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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM BELFAST CROWN COURT
IN NORTHERN IRELAND

_____

THE QUEEN

–v-

MARK DANIEL WARD

_____

Before: Deeny LJ, McCloskey J and Sir Ronald Weatherup

_____

McCLOSKEY J (giving the judgment of the court)

Introduction

[1] Mark Daniel Ward ("the Appellant"), aged 27 years, was on 30 June 2017 convicted by a jury of the murder of Marcel Seeley ("the deceased") aged 34 years, whose beaten remains were found in his home at 10B Dingwell Park, Craigavon on 13 October 2015. There was no evidence, expert or otherwise, of either the precise time or date of the fatality. However, the thrust of the prosecution case was that it occurred during an estimated two hour window between approximately 7am and 9am on 11 October 2015, a Sunday morning. There was no eye witness evidence of the death. The Appellant was punished by the imposition of the mandatory sentence of life imprisonment with a minimum term of 16 years. The single Judge has granted leave to appeal against sentence, while refusing leave to appeal against conviction. As will become apparent, the contours of this appeal have evolved significantly. The jury convicted the Appellant by a majority of 11/1.

The Prosecution Case

[2] The prosecution case, which was mainly based on various pieces of circumstantial evidence, had the following central strands:

(a) On the morning of 11 October 2015 the Appellant stated to one Gerard Byrne that he had punched the deceased and blood was coming out of his ears. This conversation took place at 8A Dingwell Park, in close proximity to the residence of the deceased.

(b) The following day, 12 October 2015, the Appellant was arrested for the unconnected offence of criminal damage and was conveyed to Lurgan Police Station. CCTV footage from the station showed the footwear and trousers that he was wearing. The prosecution alleged that the same footwear and trousers were worn at the time of the murder.

(c) It was further alleged that footwear marks found on the body of the deceased and at the scene were connected with the type of shoes worn by the Appellant as displayed in the footage.

(d) There was further CCTV footage of the Appellant with the same foot and leg attire walking in Lurgan in the early hours of 11 October 2015.

(e) There was evidence from the "Base" shoe company and an imaging expert suggesting that the Appellant was wearing the Base model of shoes.

(f) There was forensic DNA evidence linking the Appellant to a cigarette butt found close to the remains of the deceased.

(g) There was further forensic evidence establishing a similarity between the footwear marks at the scene and those found at another address, 50B Union Street, Lurgan which had been previously visited by the Appellant on 10 October 2015.

(h) In addition there was evidence connecting the footprints found at the scene with the Base shoes allegedly worn by the Appellant in the CCTV footage.

[3] During police interviews the Appellant acknowledged that he knew and had socialised with the deceased, a known alcoholic. One of the few agreed facts at trial was that both Gerard Byrne (*supra*) and one Maria McConville were found by police to be commonly intoxicated, arguing and fighting in the months surrounding the death. It was further agreed that Byrne had been convicted of five minor offences of dishonesty between March 2013 and January 2015.

[4] The main prosecution witness was the aforementioned Gerard Byrne. Evidence was also given by Mark Henry, who claimed to have been drinking in the company of the Appellant during a period of some ten hours which, at its conclusion, was separated from the beginning of the aforementioned "window" by roughly two hours; Francis Nixon, a taxi driver, who drove the Appellant and Henry to an off-sales and then back to the Appellant's flat, from there (following a brief pause) to a different off licence and, finally, to another residential address, all occurring between 11pm and midnight on Saturday 10 October 2015; Mr Bates, a representative of the Base shoe company; Mr Cole, an imaging expert; Mr Harvey, forensic scientist; and Mr Rainey, a PSNI employee who purported to give in effect expert footprint evidence.

[5] The gist of Mr Byrne's evidence (derived from the trial transcript) was that between 9am and 10am on 11 October 2015 (the Sunday) the Appellant, an acquaintance of long standing, called at his home; he was very drunk, seemed to have been out all night and was carrying a bottle of wine; he stated that he had hit someone "*a couple of jabs …. blood came to their ears …… two left and a right or something … he said he was fighting with another chap that we know ….. Junior Seeley* (the deceased)"; the witness was incredulous of this claim and neither probed it nor thought further of it; the Appellant said "*… Do you think the chap has died with blood coming out his ears?"*; he was "*… falling asleep … he needed to go home*"; the witness arranged for a taxi to escort the Appellant home; he saw the police at the home of the deceased two days later; and he recounted to a brother of the deceased what the Appellant had said.

[6] The defence strategy entailed seeking to expose Mr Byrne as a witness not worthy of belief. This is clear from the transcript of his cross examination. He was questioned on the basis of, *inter alia*, asserted manifest inconsistencies between his sworn evidence and his written statements to the police. Furthermore, the defence sought, and were granted, permission to adduce evidence of the witness's bad character, namely his criminal record: see [3] *supra*. Mr MacCreanor QC (with Mr Thompson, of Counsel), on behalf of the Appellant, submitted that Mr Byrne had been discredited before the jury. It is not difficult to find traces of this in the judge's charge to the jury (see especially transcript, pages 923 – 929). Furthermore, Mr MacCreanor highlighted that Byrne had been exposed as having lied under oath, by reference to certain disclosed material, and had to be recalled. The unreliability of Mr Byrne was one of the major themes of the initial defence skeleton argument before this court. For example:

> "*Gerry Byrne faced a substantial challenge to his credibility. His evidence was left as tenuous, unreliable, inconsistent and inherently weak. He was exposed as lying in how he had presented to the police with his evidence*

against the Defendant. The Judge gave a very strong direction to the jury favouring the defence …."

[7] The other prominent themes of the defence case at trial were the substantial challenges to the evidence of Mr Bates, Mr Rainey and Mr Cole.

[8] Returning briefly to the discrete topic of the Appellant's police interviews, the evidence adduced was that there were 16 such interviews altogether during a three day period. He was accompanied by an "appropriate adult". There was no challenge to the conduct of the interviews or the content of the transcripts. The jury was provided with a reduced version of the latter. The interviews, for the most part, were of the "no comment" variety. In his few positive responses to the detectives' questions, the Appellant stated that he had known the deceased for about ten years and had drunk in his flat numerous times; they were friends; numerous other people had frequented the flat; he knew "*nothing*" about the death; he wished to "*clear [him]self*"; (in terms) he had not been in Byrne's house on the critical Sunday morning; and he could think of no reason why Byrne had made the contrary case. This discrete chapter was addressed as a free standing topic in the judge's charge to the jury.

The Appeal

[9] The grounds of appeal, in their original incarnation, were the following:

(i) The trial judge erred in ruling that it was not undesirable that the Appellant give evidence, under Article 4(1)(b) of the Criminal Evidence (NI) Order 1988.

(ii) The trial judge erred in permitting the prosecution to adduce evidence seeking to rebut that of the Appellant's psychological expert that he had failed the test of memory malingering.

(iii) The judge's charge to the jury in relation to adverse inferences was imbalanced and unfair.

(iv) The aforementioned footprint evidence of Mr Rainey) should have been the subject of a judicial direction either to exclude or, as a minimum, to treat with considerable caution.

(v) The importance and weight to be attributed to the same evidence was wrongly inflated and portrayed in the judge's charge to the jury

[10] As the resume of the evidence at [5] and [11] – [14] above indicates, the intoxicated state of the Appellant featured at the trial. This gave rise to a significant change of direction in the Appellant's challenge to his conviction. When this appeal was first listed for hearing the court raised with the parties the question of the trial judge's failure to direct the jury on the inter-related issues of intention and intoxication in accordance with R v Sheehan and Moore [1974] 60 Cr App R 308. The hearing was adjourned to enable prosecution and defence to give appropriate consideration to this issue. The upshot was twofold. First, it was accepted (initially) on behalf of the prosecution that such a direction should have been given. Second, the Appellant sought the leave of the court to amend the grounds of appeal by addition of the following:

> "*The trial judge's failure to direct the jury appropriately on the effect of intoxication upon the Appellant's intent is a matter of such gravity as to cause a sense of unease about the safety of the verdict.*"

There was, properly, no prosecution objection to this application and the court granted leave to amend accordingly. The appeal was then presented on this new ground only. It is appropriate to interpose at this stage that Mr McDowell QC on behalf of the prosecution sought to resile from his initial concession that such a direction should have been made.

Intoxication: the main evidence

[11] One turns to consider the evidence bearing on the intoxication of the Appellant at the material time. There is a substantial body of evidence relating to the demeanour and apparent condition of the Appellant during the period under scrutiny. Mr Byrne's descriptions of the Appellant's appearance and condition were both colourful and graphic. They convey the mental image of a male person clearly affected by alcohol consumption. He testified *inter alia* that on the morning of 11 October 2015 the Appellant – "*… was very drunk. He must have been on the beer all night …*"

He continued:

> "*From what I can remember now he was so drunk he was talking about strange things, like things that I know weren't … he was all over the place like. He seemed to be in Disney land. ….*
>
> [The Appellant was] *drunker than I've ever seen him, and I have drank with him ….*

> *Twisted, drunk and wiped out …*
>
> *He was drunk and I wanted to just get him home …* [he was] *off his trolley … he was too drunk …. he was too drunk I think to be winding people up.*"

Mr Byrne added that the Appellant was drinking from an open bottle of Buckfast (fortified wine).

[12] There was also evidence from one Mark Henry, a friend, that they had been drinking from around 7pm on the evening in question, purchasing and consuming a significant amount of alcohol – beer and spirits – and, further, ingesting cocaine. Ward further testified that they went together to Martin Reilly's flat at 51 Union Street where they continued to drink until Henry left for home at around 5.30am. While this witness stated, unequivocally, when cross examined, that he was drunk before the "Reilly's flat" phase, he said nothing about the Appellant's state of intoxication, with the exception that when asked in examination in chief how both of them were before leaving for Reilly's flat, he said "*still relevantly* [sic] *sober, just getting* [end of answer]". There was also evidence that shortly after Henry's departure the Appellant and Reilly went out in search of more alcohol.

[13] There was other evidence bearing on this issue. Dr Weir, a consultant psychologist, gave evidence, in the absence of the jury, directed to the desirability of the Appellant testifying. Dr Weir's report recounted that the Appellant had in previous years suffered a serious head injury. It described the effect of alcohol on him in consequence. Her opinion was that by reason of the head injury the Appellant was more quickly and more seriously affected by alcohol consumption than a normal able bodied person. In passing, while a mechanism for placing this evidence before the jury could have been devised, none was evidently canvassed by either the trial judge or the defence.

[14] There are certain other items of evidence describing the conduct and movements of the Appellant during the period under scrutiny. This included evidence from two taxi drivers with whom the Appellant interacted at different times. One opined that the Appellant did not appear drunk, while the other commented that the Appellant appeared hung over and stated that he had been "up" all night. In this latter context the Appellant was also observed by two police officers, neither of whom made any observation about his demeanour or condition. There was also CCTV footage depicting the Appellant walking in Lurgan at two separate locations between 6.30am and 7.30am on 11 October 2015. There was no evidence from any witness that this displayed anything untoward about the Appellant's physical movements.

The Defence Statements

[15] The defence statements are of some importance in the court's resolution of this appeal. There were two of these. It is appropriate to reproduce certain excerpts in full. In the first, provided pre-trial, it was stated *inter alia*:

> "*The Defendant accepts that he knew the victim Marcell Seeley and had been in his company on numerous occasions. Indeed the Defendant further accepts that most of his experiences with Marcell Seeley were when the two consumed alcohol together and it was known to the Accused that Marcell Seeley was an alcoholic. The Defendant further accepts that he had been in the home of Marcell Seeley on several occasions drinking with the victim and various others. In fact various people drinking in the property would not have been uncommon.*
>
> ***The Defendant asserts that he was not in the property of Marcell Seeley on the dates asserted by the prosecution****. ….*
>
> *The Defendant avers that on the night of Saturday 10 October 2015 he was at the home of a friend and had consumed alcohol. In the early hours of the morning of Sunday 11 October he went to another friend's house to continue drinking. The Defendant accepts that he was later in an off licence that morning. The Defendant further accepts that he visited Gerard Byrne on the morning of 11 October 2015 before getting a taxi to his mother's home ….*
>
> *The Defendant directly challenges the evidence of Gerard Byrne insofar as it is not in accordance with the above. His credibility, veracity and reliability as a witness will be at issue …*
>
> *The Defendant believes that Gerard Byrne may have fallen out and/or harboured animosity towards the deceased Marcell Seeley. He also believes others … had been involved in altercations and/or arguments with Marcell Seeley.*"

[Emphasis added]

[16] The Appellant's amended Defence Statement was produced mid-trial, in the immediate aftermath of the evidence of Mr Byrne (*supra*). It is not in dispute that Mr Byrne's evidence to the jury was the impetus for this

development. The first two paragraphs ("*The Defendant accepts … would not have been uncommon*") were unchanged. At this point a significant variation occurs:

> "*The Defendant avers that on the night of Saturday 10 October 2015 he was at the home of a friend and had consumed alcohol. In the early hours of the morning of Sunday 11 October he went to another friend, Martin Reilly's home, to continue drinking.* [The first mention of Reilly.] *In the early hours of the morning the Accused left his friend's home for a period of time before returning to drink there again. In that period of time the Accused went to get alcohol and then walked to Dingwell Park* [the deceased's residence] *… when outside Marcell Seeley's flat he heard shouting and went in. Inside there was a fight between Gerard Byrne, Maria McConville and Marcell Seeley. The Defendant intervened and split the fight up. During this time the Defendant was punched once by Marcell Seeley and he in turn punched him back once. The Defendant left shortly thereafter leaving Marcell Seeley, Gerard Byrne and Maria McConville still arguing ….*
>
> [As per original Defence Statement] *The Defendant accepts that he was later in an off licence that morning. The Defendant further accepts that he visited Gerard Byrne on the morning of 11 October 2015 before getting a taxi to his mother's home …*
>
> *The Defendant directly challenges the evidence of Gerard Byrne …* [as above] *…*
>
> *The Defendant believes that Gerard Byrne ….* [as above] *……*"

Intoxication and R v Sheehan and Moore

[17] In R v Sheehan and Moore [1975] 1 WLR 739 Geoffrey Lane LJ stated at 744C:

> "*……. in cases where drunkenness and its possible effect upon the Defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the Defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the*

> *jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence and on that basis to ask themselves whether they feel sure that at the material time the Defendant had the requisite intent.*"

The court quashed the conviction for murder, substituting a verdict of manslaughter.

[18] We preface our consideration of some of the other cases touching on the Sheehan and Moore direction with the observation that the central question which ultimately emerged in this appeal was that of the threshold to be overcome to require such a direction to be given. Examination of the decided cases exposes the judicial guidance available on this issue.

[19] From R v Bennett [1995] Crim LR 877 and R v Groark [1999] Crim LR 669 (*infra)* one distils the principle that the Judge is normally obliged to direct the jury on intoxication where there is evidence such that a reasonable jury might conclude that there is a reasonable possibility that the Defendant did not have the requisite *mens rea*.

[20] In R v McKnight [2000] WL 491376 the appellate challenge to a majority jury verdict convicting the Appellant of murder was that the trial judge had –

> "*… failed to direct the jury properly about the relevance of drink to the issue of intent. It was an agreed fact that at the time of the killing the appellant had a blood alcohol reading of approximately 300mg of alcohol per 100ml of blood.*"

At her trial the Appellant's case was that her admitted conduct in arming herself with the murder weapon, a knife and wounding the deceased with a stab to the neck had lacked the requisite intent and constituted lawful self-defence. Henry LJ addressed the "direction threshold" in the following way, at [16]:

> "*It is, of course, a general rule that where there is evidence from which a jury could reasonably infer that a defence might be relied on by the Defendant, the Judge should leave it to the jury. Indeed the Judge may be obliged to do so even against the wishes of the defence …* "

He added, at [17]:

> "*At the same time, while alcohol played a large part in many, if not most, crimes of violence, the standard Sheehan*

> *and Moore ….. direction is not given in every such case, not even perhaps in the majority of such cases. This is because a drunken intent is still an intent. And, as is the case with many specific directions, to give them when they are unnecessary may be confusing.*"

At [32] Henry LJ commented that neither party could remember whether the issue of intoxication had been raised with the trial judge, continuing:

> "*It seems to us likely that, whether it was or not, he took his own decision that this was not a proper case for a Sheehan and Moore direction. We base that on the fact that he faithfully summed up the evidence on intoxication, but did not give that familiar direction which he must have been aware of ….*
>
> [33] *But if we were wrong in that view, in our judgment there was no sufficient evidence before the jury which would have entitled them to conclude that the Defendant might not have formed the intention to kill or cause grievous bodily harm because she was so drunk …*
>
> [34] *Accordingly, in our judgment, it would have been wrong to leave the matter to the jury.*"

[21] In Sooklal v The State [2013] 1 WLR 2011, a decision of the Privy Council, Lord Hope, delivering the unanimous judgment of the Board, stated at 2017A/B:

> "*The question in the case of this Defendant is whether there was a sufficient basis in the evidence for the argument that he lacked the specific intent for murder because he was intoxicated. If there was, their Lordships are in no doubt that the direction which the Judge gave was a misdirection.*"

He continued, at 2017D/E:

> "*What is required is evidence that the Defendant was so intoxicated that he lacked the specific intent which is essential for murder: that is the intent to kill or to inflict grievous bodily harm upon the victim …*
>
> *This test is not satisfied by evidence that the Defendant had consumed so much alcohol that he was intoxicated. Nor is it satisfied by evidence that he could not remember what he was doing because he was drunk.* ***The essence of the***

> ***defence is that the Defendant did not have the guilty intent because his mind was so affected by drink that he did not know what he was doing at the time when he did the act with which he has been charged. The intoxication must have been of such a degree that it prevented him from foreseeing or knowing what he would have foreseen or known had he been sober.***"
>
> [Emphasis added.]

[22] The cases belonging to this field include R v Groark [1999] Crim LR 669, which is noteworthy for its pre-eminently sensible suggestion that in appropriate cases the question of whether a Sheehan and Moore direction should be given to the jury should be proactively canvassed with the defence by the trial judge. Waller LJ stated [transcript, page 5]:

> "*It must be accordingly, as we see it, open to the Judge to clarify with Counsel representing the Defendant whether there is an issue of fact which has been raised; a fortiori where it is clear that the Defendant is not contending that he could not form the requisite intention,* ***and the suggestion that he could not form an intention would be in conflict with a defence that he is running****. In that situation, as we say, a fortiori it must be open to the Judge to see whether defence Counsel has any objection to the direction that the Judge intends to give, and the Judge should be entitled then to act on the clear statement of counsel's position.*"
>
> [Emphasis added.]

The following passage is also noteworthy:

> "*Anything we say in this case is not intended to cast any doubt on what is said in R v Bennett or any doubt on the proposition that if there is evidence of drunkenness which might give rise to an issue as to whether a specific intention could be formed by the accused, a direction should normally be given.*"

[23] The case of Bennett mentioned in the foregoing quotation (R v Bennett [1995] Crim LR 877), which concerned a charge of arson, contains a passage which highlights the choices, or discretion, available to the trial judge [transcript, page 4]:

> "*Unlike a case in which a judge has to decide whether or not to give a direction on an alternative defence which is*

> *inconsistent with a defence advanced by the Defendant, the judge **in this case** had to give a direction on an essential element of the offence which the Crown had to prove, that is to say the intent to destroy or damage property and the intent by the said damage to endanger the life of others.*"

The words "*in this case*" stand out and are to be compared with those of Lord Hope in Sooklal in the passage quoted above ("*… in the case of this Defendant …..*".

[24] This issue was considered by the Northern Ireland Court of Appeal in the recent decision of R v White [2017] NICA 49. The Lord Chief Justice, giving the judgment of the court, stated at [10]–[11]:

> "*Murder is a crime of specific intent. The jury must be satisfied that the accused intended to kill the victim or cause him really serious injury. There is often no direct evidence of intention but by virtue of section 4 of the Criminal Justice Act (NI) 1966 the jury is entitled to infer the relevant intent although it is not bound to do so …*
>
> *Whether or not a person has formed the requisite intention can be affected by the voluntary consumption of alcohol.*"

Consideration was then given to Sooklal at 2017a/e (above).

The Lord Chief Justice observed at [20] that there is "*… a relatively significant threshold which must be crossed before the court was obliged to give the Sheehan and Moore direction.*" The judgment adds at [22]:

> "*We wish to make it clear, however, that … where the evidence does raise an issue about the effects of alcohol on the specific intention necessary for a criminal offence, there is an obligation on the court, whether or not the matter is raised by Counsel, to ensure that the jury is properly directed in relation to it.*"

The judgment continues at [21]:

> "*Where **a judgment of this sort** is to be made those involved in the trial process will invariably have a better feel for the issues in the case and a better sense of the matters in issue. The discussion between the Judge and Counsel did not touch upon the suggestion that the Appellant's intention may have been affected by her consumption of alcohol. We accept that the Appellant's Counsel may not have wished to engage with that issue*

> *since that might have undermined his client's credibility. That ought not, however, to have stopped the prosecution alerting the Judge to the issue and the Judge himself dealing with it* ***if the evidence raised such an issue****. We would not have criticised the Judge for giving a Sheehan and Moore direction out of an abundance of caution but we do not consider that the facts and circumstances of this case required such a direction to be given.*"
>
> [Emphasis added]

Finally, at [22], the court stated unequivocally that the trial judge's duty to ensure that the jury is properly directed is unaffected by whether the issue of intoxication has been raised on behalf of any party.

Analysis

[25] We consider that, on careful analysis, all of the cases considered in [17]–[24] above speak with the same voice on the issue of the threshold test. Fundamentally, when the stage of directing the jury is reached, following the conclusion of all the evidence, there must be an issue about alcohol consumption having extinguished the necessary *mens rea*. The issue must be concrete rather than flimsy or fanciful. It must have some basis in the course of the trial. At the pre-directions stage the Judge, with the assistance of the parties, will consider the pieces of evidence which, individually or collectively, have the potential to raise the issue sufficiently. In White this court described the threshold to be overcome as a "*relatively significant*" one. This is so because, as a consideration of the judgment in White makes clear, the second threshold in play, which would be for the jury, namely evidence that the Accused was so intoxicated that he lacked the specific intent which is essential for murder, is a self-evidently elevated one.

[26] In evaluating whether there is a concrete issue of intoxication extinguishing specific intent, the trial judge will be considering whether there is evidence from which a properly directed jury could reasonably conclude that the prosecution had failed to discharge the burden of establishing the requisite intent. As White at [21] and McKnight at [17] make clear, the exercise of evaluative judgment for the trial judge may, in certain cases, require consideration of whether a Sheehan and Moore direction may be inconsistent with the defence case or may be liable to confuse the jury. In some cases the decision may be a difficult, borderline one. It is clear from the cases considered above that an appellate court will consider whether decisions of this kind attract an appropriate degree of latitude. One of the reasons for this is found in the distinctive roles of appellate court and trial judge. The former is remote from the arena of the trial and its ambience, nuances, emphases, twists and turns. Furthermore, it is this truism which explains why an

appellate court will pay regard to the conduct of the defence at trial, to issues which were raised, to issues which were not raised and to the interaction between the parties' legal representatives and the trial judge at the jury direction stage. All of this forms a significant part of the context which an appellate court will retrospectively review in its audit of whether the conviction under challenge is unsafe.

[27] One final observation in this review of the governing principles seems appropriate. In cases where there is an issue of whether intoxication was such as to extinguish the necessary specific intent the question is not one of capacity. Rather the inquiry relates to whether the Accused actually formed the requisite intent, to be contrasted with whether the Accused was incapable of forming such intent. This important distinction is highlighted in Blackstone's Criminal Practice 2018, paragraph A3.21.

Submissions

[28] The thrust of the argument of Mr MacCreanor QC was that there was more than sufficient evidence to warrant a Sheehan and Moore direction to the jury. The failure to give such a direction, he submitted, rendered unsafe the jury's verdict. Mr MacCreanor, properly, did not seek to resile from how the defence had been run at the trial and, in this respect, readily accepted the court's characterisation – in [6] above – of the challenge to Mr Byrne's evidence as frontal. He submitted that, as evidenced by the judge's direction to the jury on the issue of intoxication, alternative approaches to the legal consequences of this factor could have been outlined. In response to the court's question, Mr MacCreanor accepted that an alternative verdict of guilty of manslaughter would have represented the best conceivable outcome for his client. Counsel acknowledged, correctly, that the central issue at trial was whether the prosecution had proved beyond reasonable doubt that the Appellant was the person who killed the deceased.

[29] On behalf of the prosecution, Mr McDowell QC sought to argue that any suggestion of lack of *mens rea* by intoxication is negated by the Appellant's acceptance that he intentionally punched the deceased, coupled with the objective evidence establishing the vicious nature of the attack. Mr McDowell further submitted that *mens rea* was not an issue at any stage of the trial. Rather, on the implied acceptance in every quarter that mental culpability was a given, the central issue at all times was whether the prosecution had proven beyond reasonable doubt that the perpetrator of the attack and ensuing death was the Appellant.

Unsafe Verdict

[30] The applicable test is whether the conviction of the Appellant is safe. The approach was set out in R v Pollock [2004] NICA 34, at [32], as follows:-

> *"1. The Court of Appeal should concentrate on the single and simple question 'Does it think that the verdict is unsafe'.*
>
> 2. *This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.*
>
> 3. *The court should eschew speculation as to what may have influenced the jury to its verdict.*
>
> 4. *The Court of Appeal must be persuaded that the verdict is unsafe but if having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."*

Conclusion

[31] For this court the main ingredients in the equation are the following. Firstly, there is the evidence pertaining to the police interviews of the Appellant. Next there is the evidence of the Appellant's alcohol consumption and intoxication. The third ingredient is formed by the original Defence Statement and the amended Defence Statement. Fourth, it is necessary to take into account that the Sheehan and Moore direction issue was at no stage ventilated during the trial. Fifth, this issue materialised belatedly on appeal and only following the intervention of a different constitution of this court at an adjourned hearing of this appeal. Sixth, there is no hint of incompetent legal representation. All of these factors, considered in tandem, inform this court's review of the safety of the Appellant's conviction.

[32] It may be said in general terms that a duty to give a Sheehan and Moore direction arises where a failure to do so would be liable to render unsafe the ensuing conviction of the accused person. This may be regarded as the ultimate touchstone, the mischief which must be addressed at both the trial and the appellate stages.

[33] In our review of the decided cases we have identified a clear distinction between trials in which intoxication negating specific intent is a concrete issue – a real live issue – and those where it is not. In cases belonging to the former

category, the threshold is not automatically overcome. Rather, the case becomes a candidate for a Sheehan and Moore direction. The trial judge, applying the simple test formulated in McKnight, will consider whether there is evidence on which a properly directed jury could reasonably conclude that the requisite specific intent was negated by intoxication. If the trial judge considers that there is no, or insufficient, evidence of this calibre, the direction will plainly be inappropriate. In making this assessment the trial judge will enjoy a certain margin of appreciation, given his immersion in not only the evidence but also his insight into the nuances and subtleties pertaining to the presentation of the prosecution and defence cases, in popular parlance the "*run of the case*".

[34] Further, in certain cases it will be appropriate for the trial judge to consider whether a Sheehan and Moore direction could confuse or mislead the jury. Once again the judge's unique familiarity with the "*run of the case*" will be an important element in this exercise. Considerations such as the complexity, both factual and legal, of the case may well fall to be reckoned. The trial judge is also likely to weigh the directions which will be given to the jury, together with the prosecution and defence closing addresses, actual or anticipated. Finally, in the performance of this exercise, one of the questions which may foreseeably arise with some frequency is whether a Sheehan and Moore direction has the potential of undermining the defence case.

[35] Two propositions, which we consider uncontentious, emerge. The first is that a confused jury is not conducive to a fair trial. In the modern criminal trial the most elaborate steps, via specially tailored specimen directions and other measures, are routinely taken with a view to ensuring, so far as is humanly possible, that every jury has a clear and properly informed understanding of its role and responsibilities. The second proposition is that a judge's direction to the jury which could improperly undermine any material aspect of the defence case is likely to render the trial unfair and any ensuing conviction unsafe.

[36] We apply the foregoing framework to the present case in the following way. Extinguishment of the requisite specific intent did not feature, even obliquely, at any stage of the trial of this Appellant. Furthermore, there was no hint of this in the original Defence Statement. Even more telling, in our view, is the absence of any ventilation of this issue in the amended Defence Statement which, significantly, was formulated mid-trial after the Appellant and his legal representatives had absorbed the evidence of the key prosecution witness, Mr Byrne. It is appropriate to pause briefly at this juncture. The evidence of Mr Byrne precipitated a watershed in the trial. It provided ample opportunity for negation of specific intent by intoxication to be introduced in the Appellant's case. We consider it inconceivable that if this truly were an issue of any merit or substance, it was simply overlooked when the solemn exercise of formally altering the contours of the Appellant's

defence was undertaken, in the immediate aftermath of Mr Byrne's repeated and colourful descriptions of the Appellant's inebriation. *Au contraire*, both the Appellant and his legal team were absolutely clear that Byrne's evidence was a fabrication. Furthermore, no attempt to put into effect an alternative defence case was made.

[37] There is a further consideration pointing firmly against the single ground on which this appeal is now advanced. The original Defence Statement was couched in terms which are far from vague or obscure. It has two central features. The first is the Appellant's unequivocal assertion that he was not in the home of the deceased at any material time. The second is his detailed account of his movements and whereabouts throughout a period of approximately 15 hours from the Saturday evening to around mid-morning Sunday. There is no hint of alcoholic haze or blur in this account. Precisely the same observation applies to the amended Defence Statement, which contains even greater detail of times, movements, people, whereabouts and addresses. Of particular note is the detail and coherence of the account which the Appellant was now giving, for the first time, of the alleged physical altercation in the flat of the deceased. Common sense imbued with reality points strongly to the view that these are not the accounts of a person who was so heavily intoxicated as to be incapable of forming the requisite intent. If further reinforcement of this analysis is required it is provided by the nature and extent of the deceased's injuries.

[38] Our analysis in the foregoing paragraphs impels to the following conclusions:

(i) Intoxication extinguishing intent was at no time a feature of the Appellant's defence and was not a concrete issue at his trial. Indeed it was not an issue at all. The threshold for giving a Sheehan and Moore direction was not, therefore, overcome.

(ii) There was no evidential platform from which the jury, properly directed, could reasonably have found that the Appellant lacked the requisite intent by reason of intoxication.

(iii) It was not, therefore, necessary for a Sheehan and Moore direction to be given.

(iv) It follows from the above that the Appellant received a fair trial and this court harbours no reservations about the safety of his conviction.

[39] The appeal against conviction is dismissed accordingly. The appeal against sentence, which benefits from the grant of leave to appeal, will be processed in accordance with separate listing arrangements.