THE COURT OF APPEAL

Record Number: 18/2022

Bill Number: 89/2019

Kennedy J.

Burns J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

ALAN WARD

APPELLANT

Judgment of the Court delivered on the 27th day of June 2024 by Ms. Justice Ní Raifeartaigh

Introduction

1. This is an appeal against conviction. The appellant was convicted of three counts following a jury trial, namely murder, threat to kill (contrary to section 5 of the Non-Fatal Offences Against the Person Act, 1997), and attempted assault. The primary issue on appeal is the interaction between the rule that a witness may not comment on the "ultimate issue" falling for decision by a jury and the opinions of the prosecution and defence psychiatrists with regard to the interaction between mental disorder and intoxication, and their impact on the appellant's mind at the time of the killing.

2. Other issues also arising are the judge's treatment of the issue of intoxication in his charge to the jury; comments made by the prosecution in the closing speech about the appellant's self-report to the psychiatrists of having endured a violent childhood; a ruling that the defence could not put a particular question to a garda officer about a statement the appellant had made during interview; and the refusal of the prosecution to call two witnesses who had made statements but were not included in the Book of Evidence.

3. There was also a ground of appeal relating to the admissibility of a portion of a psychologist's report (Ground 2) but this was withdrawn at the oral hearing of the appeal and is not dealt with in this judgment.

4. Section 6 of the Criminal Law (Insanity) Act, 2006 provides:

> "(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."

5. Mental disorder is treated thus: “"mental disorder" includes mental illness, mental disability, dementia or any disease of the mind *but does not include intoxication*” (emphasis added).

Factual background and the evidence at the trial

6. The appellant was married to the deceased, Catherine Ward, for 23 years and had been abusive and violent towards his wife during the marriage. He also had a long history of alcohol abuse. Mrs. Ward had left with the children on a number of occasions during the marriage. In 2017 the appellant had a stroke which left him with certain impairments including of his ability to communicate.

7. On the 1st March 2019, the appellant fatally stabbed his wife upstairs in their family home. On the night in question, she was heard by her sons screaming after she ran up the stairs followed by the appellant. One of their sons saw the appellant standing over the body in the immediate aftermath of what had happened, holding a knife. The appellant then attempted to slash and lunge at one of his sons with the knife and made threats to kill him.

8. He told gardaí at the scene that his wife had hit him and that he *“grabbed my knife and I said to her if she did it again, I’d hit her with it.”* He then said that he was sorry that

he had stabbed her, that he hoped she was not dead and that he did not "mean" to do it. Admissions were also made at subsequent formal garda interview. During interview the appellant also said "*That's not me*" or "*it's not me*" with regard to his stabbing and killing of his wife.

9. At the trial, the appellant accepted that he had stabbed his wife and relied primarily on the defence of diminished responsibility. It was argued in the alternative that he may not have formed the requisite intent to be guilty of murder due to intoxication. There was limited evidence of intoxication. The experts (as we shall see) agreed that the effect of intoxication upon the appellant would have been greater than upon someone who did not have his acquired brain injury. They were also agreed that the appellant suffered from a mental disorder. The important subject of disagreement between the experts was whether the mental disorder or the intoxication were operating on his mind at the time of the stabbing.

10. A neighbour with whom the appellant and the deceased got on well gave evidence that on the 16th January 2019, the appellant told her he was distressed and at one point said to her "*You lovely woman but brain telling me to stab you*". On the same date, according to the medical notes as reported by Dr. O'Connell, he had been taken by ambulance to A&E and said he wanted to hurt himself and made stabbing motions to his own chest; and expressed a fear of hurting others namely his wife and three sons.

The first issue: Expert Evidence and the "ultimate issue"

11. We will deal in the first instance with the issue which featured most prominently during the appeal. This arises from Ground 6 of the Notice of Appeal, which says:

> "The learned Trial Judge erred in law in allowing the prosecution to adduce the opinion evidence of Dr. Smith on the ultimate issue for determination by the jury as

to whether diminished responsibility should reduce the crime from murder to manslaughter."

The issue as it was dealt with at the trial

12. During the trial, before expert evidence was adduced in front of the jury, legal argument took place as to whether certain passages in the report of Dr. Smith, the prosecution expert, could be given in evidence before the jury. The passages in question were:

> *"16.5.8 Based on the evidence available to me, it is my opinion that Mr Ward was suffering from a non-traumatic acquired brain injury at the time of the offence charged, however in my view his actions at the material time were better explained by acute intoxication with alcohol and hypnotic medication.*
>
> *16.5.9 I base this opinion on evidence that Mr Ward had been physically violent towards his deceased wife preceding his acquired brain injury during arguments while intoxicated with alcohol and "tablets" (29th September 2002).*
>
> *16.5.10 Additionally, I note from the Statement of Evidence to be given by his son Mr Daniel Ward that he reported overhearing his parents argue immediately before the alleged offending. This account was corroborated in the Statement of Evidence to be given by Garda Elaine Maher.*
>
> *16.5.11 I further note Statements of Evidence to be given by Garda Kerry Harman and Garda Garrett Boyle, which reported that at the time of his arrest for the alleged index offence, while outside his home, Mr Ward said he had a "row" with the deceased, became angry after she assaulted him and threatened her with a knife before stabbing her.*

16.5.12 […] I was not satisfied however that the abnormality of mental functioning caused by his acquired brain injury was sufficient to substantially impair his responsibility at the material time, had he not been intoxicated with alcohol and hypnotic medications."

13. Counsel for the appellant submitted that Dr. Smith was purporting to offer opinion evidence on the ultimate issue in the case when he said that the responsibility of the appellant was not diminished by the mental disorder but was better explained by intoxication. It was submitted that his was a matter for the jury to determine since it was necessary to balance all the evidence and circumstances, including factors which were not within the psychiatrist's sphere of expertise, such as, for example, the history of violence in their relationship. It was submitted that an important factor for consideration in this context was the fact that the defence expert Dr. O'Connell did not offer an opinion on the ultimate issue in his report. The application was opposed by the prosecution.

14. In his ruling, the trial judge noted that the issue fell to be decided by reference to the words of the statute. He noted that Section 1 of the Criminal Law (Insanity) Act 2006 expressly provides that the term "mental disorder" does not include "intoxication" and said that intoxication was an "obvious feature of the evidence" which would have to be considered by the jury. Given that the jury would be required to consider whether the appellant was subject to a mental disorder (from which intoxication was excluded), it was "an entirely appropriate process that an expert qualified to opine on whether a person has a mental disorder as defined by the Act should necessarily also be able to offer an expert view on the applicability or the non-applicability of a specific statutory component of the concept of mental disorder as defined by the Act". He said that where there was a conflict of expert evidence, such evidence was offered for the assistance of the jury in discharging their task

as ultimate fact finders, and they might well disagree with the prosecution expert's opinion. He said that it was equally open to the defence expert to offer his views on the interaction between mental disorder and intoxication. He said that he believed the jury would be "rightly surprised" if at the end of the case they did not have the assistance of both experts in the case on all ingredients of the statutory definition of mental disorder and were left without any expert opinion to guide them on the interaction and the distinctions specifically drawn by the statutory provision in question. He concluded by saying that his reasoning was based on the wording of the legislative provisions but noted that it appeared to be somewhat at least in line with the "persuasive" observations of the Court of Appeal of England and Wales in *Regina v. Brennan* [2015] 1 WLR 2060.

15. When he came to give evidence before the jury, the prosecution expert Dr. Smith accepted that the appellant had a mental disorder at the time but went on to add that in his view, intoxication was the "better" explanation for what had happened. He gave evidence as follows:

> *"So, based on the evidence available to me, it is my opinion that Mr Ward was suffering from an non-traumatic acquired brain injury caused by a stroke in January 2017 at the time of the offence charged. However, in my view, his actions at the material time were better explained by acute intoxication with alcohol and hypnotic medication or sleep medication. I based this opinion on evidence that Mr Ward had been physically violent towards his deceased wife preceding the onset of the acquired brain injury, during arguments while intoxicated with alcohol and tablets, namely on the 29th of September 2002 when he was charged with assault causing harm. […] I was not satisfied however that the abnormality of mental functioning caused by his acquired brain injury was sufficient to substantially impair his responsibility at the*

material time, had he not been intoxicated with alcohol and sleep medication. I acknowledge however that the extent to which Mr Ward's responsibility may have been substantially impaired or diminished at the material time, is a matter for the jury or Court."

16. Dr. O'Connell, the defence expert, said the appellant was labouring under a mental disorder caused by a stroke, the consequences of this included extreme frustration arising from receptive and expressive dysphasia, and also thought that this mental disorder was likely to be combined with PTSD arising from childhood trauma. However, both of these factors were complicated by alcohol misuse. Initially, he declined to go any further:

"Q: But obviously you're aware that Dr Smith's report actually offers an opinion on the ultimate issue for consideration by the jury as to whether or not the mental disorder substantially diminishes responsibility at the material time, and are you offering an opinion on that ultimate issue yourself?

A: My difficulty in doing so is that I'm conscious that this is the ultimate issue. It is the matter for which we have a jury empanelled to consider, and for me to say what I think can be -- open to me to criticism for usurping the authority of the Court. Although I may be given permission to do so, this is the area that I find quite difficult. On the other hand, I do appreciate that this is an incredibly complicated exercise in trying to balance out various strands of evidence. How much weight to place on the different elements, alcohol intoxication, use of drugs like Zimovane, and the mental disorder. There is objective compelling evidence that all of these factors were present at the material time. The intoxication element is expressly excluded in the mental disorder act, but the brain injury is permitted. It is a mental disorder, and we both agree that it was present at the time. And I have reviewed the evidence and presented

my evidence in chief, citing evidence of Mr Ward's presentations to a number of different settings, a number of doctors since the stroke, exhibiting features that I think are consistent with his having a mental disorder. It then becomes a matter for the jury to weigh these facts up and decide how they combine at the material time in the circumstances that led to this awful tragedy. But I have to hand that over to the jury."

17. However, when pressed, he expressed the opinion that the mental disorder had a substantial impact on the Appellant's conduct in killing the deceased:

"Q. Well, you have been given permission to express an opinion, and you don't want to any further; is that it?

A. Well, I've tried to be as clear as possible. I do think this is the task of the jury. And it's a very --

Q. Well, we all know that it's required for the jury. The issue is you have been offered the opportunity. You don't wish to, yes?

A. Well, I may be put in a position where I'll express a view. It's incredibly difficult. I think that, were alcohol not a factor, these circumstances very likely would not have arisen. Also, if Mr Ward's mental disorder was not present, it is likely these factors would not have arisen. How much weight you put on one-- can you exclude both and separate them out? That's not possible. Both were factors at the material time, and, in my view, each one had a substantial role to play. That includes the mental disorder question." (Emphasis added)

18. During a relatively lengthy explanation of diminished responsibility and the role of the experts, the trial judge's charge said *inter alia*:

"…At the end of the day under cross examination, Dr O'Connell expressed the view that it was his opinion that the mental disorder and the intoxication were both substantially operative at the time. That's one way of looking at the case. Dr Smith expressed it differently, he said that a more likely explanation for what happened here is that it was down to the intoxication. So there you have a difference in views. It's your view on these matters that counts, because members of the jury, they both in my view stop short of the ultimate decision… You might come to the view that absolutely, I'm satisfied probability and beyond that this was down to the mental disorder. Well, then it's a case of diminished responsibility. You might at the other end of the scale take the view, this had everything to do with drink and very little to do with the mental disorder. If that's the case, well then, it's a murder verdict, members of the jury. But there's the middle view, and I've tried to formulate it in the question.

You have to find the attribution, if you accept Dr O'Connell's view that they're both substantial and if that coincides with your view, and that they're both operative at the time, well then, it's a diminished responsibility manslaughter verdict in those circumstances, members of the jury. That's my paraphrase of what they ultimately came down to at the end of the day.

…..

…[M]embers of the jury, the experts are there to help you and to assist you with opinion within their field of expertise. And I referred to you earlier and I make no apologies for saying it again, opinions are irrelevant for most witnesses, … ordinary witnesses aren't allowed, you decide what things mean, ordinary witnesses can't give their opinion on what other people say. But experts can and

the reason why an expert is allowed to give expert opinion is because the field of psychiatry is beyond your ken and I presume and mine… you're not there to rubber stamp what an expert says, they're there to assist you in making your decisions, the decisions you have to make. They are not there to usurp your function and to make the decision for you. And in fairness to both of them, they made that perfectly clear, it's your decision and when they go on beyond, and because in my view allowed to give opinion on intoxication and mental disorder and the effects there of, because it's all there in the Act. This is their area of expertise, and they gave to a greater or lesser extent, they gave the opinions that they wanted to give. But those opinions don't bind you and they told you, members of the jury. They are there to assist you in coming to your view of what the correct decision and outcome on this evidence should be, members of the jury…" (Emphasis added)

The appellant's submissions on this issue

19. The appellant acknowledges that, in essence, the trial judge told the jury that the experts had disagreed on whether diminished responsibility applied and that the matter was for the jury to decide. However he submits that allowing the experts to express a view on whether the appellant fell within the statutory parameters of the defence of diminished responsibility was wholly erroneous and infringed the 'ultimate issue rule'.

20. He refers to *People (DPP) v. Kehoe* [1992] ILRM 481 where it was said (p.485):-

"The court is of the opinion that the accused's defence was properly to be considered by the jury without such elaboration and that, further, in the course of his evidence it

is clear that Dr Behan overstepped the mark in saying that he believed the accused did not have an intention to kill and that the accused was telling the truth. These are clearly matters four-square within the jury's function and a witness no more than the trial judge or anyone else is not entitled to trespass on what is the jury's function."

(emphasis added)

21. The Appellant refers to McGrath, *Evidence* (3rd edn.; Round Hall, 2020), including para 6-55 where it is stated:

"The Court of Appeal confirmed the continuing application of the ultimate issue rule in People (DPP) v Ramzan, where it upheld the decision of the trial judge to exclude the evidence of a psychologist in relation to the capacity of an accused to make reasoned decisions at various times by reason of head injuries he had sustained in a road traffic accident. The trial judge was not persuaded that the medical expert had any relevant evidence to give, in circumstances where the appellant had described his own injuries, treatment and sequelae and the expert had not been involved in the treatment of the accused and, in any event, considered that the opinions he was prepared to offer offended the ultimate issue rule and were liable, if stated before the jury, to trespass on the jury's function. This ruling was upheld as correct."

22. He also refers to *The People (DPP) v AC* [2022] 2 I.R. 49:-

"Opinion evidence has been analysed as dangerous in the exposition of a witness since it may undermine the duty of the court to reach its own conclusion of fact. The danger arises in the usurpation of the role of fact finding where a witness opines on the ultimate issue and this may be why strictures against opinion evidence developed; Landon (1944) 60 LQR 201. An expert may come close to or cross over the line of the

ultimate issue. In psychiatrically defending a killer, for instance, it is impossible, as it may be in other cases, not to give an opinion that because of a mental disorder the accused did not know the nature and quality of a homicidal act; the very issue for the jury. The law has always treated the approach to this with sense. Expert assistance may be needed to inform a court or jury as to the proper approach to the ultimate issue, provided an expert is not made into the 13th juror; The People (DPP) v Kehoe [1992] ILRM 481. Opinion and fact are difficult to sort out from each other as defined categories."

23. He refers to the Supreme Court decision in *O'Leary v Mercy University Hospital Cork* [2019] IESC 48, to the effect that the fundamental principle is that while expert evidence may be adduced to assist the court, it is ultimately the trier of fact who must make the decision (para. 17):

"In Flynn v. Bus Atha Cliath, Charleton J. in the High Court drew attention to the fact that the entitlement of an expert to express an opinion was predicated upon informing the court of the factors which made up that opinion, and supplying the court with the elements of knowledge which study and experience had furnished, and which formed the basis of the opinion, so that, in the circumstances, the court may be enabled to take a different view to theirs. As Charleton J commented, experts are privileged by being able to express a view relevant to the issue before the court because of the unusual nature of their status and enables them to express a view; sometimes, but not in every case, on and matters relevant to those upon which the case may turn. In short the role of such witnesses can be of great importance in assisting a court determine the outcome of any case; the more important the role the higher the duty of independence.

Ultimately the judge, and the judge alone, must make the decision." [Emphasis added by the appellant.]

24. He accepts that in *Karen Millen Fashions Ltd v Dunnes Stores* [2014] 1 I.R 10, the following pragmatic reasons for abandoning the ultimate issue rule were identified by O'Donnell J, at para. 23:

> *"For my own part, I can see how it is at least convenient to permit experts to give evidence in general as to their conclusions, so long as it is very clearly understood that what is important are the reasons leading the expert to that conclusion rather than the fact of the conclusion itself. Anything else is somewhat artificial. It is a matter of near certainty that the only expert witnesses called by either side will have formed an opinion favourable to that side and their evidence can often be best understood when both the reasons and conclusions are stated so long as it is understood and appreciated that the reasons leading an expert to a particular conclusion are the important matters for the court to consider."*

25. He points out that in that case, the expert witnesses were called to give assessments of patterns on garments and the trial judge refused to allow evidence on the ultimate issue. The Supreme Court upheld that refusal, and reaffirmed that a trial court was entitled to refuse to receive evidence on the ultimate issue. The appellant submits that likewise here such an opinion clearly was not necessary because the jury was given the factual background, they were offered assistance from the experts on their proper area of expertise, and the relevant matters for consideration from an expert point of view were highlighted to them. This was enough, as in *Karen Millen*, to permit them, as triers of fact, to come to a conclusion. Ultimately, the prosecution expert should not have been permitted to go further, because the

jury was given all of the requisite tools to determine the ultimate issue, in accordance with its unique role.

26. He refers to *People (DPP) v Abdi* [2005] 1 I.L.R.M. 382, where Hardiman J. said at p. 393, that:

> *"The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision. Where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstances. Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact."*

The prosecution submissions on the issue

27. The prosecution submits that the jury has to decide as a matter of fact if the accused was suffering from a mental disability, which excludes alcohol, and if the expert was to merely give an opinion that he did suffer from a mental disorder and did not qualify his view with reference to the issue of intoxication, the jury would be left with a 'loose end". This was not a trespass on the jury function because it was still a matter for the jury to decide whether they accepted the expert's view. They were told, on many occasions during the trial, that matters of fact were exclusively within their province.

28. The appellant refers to *Brennan* where it was said, with reference to the phrase "substantial impairment" in the equivalent English legislation:

> *" That does, we accept, involved a degree of evaluation potentially indicative of being a jury question, what the phrase actually connotes has recently been the subject of further discussion in Golds. But overall, by provision of section 2, as amended, we*

are altogether significantly more structured than the former provisions, in particular by reference to substantial impairment of mental responsibility as contained in the original version of section 2 of the 1957 Act. As we see it, most if not all aspects of the new provisions relate entirely to psychiatric matters. In our view, it is both legitimate and helpful, given the structure of the new provisions, for an expert psychiatrist to include in his or her evidence a view on all four stages, including a view as to whether there was a substantial impairment. As Professor Ormerod explains in his paper: 'Since the question of whether there is an impairment is a purely psychiatric question, it would also seem appropriate for the expert to offer an opinion on whether there is a substantial impairment.' We agree. Moreover, where the expert is able to and does express a view on all four matters, we can see no legal or other objection to such expert, if willing and prepared to do so, as here, making explicit in evidence his or her opinion on what is called the ultimate issue, the more so when such view will, in any event, probably have been implicit from his or her stated opinion on the four matters. It is difficult to see how the expression by an expert of any such view in a given case could contravene any principle of deference to the jury as the ultimate decision makers." (Emphasis added by the Director)

29. The prosecution contends that it is difficult to understand how there was an unfairness when the defence expert was also permitted to give his opinion on the same issue and to comment specifically on the opinion of Dr. Smith.

Discussion and Conclusion on this issue

30. We are satisfied that allowing the experts to express the opinions they did in front of the jury was permissible and appropriate. The defence of diminished responsibility involves a number of ingredients: (i) the accused person must have been suffering from a mental

disorder (which does not include intoxication) at the time of the act (ii) the mental disorder must be such as to "diminish substantially" the accused person's responsibility for the act. This requires a jury to consider the *interaction* between intoxication and mental disorder in a case where there is evidence of both. We agree with the prosecution that if the expert had merely opined as to the presence of a mental disorder without going on to offer a view on the interaction between that mental disorder and the intoxication of which there was evidence, this opinion would have been incomplete and, to use the language of O'Donnell J (as he then was) in *Karen Millen*, "artificial". Importantly: (i) the reasons for the conclusion were set out; (ii) it was made clear by both the expert himself and the trial judge that it was ultimately a matter for the jury; (iii) the defence expert was also allowed to express his opinion, and it was a contrary opinion.

31. This is not at all akin to the situation in *Kehoe* where, it will be recalled, the expert had expressed the view that he believed the accused did not have an intention to kill and that he was telling the truth; matters which fall outside an expert's area of expertise and upon which the jury do not require assistance.

32. In *Ramzan,* a case involving drugs-related charges, the appellant's counsel originally planned to run an insanity defence but this was abandoned during the trial. The opinions of a Dr. Pender, a neuro-psychologist, which it was sought to be adduced in evidence were as follows:

> "I suspect it would be very difficult for Mr Ramzan to resist any significant pressure and to problem-solve his way out of a complex situation."
>
> and -

"In my opinion, despite the fact that he understood the gravity of the situation, he would have had great difficulty inhibiting his behaviours and putting into place an alternative course of action. In my opinion, his serious brain injury compromised his ability to make reasoned decisions and act appropriately, especially in difficult or challenging circumstances

33. In a context where the insanity defence had been abandoned, the Court (judgment delivered by Edwards J) was not persuaded that this evidence was in any way relevant:

> "The trial judge engaged directly with the issue of potential relevance and was not persuaded that Dr. Pender had in fact any relevant evidence to give, in circumstances where the appellant had described his own injuries, treatment and sequelae, in circumstances where Dr. Pender had not been involved in the appellant's treatment, and in circumstances where the opinions he was prepared to offer purportedly within the scope of his expertise as a neuro-psychologist potentially offended the ultimate issue rule and were liable, if stated before the jury, to trespass on the jury's function. We find no error in the trial judge's approach in that regard, and we uphold his ruling on this occasion as having been correct."

The crucial point of distinction is that no defence of insanity or diminished responsibility was before the jury in the *Ramzan* case, and the remarks of the Court have to be read in that context. The situation was not at all on all fours with the present case, where the experts were dealing with the individual ingredients of the statutory defence which *was* in issue.

34. Indeed, the present situation is much closer to the situation with regard to the insanity defence where, as was pointed out in the *A.C.* case, *"In psychiatrically defending a killer… it is impossible, as it may be in other cases, not to give an opinion that because of a mental disorder the accused did not know the nature and quality of a homicidal act; the very issue*

for the jury." Invariably in cases of insanity, the expert evidence will address the various limbs of the insanity defence and will offer an opinion as to whether the accused person falls within the definition of insanity. What is important is that they offer their reasons and that the jury are clearly instructed that it is for them to decide the issue, which may involve choosing between expert opinions. Indeed, it has been known for juries to come to a different conclusion than the experts even where the experts are in agreement with each other.

35. In this case, both experts were extremely careful to emphasise that the question of substantial diminution of responsibility was a matter for the jury, and the trial judge did so likewise. Having regard to the statutory definition of the defence together with those two circumstances, we are satisfied that the trial judge did not fall into any error in the manner in which he dealt with the issue.

The second issue: Childhood trauma and the prosecution closing speech

36. This issue arises out of Ground of Appeal no. 7 which says:

> "The trial was unsatisfactory and the verdicts are unsafe having regard to certain comments made by prosecution counsel in the closing speech on which the learned Trial Judge refused to give any direction to the jury. The said comments included in particular, those to the effect that the Appellant's claims that he had been exposed to violence in his childhood were not credible in circumstances where there was no evidence to support such comments; and where the prosecution was in possession of a statement/affidavit of the Appellant's brother which corroborated such claims."

37. The reference to an affidavit in the possession of the prosecution refers to an affidavit purporting to appear to have been sworn by the appellant's brother which had been sent by

the appellant's solicitor to the experts without notice to the prosecution and which was not disclosed to the prosecution until late in the trial. The deponent was not called as a witness nor (of course) was the affidavit put before the jury. The affidavit referred to violence during the appellant's childhood.

38. Each of the experts said they were not in a position to make a diagnosis of post-traumatic stress disorder (PTSD) and Dr. Smith referred to the absence of "collateral" support for what the appellant had said concerning violence in the home. During the extensive and meticulous examination and cross-examination of each of the two experts, the issue of exposure to violence during childhood and consequent trauma (whether formally diagnosed as PTSD or not) was canvassed at some length before the jury.

39. During his closing speech, prosecution counsel said the appellant had not been diagnosed with post-traumatic stress disorder by either of the doctors. There were various other references to the issue, including a reference to the fact that the appellant had not mentioned any such violence in his first interview with Dr. O'Connell, and that "the tale grew in the telling" over subsequent interviews with him. Counsel questioned "the extent to which there is reliability in this account". He said it was "self-reported" and that there was no corroboration.

40. Defence counsel in his closing speech pointed out that the prosecution psychiatrist, or indeed, the gardaí, could have made enquiries and sought documentation in relation to this issue but did not appear to have done so.

41. Before the trial judge charged the jury, counsel for the appellant complained to the judge that the prosecution had suggested to the jury that there was an issue as to the credibility of the appellant's account, whereas the prosecution had an affidavit from the

brother which corroborated the appellant's account. The trial judge said that the prosecution were entitled to make their case and he was not involving himself in this matter.

42. In his charge to the jury, the only reference to the issue appears to have been when he said: "…you recall that there seemed to be a difference of opinion as to whether, or not, there was this question of post traumatic stress disorder arising from childhood events in the case" but that the "bottom line" was that both agreed that the appellant had a mental disorder.

43. The appellant complains that the trial judge gave no direction to the jury on the issue, which would have mitigated the impact of prosecution counsel's comments and that at a minimum the judge should have told the jury that it was open to the prosecution to procure and adduce evidence relevant to this matter and that they did not do so.

44. The DPP submits that it was perfectly appropriate for the prosecution to draw attention to the self-reported nature of the information, the lack of any independent evidence, and the manner in which the recounting developed during the various consultations. It was a matter for the jury, as they were repeatedly instructed, to decide factual matters for themselves. What the prosecution counsel said was merely a correct statement of the position on the evidence. The appellant's counsel then had an opportunity to address the jury on how he thought the jury should address the evidence and he did so. He set out what investigative steps could have been taken, but were not. It was a matter for the jury thereafter as to what they made of the evidence.

45. The Court is not persuaded by the appellant's argument on this ground of appeal. It is simply a fact that there was no direct testimony before the jury about what the appellant may have endured by way of violence when he was a child and that is, in effect, all that the prosecution counsel said, albeit in robust language. Defence counsel had the opportunity to reply to this in a closing speech just as he had in relation to other aspects of the evidence.

His point, that the prosecution could have investigated the matter further and did not do so, might also be seen in the context that this was a matter upon which, for whatever reason, he chose not to call any evidence and in a context where the affidavit of the brother was apparently furnished to the prosecution at a late stage of a trial (although, to be fair, reference to the childhood violence had featured indirectly in the expert reports).

46. Insofar as observing that the prosecution could but did not investigate it further was a point worth making at all, it was indeed made by defence counsel to the jury, but we do not consider it to be of such significance that it necessitated the trial judge drawing attention to it. We are satisfied that the trial judge did not err in declining to do so and that there was no procedural unfairness in connection with this issue and this ground of appeal fails.

The third issue: The trial judge's charge on intoxication and intent

47. This issue arises out of Ground 8 of the Grounds of Appeal which says:

> "The learned Trial Judge erred in refusing to recharge the jury in the context of intent and intoxication, as to the agreement between the psychiatrists called by the defence and prosecution, Dr. Smith and Dr. O'Connell that having regard to the brain injury of the Appellant and other factors such as emotional dysregulation, the effects of alcohol would be expected to be more pronounced on the Appellant than on other persons not affected by such factors. Having regard to the manner in which the learned Trial Judge had charged the jury on intent and intoxication, in particular by focusing on the phrase "it's not me", the trial was unsatisfactory and the verdicts are unsafe."

48. Both experts were in agreement that in light of the appellant's history of a non-traumatic acquired brain injury, he would have been affected more by intoxication than

someone without his brain injury, leading to an impaired ability to manage his emotions and regulate his behaviour.

49. After the closing speeches, the trial judge invited submissions from counsel as to the appropriate direction to the jury on the issue of intent and intoxication in the context of the defence's contention as to the implications of the appellant saying to gardaí "That's not me". Although it was made clear that intoxication was a secondary issue after the primary issue of diminished responsibility, defence counsel asked the judge to direct the jury that the expert evidence was that the effects of alcohol intoxication would be greater on the appellant than on persons without the mental disorder.

50. The trial judge noted that the appellant had been unfit to be questioned on arrest due to intoxication, and dealt with the legal issue of intoxication as follows:-

> "There are of course other elements that [counsel for the defence] referred to that you have to take into account. You are entitled, and must take into account Mr Ward, the person that he was. He was intoxicated, members of the jury, intoxication, voluntarily self-administered intoxication is not a defence in itself, members of the jury. Well, I should say something about that. If there's a free standing situation of Mr Ward not being in control of himself, if that situation came about through the voluntary consumption of alcohol or other drugs, you have to look at the place of intoxication in the criminal law. And by voluntary consumption of alcohol, I mean taking a drink, when one chooses to take it and had a free choice of taking it or not. And this may be contrasted with, for example, where somebody spikes your drink and you know, you're not in control for that reason.
>
> So the situation about drink is that intoxication is not a defence in the criminal law. It is incapable of amounting to a defence, but it is material to the question of intent,

members of the jury. Intoxication could prevent the accused having the intent that is necessary to sustain the crime of murder. So you have to look *at the level of intoxication, how the effect of the intoxication was and what the evidence is in relation to that,* members of the jury. And if it was so extreme that the person didn't have the intent at the time they did the act, well then, you'd be dealing with returning a manslaughter verdict, members of the jury". (emphasis added)

51. In requisition, defence counsel requested the trial judge to draw attention to the fact that the experts had agreed that the effects of alcohol were likely to be greater on him than on persons without brain damage. The prosecution opposed this on the basis that it merely sought to draw attention to a piece of evidence that was arguably favourable to the appellant, and that if such a requisition was allowed, the prosecution ought to be afforded a similar benefit. In other words, the prosecution submitted that the appellant was attempting to "cherry pick" aspects of the expert evidence, and that highlighting certain portions in such a manner would be "problematic".

52. The trial judge refused the requisition, stating that he did not wish to pick and choose what aspects of the evidence to highlight, and furthermore, that the charge had dealt sufficiently with the issue of intention and intoxication. He added:

"I specifically asked what the context and parameters of the intoxication/intention issue were yesterday. And now I appear to be am (sic) being told after the fact that it's something quite different and I am not going back there."

53. The appellant complains that this was incorrect because the requisition was precisely in accordance with what the defence had sought the previous day.

54. The appellant submits that although intoxication was a secondary issue, it was still an extremely important matter on which the jury should have been appropriately directed, and refers to *People (DPP) v Eadon* [2021] 1 I.R. 417 in this regard. He submits that the defence had taken a risk in addressing the issue at all since the reference to alcohol intoxication inevitably tended to undermine the defence of diminished responsibility. On the evidence, the level of intoxication was not such as would ordinarily negative intent, and therefore it was absolutely essential that the trial judge remind the jury of the expert evidence that the effects of intoxication could have been amplified in the appellant's case because of his brain injury. In a complex case involving a cross-over of the issues of diminished responsibility and intoxication, it was of the utmost importance that the trial judge specifically instruct the jury as to a matter on which both experts agreed.

55. The appellant refers to *The People (DPP) v PB* [2022] IECA 111, a recent case in which the conviction was set aside on the grounds that the trial judge had refused to direct the jury as to particular evidence relevant to the crucial issue in the case, whether the appellant in that case was awake or asleep when the physical act took place.

56. The DPP submits that the jury were correctly charged on the effect of intoxication on intent and the consequences of a finding that he was so intoxicated that he could not form intent which was in line with the correct principles set out in *Eadon*. It is also pointed out that the trial judge referred not only to the level of intoxication but also the effect of it.

57. In the first instance, the appellant does not contend that the trial judge's legal direction on intoxication was in any way incorrect (unlike the situation in *Eadon).* Rather, the complaint concerns the trial judge's failure to mention a piece of evidence which was arguably favourable to the appellant.

58. Secondly, this case is entirely distinguishable from *P.B.* where it was absolutely central to the defence case whether or not the appellant was awake or asleep at the time of the alleged acts, and the trial judge did not refer to this at all in charging the jury. (Incidentally it may be noted that the accused in that case was convicted following a retrial, and was unsuccessful in his second appeal to this Court: see judgment delivered by the President dated the 13th day of November 2023). Here the possibility of intoxication negativing intention had at all times been put forward by the defence as a secondary issue in circumstances where diminished responsibility was the main defence.

59. It may have been preferable if the trial judge had mentioned this piece of evidence which was favourable to the appellant, but the question is not whether this was preferable but rather whether the trial was unfair by reason of the fact that he did not. Trial judges have a range of discretion in terms of how much they wish to address the specifics of the evidence when charging the jury. Bearing this in mind, and taking into account the whole "run" of the case, we are not satisfied the trial was unfair by reason of this not having been mentioned by the trial judge to the jury. Defence counsel referred to it in his closing speech. The primary role of the trial judge is to ensure that the jury are properly instructed as to the law on relevant matters and that role was impeccably fulfilled by the trial judge.

60. We therefore dismiss this ground of appeal also.

The fourth issue: The cross-examination of Detective Garda Eustace and the "it's not me" comment

61. This arises from Ground of Appeal No. 4 which says:

> "The learned Trial Judge erred in restraining defence counsel in the cross-examination of D/Garda Bernard Eustace as to his impression of what was said by the Appellant,

in circumstances where it was contended that the prosecution had adduced such evidence, and in particular in preventing cross-examination as to the proposition that in using phrases such as "it's not me", the Appellant had communicated to the Garda that although he had physically carried out the actions that caused the death, he did not do the killing in the sense that the actions were not his conscious or intentional acts."

62. During the cross-examination of Detective Garda Eustace by counsel for the appellant, defence counsel sought to put to the witness that when the appellant had in garda interview said things such as "it's not me", he was not denying *the actions* he had engaged in but instead was denying that he "meant" those actions (which we take to mean a rough approximation of denying that he intended them). The prosecution objected on the basis that the witness' view as to what the appellant intended to convey was not admissible. Defence counsel argued that the line of questioning was simply an attempt to establish that the appellant never positively asserted in interview that he did not do the actions in question, and that as Detective Garda Eustace was present during the interview, it was appropriate to question him as to his impression, taking the interview as a whole, of what the appellant meant by saying what he said.

63. The trial judge rejected this argument, ruling that Detective Garda Eustace could not give evidence of what he understood the appellant to mean; rather, it was a matter for the jury itself to draw conclusions from what the appellant said in interview.

64. The appellant submits that cross-examination permits the use of leading questions and that it can be far-ranging and robust and has cited various authorities for this proposition. He submits that as Detective Garda Eustace was present for the interview of the appellant, he ought to have been permitted to and, indeed, was well placed, to comment on what his

impression of what the appellant had stated was, particularly as he was dealing with an individual who had extreme language/ communication difficulties and the communication between them was extremely unusual and difficult.

65. The prosecution submits simply that the witness was being asked to interpret the answers given by the appellant and that the trial judge correctly ruled that it was for the jury to draw their conclusions from what he had said.

66. We have no hesitation in rejecting this ground of appeal. The witness was indeed being asked to interpret the appellant's answers and any answer by him would have been inadmissible evidence. The fact that cross-examination can be wide-ranging, robust, and involve the use of leading questions has nothing to do with the prohibition on inadmissible evidence which still applies during cross-examination. It is not in dispute that cross-examination may be robust and wide-ranging but there are parameters, relevance and admissibility being the primary ones. We reject this ground of appeal.

The fifth issue: refusal of the prosecution to call two witnesses not on the Book of Evidence

67. This arises from Ground of Appeal No. 3 which says:

> "The learned Trial Judge erred in refusing to call to give evidence two witnesses, Joe Flynn and Kathleen Flynn, who were neighbours of the Deceased and the Appellant, in circumstances where the prosecution had refused to do so on the grounds that while the Gardaí had interviewed them, their statements had not been included in the Book of Evidence."

68. The statement of evidence of Mr. Flynn was to the effect that he considered the appellant and his wife to be "ideal neighbours" and that he had often seen the pair walking

down the road hand in hand. He said they had never been in each other's houses but might have a chat if they were out in the garden. Mrs. Flynn made a statement saying the couple were always friendly to everyone. Each of them made reference to noise or commotion on the night in question but that they thought nothing of it. Neither of the witnesses were on the Book of Evidence.

69. During the trial, counsel for the appellants submitted that the two witnesses in question (neighbours of the appellants) ought to have been called by the prosecution or that the court itself should call them. He submitted that in the interests of justice, it should not be for the defence to call these witnesses, as they would then be deprived of the ability to cross-examine the witnesses.

70. Prosecution counsel submitted in response that the potential evidence of the two witnesses in question was not relevant, and that it was a matter for the appellant if he wished to call them to give evidence.

71. The trial judge ruled against the appellant, saying that the prosecution was entitled to call whatever witnesses it saw fit, and that, in any event, the appellant himself was entitled to call the witnesses to conduct examination-in-chief. If the witnesses proved hostile, there would be scope for him to make relevant applications to cross-examine them. He was also of the view that he was not required to exercise his discretion to call the witnesses of his own motion in order to ensure a fair trial. He considered that the witnesses had "scant relevance" given the extent of their knowledge of the appellant and his wife, which was "on the basis of seeing people going up and down the road and living next door". He pointed out that one can have a limited view of one's neighbours when one does not spend time in their houses and does not know "what goes on behind closed doors".

72. The appellant refers to *R v Oliva* [1965] 1 W.L.R. 1028, concerning the scope of the prosecution discretion in calling witnesses whose names are "on the back of the indictment" (the English equivalent of being on the Book of Evidence), discussed in *People (DPP) v Lacy* [2005] 2 I.R. 241, and *People (DPP) v DO* [2006] 3 I.R. 57 and *DPP v. Almasi* [2020] 3 I.R. 85.

73. The appellant contends that the evidence was relevant in circumstances where the prosecution was offering evidence of a negative relationship between the deceased and the appellant. He submits that evidence as to the relationship between them and their conduct and interactions around the family home was of significance, and it was relevant to put evidence of a positive relationship also before the jury.

74. He submits further that in circumstances where the prosecution was refusing to exercise its discretion to call the witnesses, the trial judge was obliged to intervene and require the prosecution to exercise its discretion to call the witnesses, or indeed, to call the witnesses of his own motion, although he acknowledges that this is a jurisdiction which should be exercised sparingly (citing *State (O'Connor) v Larkin* [1968] I.R. 255, and *Maguire v O'Dea* [1994] 1 I.L.R.M. 540, at p. 545). He submits that such an application could have been supported by the prosecution if it was not minded to call the witness itself, citing *People (DPP) v McHugh* [2018] IECA 92 where there was agreement between both sides that it would be best if the trial judge called the witness (in circumstances where the prosecution did not wish to call the witness as it did not accept that her account was full and truthful). He also cites *DPP v Quirke (No. 1)* [2023] IESC 5 at para. 24.

75. The appellant contends that the two individuals had indicated to the appellant that they were unavailable and unwilling to give evidence at trial and he was "effectively deprived of the benefit of their evidence".

76. The prosecution submits that the witnesses had no relevance in circumstances where their knowledge was limited to seeing the appellant and his wife on the street or in the garden. They submit that the factual position was entirely different in *McHugh* where the prosecution had accepted that the individual in question would have been "an essential witness" from the defence perspective.

77. The prosecution accepts that exceptionally a trial judge can exercise a discretion to call a witness but stands over the trial judge's ruling when he said that the discretion had to be exercised for a reason and that he was reluctant to be seen to "enter the fray" by calling the witnesses, who had made "mundane, banal type observations" to the garda; and when he said that it was not apparent why they would need to be cross-examined and the ordinary assumption would be that, having given statements freely to the gardaí, they would attend court and give evidence if served with a subpoena.

78. The DPP contends that it is not correct to contend that in the circumstances *"the appellant was effectively deprived of the benefit of their evidence"*. Witness summonses had been served and the trial judge had already indicated that he would issue bench warrants if necessary to secure their attendance at the request of the appellant, but once the judge had ruled on the application, the appellant never pursued the matter of their attendance. They were not *'deprived'* of any opportunity; they simply chose not to call them.

79. In the Court's view, it is not necessary to set out or discuss the authorities cited. The position is simple. The prosecution did not consider the witness to have relevant evidence to offer. The Court agrees. It was not in dispute during the trial that the appellant had previously been violent to his wife, that he had an alcohol abuse problem, and that he had a brain injury. It was not in dispute that he had stabbed his wife to death. The key issues in the case concerned his precise state of mind at the time of the killing. All that the two witnesses

could offer was that he and his wife seemed like content, friendly neighbours; they were indeed, as the trial judge said, mundane, banal observations. They had never been in the house of the appellant and his wife, and were not even friends of theirs, let alone close friends or confidantes. Their general impressions of the appellant and his wife from the street or garden could not possibly have amounted to evidence of such relevance that it amounted to a breach of duty on the part of the prosecution not to call them as witnesses, nor call into play the exceptional jurisdiction of the trial judge to call the witnesses. It is also incorrect to say that the defence were "deprived" of their evidence in circumstances where they chose not to pursue their attendance, apparently abandoning the issue after the trial judge had ruled against them as described. An accused person does not have a right to cross-examine a witness who, objectively speaking, has no relevant evidence to offer.

80. We have no hesitation in rejecting this ground of appeal.

81. In all of the circumstances, none of the grounds of appeal having been successful, we dismiss the appeal.