Neutral Citation Number: [2021] EWCA Crim 581

Case No: C5/2019/02278

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM The Central Criminal Court
His Honour Judge Wide Q.C.
T20157387

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd April 2021

Before :

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE DOVE
and
MR JUSTICE BUTCHER

- -

Between :

Kinse Aidid

Appellant

- and -

Respondent

The Queen

- -
- -

Mr K Monteith Q.C. and Mr C Sekar (**assigned by the Registrar of Criminal Appeals**) for the appellant
Mr A Orchard Q.C. and Mr B Temple (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing dates: 23 March 2021

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Approved Judgment

Lord Justice Fulford VP:

Introduction

1. On 8 April 2016, in the Central Criminal Court (Judge Wide Q.C. and a jury), the appellant (who is now aged 25) was convicted of murder. She was sentenced to "*imprisonment for life*" with the period of 15 years less 200 days served on remand specified as the minimum term under section 269(2) Criminal Justice Act 2003.

2. The appellant had two co-accused. Magdalena Agathine was acquitted of murder but convicted of manslaughter. She was sentenced to 9 years' imprisonment. Walid Ibrahim was acquitted on the judge's direction following a submission of no case to answer.

3. On 30 October 2020, the full court, on a technical aspect of the appellant's proposed appeal against sentence, corrected the sentence to "*custody for life*" with a minimum term of 15 years less 200 days (given that she was aged 20 years at the date of sentence). Her renewed application for leave to appeal sentence on substantive grounds was refused. An application for an extension of time (1137 days) and an application for leave to appeal against conviction were granted.

The Facts

The Prosecution Case

4. On the evening of Thursday 17 September 2015, emergency services were called to flat 26 Gainsborough House, Ayley Croft in Enfield. The front door lock was broken (from the inside) and would not open. Access was gained forcibly by a neighbour, Mr Nicholas.

5. The body of the deceased, Hamdi Juimala, aged 27, was found face down, naked, on the bedroom floor. It appeared that she had been dead for some time. She had numerous bruises over her face and body, grip marks on her arms, burns to her back and shoulders and superficial incision wounds above her eyes. The area around her body appeared to have been cleaned to remove traces of blood. There were signs of a disturbance in the hallway and bedroom.

6. The only other individuals present in the flat when the door was forced open were the appellant and her co-accused, Agathine. Both of them appeared to have just woken up and seemed shocked. They said that although they did not know what had happened, they did not intend to be arrested. They had departed the scene by the time the police arrived.

7. Such were the bare outline facts. The prosecution's case in detail was that the appellant and her co-accused, acting together in a joint enterprise attack, murdered the deceased between 6.30am and 7.30am on Thursday 17 September 2015. She died, it was alleged, as a consequence of sustained violence inside the hallway of the flat.

8. The flat had been rented by someone called Abdi, who was also known as Narm or Najib, and the premises had been used between 13 and 17 September 2015 for an extended party. Numerous people came and went from the address, alcohol was consumed and cannabis was smoked. The appellant and Agathine had arrived on the evening of Sunday 13 September 2015 and had remained throughout.

9. Mohammed Gas had been at the party. He knew Agathine, the appellant and the deceased. He described Agathine as a calming influence, not a fighter. He thought the appellant was confident, outgoing and loud. He had seen the appellant and deceased at a couple of previous parties and commented that they did not get along.

10. Tunga Mapuya (referred to as Tomkina Pullya in the transcript) knew the deceased well and suggested she was uncontrollable and aggressive when in drink. He arrived at the flat on Wednesday 16 September 2015 at about 8pm, at the deceased's request. He was told by a tall thin Somali man that neither the deceased nor the tenant (Abdi) were present. Soon after he departed, he received a telephone call from the appellant using Hamdi Juimala's telephone. She asked him to return. He was admitted to the flat by the appellant. He saw the deceased who was in a drunken state and slurring her words. She was unmarked and there was no mention of any dispute or problem. Later, following his departure, he received two telephone calls from Hamdi Juimala's telephone which he did not answer. There was no response when he returned the calls.

11. Mohammed Omar (also called "Cheeks") had been at the party during the early evening of Wednesday 16 September 2015 and described a "*comfortable vibe*", with music and dancing. He saw the appellant and a lighter skinned girl (Agathine) dancing provocatively with Walid Ibrahim, whilst the deceased sat on the sofa. A good deal of alcohol was being consumed. He left before 9.30pm.

12. At about 9.25pm on Wednesday 16 September 2015, there was a fight between the appellant and the deceased outside the flat. This was witnessed by several neighbours and it was captured on CCTV footage.

13. The appellant was said to have been the aggressor, and the attack included punching and kicking the deceased whilst she was on the ground. Afterwards, both women went back inside the flat.

14. Mohammed Omar returned at about 10.25pm. The appellant and Agathine were sitting in the lounge. Walid told him the girls had been arguing and that one of them (he assumed the deceased) was now sleeping in the bedroom. He left once again.

15. He returned at about 12.30am, for about 18 minutes. On this occasion he did not see the deceased. Only the appellant, Walid and Agathine were present in the living room. They were tired and had "*drunk enough*".

16. He visited again between 3.16am and 4.40am. He did not recall hearing Agathine speaking on her telephone, nor did he see Walid drag the deceased by her hair or hit her head against a wall.

17. Jermaine Sylvester was not at the flat but received numerous telephone calls and WhatsApp messages from Agathine, which commenced at about 3am on 17 September 2015. She was drunk and he could hear her and the appellant laughing and talking. He also heard a third female (the deceased) and a man seemingly arguing and swearing. At about 8am, Agathine told him there had been a fight. She and the appellant had beaten up the deceased "*pretty badly*" because she had been rude and aggressive. The appellant had continued the assault on her with kicks and punches whilst she was on the floor. He could hear the appellant in the background agreeing with what was being said. The appellant had stripped the deceased and thrown her clothes and a bag over the balcony

and had cleaned up blood. She said the deceased was sleeping. As far as he understood, there had been only one fight.

18. Later, at 2pm on 17 September 2015, Agathine texted him again saying the girl had stopped breathing and that they had called an ambulance. There was no record, however, of any such 999 call.

19. Mohammed Gas went back to the flat at 3pm on 17 September 2015. The appellant spoke to him through the door. She said a man had locked her, Agathine and the deceased inside but would be returning. The appellant sounded normal and asked for cigarettes.

20. Mohammed Omar also returned to the flat on 17 September 2015, although the time of the visit was unclear. He had a similar discussion with the appellant. She said they had looked for the key but could not find it. When he asked about the deceased, she said she was in the bedroom "*asleep*". She went to check on her whilst Mohammed Omar waited outside the door. The appellant told him "*She's sleeping and I can't wake her*".

21. Later (between 8pm and 9pm) Mohammed Omar returned to the flat with Abdi, the tenant, and a spare key. However, the door would not unlock and after forcing entry (with the assistance of a neighbour as set out above), they discovered the deceased's body, together with the appellant and Agathine, inside the flat.

22. He noted considerable damage within the premises including broken lightbulbs in the corridor and bedroom, broken bottles and a broken door buzzer. The appellant and Agathine left the premises before police arrived.

23. The post-mortem examination revealed multiple sites of blunt impact on the head and body of the deceased. The liver was lacerated. These injuries were consistent with punches and kicks, as well as the victim falling over. There were grip marks to her arms. There was a traumatic brain injury. Several incised wounds were observed above the left eyebrow and there was a penetrating wound to the right side of the right eye. A number of areas across the back, neck and shoulders revealed skin loss, consistent with the victim's body having been burnt, possibly after death.

24. The deceased's injuries were such that there would have been considerable blood loss, the absence of which at the scene suggested that the area had been cleaned. DNA from the deceased's blood was found on the appellant's trainers. The appellant's jacket bore a mixed profile of the deceased's and her own blood.

25. The appellant was arrested on 18 September 2015 at the hostel where she lived and a number of items of her clothing were seized. In interview, she gave an account which she later accepted was untrue, in particular that she had been asleep for 26 hours immediately prior to the door being forced open, when the deceased's body was discovered.

26. She said she had gone to flat 26 with Agathine on Monday 14 September 2015 and stayed at the premises throughout the entire party. She claimed she had had nothing to do with killing the deceased. Having initially suggested she had never seen the deceased before, in her fourth interview she gave an account of Ibrahim grabbing a girl and hitting her head against the wall, kicking her downstairs and leaving her in the stairwell. Thereafter she said they continued drinking and then she went to sleep. She woke at 8pm on 17 September 2015 and whilst looking for the door key, discovered the deceased in

the bedroom. She denied that she was the person on CCTV footage fighting the deceased on 16 September 2015, suggesting this was in fact Magdalena Agathine.

27. Mobile telephone data demonstrated that the telephones of the appellant and co-accused Agathine were in use during the overnight period between Wednesday 16 September 2015 and Thursday 17 September 2015, contradicting the appellant's statement in interview that she had been uninterruptedly asleep.

28. Agathine was arrested on 20 September 2015. She volunteered an account, namely that the men had locked her, the appellant and the deceased in the flat when they went out. They had all been very drunk. When she looked in the bedroom, she saw the deceased on the floor. She wanted to call the police but the appellant said the owner of the flat would return soon, so they should wait.

29. In later interviews, she simply gave a prepared statement, in which she denied any involvement in the murder nor any knowledge of how the deceased was killed.

30. Walid Ibrahim was arrested on 20 September 2015. In his initial interviews he made no comment. Thereafter he gave a prepared statement denying involvement in the murder. He maintained he had left the flat on 17 September 2015 between 5.30am and 6.30am at which stage the victim was safe and well. He accepted he had seen the appellant and Agathine assault her on several occasions and had had to separate them. He had not encouraged this violence and he had not caused any injuries to the deceased. He speculated that the appellant and Agathine were responsible for the death, or at least knew what had occurred.

31. There was no dispute that the fatal injuries could not have been caused during the fight outside the flat with the appellant the previous evening at 9.30pm. Furthermore, if there had been a fight between the deceased and Wahid Ibrahim (which the prosecution suggested was a lie by the appellant), it took place immediately before the fight outside with the appellant at 9.30pm on 16 September 2015 and not, as the appellant asserted, at 3am on 17 September 2015.

The Appellant's Case at Trial

32. The appellant gave evidence at trial. She set out that she was of previous good character with no convictions or cautions. She regularly visited the address at 26 Gainsborough House, where she met Abdi and his friends. She would usually stay for a couple of nights. She met the deceased and co-accused Ibrahim there in July 2015, and assumed they were having a relationship. There was an occasion in July 2015 when the deceased attacked her in one of the bedrooms at the address, but she was more baffled by the incident than angry or upset. There was no animosity as a consequence.

33. She met Agathine in 2015 and they became good friends. Agathine was calm and kind but did not have many friends. The appellant took her under her wing.

34. They attended the party at Gainsborough Road because they had nowhere else to stay at the time. It was unexceptional for her to stay for a couple of days at a time.

35. Walid Ibrahim and the deceased arrived at the address separately. They were not getting on well and started arguing. Everyone was drinking. It seemed to the appellant that Ibrahim was interested in Agathine given he was flirting with her. He was rowing with

the deceased in Somali. She noted the arrival of Tunga Mapuya, who had come to see the deceased.

36. At 9.30pm, the deceased asked her to go outside to keep her company. As they walked downstairs the appellant enquired as to why she was in such an abusive relationship with Ibrahim, but the deceased told her to mind her own business. Then, without warning, the deceased grabbed her, and they started fighting. She agreed that she swung the deceased onto the floor and hit and slapped her, but she did not deliver any kicks. She hit the deceased's head on the ground a couple of times to make her let go of her shoulders. She agreed the deceased was incapable of defending herself. She was not angry but upset. She denied shouting "*go home*" to the deceased.

37. She accepted that just before they both returned inside, she tried to force the deceased back onto the ground. She suggested that she was attempting to make her stay out of sight to avoid Ibrahim seeing her and to prevent her re-entering the flat. The deceased had no visible injuries. They both went into the sitting room and carried on drinking with everyone else.

38. Time seemed to pass quickly because she was quite drunk. She saw Ibrahim dragging the deceased into the stairwell at about 3am, banging her head and kicking her. This account is to be contrasted with the contents of her defence case statement in which she suggested this happened at 10pm. She and Mohammed Omar intervened, taking the deceased into the bedroom where she lay on the bed fully clothed. These events had not been mentioned during her interview.

39. She said that she had not known that Agathine was messaging and speaking with Sylvester using the "loudspeaker" facility on her mobile telephone. She had carried on drinking and had used her own telephone. She fell asleep and was unaware that Agathine and Ibrahim left the flat at about 4.55am on 17 September 2015.

40. When she woke up, only Agathine, herself and the deceased were in the flat. Agathine told her that Ibrahim would be returning. When Mohammed Omar came to the door at about 11am, he asked why it was locked and she went to search for the key. She went into the bedroom and saw the deceased lying face down on the floor, in a really bad state, unclothed with a blue blanket covering her. She checked to see if she was breathing and thought she might be unconscious. Mohammed Omar (who was still outside) told her not to call 999, and that he would get help and come back. She spoke to Agathine who said she did not know what had happened to the deceased. She said she was scared to call the police because she had been beaten up when she had done something similar on an earlier occasion.

41. She described how Agathine went to the kitchen and returned with a saucepan of water which she poured over the deceased in order to wake her up. A scoop of washing powder was also thrown on the deceased. The appellant denied that she was involved in cleaning up the scene and said she did not know for certain that the deceased was dead until the ambulance staff attended.

42. Thereafter, Agathine suggested they should leave and split up because they would be blamed for the death. The appellant returned to her hostel.

43. She accepted that she had lied in interview about knowing or seeing the deceased because she knew it would look bad if she said she had fought with her earlier in the evening.

Agathine's Case at Trial

44. Agathine also gave evidence during the trial. She was of previous good character. She went to the party with the appellant; everyone was drinking and appeared drunk. She suggested that on Wednesday 16 September 2015, Walid and the appellant told the deceased to go home and that she needed to stop drinking because she was drunk, but she did not leave. She was swearing. According to Agathine, at 9.25pm Walid grabbed the deceased by the arm and dragged her to the door, telling her to leave. He pushed her outside and the appellant threw her clothes and bag over the balcony.

45. Whilst the appellant and Walid were outside with the deceased, she (Agathine) remained in the flat alone. She looked over the balcony and saw the appellant beating the deceased. Both of them were drunk. The appellant and deceased returned five or ten minutes later. The deceased was injured and went to lie down in the bedroom and Walid followed her. The appellant said that before the fight outside, Walid had hit the deceased's head against the wall and dragged her downstairs.

46. On 17 September 2015, she went out of the flat with Walid at about 4.30am to find a shop. They returned an hour later. When they returned, there was a delay getting in because Walid did not have a key. The appellant was in the flat and the deceased was sleeping in the bedroom. The appellant dragged the deceased into the hallway and started kicking her legs, telling her to get up and help look for the key, but the deceased was still drunk and asleep.

47. In due course, Agathine slapped the deceased's face. She agreed the deceased was badly injured but denied that she had encouraged the appellant. The latter stripped the deceased of her clothes and said, "*She doesn't listen…she can go home naked*". She and Walid did nothing to stop what was happening. The appellant said to the deceased "*You fucking looking for me with a machete. Talk now".* Thereafter, she delivered hard and repeated kicks to her head and body. The attack continued for up to 15 minutes before the appellant dragged her back into the bedroom. They realised the deceased might not be alive, and Walid told them to clean up the mess. He left the flat and locked the door from the outside. She described cleaning blood from the hallway, the radiator and the floor using a pan of water and washing up liquid. The appellant also cleaned up in the bedroom around the deceased's body, using hot water.

48. At about 11am, shortly before Mohammed Omar returned, she realised the deceased was very cold and they put a blanket over her.

49. Jermaine Sylvester used the loudspeaker facility on his mobile telephone when she spoke to him at 3am on 17 September 2015. The appellant was with her and they were both drunk. When she told him "*we've beaten up a girl*" this was a reference to the appellant's earlier fight with the deceased outside the flat.

50. During the remainder of 17 September 2015, before the door was forced open, they sat in the living room and the appellant told her that if arrested, she should pretend to the police that they had just woken up.

51. Agathine accepted that her initial account to police, her prepared statements and her initial case statement were all untrue.

The Appeal

Submissions

52. A single point is taken on this appeal. It is suggested the judge erred in law in that he failed to direct the jury, alternatively he failed to give them a proper or adequate direction, on the potential consequences of a large intake of alcohol over a period of days on the appellant and its effect vis-à-vis a crime of specific intent.

53. The written directions were discussed with and agreed by counsel. They were short: the main body of the directions occupied 12 lines and there were three footnotes extending to 10 lines. Copies were provided to the jury. On the issue of intent, the judge set out:

> In the main body of the directions
> "Are we sure that the defendant intended the attack to cause really serious bodily harm to Hamdi Juimala?"
>
> In the related third footnote
> "When considering the issue of the defendant's intent, if you decide that she was affected by alcohol, take that into account but bear in mind that a drunken intent is still intent."

54. During the summing up, the judge observed:

> "You can see that next to the word 'intended' in question three, takes you down to the third footnote: 'When considering the issue of the defendant's intent, if you decide that she was affected by alcohol, take that into account. But bear in mind that a drunken intent is still intent'. Now, I do not need to keep reading that. You have got it in writing and you can refer to it as often as you wish when you retire.
>
> […]
>
> Now, Kinse Aidid's case in a nutshell. The importance of putting emotion on one side. The burden and standard of proof, Kinse's lack of previous convictions, and lies not equating to guilt were all emphasised. The issues were identified by Mr Lakha as these: Can the prosecution prove that Kinse was responsible for the fatal attack? And if she was, did she intend to cause really serious harm? Especially, bearing in mind, her drunkenness and lack of sleep."
>
> […]
>
> "(as) submits Mr Lakha […] (i)t was not Kinse who went out with Walid at 4.55am. The indications are that Kinse was then asleep. It is not so extraordinary, bearing in mind her drunkenness and lack of sleep, that she slept through the final attack. The throwing of the clothes over the balcony and the clean-up and the story about Walid asking for the original keys is plainly nonsense. He had a set of keys. And anyway, they could always get in and out by jamming the door open or buzzing the neighbours."

55. In essence, Mr Monteith Q.C. and Mr Sekar (both of whom did not appear at trial) submit that this case should have resulted in a verdict of manslaughter and not murder. Although not acknowledged at trial, it is said that the appellant now accepts responsibility for the victim's death. It is necessary to stress that the appellant's defence was that she was asleep during, and therefore uninvolved in, the critical final attack on the deceased. It is suggested that this claim is not unbelievable given – as her trial counsel described the issue to the jury – her drunkenness and lack of sleep.

56. The essence of the argument for the appellant is that the jury were not appropriately directed to focus on what is suggested to have been the key question, namely whether the appellant – as a result of possible intoxication – may simply have not formed the necessary intent. On this basis, it is argued that the jury should have been directed that in order for the appellant to be convicted, the prosecution, *inter alia*, needed to prove that the appellant had the intent to cause the victim really serious bodily harm despite her possible intoxication.

57. The appellant relies on the suggested approach formulated by the authors of the Crown Court Compendium, which in the latest December 2020 edition sets out at 9-4:

"**Directions**

9. A direction about the effect of intoxication by alcohol and/or drugs on D's state of mind will be necessary only if:

    1. (1) D claims not to have formed the required state of mind (mens rea) because he/she was intoxicated by such substances; and

    2. (2) there is evidence that D may have consumed such substances in such a quantity that D may not have formed that state of mind.

10. The need for and form of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to an offence of specific intent where D was voluntarily intoxicated by alcohol and/or drugs, the jury should normally be directed as follows:

    (1) It is possible for a person to be so intoxicated by alcohol/drugs that he/she does not form the requisite intent.

> (2) However, in many cases a person intoxicated by alcohol/drugs may still be perfectly capable of forming an intention and does in fact do so.
>
> (3) The crucial question for the jury is whether, notwithstanding the level of intoxication, D did in fact have and/or act with the relevant intent.
>
> (4) If D does so, then it is no defence for D to say that they would not have had a particular intention or acted in a particular way had they not been affected by alcohol/drugs.
>
> (5) The jury should therefore consider whether, despite being intoxicated, D had the required intention at the time of the alleged offence.
>
> (6) If they were sure that D did have the relevant intent, D's intoxication would not provide him/her with any defence.
>
> (7) If they were not sure, D would be not guilty.

58. We return to these suggested directions later in this judgment, at [91].

59. We are reminded by Mr Monteith that the appellant's contention of having been asleep was subjected to a sustained attack by the prosecution ("*inconceivable*", "*fantastic lies*" etc.) and there was abundant evidence as to the quantities of alcohol consumed.

60. For the respondent, Mr Orchard Q.C. and Mr Temple submit that a direction on the possible effects of alcohol consumption on intention was not required in the present circumstances. Although it is acknowledged that there was clear evidence of the appellant's intoxication, it is argued by the respondent that evidence of this nature does not automatically necessitate a direction of the kind suggested. It is contended that "*mere drunkenness and/or a failure of memory*" is insufficient. Instead, there must be evidence on which a jury could conclude that because of the "*very substantial degree of intoxication*" following the consumption of alcohol the defendant simply did not know what he or she was doing. Furthermore, the respondent highlights that it was not the appellant's case that she had not formed a murderous intent due to her intoxication, but rather that she was not involved in the fatal attack upon the deceased and had not assaulted her other than during the earlier incident at 9.30pm.

61. In the alternative, if a direction was necessary, it is argued by the Crown that the judge's formulation was in any event appropriate or, at the very least, sufficient. Finally, it is suggested that the conviction, in any event, is not unsafe.

62. We have been helpfully directed to a number of relevant authorities, and we are grateful for the careful research undertaken by counsel which underpinned their constructive submissions.

Discussion

63. With crimes of specific intent, when evidence of intoxication is potentially legally relevant, three principal questions arise:

    i) when should a direction in this context be given to the jury?

    ii) if a direction is to be given, what are its essential elements?

    iii) what are the consequences of not giving a direction when one is judged to have been necessary?

The First Question: *when should a direction in this context be given to the jury*?

64. Addressing the first question, given what is in our view a lack of clarity within the jurisprudence, it has been necessary to consider the relevant authorities on this issue in some detail. We have summarised them, to the extent relevant, in the order in which they were decided.

65. The first is *R v Sheehan and Moore* (1974) 60 Cr App R 308. The victim was burnt to death by the accused, having been doused in petrol. Sheehan said he was not drunk and although he had had a bit of a fight with the victim, he had not intended to kill him. Moore's case was that he had had a good deal to drink, but that he had not intended to kill the victim and he thought they were only going to set the house on fire. The judge directed the jury, *"drunkenness is only a defence to an act which would otherwise be criminal if a person has drunk so much that he is incapable, not nearly, but incapable of forming the intention to do the particular act*". It was submitted by the appellants that this was a plain misdirection. In giving the judgment of the court, Lane LJ stated:

> "[…] 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."

66. The appellant in *R v Bennett* [1995] Crim LR 877 was convicted of arson intending to endanger life. The interviewing officer, along with a friend of the appellant, gave evidence that she was drunk on the night of the fire. The appellant, however, denied being drunk, saying she was only "*merry*". The judgment of the court included the following:

> "A judge must direct the jury, not only on those matters specifically raised by a defendant, but also on issues which, though not pursued by the defendant, are on the evidence are capable of serving as a defence or bearing on the facts which the prosecution must prove to bring home the offence to the accused."

67. This court determined that the judge needed to give a direction on what was an essential element of the offence which the Crown had to prove, and that voluntary intoxication had

to be treated like any other evidence which tended to show the defendant may have lacked the state of mind necessary to support the offence.

68. In *R v Brown and Stratton* [1998] Crim L R 485 the effect of the judge's direction, in a case of causing grievous bodily harm with intent in which there was evidence that the appellants had been intoxicated (Brown said he was drunk; Stratton he had consumed four to six pints of lager), was that the consumption of alcohol was an irrelevant consideration. The direction began as follows:

> "There is reference to the Defendants having been drinking that evening, members of the jury, and you might be wondering if the influence of drink has any effect on this question of intent. Well, it does not, except in very extreme circumstances which do not arise here."

69. Brown did not give evidence. Stratton admitted he hit the victim (his father) and said he lost his temper. Against that background, Potter LJ observed:

> "The criticism is that the effect of that passage, and in particular the first two sentences (*cited above*), amount to a direction that whether or not the defendants were under the influence of drink was irrelevant to the question of whether they had formed a specific intent to cause grievous bodily harm. Although it was no part of either appellant's defence that he was intoxicated to the extent of being incapable of forming an intent at all, the way in which the judge put it must have had the effect of heading off, as it were, the jury from considering the possible effect of drink upon the mind of the appellant to the extent that they were not told that they should consider drink as one factor in relation to deciding whether the requisite specific intent had in fact been formed.
>
> In their interviews each defendant had asserted that he was drunk and each had given a broad account of going around to see the victim and hitting him. Indeed the Crown's case against Brown was put on the basis that the account in his interview was correct, the issue being intent. Stratton too accepted at interview that he was responsible for the injuries. However, the question of intent to do grievous bodily harm, as opposed to some lesser degree of hurt, was never explored in interview with either appellant. It was thus a matter for the jury on all the available evidence which also included evidence from a neighbour that Stratton at least appeared drunk at the time of the incident.
>
> In those circumstances it has been argued, and we think rightly, that the direction we have quoted was deficient, in that it discounted the possibility of intoxication as relevant in the circumstances of the case. In a case requiring a specific intent, such as a section 18 offence, it is in our view necessary, as the form of direction in the Crown Court Bench Book makes quite clear, to inform the jury that in deciding whether the defendant had the specific intent they must take into account the evidence that he was drunk and that if, because he was drunk, the jury considers that he did not intend or may not have intended to cause the requisite degree of harm, then the defendant is entitled to be acquitted. For the judge simply to make clear to the jury that a drunken intent is still an intent was not sufficient to bring that home to the jury."

70. *R v Groark* [1999] Crim LR 669 concerned an appellant charged with wounding with intent who had consumed about 10 pints of beer but who suggested he acted in self-defence whilst knowing what he was doing. His counsel invited the judge not to give a direction on the possible relevance of self-induced intoxication, on the basis that his client had never claimed to be sufficiently drunk not to know what he was doing. Waller LJ indicated that if there was evidence of drunkenness which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that a drunken intent was nevertheless an intent, but that they had to feel sure, having regard to all the evidence, that the defendant had had the intent. However, where a defendant was not contending that he had been unable to form the requisite intention, it was open to the judge to enquire whether defence counsel had any objection to such a direction.

71. In *R v McKnight* (Court of Appeal (Criminal Division) transcript of 19 April 2000) the appellant was convicted of murder. She described in her evidence at trial, in substantial detail, what had happened in the course of a struggle. She said she was not drunk, which she clarified by indicating that she was not "*leglessly drunk*". She also described being "*affected*" by drink, which matched other evidence that she had consumed a significant amount of alcohol and had, for instance, slurred speech. But in cross-examination she said, in response to a specific question, that she was not saying that she was too drunk to know what she was doing. Nowhere in her evidence did the appellant claim she was incapable of forming the relevant intent or that she did not know what she was doing. She simply stated, instead, that she did not have the specific intention for the offence of murder.

72. Against that background, Henry LJ at [37] observed:

> "In our judgment, it follows from *Sooklal* ([1999] 1 WLR 2011) that there must be a proper factual basis before the *Sheehan and Moore* direction is given. It certainly is not every case of drunkenness that would require it. There is no such factual basis here. It would be prudent in all cases involving drunkenness for the trial judge to discuss the issue with counsel at the close of evidence, or perhaps earlier in some cases."

73. In *R v Alden & Jones* [2001] EWCA Crim 3041 (in the Courts-Martial Appeal Court), the two appellants, members of the armed forces, who were the worse for drink, attacked a Lance Corporal, causing some serious injuries. Both men in evidence said that they had been drinking. Jones described himself as merry and happy, and Alden said he was drunk but not "out of it". Rose LJ VP put the matter as follows:

> "35. In our judgment, so far as the question of alcohol and specific intent are concerned […] (t)he crucial question in every case where there is evidence that a defendant has taken a substantial quantity of drink, is whether there is an issue as to the defendant's formation of specific intent by reason of the alcohol which he has taken. As the passage in the judgment of Lane LJ in *Sheehan & Moore*, makes clear, the necessary prerequisite to a direction of the kind identified in that case is that there must be an issue as to the effect of drunkenness upon the defendant's state of mind.

74. Having reviewed various authorities, the Vice-President went on to observe:

> "40. The consequence of these authorities, as it seems to us, is that they illustrate that the terms of a summing-up, in relation to alcohol as affecting intention, have to be addressed to the evidence in the particular case."

75. The tribunal had been directed that before either accused could be convicted, the members needed to be sure of an intention, on the part of Jones, to cause grievous bodily harm when he delivered the kick, and an intention, on the part of Alden, to encourage the infliction of grievous bodily harm with that intent. The Vice-President stated that this direction, given the facts of that case, was appropriate and concluded, "*It is not possible to say that there is any inadequacy in the direction which was given in relation to alcohol and intent, such as is capable of rendering the tribunal's verdicts unsafe*" (see [42]).

76. *The Queen v Lindsey White* [2017] NICA 49 concerned a street attack on a Polish national, Mr Muszynski, who was brutally killed. The appellant's co-accused, Cunningham, pleaded guilty to murder and gave evidence for the prosecution. He accepted he was the main perpetrator, but the attack was said to have been White's idea; she started the violence with a single punch and then joined in, at one stage standing on the deceased's throat bearing her full weight down on his neck. In her defence White accepted that she had been present but accused Cunningham of having committed the assault alone, not in self-defence or in defence of her. She denied being drunk. There were a number of witnesses, however, who gave evidence of her consumption of alcohol and she submitted that in light of the evidence suggesting that she was drunk at the time, it was necessary for the judge to give a direction in accordance with *Sheehan and Moore*. Having cited a passage from Lord Hope's judgment in *Narine Sooklal and another v The State* [1999] 1 WLR 2011, Morgan LCJ delivering the judgment of the Court of Appeal (Northern Ireland) explained:

> "20. The issue for the jury was the actual intent of the defendant but it is apparent that there was a relatively significant threshold which must be crossed before the court was obliged to give the *Sheehan and Moore* direction. The evidence of the appellant herself provided no support for such a direction. The evidence of Cunningham suggested that the appellant was intoxicated but his account of their conversation both beforehand when he alleged that she was the aggressor who suggested getting the deceased and afterwards once they had completed the attack did not support any case that she did not have the requisite intent. Similarly, her remarks to McCartney and Dundon did not support the suggestion that she did not have the requisite intention because of her consumption of alcohol.
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> 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.
>
> 22. We wish to make it clear, however, that we accept Mr O'Donoghue's submission that where the evidence does raise an issue about the effect 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. That follows from *R v Bennett [1995] Crim LR 877* where the court said that the judge is required to direct the jury, not only on those issues specifically raised by the defendant, but also on issues which, though not pursued by the defendant, are on the evidence capable of serving as a defence, or bearing on facts which the prosecution must prove to bring home the offence to the accused."

77. In another appeal in the Court of Appeal (Northern Ireland), *The Queen v Daniel Ward* [2018] NICA 40, the appellant stated that he had had nothing to with the death of the victim and had not been present at the relevant time. There was, however, a substantial body of evidence relating to the demeanour and condition of the appellant, to the effect that he was clearly affected by the consumption of alcohol ("*very drunk*" "*he seemed to be in Disney land*"). McCloskey J, giving the judgment of the court, reviewed *Sheehan and Moore, Bennett, Groark, McKnight, Sooklal*, and *White.* The judge thereafter set out the court's analysis as follows:

> "25. We consider that, on careful analysis, all of the cases considered […] 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."

78. The court concluded that "*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*" (at [38]).

79. *R v Campeanu* [2020] EWCA Crim 362 was decided on 16 January 2020. The applicant was convicted of murder and child destruction. He and the deceased (his partner) were addicted to crack cocaine. Prior to the killing, the applicant had consumed large quantities of crack cocaine. The couple had arrived home at their flat at 10.40pm and the wounds were inflicted between then and nine minutes past midnight when the applicant telephoned his ex-wife in Romania. At 20 minutes past midnight, he telephoned his daughter, Sabina, and said words in Romanian to the effect of "*I got rid of her*". Before calling the emergency services two hours later the applicant smoked more crack cocaine, watched some videos and drove around London. The applicant accepted that he had been responsible for inflicting the fatal stab wounds and when the police arrived at the flat he was very relaxed and calm and told them that he was responsible for the killing and showed them the body. This was all captured on body worn footage of the police officers.

80. The applicant's case was that he had acted in self-defence when he stabbed the victim twice in the neck and that, given that he was under attack and they were both under the influence of crack cocaine, his response was proportionate. At no stage did the applicant suggest he did not know what he was doing or that he was incapable of forming the requisite intent for murder because of his consumption of crack cocaine.

81. The judge declined to give a direction as to the potential impact of intoxication. The applicant's evidence was that he acted in self-defence. He had given a detailed account of the various positions of himself and the victim during the incident, when the fatal wounds were inflicted. Therefore, his evidence was not that he did not know what he was doing and could not have formed the intent to kill because of his voluntary intoxication by ingestion of crack cocaine.

82. Flaux LJ, relying particularly on *McKnight* (see above), indicated that "*for a Sheehan direction to be necessary there must be a proper factual or evidential basis for it*" (see [22]) and that "*there must be sufficient evidence of the defendant claiming not to have formed the requisite intention due to his state of intoxication. The mere fact of intoxication is not sufficient of itself. There must be a causal connection between the two. The evidence* […] *about the applicant being in a state of paranoia because of the drugs was not evidence of his state of mind at the time of the stabbing and* […] *it does not*

create a causal connection between himself induced intoxication and killing her" (see [24]).

83. *R v Mohamadi* [2020] EWCA Crim 327 (judgment given on 21 February 2020) concerned an appellant who was said to have been involved in the multi-perpetrator rape of a young female victim. There was evidence that the appellant, who was not used to drinking, had consumed three or four shots of alcohol. He said he was very drunk and had only vague memories of what had occurred. He denied having had sex with the victim and he did not witness any assault on her. The appeal concerned the suggested failure by the judge properly to direct the jury on the relevance of intoxication to the issue of intent. The judge had been asked, and had refused, to include a direction on this issue during the summing up, as described by Leggatt LJ:

> "22. When the proposed directions were discussed with counsel before the judge summed up the case to the jury, counsel then representing the appellant […] asked the judge to give a specific direction on the issue of intoxication. The judge, however, declined to do so in circumstances where the appellant had not put forward any case that he was merely a spectator to rape and denied that he had seen or been aware of any rape, or had been present at any time in the room where the rape was said to have occurred. It was also not accepted by the prosecution that the appellant was drunk – or at least that he was as drunk as he claimed. The judge took the view that in these circumstances any direction about the effect of intoxication on intention would be addressing an entirely hypothetical situation which no one had raised on the evidence, and that such a direction was therefore inappropriate."

84. Notwithstanding the appellant's denials that he had been present during the incident, there was strong evidence that this was not true, such as his DNA on a cigarette end in the room where the attack occurred and his thumb print on a drink can left by the mattress that had been used. There was also evidence that suggested the appellant was intoxicated. Leggatt LJ went on to observe:

> "29 […] Even if the jury rejected, as lies, his claims that he had been so drunk that he could not remember much that had happened that night – as they would, it seems to us, have been bound to have done if they reached the point of finding that he was present in the room – they might well have considered that they could not rule out the possibility that he was under the influence of drink, particularly given the evidence that the defendants had visited a nightclub and public houses that night, and given the appellant's young age.
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> 30. We therefore consider that a conclusion that the appellant did not actively participate in the rapes but was present when they took place, and also that he was affected at least to some extent by drink, far from being purely hypothetical, was a relevant, if not the most relevant and likely, scenario which the jury would need to consider in his case."

85. We shall return to *Mohamadi* in the context of the third question, *viz.* what are the consequences of not giving a direction when one is considered to have been necessary?

86. We are concerned that the present state of the authorities is likely to create uncertainty for trial judges as to when it is necessary to give a direction on the relevance of self-induced intoxication. The position is straightforward if the accused's case is that he or she was too drunk to know what he or she was doing and had not formed the necessary intent. A direction is then clearly necessary. However, the difficultly arises when it is not part of an accused's case that as a result of intoxication he or she was incapable either of forming the relevant intent or knowing what he or she was doing. In these circumstances, there is tension in the jurisprudence. On the one hand, cases such as *McKnight, Alden and Jones, White, Ward* and *Campeanu* tend to suggest that when the accused has not given this explanation or, alternatively, if self-induced intoxication has not been raised as a live or a concrete issue in the case, then the direction need not be given. On the basis of these authorities, it would appear that the potential significance of clear evidence of varying degrees of drunkenness or the effects of drugs may be neutralised by the accused's case that he or she had sufficiently known what they were doing (for instance, by acting in self-defence) thereby rendering a direction unnecessary. On the other hand, the decisions in *Sheehan and Moore*, *Bennett*, *Brown and Stratton*, *Groark* and *Mohamadi* indicate that if there is evidence of drunkenness/intoxication which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that i) a drunken intent was nevertheless an intent, but ii) that they had to feel sure, having regard to all the evidence, that the defendant had had the intent. In these five authorities, the court reached this conclusion even though it was not the accused's defence that he or she had been so affected (in *Sheehan and Moore, Bennett, Brown and Stratton* and *Groark*, the defendants said they knew what they were doing notwithstanding the consumption of alcohol and in *Mohamadi* the defendant said he had not been present). This court determined a direction, nonetheless, should have been given, leaving it for the jury to decide, on the basis of their conclusions on the evidence, whether intoxication may have resulted in the accused not having the necessary intent.

87. It follows that, although we agree with McCloskey J in *Ward* that the authorities tend to speak with the same voice on the issue of the "*threshold test*", namely that there must be an issue about alcohol consumption having extinguished the necessary *mens rea*, it is desirable nonetheless to resolve the potential tension that we have sought to describe in the jurisprudence as to when the consumption of alcohol or drugs "*is an issue*".

88. Juries in criminal cases are not limited in their consideration of the evidence to the arguments advanced by the prosecution and the defence. They are the finders of fact and it is open to them to reach conclusions that do not match the particular contentions advanced by the parties. They are free, for instance, to reject an accused's account but nonetheless to acquit him or her (or convict of a lesser charge) because they conclude that they are unsure that one or more of the ingredients of the offence of specific intent have been made out. A defendant, for instance, who had been drinking heavily may have advanced a case that he or she knew exactly what was happening when the victim was killed, and that they had acted in lawful self-defence. If the jury reject self-defence, they would still need to consider whether they were sure he or she had the intent to kill or to cause really serious bodily harm, notwithstanding the consumption of alcohol or drugs. The judge must avoid conjuring fanciful factual scenarios, but if there is sufficient evidence as to the consumption of alcohol or drugs such as to make it, viewed realistically, a potential issue as regards intent, then regardless of the nature of the accused's defence, in our judgment the correct position was described by Waller LJ in *Groark:* "*if there is evidence of drunkenness which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally*

be given to the jury that a drunken intent was nevertheless an intent, but that they had to feel sure, having regard to all the evidence, that the defendant had had the intent." Or as the court observed in *Bennett*, "*voluntary intoxication had to be treated like any other evidence which tended to show the defendant may have lacked the state of mind necessary to support the offence*".

89. It follows that that we reject the prosecution's contention that a direction as to the effect of drunkenness on intention was unnecessary in the present case.

The Second Question: *what are the essential elements of a direction on the effect of intoxication on the defendant's intent?*

90. As to the second question, the answer in our judgment is long established and uncontroversial. In *R v Sheehan and Moore* (see [65] above) Lane LJ set out how judges are to direct the jury "*where drunkenness and its possible effect on the defendant's mens rea is in issue*". The ratio of the case is conveniently set out in the headnote as follows:

> "The proper direction now is, first, 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 intent was there, for a drunken intent is nevertheless an intent; secondly, the jury should be instructed to have regard to all the evidence, including the evidence 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."

91. We entirely support the general approach taken by the editors of the Crown Court Compendium of breaking down complex legal directions into a series of short questions, which need to be answered in a logical order. The issues relevant to the relationship between intoxication and specific intent are set out carefully and sequentially in the extract set out at [57] above, and these are accurately distilled in the example direction which the Compendium provides in relation to an offence of section 18 assault. As the Compendium observes, the direction needs to be bespoke to the facts of the individual case in respect of these issues.

92. We cannot leave this topic without observing that, by way of general approach, we deprecate the use of footnotes in the typed directions in law, a device used by the judge in the instant case. Lawyers and judges are comfortable moving between the main text and footnotes, but not all jurors will necessarily be familiar with reading important information in this way.

The Third Question: *what are the consequences of not giving a direction when one is considered to have been necessary?*

93. For the third question, it is important immediately to emphasise that in *Sheehan and Moore* the appellants' convictions for murder were quashed and convictions for manslaughter substituted, not because of a failure to direct the jury on the relevance of drunkenness to intention but because the judge had positively and fundamentally misdirected the jury on that question. Similarly, in *Brown and Stratton* the judge had misdirected the jury on the issue of alcohol by suggesting it was irrelevant to intent. There is nothing in either of these judgments to suggest that an omission to give a direction of the kind recommended by the court would, by itself, have been sufficient to

render the convictions in those cases unsafe. Furthermore, in *Mohamadi* Leggatt LJ concluded:

> "44. We do not consider, however, that the omission to give such a direction gives rise to a real risk that the jury might have made an error. The jury had heard and had been reminded in both the defence closing speech and in the summing-up of the appellant's evidence that he was drunk when the offences occurred. They were very clearly directed that, before convicting him on the basis of his presence alone, they had to be sure that he intended by his presence to assist, encourage, or cause the crime to be carried out. They were properly directed in the clearest terms that it was their function to assess the evidence and to decide what factual inferences and conclusions they should draw. They were directed, too, about the difference between drawing an inference and speculation. We do not think that in these circumstances it was a material error that they were not specifically advised to take into account a particular aspect of the evidence, albeit a relevant aspect, namely, the evidence relating to drink, when deciding whether they could be sure that the appellant had the necessary intention. Put another way, the direction which the appellant contends that the judge should have given was not a direction on a matter of law, but a direction about how the jury should approach their fact-finding task. Whilst such a direction might have been helpful to them, it went beyond the essential role of the judge.
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> 45. In conclusion, standing back and looking at the case as a whole, the judge, as it seems to us, was wrong when formulating her directions to dismiss as entirely hypothetical the possibility that the appellant was (contrary to his case) present when the rapes occurred but under the influence of drink (even if not as drunk as he claimed). Had the judge recognised the potential salience of this scenario, she no doubt would have said more about it than she did to the jury. Nevertheless, the judge directed the jury correctly as to the law, including the need to focus on the question of whether presence intentionally encouraged the crimes. She fully and fairly summed up the evidence, including the evidence relating to drink and its effect on the appellant. We have no reason to think, in these circumstances, that the jury might have been under any misunderstanding as to the questions which they had to answer. We do not consider that in the circumstances of this case the appellant's conviction was unsafe."

94. Although, as described in *Bennett* ([66] above), voluntary intoxication is to be treated like any other evidence which tends to show the defendant may have lacked the state of mind necessary to support the offence, we respectfully doubt whether Leggatt LJ was correct to describe the judge's direction on this issue as not being a direction on a matter of law, given in our judgment it bears directly upon the question of the specific intention of which the jury must be sure before they could convict. In any event, whenever the effect of intoxication is an issue in the case, it will be part of the judge's duty to give a direction of the kind set out above, whether or not this step is strictly, as Leggatt LJ described it, "*beyond the essential role of the judge*". We do agree with Leggatt LJ, however, that the failure to give the direction, or, we would add, to deliver it precisely in conformity with the formula set out by Lane LJ in *Sheehan and Moore*, may not necessarily result in an unsafe verdict. This will depend on all the evidence and the issues in the case, along with the directions otherwise given by the judge.

Conclusion

95. In this case the judge directed the jury, as set out above at [53] and [54], that if they were sure the appellant took part in attacking the victim, they equally had to be sure that the appellant intended the attack to cause really serious bodily harm to the victim. If they considered she was affected by alcohol, that was to be taken into account bearing in mind that a drunken intent is still intent. He reminded the jury that the appellant raised the critical question whether, if the prosecution was able to prove that she was responsible for the attack, were they sure she intended to cause really serious harm bearing in mind her drunkenness and her lack of sleep. Her case was that it was not extraordinary that she may have been asleep during the final attack given her intoxication and her sleep-deprived state.

96. In our view – albeit it was put briefly and at different parts of the summing up – the judge faithfully reflected the direction suggested by Lane LJ in *Sheehan and Moore*, namely that a drunken intent is still an intent but that the jury should have regard particularly to the alcohol consumed (as well as, in this case, lack of sleep) when asking themselves whether they were sure that at the material time the defendant had the requisite intention for the crime of murder. As just set out, the judge described the essential question as posed by the appellant: might her drunkenness and lack of sleep have had the consequence that the prosecution was unable to prove that she had the intention for murder? Overall, the way in which the judge dealt with this issue resulted in a clear and sufficient direction.

97. As a result, and notwithstanding the forceful and helpful submissions of Mr Monteith QC and Mr Sekar, we have no doubt this conviction is safe and the appeal is dismissed.

Postscript

98. At the conclusion of the hearing the court was invited to grant a representation order for the firm of solicitors who have been providing assistance to Mr Monteith and Mr Sekar. This involved, in the main, collecting and ordering the case papers; communicating with the previous representatives; and liasing with the appellant and counsel, including by way of conferences and consultations.

99. In *R v Yaryare and others* [2020] EWCA Crim 1314; [2020 4 WLR 156 a similar application was made for three junior counsel. In refusing the application the court observed:

> "113. It is important in this context to emphasise that decisions as regards representation orders should be made, save exceptionally, well in advance of the hearing of an appeal. This is pre-eminently a matter for the Registrar, albeit the issue can be put before the presiding Lord or Lady Justice, or the Vice President of the Court of Appeal (Criminal Division), in advance of the hearing if there is a substantive basis for appealing her decision. These decisions require careful evaluation of the criteria set out in regulation 18(2) of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (SI 2013/614 as amended by 2013/2814. This should not be left, without good reason, until the day of the hearing because it requires a "*forward-looking*" assessment of whether the case can be adequately presented without two counsel. The court needs to consider variously (depending on the application) the exceptional condition, the counsel condition and the prosecution condition. Although it is not impossible to

> make this judgment ex post facto, as a matter of principle it should be dealt with in advance of the hearing. […]"

100. Although we are grateful for the assistance provided by McLarty Solicitors, the approach in principle identified in *Yaryare* applies equally to the present application. This funding issue should have been raised with the Registrar at an appropriately early stage in the case for her determination as to whether counsel required the assistance of instructing solicitors.

101. We are also asked to give an indication as to whether the case was exceptional for the purposes of billing, bearing in mind the complexity of the issues raised. Again, this is a matter for the Registrar. We would only observe that the judgment in this regard perhaps speaks for itself.