THE COURT OF APPEAL

UNAPPROVED

[2014 106]

Neutral Citation Number: [2021] IECA 143

Birmingham P.

Donnelly J.

Ní Raifeartaigh J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/PROSECUTOR

AND

ANDRZEJ BENKO

APPELLANT/DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 14th day of May 2021

Nature of case

1. In *DPP v. Eadon,*[1] the Supreme Court (Charleton J.) said that the difficulty with intent is that "no one can see inside the accused's mind" and added:

[1] [2019] IESC 98

"*What the accused intended is to be inferred from what others see and hear; the facts on the ground, meaning the state of the victim's body or the presence or absence of defence markings, any admissions made by the accused which explain his mental state at the time; a prior declaration of intent; and the application of shrewdness and common sense in the analysis of the circumstances.*"

2. One matter which frequently arises in the context of assessing the intentions of an accused person is the presumption that a person intends the natural and probable consequences of his actions (hereinafter "the presumption"). This judgment concerns a trial judge's charge to the jury on the presumption in the context of a trial for attempted murder where, of course, the required mens rea is intention to kill. The discussion in this judgment arises solely in relation to what is sometimes referred to as 'ordinary' intention. By 'ordinary intention', we mean the typical and most common meaning of intention, such that to ask the question, "What did this person intend to do by his or her action?", means the same thing as asking, "What was her purpose in so acting?", "What did he want to achieve by his action?", "What did she mean to do by her action?", or "What was her object/objective in so acting?". We do not attempt to discuss what is sometimes referred to as 'oblique intention' or the relationship of the presumption to that concept.

3. The appellant contends that the trial judge failed to explain the presumption adequately to the jury. He also submits that the trial judge should not have directed the jury about the presumption at all because the presumption is confined to murder cases where it arises by virtue of s.4(2) of the Criminal Justice Act 1964.

4. This arises in the context of the appellant's conviction of the attempted murder of his wife, Joanna Benko, on the 7 March 2014. The offence occurred on the 5 July 2010 at their home at Mulhuddart, Co. Dublin. It is not in dispute that the appellant struck his sleeping wife on the head with a lump hammer no more than three times, inflicting life-changing injuries. The appellant appeals against both conviction and sentence. It is a tragic case, particularly when one considers the position of their young child; his father now stands convicted of the attempted murder of his mother, and his mother has sustained severe injuries such that she will need full-time care for the rest of her life.

5. The trial took place from the 4 March 2014 to the 7 March 2014. The sentence was adjourned to the 7 April 2014 at which time evidence was heard. The matter was then further adjourned to the 11 April 2014, when a sentence of 15 years imprisonment was imposed by the trial judge. This judgment concerns the appeal against conviction alone.

The Trial

6. Most of the facts were admitted by the appellant at trial and the sole issue for the jury, in reality, was the question of whether the appellant had an intention to kill at the time he struck his wife, this being the requisite *mens rea* for attempted murder.

7. The offence occurred during the morning of the 5 July 2010, at the family home in Dublin. The injured party, Mrs. Benko, resided there with her husband the appellant, her 3-year old son and two other persons. The injured party had been married to the appellant since 2002 and had lived in Ireland since 2004. Both were originally from Poland. The offence took place on the injured party's birthday. The appellant left their home in the morning, travelled to various locations, and purchased flowers. On his return with the

flowers, he removed the couple's child from where he was sleeping beside his mother and placed him on the couch downstairs. He went to get a vase for the flowers, but instead took up a lump hammer and attacked his wife in the upstairs bedroom. He then contacted the emergency services and travelled to Blanchardstown Garda Station where he told the Garda who was on duty in the front office what he had done. A voluntary cautioned interview took place, during which he gave a detailed description of the events of the morning. He also agreed to give the account on videotape. He was arrested and interviewed on four further occasions during his detention. The detail of what he said to the Gardaí is set out below.

8. When the ambulance personnel and Gardaí arrived at the family home, they found the injured party lying on the bed in the main bedroom of the house. She had significant injuries to her head and there was a considerable amount of blood around the pillow area of the bed. She was rushed to Blanchardstown Hospital, and then to Beaumont Hospital, where she was treated in a specialist neurological unit.

9. The medical evidence was that she had suffered a comminuted fracture of her skull, bruising and injury to her brain. Her injuries have left her confined to a wheelchair for most of her day, rendered her more childlike, severely limited her communication, and are such that she will require full-time care for the rest of her life.

10. Upon a search of the house, the lump hammer was found in a plastic basin in a storage rom. A box of syringes was found in the wardrobe of a bedroom, and several 'bongs' or drug smoking devices were found in various places. A metal tray with yellow powder was located in the bedroom in which Mrs. Benko was found; it did not contain a

controlled drug but it was confirmed that controlled drugs are frequently ‘cut’ with other drugs.

11. Two Polish people who were living in the house at the time gave evidence that they had slept through the incident without being disturbed. They also stated they were aware of difficulties in the marriage, and one of them had heard raised voices and shouting on one occasion. A neighbour gave evidence that he had heard the Benkos fighting the previous day. A colleague of Mr. Benko said that he was aware from conversations that there were difficulties in the marriage and that Mr. Benko suspected his wife of taking and dealing in drugs, and that he wanted to go to a marriage counsellor. He also stated that he had spoken to the appellant on the morning in question and he had mentioned his plan to get flowers for his wife for her birthday, and to do something for dinner that night.

12. A blood sample taken from Mrs. Benko showed the presence of amphetamine at the level of 0.34 micrograms per millilitre of blood, within the ‘toxic’ range, in a scale which included the ranges ‘therapeutic’, ‘toxic’ and ‘lethal’.

13. The Gardaí collected CCTV footage which confirmed the appellant’s account to them of his movements on the morning in question.

The content of the admissions made by the appellant to the Gardaí

14. The prosecution case as to the appellant’s state of mind rested in part upon his own admissions to the Gardaí, the admissibility of which were not contested.

15. When the appellant first arrived at the Garda station, he was in a panicked and agitated state and indicated to Garda Caul, who was on duty at the public counter, that he wished to speak in private. He was brought to a consultation room where he told her that he had hit his wife with a hammer while she was asleep. Garda Caul was joined by a colleague and after they had cautioned him and indicated that he was not under arrest, they conducted an interview and took a memorandum of what was said. This was followed by a videotaped interviewed.

16. Subsequently he was arrested and detained and interviewed on four occasions, giving considerable detail about his actions and his state of mind. Because of this, there was an extensive record for the jury of what the appellant said about his state of mind at the time of the assault upon his wife. This is perhaps an unusual feature of this particular murder case.

17. The appellant is Polish, but it was clear that he had sufficient English to express himself and to understand what was being said to him. No issue arose at the trial in connection with language issues.

18. The first admission made by the appellant was when he was asked why he came to the Garda station. He said:

> *"I came because I hurt my wife today. I jumped into the car to come here to get emergency services because they might not understand me on the phone because I hurt my wife".*

19. He said she was in bed sleeping, and "*I took hammer and hit her on her left temple three times, not more than four*". When asked why, he said: "*I got feeling that I gave her everything ..." -- sorry, "I got feelings that I gave her everything I could and she wanted to pull from me. Every day since January, she was shouting at me and calling at me every day.*

20. When asked: "Did you intend to kill your wife?", he said: "*When I was going upstairs, I intended to kill her. During when I already hit her once, I kept hitting. I didn't want to anymore. It was coming I wanted to, then didn't want, then want, then didn't want".* The latter sentence was relied upon by the appellant's counsel to suggest that he was equivocal about his intentions.

21. After some further details were elicited, he was asked; "Did you understand when you hit your wife that you would cause her serious harm?" And he said: "*Yes, I know. I wasn't thinking. I was turned off. I know she would be hurt. I was destroyed financially, emotionally*". "When you hit Joanna, how hard did you hit her?" And he said: "*Maybe 20% of my force, but the hammer was heavy*" and indicated that it was a small lump hammer, about 2 inches in width. This reference to 20% of his force was relied upon by the appellant's counsel at trial, pointing to the fact that he was a large, powerful man who could easily have killed his wife if he had struck her with full force. It was submitted that this reference to 20% of his force supported the possibility that his intention fell short of an intention to kill, which of course is required for attempted murder.

22. Shortly afterwards, when the notes were read over to him, he added that he did not hit her more than three times, and that every day she was shouting at him illogically since January. He said, "*Joanna was associated with drug dealers and gangsters*".

23. An interview was then recorded on videotape. In the course of that interview, he said as follows. He said that he got up at 6am that morning, picked up his stuff and drove to work at Fonthill Business Park, Clondalkin. He said he did not speak with his wife because she was sleeping. He said that she finished probably smoking drugs at 3am and would sleep till about 1pm to 2pm. He said he had only spent one hour at work because he wanted to organise holidays. He then left then to go to Palmerstown petrol station to fill up the company van with diesel, which was shortly before 8am. He said he then went to B & Q, Liffey Valley Shopping Centre, then to Lidl in Tyrrelstown where he got flowers, and then went home. He said he then made breakfast for the child, brought him downstairs and put him in front of the TV on living room couch. The child had been sleeping in the parents' bedroom. His wife was still in a deep sleep at the time. She was in pyjamas and she was under the covers in her bed.

24. He then continued:

> *"Son fall asleep on the couch in the living room, and I knew my wife had taken drugs and fell asleep. And I went upstairs to try and talk to me wife, but she was in a deep sleep and wouldn't talk to me. I went downstairs for a hammer and was thinking constantly hit her, yes or no. I went upstairs and I went into the bedroom and I was thinking maybe I shouldn't do this and maybe give her a chance. And then I hit her in the head, maybe once, maybe twice, and I ran from the house to maybe try and save her. I didn't have right to do this."*

25. He said he got the hammer from the "*extension at the bottom. In the bedroom that is not finished, there is lots of tools*". He said "*I didn't go on purpose to get hammer. I was getting vase for flowers and saw hammer and looked twice and took hammer*". He said he chose "*one of the smallest lump hammers*" and continued:

> *"I went upstairs and I was thinking yes or no. I got to the room and was thinking I must give us a chance and then I hit her on the head".*

26. He then described hitting her at the upper left temple, and that he hit her with three blows in the same or similar spot. When asked about the strength with which he hit her, he said;

> *"I wasn't using my full power. Maybe 20% of my power. I'm very strong, using my hands every day".*

27. He was asked "Did you know that you would cause your wife serious harm by hitting her in the head with a hammer?" to which he replied "*Afterwards I knew*". He was asked if he knew "beforehand" , to which he replied "*Here,*" and at that point he pointed to his forehead. He said, "*Here, yes, to kill someone, here,*" and then he pointed at his left temple, "*Not as serious. I didn't make choice where to hit her. It wasn't like murder. I'm still loving her*".

28. He then said "*I run away to get you and ringing at the same time to get emergency services, 112 number, and asked for guards*" and "*I run immediately, I knew I had to ring emergencies*". He said he went downstairs, into the dining room to put on his shoes and

saw his son asleep in the living room. He went out the front door into the car to try to get help. While he was driving, he was calling 112.

29. The Gardaí then asked: "When you took the hammer from the extension room and went up the stairs, did you intend to kill your wife?" Answer:

> *"Once, yes; once, not. I wasn't sure. I wasn't really sure. I had hope, hammer in pocket.*"

And

> *"I wasn't too close when I was hitting her. I hit her from far away*".

30. He agreed to give his clothes to the Gardaí, and to have his car examined, and said: "*I'm guilty. My dream is to be end of life*". When asked about who else was living in the house, he mentioned a man and a woman who had been living there for 10 days and were friends of his wife. He said that his wife had been taking amphetamines since "very early" and that in January 2005 she had stopped and instead started smoking cannabis. He said that since December 2009, she started spending " illogically" and that "*she was using all my money in my account to try and make some business with drugs. I had no money for my mortgage and borrowed to pay for my mortgage*". He then mentioned some matters personal to Mrs. Benko which are not relevant to the appeal.

31. Further admissions in the course of interview were as follows:

> *"I went straight upstairs. I was thinking what should I do. I tried to wake her by calling her. I didn't push her in case she hit me across the face. She hit me last Saturday on the back of the neck…I hit her with the hammer on the side of the head…more than once, but not a lot of times."*

When asked "What would you think hitting a person in the head with a hammer would do to them?", he said: "*Serious injury and to kill somebody*." He was asked how long he thought about doing it and he said: "*About two minutes. It wasn't 10 seconds; it was longer. I was walking backwards and forwards*." He was asked: "So, it wasn't a quick decision that you made?" and he said "*No*."

32. He said that he thought she was going to leave him:

> " *She said constantly that. Three to four months ago, she left and came back to me, and the same three weeks ago…. Of course, she always said she would take Philip. If she said she would leave and not take Philip, I wouldn't mind so much*".

He said that he loved his wife but:

> "*She spent all my money and had my Laser and Visa cards. I didn't want to take them from her in case she thought it was over. The worst was the last few days. She took my salary and spent it all. A few weeks ago, my baby found ecstasy that she was selling for her brother, over 100 of them.*"

He said that in recent weeks, "*I was afraid that I would be leaving my son and that she would kill my son by him finding drugs*."

33. He was then asked; "Andrzej, is it fair to say that you decided to kill Joanna to protect Philip and stop her from hurting you?" Answer: "*You could say that*". This is a clear admission of having an intention to kill as distinct from an intention to cause serious harm.

34. Another admission was in response to the question: "Why did you want to kill Joanna today?" Answer: "*I didn't feel any hope for my son and her. She kept on taking*

drugs and she would not stop. I lost hope for my life -- sorry, I lost hope for life and my baby. I had enough. I was sick of her but I shouldn't be doing that."

35. He said that he was hoping to talk to his wife, and this led to the following exchange:

"Question: So, why take a lump hammer with you if you wanted to talk?".

Answer: *"Because I suppose that we won't talk and I wanted to make my justice."*

Question: "What is our justice*?"*

Answer: *"Justice to finish my hell*."

Question: "What would finish your hell?"

Answer: "*If I would kill my wife*."

Question: "So, you took the lump hammer to kill your wife?"

Answer: "*The lump hammer was for that purpose, to kill my wife*."

Again, this was a clear admission of an intention to kill.

36. Shortly after that, the exchange continued as follows:

Question: “When did you decide to kill your wife?"

Answer: *"Since I was searching for a vase."*

Question: "How long did you think about killing your wife when you had the lump hammer in your pocket?"

Answer: "*Two, three minutes."*

Question: "How many times did you get into the bedroom with the hammer in your pocket?"

Answer: "*With the hammer, once."*

Question: "After you took Philip out of the bed, how many times did you go into the bedroom?"

Answer: "*Two times."*

Question: "So, once without the hammer and once with it?"

Answer: *"Correct."*

Question: "The time you went into the room without the hammer, what did you do?"

Answer: "*I was facing the wardrobe. I could see her in the mirror okay. The hammer was for the purpose to kill her. This is clear*."

This was another admission of an intention to kill.

37. Another exchange was:

Answer: "*I was trying -- sorry, I was talking to try and wake her. She didn't wake. Deep sleep*."

Question: "How did you feel?"

Answer: "*I lost hope for any contact with her."*

Question: "Did you decide then to kill her*?"*

Answer: *"At that point, I was thinking that way exactly what you are saying, yes."*

Again, this was a clear admission of an intention to kill.

38. At the trial, counsel sought to persuade the jury that they should place greater weight on what the appellant had first said when he arrived at the Garda station, where his admissions were more equivocal about his intentions. He also drew attention to particular matters such as his admission that he had used only 20% of his force and that he was a large man who could easily have killed his sleeping wife with the hammer if he had

genuinely wished to do so. In essence, he sought to persuade the jury that Mr. Benko's intention fell short of an intention kill.

The trial judge's charge to the jury

39. Before charging the jury, the trial judge canvassed with counsel the question of whether the alternative of convicting on s.4 of the Non-Fatal Offences Against the Person Act 1997 should be left to the jury pursuant to s.9(4) of the Criminal Law Act 1997, which permits alternative verdicts. Counsel for the DPP was somewhat equivocal, saying that his firm instructions had been to put murder only on the indictment and that the prosecution contended that the appellant's admissions constituted admissions to intending to kill (and not the lesser intent of causing serious harm); however, he also suggested that if the trial judge considered that the justice of the case required the jury to be informed of the possibility of the alternative verdict, he should so inform them. Counsel on behalf of the appellant opposed the idea of leaving the possibility of an alternative count to the jury, saying that his client had wished to plead to a lesser count but it was not acceptable to the DPP, and that the alternative count had deliberately not been included on the indictment. In circumstances where the DPP had, he said, opted for an 'all or nothing' situation, it would be inappropriate to leave the alternative count to the jury. The trial judge did not do so. For present purposes, it may be noted that there was no discussion of the presumption as to natural and probable consequences at this stage, that is to say, prior to the trial judge's charge.

40. The trial judge commenced his charge on the 6 March 2014. He made it clear that the burden of proof was on the prosecution and that the standard of proof was 'beyond reasonable doubt'. He referred to the appellant being entitled to the benefit of the doubt.

He then went on to deal with the required *mens rea* for attempted murder, making it clear that only an intention to kill would suffice, and emphasising that it was the subjective state of mind of the appellant that mattered:-

> *"Now, I turn now to the principles which apply to the law pertaining to attempted murder. And a person is guilty of attempted murder if the prosecution prove actions on his part which could give rise, reasonably speaking, to the death of the -- or to the death of the injured party with an intention at that time to kill. So, in a serious crime, there are two elements of the -- of every serious crime. There's the mental element and there's the physical element. And you can appreciate that it would be very wrong to find somebody guilty of a serious crime unless, as it were, they were morally culpable as well, unless, in a sense, they had what call mens rea or a guilty mind. And the guilty mind which the prosecution must prove in the case of attempted murder is an intention to kill at the time when the physical action in question is taking place or being engaged in by the individual in question. And, of course, no more and no less than that.*

41. The trial judge then emphasised the subjective nature of the intention:

> *Now, you're here to decide on whether or not Mr Benko is guilty or not guilty. You're not here to decide whether or not some theoretical or notional person, some third party, some identikit reasonable man, and he is a man, so we'll say reasonable man, has -- is guilty or not guilty, or whether or not in particular he has a -- you are in particular required to address his state of mind, his subjective state of mind. You could imagine, let us suppose, that the typical sane balanced reasonable member of society who's travelling to work on the Luas might be called the reasonable man. In England, the -- for years it used -- the phrase used, and it crept in here, is "the man*

on the Clapham omnibus", the average sensible person was, as it were, held out and constituted as a reasonable man. And, of course, that is not what you have to decide as to whether or not, objectively speaking, the accused had a given state of mind on the occasion in question. To that yardstick, you have to decide whether or not, subjectively speaking, this man, with all his baggage -- I don't mean that in a derogatory sense -- with all his weaknesses, with all his strengths, in the particular circumstances of the case, subjectively speaking, had the guilty mind to which I have referred. It might or might not be, objectively speaking, a reasonable view. It might well be, or not, but that would be a matter for you. Obviously, if I am to try and decide on someone's state of mind, I have regard to what they have done -- what they have done and said and the totality of the circumstances, or setting, in which the state of mind is to be judged, that is to say, in your case, the evidence in this particular case. Now, of course, one might say, a given individual, acting reasonably, and objectively speaking, he had a given state of mind. But you do not stop at that. You're entitled to use that merely as a tool, so to speak. What would a reasonable person have been thinking in this situation? And, of course, that's, if you like, one of the tools which you must use in order to look at the subjective state of mind of the individual in question when you're addressing the issue of guilty mind on his part.

42. The trial judge then introduced the presumption that a person intends the natural and probable consequences of his actions:-

"Now, everybody is presumed to intend the natural and probable consequences of his actions, but that presumption may be rebutted, set aside, destroyed, rendered inoperative, but that is nonetheless the presumption. The prosecution, of course, have

to prove to you beyond a reasonable doubt that it wasn't rebutted, but nonetheless that principle is of assistance to you in order to look into the mind of the accused and make a judgment as to whether or not he, subjectively speaking, had the intention in question."

43. After the jury had retired, counsel on behalf of the appellant raised a requisition in connection with "*what your lordship has told the Court regarding a certain presumption in regards the natural and probable consequences*". He said:-

"Your lordship, with perfect clarity, in fairness, pointed out to the jury that they must inquire into the subjective state of Mr Benko's mind. In my respectful submission, they would be required to apply their minds to the evidence and to inferences to be drawn starting from a neutral position rather than starting from the position of a presumption in [the prosecution's] favour in circumstances otherwise than under the 1964 Act, section 4 of which would the same terms as your lordship has mentioned to the jury, that there is a presumption which may be rebutted of intending natural and probable consequences. That appears, in my submission, to relate to a charge where someone has been killed and clearly said to be unlawful."

44. The judge then said: "*I thought it related to every crime*", to which counsel said "*Well, I suppose -- I suppose, I think –*"; and the judge then added "*At common law*", to which counsel said:-

"*Indeed. I think it could be said in some circumstances that there's a distinction without a difference to be drawn, but my concern would be that if the jury are told to, and correctly so, to be inquiring into the subjective state of Mr Benko's mind --…. to see did he in fact, as your lordship has put to the jury, with all his baggage in the*

particular circumstances of the case have that intent…In my submission, the starting point would be from a neutral position rather than from a presumption in favour of a certain outcome and that that may cause confusion in the context of them leaving their minds open to the reasonable possibilities of the inferences to be drawn."

45. It will be noted that the requisition was therefore to the effect that the trial judge should not have directed the jury about the presumption at all. There was no requisition that if he decided to maintain his reference to the presumption, he should contextualise his remarks with reference to the facts of the case. This was, as we shall see, one of the arguments made on appeal, but it was not made to the trial judge.

46. The trial judge sought the views of counsel for the prosecution, who stated:

"About the presumption. Well, I tend to agree that in fact the Act perhaps only applies to a murder charge…[but] [T]he Court is correct in common law that it's a natural inference or natural presumption for, in any circumstances, and it is perhaps -- when combined with the burden of proof, as the Court went on to do, it perhaps doesn't further the prosecution case, in any event, because the prosecution still has to prove the intention beyond a reasonable doubt.

47. The trial judge then said: "*Well, no, I don't think it makes any difference to the prosecution or defence case, provided I have told them the law correctly…And have I told them the law correctly*?". Prosecution counsel answered in the affirmative, and defence counsel said: "*The Court has the point yes, Judge…May it please the Court*". Thus, counsel on behalf of the appellant did not appear to be pressing the requisition. The jury

returned and the trial re-charged the jury on other matters, but not in relation to the presumption.

48. No further requisition by counsel for the appellant was raised after the re-charge to the effect that the trial judge had failed to amend his direction to the jury in any way regarding the presumption. Yet the trial judge's charge on the presumption is now the very point upon which he now appeals. There was a single ground of appeal in this appeal against conviction, namely that the trial judge erred in explaining the meaning and effect of the presumption provided for in s.4 of the Criminal Justice Act, 1964 as it applied to the facts in the instant case. This in turn sub-divided further into two distinct arguments: (1) that the presumption does not apply in non-murder cases because s.4(2) of the Criminal Justice Act 1964 does not apply, and therefore the trial judge should not have directed the jury on the presumption at all; and (2) even if the trial was correct/entitled to charge the jury in relation to the presumption, his charge was inadequate because he failed to explain it adequately to the jury and failed to contextualise his explanation to the facts of the case.

The appellant's submission that the presumption does not apply in non-murder case: the common law presumption in relation to natural and probable consequences of acts

49. One of the arguments advanced on behalf of the appellant is that the presumption that a person intends the natural and probable consequence of his or her actions is confined to murder cases because it stems from s.4(2) of the Criminal Justice Act 1964. Therefore, counsel submits, the trial judge should not have referred to the presumption at all when directing the jury, and the jury should have been told to start from a "neutral" position. Counsel submits that, notwithstanding a widespread belief that a similar presumption

applies more generally in Irish law, authority for that proposition is scant and it is arguable that the presumption does not apply outside the parameters of the statutory provision.

50. Counsel on behalf of the DPP submits that a number of authorities make it clear that the presumption is well established as a general principle of the common law, including such cases as *Douglas and Hayes,*[2] *Redmond v. Ireland,*[3] *and DPP v Synnott*[4] in this regard.

51. The Court is satisfied that at common law there was a well-established rule or presumption which was broadly similar to that contained in s.4(2) of the Criminal Justice Act 1964, and further, that this principle applied across a wide range of offences involving 'intent'.[5] In many of the cases, the language used to express the relevant proposition involved words such as "a man is supposed to have intended [the natural and probable consequences of his actions] or "is considered to have intended", or "is taken to have intended", although some of the cases do use the language of presumption and rebuttal.

52. The presumption continues in existence in modern Irish criminal law independent to and outside of s.4(2) of the 1964 Act. In *DPP v. Douglas and Hayes*, the Court of Criminal Appeal confirmed that the *mens rea* in a case of shooting with intent to murder contrary to s.14 of the Offences Against the Person Act 1861 was an intention to kill and referred to the presumption in the context of that offence. McWilliam J. said:-

[2] [1985] IRLM 25
[3] [2015] 4 IR 84
[4] [2016] IECA 270
[5] See, for example, *R v. Farrington* 168 ER 763, *R v. Harvey* (1981) 72 Cr App R 139, *R v. Martin* 8 QBD 54, *R v. Meade* [1909] 1 KB 895.

"*Unless an accused has actually expressed an intent, his intent can only be ascertained from a consideration of his actions and the surrounding circumstances, and a general principle with regard to establishing intention has regularly been stated as being that every man is taken to intend the natural and probable consequences of his own acts".*

53. In *Redmond v. Ireland*,[6] the Supreme Court (Charleton J.) stated:

"*..it is clear that in appropriate circumstances presumptions which reverse the ordinary burden of proof may be created through clear words or may already exist at common law. Examples of the latter are the presumption that a person committing a crime is not insane and that an offender intends the natural and probable consequences of their action. Such presumptions can be rebutted and as regards the latter presumption, the burden is on the prosecution to show that it has not been rebutted".*

54. In *DPP v Synnott*,[7] the presumption was briefly referred to in the context of offences of causing loss by deception and corruption in public office arising out of a Garda's involvement in relation to a false a report of an accident for the purpose of claiming insurance. No doubt there are other examples, but these suffice to show that the common law presumption continues to have an existence in Irish law quite apart from the statutory version of it contained in s.4(2) of the 1964 Act.[8]

[6] [2015] IESC 98
[7] [2016] IECA 270
[8] The enactment of s.4 of the 1964 Act took place against widespread disquiet about the House of Lords decision in *R v. Smith* [1961] AC 290 and the introduction of an 'objective' test into the mental element for murder. The language of the Irish provision (s.4(2)) is notably different in its terms from the English statutory response in s.8 of the Criminal Justice Act 1967, but the established interpretation of s.4(2)-that there is no reversal of the burden of proof and that the prosecution must negative the presumption beyond reasonable doubt- has rendered the difference between the two provisions very narrow if not non-existent.

55. Accordingly, the Court rejects the appellant's contention that because this was not a murder case the trial judge was in error in referring to the presumption.

The appellant's submission that the trial judge's direction on the presumption was inadequate

56. The above point was not the appellant's main point, however. His primary contention was that even if the trial judge was entitled to direct the jury about the presumption, the terms in which he did so were inadequate because (a) he failed to contextualise it with regard to the facts of the case, and (b) failed to make clear that the natural and probable 'result' that the jury should direct their minds to was *death* and not merely serious injury (as would be appropriate in a murder case). In other words, the argument was that the trial judge failed to make clear to the jury that the question they should pose to themselves, when considering the presumption, is "Was death the natural and probable consequence of the accused's actions?" (before going on to consider whether the presumption had been rebutted).

57. The appellant also submits that the trial judge should have explained to the jury in detail what it means and the "steps that they must engage in to properly apply it". He also submits that there were relevant facts to which the trial judge should have drawn the jury's attention, such as the appellant's statement that he was using 20% of his force when striking his wife, and (accepting the impossibility of making this point in any sensitive way) that she did not in fact die, taking into account that the appellant was a large, strong man wielding a hammer, and his wife was asleep at the time of the assault. Put bluntly, counsel said, if the appellant had really wanted to kill her, he would have done so.

58. The respondent submits that the trial judge dealt satisfactorily with the presumption and that the argument is largely academic in any event in light of the facts of the case: "*given the admissions made by the appellant, the nature of the assault (use of a lump hammer on the head of a small sleeping woman on multiple occasions in circumstances where he had motive) and the attendance circumstances, it is doubtful if any reliance was to be placed by the jury on the presumption as there was ample evidence that the appellant intended to kill his wife on the occasion in question, irrespective of any presumption*." It is pointed out that the appellant did not hit his wife just once but no more than three times; that he took aim at her head and not at a limb; and that he used a hammer and not a flimsy or light weapon. Moreover he made specific admissions that he intended to kill her. In those circumstances, the DPP submits, the jury could not have had any reasonable doubt about the fact that he intended to kill.

Some preliminary remarks about the presumption

59. The language of presumption and rebuttal can sometimes obscure the simplicity of what underlies this particular presumption. As one writer has observed:

> *"It is a mundane piece of inferential reasoning to assume, until or unless one gets an indication otherwise, that conduct that has likely results was intended to produce such results, or that conduct that looks to be directed towards a particular end was so directed. However, it will not always be the case that a person really intended the likely results of his or her conduct; humans are*

imperfect actors, and there is always scope for the external appearance of someone's actions not to match what he or she was trying to do".[9]

60. Thus, for example, if we see a person pointing a shotgun at someone's chest and shooting them dead, we tend to assume that they intended to kill that person. However, we might not reach that conclusion if there was credible evidence that the person who pulled the trigger thought the gun was not loaded, here the circumstances might support that the person who fired the shot was mistaken as to a crucial matter of fact. In another case, the circumstances might suggest an accident. Suppose, for example, two teenage best friends find a gun discarded on wasteland and start fooling around with it, knowing nothing about how guns might be accidentally discharged. If one shoots the other fatally, and reacts with horror and shock, we might not conclude that there was a shooting with an intent to kill but rather that it was a tragic accident. On the other hand, we might reach a different conclusion if there was evidence that the one of the two young men had placed the gun in that location earlier, was the person who suggested that they go to that location, and we learn that there was a background of a recent personal betrayal such as that the deceased had developed a sexual relationship with the other's girlfriend. The examples and counter-examples can be multiplied. Context is everything. The actions of the accused person fall to be construed by juries in light of all the circumstances. We use this kind of reasoning every day of the week in our ordinary lives and it is merely formalised for the purpose of a criminal trial.

61. The legal language of 'subjective' and 'objective' can sometimes be less than illuminating and it may be helpful to clarify the use of the terms in the present context as

[9] David Prendergast, *The presumption pertaining to murder mens rea in s.4(2) of the Criminal Justice Act 1964*, 2018 60 Irish Jurist 167.

follows. Presumptions usually operate as 'bridges' or short-cuts, usually in aid of the prosecution. In the present context, in theory, the presumption is there to create a 'bridge' from an objective state of affairs to a subjective one i.e. if the jury are satisfied that the act of the accused was *objectively* likely ("natural and probable") to produce the result that it did, then they can presume that the accused *subjectively* intended that result; but of course this is subject to the enormously important caveat that the presumption may be rebutted, and that actual intention or "subjective intention" on the part of the accused must be proved beyond a reasonable doubt. But what does it take to rebut the presumption, if in a particular case it can indeed be said that it was natural and probable that the accused's actions would cause death? This is where the burden of proof comes in.

62. In modern Irish law, the well-established interpretation of the presumption (whether of the statutory version in s.4(2) or the common law version) is that it does *not* shift the burden of proof.[10] Therefore the accused does *not* have to prove that the presumption is rebutted; instead, the prosecution must prove beyond reasonable doubt that the presumption was not rebutted.

Assessment of the trial judge's charge on the presumption

63. We have set out the relevant portions of the trial judge's charge earlier in this judgment but the specific portion dealing with the presumption bears repeating at this point:-

[10] See Walsh J. in *People (Attorney General) v. Dwyer* [1972] IR 416; *People (Attorney General) v. Murray* [1977] IR 360; *People (Attorney General) v. Commane* (1965) WJSC-CCA 388; *People (Attorney General) v. Sherlock and Collins* (1965) WJSC-CCA 482; *DPP v. McBride* [1996] 1 IR 312; *DPP v. Cotter* (1999) WJSC-CCA 1583; *DPP v. Hull* (1998) WJSC-CCA 1088. Unlike many other statutory provisions, it was never subjected to close judicial scrutiny as to whether it might have effected a burden-shift or whether such a burden shift might be unconstitutional; but the interpretation first set out in Dwyer became the established orthodoxy from an early stage. In 2017, the Supreme Court in a determination refused to accept a point of law concerning the presumption, considering that its interpretation was uncontroversial (*DPP v. Jackson* [2018] IESCDET 100).

> *"Now, everybody is presumed to intend the natural and probable consequences of his actions, but that presumption may be rebutted, set aside, destroyed, rendered inoperative, but that is nonetheless the presumption. The prosecution, of course, have to prove to you beyond a reasonable doubt that it wasn't rebutted, but nonetheless that principle is of assistance to you in order to look into the mind of the accused and make a judgment as to whether or not he, subjectively speaking, had the intention in question."*

This direction was entirely correct as far as it went and, importantly, it correctly stated the burden of proof, but was it sufficiently detailed? Did it sufficiently explain how the presumption works in a manner which a jury would understand? While the trial judge did explain that the term 'rebutted' means 'set aside, destroyed, rendered inoperative', he did not furnish any example whether external to the case or with reference to the facts of the case. The appellant complains, for example, that the trial judge did not specifically refer to the admission concerning the use of 20% of his force as a factor which might, the appellant contends, have rebutted the presumption.

64. Further, the trial judge did not specifically say, when setting out the presumption, that the 'consequence' which had to be natural and probable was death (as distinct from serious injury). For example, he could have said something along the lines of: "*When applying the presumption, the question is -What would the ordinary person think was the natural and probable consequence of performing this action (in this case, hitting a sleeping woman three times on the temple with a lump hammer)?. If the answer is <u>death,</u> you can presume death was intended; but if other aspects of the evidence raise a reasonable doubt about this, then you must acquit*." On the other hand, the trial judge had, immediately before that passage quoted above made it crystal clear to the jury that the

only intention that would suffice for attempted murder would be an intention to kill. Logically, therefore, the only 'consequence' that could have been meant was death and not something falling short of that.

65. The appellant also complains that there was no specific medical evidence on the likelihood of lethal consequences from such an assault. This is however to misunderstand the presumption which simply requires the jury to look at matters from the point of an ordinary person in the position of the accused, not a person with specialist medical knowledge.

66. The trial judge's charge on the presumption in the present case was correct but it was also succinct. In a case where the only issue for the jury was whether the accused man had an intention to kill, it might have been preferable to give a greater explanation of the matters referred to above; (i) making clear that the presumption only operated if the jury considered that the natural probable consequence of this accused's actions was death; (ii) explaining by means of an example what 'rebuttal' actually means; and (iii) contextualising it to the case.

67. That said, however, we are mindful of the following comment of the Supreme Court in its recent determination in *DPP v. Jackson,*[11]

> "*it is always possible to finely comb a charge after the fact and to complain that certain issues ought to have been dealt with at greater length, in more detail or in a different manner. However, a perfect charge is not what is required (nor, indeed is achievable). What is required is a clear, accurate and understandable*

[11] [2018] IESCDET 100

explanation of the legal principles at play so as to enable the jury to perform its function".

68. In the present case, the accused was defended by a very experienced defence counsel. The latter had clearly addressed his mind specifically to the question of how the trial judge had directed the jury on the presumption, as is clear from the requisition and exchange set out at paragraphs 41-45 above, and ultimately he did not press his requisition that the direction was inadequate. Further, he did not *at all* raise a requisition as to the need for contextualising the direction to the facts of the case. Further, the context was that of a trial in which there was little factual dispute and it was made crystal clear to the jury that the key issue was whether an intent to kill had been proved beyond a reasonable doubt. It was also a trial in which there were extensive admissions from the accused during Garda interviewing, and both prosecution and defence had laid emphasis on the different variations in the language of the admissions. In the particular circumstances of this case, the Court is satisfied that the trial judge's direction on the presumption could not have led to any unfairness or misunderstanding on the part of the jury. If defence counsel had thought it would, he would not have hesitated to press his requisition. This ground of appeal is therefore refused and the appeal is dismissed.

69. Accordingly, both grounds of appeal fail. The Court is of the view that the trial judge did not fall into error in directing the jury on the presumption simply because this was a case of attempted murder and not murder. Nor did the trial judge fall into error in the manner in which he directed the jury in relation to the presumption. The appeal against conviction is dismissed.