evinces an intention to "amend" the law, rather than replace it or to substitute a new law.

71. Amongst the changes to the full insanity defence are some putative changes to definitions. At Irish common law, as modified by Doyle *v Wicklow Co Council*, it was necessary to establish that at the time of the act the accused was labouring under *a defect of reason from disease of the mind* with one of three specified consequences. However, disease of the mind was undefined and potentially embraced more than recognised mental illness but the extent to which it might do so was uncertain. As Prof Finbarr McAuley commented in his work entitled *"Insanity, Psychiatry and Criminal Responsibility"* (Round Hall, 1993) at p. 63:

> "The issue was whether the accused's mental faculties were impaired by illness not whether he was suffering from a recognized mental illness. Any pathological condition which interferes with the accused's reasoning powers in the appropriate way is therefore a 'disease of the mind' in the relevant sense, including purely physical diseases or states that are only of incidental concern to psychiatrists, such as arteriosclerosis (as in *R.v Kemp* [1957] 1 Q.B.399) ; epilepsy (as in *R v Bratty* [1963] A.C. 386); diabetes (as in *R. v Quick* [1973] Q.B. 910 and somnambulism (as in *R v Burgess* [1991] 2 WLR 1206)"

72. Following the enactment of s.5 of the Act of 2006 what must now be established is that the accused was suffering from *a mental disorder*, defined in s.1 of that Act as including "*mental illness, mental disability, dementia or any disease of the mind"* but not including intoxication. It is clear that "mental disorder" in the Act of 2006 is broader in its scope than "mental disorder" as defined in the Mental Health Act 2001. However, while the categories of conditions qualifying as a mental disorder for the purposes of the Act of 2006 might appear superficially to have been broadened beyond what was covered at common law, it can be strongly argued that "mental illness", "mental disability" and "dementia" are all embraced already by the generic or residual category of "disease of the mind". At most therefore the new definition somewhat clarifies the position with respect to the three sub-categories mentioned, but little advances the position in other respects. It is a further problem is that neither "mental illness", nor "mental disability" and nor "dementia" is in turn defined. Moreover, while it is probably beyond argument that "mental illness" must include such mental illnesses as are recognised in either the current version of the Diagnostic and Statistical Manual of the American Psychiatric Association, (currently DSM V), alternatively in the current version of the World Health Organisation's International Classification of Diseases, (currently ICD 10), it is unclear whether the term could apply more extensively e.g., mental illnesses as recognised or understood in traditional Chinese medicine. The requirement that the jury should hear evidence relating to the accused's medical condition from a "consultant psychiatrist" as defined in s.2 of the Mental Health Act 2001 renders it perhaps unlikely that recourse would often be had to some non-mainstream and non-western definition of mental illness, or for that matter "disease of the mind", but these possibilities

do not appear to be excluded. A "consultant psychiatrist" as so defined means "a consultant psychiatrist who is employed by a health board or by an approved centre or a person whose name is entered on the division of psychiatry or the division of child and adolescent psychiatry of the Register of Medical Specialists maintained by the Medical Council in Ireland".

73. Accordingly, it seems to this Court that notwithstanding the enactment of s.5 of the Act of 2006 there is little substantive change to the common law position in so as it concerns definition of the pathology to be demonstrated as having existed at the time of the act in order to successfully rely upon the defence.

74. S. 5 of the Act of 2006 further requires that where the accused person was suffering at the time of the act from a mental disorder, that mental disorder should have been such that he or she (i) did not know the nature and quality of the act, or (ii) did not know that what he or she was doing was wrong, or (iii) was unable to refrain from committing the act. These required consequences of the mental disorder do not appear to be very substantively different from the required consequences of the defect of reason from disease of the mind that had to be demonstrated at common law in order to avail of the insanity defence, namely that the accused was so affected as not to know the nature and quality of the act that he was committing; or if he did know it, that he did not know that what he was doing was wrong; or as to be prevented from exercising a free volition as to whether he should or should not do the act. However, the Court notes that Genevieve Coonan and Brian Foley argue in their work entitled *The Judge's Charge in Criminal Trial* (Round Hall, 2008) that the requirement of being "unable to refrain", being unique to Ireland, has to be interpreted as requiring a *total loss* of self control because of the interaction between s. 5 and s.6 of the Act of 2006. S. 6 of the Act of 2006 allows a person to rely on the defence of diminished responsibility where "the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act". Otherwise the changes to the Irish common law position concerning the ingredients necessary to sustain a defence of insanity appear to be modest.

75. It seems to this Court to be a matter of some importance that s. 5 of the Act of 2006 does not deal with the burden and standard of proof to be borne by a party seeking to avail of the defence of insanity. As the parties to the present litigation have pointed out in their submissions the sole requirement of the section in that regard is that the court (in the case of the District Court or the Special Criminal Court) or, in any other case, the jury, *"finds"* that that the accused person committed the act alleged and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, *"finds"* the existence of one of the three specified consequences.

76. The mere requirement that there should be these "findings" is utterly unhelpful in terms of whether there is a presumptive starting position, either in favour of innocence or sanity, and in terms where the burden of proof lies, in terms of the nature and quality of any such burden, and in terms of the standard of proof to be met in discharge of that burden. The Court will return to these very pertinent issues presently.

77. However, before doing so, it is appropriate to continue with and conclude our review of the substance of the changes wrought by the Act of 2006 in terms of the defence of insanity. A further important change is to the wording of the special verdict, and the repeal of Trial of Lunatics Act 1883 (the Act of 1883), s. 2 of which had provided for the special verdict of "guilty but insane". Section 5(1) of the Act of 2006 creates a new verdict of "not guilty by reason of insanity", and in effect restores the position to that which had in fact been provided for Criminal Lunatics Act of 1800 which had created a special verdict of "not guilty on the ground of insanity". For those who may be interested the historical, and somewhat illogical, reason for the change to the special verdict as provided for in the Act of 1883, which was made at the behest of Queen Victoria, is well described in Walker on *Crime and Insanity in England,* (Edinburgh 1968).

78. In the view of the Court the change to the special verdict is one more of form than of substance. It remains a "special" verdict. It is special in the sense that in both formulations it was and is an acquittal, but not an unconditional acquittal entitling the defendant to unconditional discharge. On the contrary, under the old formulation the recipient of such a verdict was required to be detained until the government's pleasure was made known, and in effect until comparatively recently that meant indefinite confinement in a institution housing the criminally insane such as the Central Mental Hospital. In more recent years, following the decision of the Supreme Court in *Gallagher v The Central Mental Hospital (No 2)* [1996] 3 IR 1 a person subject to the old (pre Act of 2006) special verdict could be so detained only for so long as the necessity justifying it continued to exist. A recipient of the new special verdict under the Act of 2006 falls to be dealt with in accordance with s.5(2) of that Act which requires that if the court, having considered relevant reports and evidence, is satisfied that the person concerned is suffering from a mental disorder (within the meaning of the Mental Health Act 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under s.13. Section 13 of the Act of 2006 provides for periodic reviews and determination of the question of whether or not a patient found not guilty by reason of insanity is still in need of in-patient treatment in a designated centre.

79. The Act of 2006, in s. 6 thereof, indisputably introduces a wholly new limited statutory defence based on diminished responsibility, and for which there was no provision at common law. The possibility of availing of this new limited statutory defence is confined to persons facing trial for murder, and if successfully availed of it operates to reduce what would otherwise be murder to manslaughter. The Court will consider more specifically the terms of s. 6 of the Act of 2006 at a later point in this judgment. However, at this point it is sufficient to note that this defence has not been enacted to operate in splendid isolation and unconnected to the defence of insanity. As already pointed out the terms of s.5(4) of the Act of 2006 provide that where an accused is contending that he should be found guilty of manslaughter on the ground of diminished responsibility, the prosecution may adduce evidence tending to prove that he should instead be found not guilty by reason of insanity; or vice versa. This Court has previously had occasion to consider the operation of s. 5(4) of the Act of 2006 in the case of *The People (Director of Public Prosecutions) v Henry* [2015] IECA 219 (unreported, Court of Appeal, 1st of May 2015) to which further reference will be made later in this judgment.

80. More generally, the remainder of the Act of 2006

81. All of that representing the background to, and the scheme of, the Act of 2006 the Court is left in the position of having to determine, in so far as it can, whether it was the intention of the legislature to continue with, the exceptional rules as to the burden and standard of proof in respect of insanity that existed at common law, or to discard them such that insanity, post the enactment of the Act of 2006, is to be treated no differently to other defences such as automatism, duress or self defence, where the accused is required only to raise a reasonable doubt as to circumstances of exculpation.

82. It has been widely argued in academic commentary (e.g., Jones, *"Insanity, automatism and the burden of proof on an accused"* (1995) 111 LQR 475), and it has been accepted in the jurisprudence of the courts in certain other jurisdictions (e.g. in Canada in *R v Chaulk* [1990] 3 S.C.R 1303), that the common law rules as to the burden and standard of proof in relation to the defence of insanity are anomalous and, being difficult to reconcile with the presumption of innocence, are difficult to justify.

83. However, this Court considers that it would be a mistake to rush to a judgment, as we are in effect being invited to do by the appellant, that the Oireachtas, in the absence of express wording evincing an intention on their part to continue with the anomalous historical approach, intended to discard it. At the very least before arriving at such a judgment it is necessary to consider the known public policy considerations underpinning the reversal of the burden at common law; to consider whether those considerations have, or could have, continued validity; and to consider whether there is any evidence to suggest an intention on the part of the legislature to reject them as obsolete and to effect the sort of radical changes that the appellant contends were effected.

84. The Court is faced with an immediate difficulty which arises in that regard in that, obscured by the mists of time, those policy considerations have become somewhat indistinct.

85. The appellant has sought to make the case that the common law rules are anachronistic in 2015*, inter alia*, because he contends that the justification for them is in part bound up with the prevalence of the death penalty at the time of M'Naghten's case, and that that situation no longer obtains. This argument, in so far as it goes, is based upon a concern about the possible feigning of insanity by accused persons, particularly where the alternative is the gallows. The suggestion is that imposing a persuasive burden on an accused with respect to the issue of his insanity serves as a bulwark to prevent sane persons escaping criminal liability on the basis of tenuous insanity pleas. Moreover, it is said, the harsher effects of imposing such a burden are tempered by setting the standard at proof on the balance of probabilities, which standard a truly insane accused will have little difficulty in meeting. While this argument is superficially attractive there appears to be little enough evidence to suggest that it was a dominant factor in the historical decision to cast the persuasive burden on an accused.

86. The clearest hint as to the actual policy considerations underpinning the common law position is to be found in the questions posed by the House of Lords to the judiciary on the 19th of June 1843, and the answers thereto, that gave rise to what are now called the M'Naghten Rules.

87. O'Hanlon, in his article entitled *"Not Guilty Because of Insanity"* 1968 Irish Jurist 3(1) 61-77 succinctly sets the scene:

> "M'Naghten on the 20th January, 1843, shot Edward Drummond, private secretary of Sir Robert Peel, Prime Minister, in the back as he walked up Whitehall. When put on trial he claimed that he believed he was subject to persecution by the Tory Party and that his life was thereby endangered. He thereupon shot Drummond, mistaking him for Peel.
>
> The verdict in *M'Naghten's case*, "Not guilty on the ground of insanity" provoked so much dissatisfaction that in the same year the House of Lords summoned the Judges to answer a series of questions as to the law relating to insanity. The Judges protested against being required to declare the law otherwise than by the traditional method of judicial decision with reference to the facts of a particular case, but attended nonetheless before the House of Lords on the 19th June, 1843, to give their answers.
>
> The questions were five in number. The first four were concerned with the general issue of insanity as a factor excusing an accused person from criminal responsibility, and the last question was concerned with the admissibility of certain types of medical evidence in relation to insanity."

88. For the purposes of the exercise the Court is presently engaged in it is sufficient to refer to questions 2 & 3, and the single combined answer given to those questions:

> Q. 2— "What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example) and insanity is set up as a defence?
>
> Q. 3— "In what terms ought the question be left to the jury as to the prisoner's state of mind at the time when the act was committed?
>
> A. 2 & 3**.— "The jury ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction;" ...** (this Court's emphasis) … "and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely if ever leading to any mistake with the jury is not, we conceive, so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

89. It will seen from their Lordships answers that their focus was upon the presumption of sanity, and the need for a person claiming to be insane to clearly rebut that presumption by proving the contrary to the jury's satisfaction. While the M'Naghten Rules leave unresolved the precise nature of the burden imposed on an accused who seeks to establish a defence of insanity there appears to be little doubt that what was contemplated was a burden of persuasion, rather than an evidential burden in the strict sense. As Jones *(op cit)* has pointed out, in *R. v. Stokes*, (1848) 3 C and K 183, a case which arose just five years after *R. v M'Naghten*, Rolfe B. directed a jury in the following terms (at p.188):

> "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The onus rests on him; and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict; for every man must be presumed to be responsible for his acts till the contrary is clearly shown."

This is not an evidential burden which is being described, and the only live issue seems to have been the quantum of the persuasive

burden.

90. Jones *(op cit)* makes the interesting observation that it seems improbable that the judges in the *M'Naghten* case intended to lay down a special rule for insanity, and that they were merely applying to insanity what they understood to be a general rule. Prior to the celebrated decision in *Woolmington v DPP* the view was widely taken that the burden of proof in respect of all general defences rested upon the accused. The *Woolmington* doctrine radically changed all of that and established that in a criminal case there is a single issue of guilt, the persuasive burden of which should rest on the prosecution. The accused should not carry the risk of non-persuasion not only in regard to constituent elements of the crime, but also in connection with any defensive issue that he raises. However, as previously pointed out, the *Woolmington* doctrine was expressly not extended to insanity by Viscount Sankey.

91. The preponderance of academic writing suggests that the thinking behind the imposition of a persuasive burden in cases of insanity is that it is next to impossible for the prosecution to prove sanity. Indeed, as Jones *(op cit)* has commented, even in *R. v. Chaulk* the persuasive onus on the accused did in fact survive the constitutional scrutiny of the Canadian Supreme Court. Of the four judges who concluded that there was a conflict with the presumption of innocence, three were prepared to say that the imposition of the legal burden on insanity could be justified as a reasonable and demonstrably justifiable limitation under s. 1 of the *Canadian Charter of Rights and Freedoms*. The justification advanced by the Chief Justice for this was the practical impossibility for the prosecution of proving the sanity or disproving the insanity of the accused beyond a reasonable doubt. The nature of such an onus was variously described as "impossibly onerous"; "tremendous difficulty"; "nearly impossible"; "impossible"; "virtually impossible"; next to impossible"; and "unworkable".

92. Whether the public policy considerations underpinning the common laws rules as to the burden and standard of proof in insanity cases, are based on a concern about sane persons escaping criminal liability on the basis of tenuous insanity pleas, or upon the great difficulty in proving a person's sanity to the standard of beyond reasonable doubt, it seems to this Court that there is nothing in the Act of 2006 to suggest that the Oireachtas had arrived at the view that such legitimate considerations no longer obtain or that they ought to be rejected as obsolete.

93. In those circumstances the Court considers that Oireachtas has left unchanged the pre-existing common law rules as to the burden and standard of proof in insanity cases, and that the correct characterisation of the effect of s. 5 of the Act of 2006 is that it does not create a wholly new statutory defence of insanity in place of the former common law defence of insanity, but rather that it has merely modified the common law defence of insanity.

94. At this point it is appropriate to return to s. 6 of the Act of 2006 which undoubtedly does create a wholly new statutory partial defence to murder, namely that of diminished responsibility. That having been said, the new partial defence is not a stand alone defence and it has to be viewed in its place within the scheme of the Act of 2006. It is directly linked to s. 5 in several ways. First, the concept of "mental disorder" which appears in both s.5 and s. 6 is a shared and common one. Secondly, to successfully avail of the defence of diminished responsibility an accused must establish, *inter alia*, *that "the mental disorder was not such as to justify finding him or her not guilty by reason of insanity".* Thus, the entitlement to avail of diminished responsibility is therefore made directly referable to, and must be measured against, the requirements for establishing insanity. In addition, of course, it must be further established that *"the mental disorder … was such as to diminish substantially his or her responsibility for the act."* There is then the further linkage provided for in s.5(4) discussed earlier in this judgment.

95. In this Court's view the linkages identified are absolutely critical in terms of the burden and standard of proof applicable to diminished responsibility. Given the linkages between s. 5 and s.6 it could not be the case that the Oireachtas could have intended that different burdens and standards of proof could apply in the case of the insanity defence, and the partial defence of diminished responsibility. To impose different burdens and/or standards would make no sense, and would be either unworkable or give rise to absurdity in certain instances. Accordingly, when s. 6(2) of the Act of 2006 states that "it shall be for the defence **to establish**" that the accused is not liable to be convicted of murder, it is, in our view, clear beyond peradventure that this means that the accused bears the burden of persuasion in respect of his entitlement to avail of the partial defence, and that it is a burden of persuasion to the same standard as would apply if he was relying on the defence of insanity, namely proof on the balance of probabilities.

96. For these reasons the Court is not disposed to uphold the appellant's first and main ground of appeal.

The admission of the text messages

97. The deceased's mobile phone was located at the scene and was subjected to forensic analysis. That analysis had revealed that in the early hours of the morning on which he died two texts had been sent from that mobile phone.

98. The first, was recorded by the phone's internal clock as having been sent at 03.40, and sent to certain friends of the deceased, read:

> *"If i die, i died changing a tyre sumwhere random. Tel my parents i love them. If i die. But i mite not. GREAT"*

99. The second text message, sent later that morning to another one of the deceased's friends, read:

> *"I will talk to you TMO letter, Ross is my man, not T cunt"*

100. The prosecution sought to introduce both of these text messages in evidence, not just as real evidence, but also with a view to relying on the contents of the said texts as testimonial evidence.

101. At the commencement of day 2 of the trial counsel for the appellant objected to the proposed admission of the contents of these texts before the jury, contending that they constituted inadmissible hearsay. It was contended that as such their proposed admission was objectionable per se, but it was particularly objectionable in circumstances where the prosecution were intent on inviting the jury to infer that the deceased was the author of those texts, and also that a particular significant should be attached to them, in circumstances where the deceased could clearly never be called as a witness or made amenable to cross examination concerning what those texts meant or what he had intended by them, assuming that he was indeed the author, a matter in respect of which there was no evidence.

102. Counsel for the prosecution sought to argue that the text messages in question were properly admissible as an exception to the hearsay rule, in that, he submitted, they formed part of the res gestae and as such could be admitted as evidence of the state of mind of the deceased at the time that they were sent.

103. In support of this contention, counsel for the prosecution sought to place the texts in context with reference to the evidence already adduced, and still yet to be adduced, on behalf of the prosecution.

104. Speaking of the first text, he said:

> *"The text cannot be seen in isolation. And firstly I think the Court needs to know a little more about what the rest of the evidence is going to be so that it can see just how relevant it is. Now, the Court will have already seen from the photographs that were proved on Friday that there is blood on the front - at the photographs number 16 and 17 there is blood on the front bumper of the jeep, the jeep which has been established to have been owned by the accused man. And the blood appears quite clearly around 16 and 17. The photograph at number 18, I will just let the Court see that -- number 16 is from a little bit further back, the tyre looking slightly deflated, seventeen being the blood close up, but 18 is also a relevant photograph. That is the close up of a flat tyre with some wheel studs missing; that suggests some attempt to engage with the removal of it. And photograph number 20 is a close-up view of a ratchet with blood staining. Now, that ratchet is certainly one of the weapons used to kill Eoin Ryan, because his blood is on it. And that was found in the boot of that Isuzu jeep. And furthermore, when the Court comes to hear about it, the mobile phone of Eoin Ryan is found in the yard as well. When the forensic scientist conducted her examinations in this case, she has found Eoin Ryan's DNA, blood -- DNA from Eoin Ryan on the blood staining on that ratchet that I've shown that is there. It's also referred to as a socket wrench variously during the course of the interviews. But she also swabbed the jeep, and the selected -- she selected a swab from the driver's side bumper near the wheel arch, and that contained Eoin Ryan's DNA. So his blood was also on the front of the jeep. So there is an astonishing relevance. There is a prescience, in fact, about what is in the text, the contents of the text, because it says, "If I die, I died changing a tyre somewhere random. Tell my parents I love them if I die, but I might not. Great." There's an astonishing prescience, even though the timing of that is at actually 3.40 in the morning, and the time on that clock is wrong, there will be evidence about that. And there's also a very particular connection, because the Court will see the rather strange word "Great" written at the end of that text message. But the evidence of the witness, Jennifer Culligan, will be that among the young people themselves in that area "Great" was a word that they would use themselves, among themselves to exaggerate a point that they might be making. So it was -- it is therefore extraordinarily attached to communications between Eoin Ryan and the girls, and Jennifer Culligan, who says that that word "Great" is a kind of joke between themselves, or as amongst themselves, and that they would use it on occasion.*
>
> *But there's a further relevance to the evidence, and that is the contents of the admissions and memos made by the accused. Firstly, when interviewed at the scene, appearing at page 266 of the book of evidence, there's a notebook entry from Garda Donagh Walshe in which the accused man said to him, referring to the deceased, "He was stuck for a place to stay last night. I wouldn't see no man stuck. But he made a pass at me, and I'm no queer." Then later he is asked to account for his -- for the death of this young man, and if I just pick portions of the interviews, page 147, the version of events given, he was asked how this had happened, about the fifth question down: Question: "Did he stop anywhere?" Answer: "I don't know. We got out anyway. He started saying stuff like 'I want to go to bed.' And I came out to the kitchen. He was there, he had changed. The devil came out in him. He came at me. He did not have any bottom clothes on. I'm not queer or anything. I can see his face, fire in his eyes. He kept coming at me. I thought he was going to kill me." Question: "What happened?" Answer: "I pushed him back. I opened the door and pushed him out and closed the door. He kicked the door. I opened the door and told him to leave me alone, to go away." Question: "What did the man do?" Answer: "He kept coming. I was just looking at him. I keep all the tools in the kitchen. I picked up a crowbar and hit him. I hit him a couple of times. It's all a blur. I should never have gone to town. I'm truly sorry for it." Question: "When you last hit him on the head, where was he?" Answer: "He was outside. He had fallen. He was laughing up at me." And that really is the account that is given by the deceased -- or the accused. Later on, when he is asked any sort of questions about the jeep, he purports not to remember, because it appears at page 151, he is asked about the jeep: Question: "Did you ask the young man to help you change the wheel?" And he purports not to remember. "I can't remember that." He says. And he also then cannot remember anything about the jeep when he is about whether the jeep had a puncture or anything like that. Was it a jeep or a car. And he is specifically asked about the contents of this text message at page 184, the text message was read to him at the top of page 184, and he was asked by Detective Garda Fahey, "What does that mean? Who was changing the tyre?" And he says, "I don't know nothing about it." Question: "Eoin Ryan was afraid he was going to die, but he sent a text." Answer: "The devil sent the text. The devil knows everything." Question: "How do you know?" Answer: "The devil came out of him. How else could he have sent it?" So again, it is purporting not to know anything about the tyre, despite the fact that the blood of Eoin Ryan is on the front bumper of that particular tyre."*

105. Counsel for the prosecution made clear that the Director was contending that certainly the first text was indicative of fear and of an apprehension of death, or of an imminent assault, on the part of the deceased at the material time. It was submitted that this, viewed in the context of the explicit reference to the changing of a wheel, and the circumstantial evidence rehearsed by counsel, was relevant and potentially probative. There was no specific submission as to the supposed relevance or probative value (if any) of the second text.

106. The trial judge initially deferred ruling on the matter, because he stated that he wished to hear further evidence. He later gave the following ruling at the commencement of day 4 of the trial:

> *" …I'm against you, Mr Gageby, having heard the evidence to date. It seems to me that what was in the text, given its timing especially and given what I have seen pertaining to the case thus far, is relevant and part of the res gestae. Of course it can be excluded notwithstanding that as being more prejudicial than probative, but I think communications between the two of them during the night after they returned to the accused' house are of probative value to the extent of outweighing any prejudicial value."*

107. Counsel for the appellant complains that the trial judge's ruling was incorrect and that the evidence ought not to have been admitted. He disputes that they properly came within the *res gestae* exception relied upon, contending in that regard that evidence must only be permitted to go before a jury on the basis of coming within the scope of that exception where there is no possibility of concoction. He submitted it was impossible to say that where there was no direct evidence of who sent the texts in question or in what circumstances they were sent.

108. It was further submitted that even if they did come within the exception relied upon, the judge ought to have exercised his discretion to exclude them in circumstances where the motivation for, and meaning of, the contents of the text messages was unclear and no more than a matter of speculation. It was contended that the rule of evidence which constitutes the *res gestae* exception to the hearsay rule must be applied with a great degree of caution. Indeed, there must be no possibility of an alternative

explanation other than that the evidence represents a true reflection of the deceased's state of mind. It was submitted that in the absence of direct evidence of the making of the statement by the deceased and the circumstances of same, the prejudicial effect of the evidence significantly outweighed any potential probative value that it could have and that it should not have been admitted in those circumstances.

109. In response, counsel for the respondent has submitted it was a matter within the discretion of the trial to admit or not to admit the impugned evidence and that the trial judge having exercised his discretion within jurisdiction, his ruling ought to be upheld.

110. In this Court's view there was clearly a very strong basis for inference on the evidence before the Court that the texts at issue had in fact been sent by the deceased, and that they were not concocted. Accordingly, the Court considers that the trial judge was correct to the extent that he regarded the evidence in question as being capable of being admitted as part of the *res gestae*. As to the further issue concerning whether the trial judge ought nevertheless to have excluded them on the basis that they were potentially more prejudicial than probative, this Court can find no justification for interfering with the trial judge's decision to actually admit the evidence. The trial judge was best placed to consider whether in fact the evidence was more prejudicial than probative. He had heard, and was in a position to weigh and evaluate, all of the evidence adduced with a view to making such a determination. He approached the issue with considerable care, declining to rule when initially asked to do so, preferring instead to await the further evidence that had been flagged but which had not yet been adduced, before arriving at any such determination. It is clear that having weighed and assessed the evidence he arrived at the view that the evidence was probative, and that it was more probative than prejudicial. In the circumstances this Court agrees with counsel for the respondent that in circumstances where the trial judge, acting within jurisdiction, made a ruling in the proper exercise of his judicial discretion, that ruling should not be interfered with.

111. In the circumstances the Court is not disposed to uphold the appellant's second ground of complaint.

112. The appeal against conviction is therefore dismissed.