THE COURT OF APPEAL

[2015] IECA 152

The President

Birmingham J.

Sheehan J.

16/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

P.P.

Appellant

Judgment of the Court delivered on the 6th day of July 2015 by

Mr. Justice Sheehan

Introduction

1. This is an appeal against conviction and sentence.

2. The appellant was found guilty following a five day trial of five offences against his daughter which included one count of rape, three counts of sexual assault, and one count of exploitation.

3. This judgment is solely concerned with the appeal against conviction.

4. The appellant originally filed four grounds of appeal, but by later submissions to this Court, the appellant submitted that his primary submission that the verdict was unsatisfactory and unsafe arose from circumstances where no inquiry had been engaged in by the trial judge in accordance with s. 27 of the Criminal Evidence Act 1992, to satisfy himself that the complainant was giving an intelligible account of events which were

relevant to the proceedings.

5. The other grounds of appeal against conviction are:

1. The trial judge erred in allowing the s. 16 DVD interview with the complainant to go to the jury as an exhibit.
2. The trial judge erred in permitting the prosecution to introduce evidence that the appellant had visited certain adult pornographic websites.
3. The trial judge erred in refusing to discharge the jury following use by the specialist interviewing garda of the phrase "victim".
4. The trial judge erred in the manner in which he directed the jury in relation to how jurors should approach the appellant's replies to questions put to him in the garda interviews.

6. In order to consider these grounds of appeal it is necessary to set out the background to the offences.

Background

7. The appellant is the complainant's father and was separated and living apart from the complainant's mother at the time the offences took place.

8. Agreed access arrangements provided for regular weekend access for the appellant with the complainant in his apartment. The five offences of which the appellant was found guilty occurred in his apartment between the 1st October, 2009 and the 26th October, 2010.

9. At the trial, the complainant's evidence in chief was presented to the jury by way of a DVD recording of her interview with two specialist garda interviewers who conducted their interviews in a specialist interview suite on the 31st March, 2011, when the complainant was nine years old. The DVD was introduced in accordance with s. 16(1)(b) of the Criminal Evidence Act 1992, hereinafter referred to as ("the s. 16 DVD"). The trial

commenced on the 24th July, 2012 and on the first day of the trial the s. 16 DVD was played. The party assigned to be present with the complainant during the currency of the DVD being played was sworn. However, no inquiry was conducted by the court so that the court could be satisfied that the witness was capable of giving an intelligible account relevant to the proceedings.

The additional ground of appeal re. s. 27 of the Criminal Evidence Act 1992

10. Counsel for the appellant submitted that the inquiries made by the specialist garda at the commencement of the interviews with the complainant were not sufficient to discharge the statutory requirement particularly as the inquiry was conducted by a member of the investigation team in advance of the trial and over sixteen months prior to the presentation of the complainant before the trial court. Counsel for the appellant also submitted that no such inquiry had been undertaken by the trial judge prior to the commencement of the cross examination which may present as a more logical opportunity for the trial judge to engage with the complainant for the purposes of introducing the court procedure and the process of cross examination.

11. Counsel for the appellant submitted that such an inquiry is statutorily mandated as evidence tendered in this manner represents a fundamental departure from the established rules of evidence.

12. Section 16 of the Criminal Evidence Act 1992 permits video recordings of statements of children under the age of fourteen to be admitted in evidence subject to certain requirements and provides as follows:

> "(1) Subject to subsection (2) –
>
> (a) a video recording of any evidence given by a person under 17 years of age through a live television link at the preliminary examination of an offence to which this part applies, and

(b) a video recording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in paragraph (b), either –

(i) it has been considered in accordance with section 15 (2) by the judge of the District Court conducting the preliminary examination of the offence, or

(ii) the person whose statement was video recorded is available at the trial for cross-examination.

(2) (a) Any such video recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video recording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such video recording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section "statement" includes any representation of fact, whether in words or otherwise."

Section 27 provides:

"(1) Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

(2) If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury.

(3) Subsection (1) shall apply to a person with mental handicap who has reached the age of 14 years as it applies to a person under that age."

13. Counsel for the respondent submitted that this point could not be raised at the appeal as it had not been canvassed before the trial judge and counsel for the respondent relied upon the judgment of the Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v. Cronin* [2003] 3 I.R. at 377.

14. In *The People at the Suit of the Director of Public Prosecutions v. Cronin*, the applicant had been convicted of murdering his wife whom he was alleged to have shot in a nightclub. Throughout the duration of the trial, the applicant had denied that he was armed or had fired the fatal shot. The jury returned a verdict of guilty of murder. A number of years later, a new legal team was progressing the applicant's appeal and raised, for the first time, the possibility of the offence being one of manslaughter. The applicant advanced the argument that the trial judge should have left the possibility of a manslaughter verdict to the jury on the basis of evidence given by one witness who claimed to have seen the victim

pushing the applicant's hand away from her before the shot was fired. It was argued that this might have justified a manslaughter verdict on the basis of accidental discharge of a firearm. The Court of Criminal Appeal dismissed the appeal. As O'Malley states in his book 'The Criminal Process' (Roundhall, Dublin, 2009) at p.86 :-

> "In Cronin itself, the possibility of manslaughter was being raised for the first time several years after the conclusion of the trial, and following a perusal of the transcript by a new legal team. While the court did not exclude entirely the possibility that a judge might be obliged or, at least, permitted to place before the jury a defence that had not been raised... it clearly did not accept that trial judges have a general duty to bear what is sometimes called the "invisible burden" to leave matters to the jury in the absence of any request from the parties to do so."

15. It is clear that to impose such an unqualified obligation on a trial judge would represent an unwarranted judicial intrusion. The decision of the Court of Criminal Appeal was unsuccessfully appealed to the Supreme Court. However, Kearns J. (as he then was) accepted that exceptional cases may arise where it may be appropriate for a judge to intervene more actively and refer to circumstances where an accused person was unrepresented or where the defendant's legal advisers were falling into error as a result of incompetence. The central issue in *Cronin* was whether a point which had not been raised at trial could be advanced subsequently as a ground of appeal.

16. The Court has considered the submissions of the appellant and the respondent on the question as to whether or not it should now permit the additional ground to be argued given that this point was not raised at the trial. The Court concludes that the issue raised is an important one relating to the admissibility of the principle evidence in the case and accordingly holds that it is proper to allow the appellant to argue this fresh ground of appeal notwithstanding the fact that no objection had been raised at the trial to the

admissibility of the complainant's evidence.

17. Counsel for the appellant submitted that it was for this Court to determine whether the departure from the statutory requirements in this case was of such a fundamental nature that it deprived the trial court of jurisdiction to hear the evidence in chief as tendered by way of the s. 16 DVD interview.

18. Counsel for the appellant noted the general rule in civil and criminal proceedings for oral evidence to be given on oath or affirmation but accepted the good policy reasons for the statutory exception in respect of child witnesses or complainant's. The exception departs so fundamentally from the normal rules of evidence that the legislature has provided that certain safeguards are in place to ensure that such unsworn evidence is placed correctly before a court. In this regard counsel relied upon the Supreme Court decision in *Mapp v. Gilhooley* [1991] 1 I.R. 253, in which the only ground of appeal being pursued in the Supreme Court was that the trial judge had erred in permitting the plaintiff to give evidence when he was unsworn and incompetent as a witness. The Supreme Court allowed the appeal and held that the general rule was that oral or written evidence of any witness must be sworn and exceptions to this general rule are provided by statute.

19. Counsel for the appellant argued that implied in that section, is that the court as opposed to the interviewing garda conducts an inquiry as to whether the child under fourteen years of age is capable of giving an intelligible account of events prior to giving evidence and comes to a conclusion based on this inquiry that the person is so capable.

20. Counsel for the appellant further submitted that s. 27 of the Act of 1992, does not extend to allowing video recorded statements to be admitted into evidence which were taken otherwise than on oath. It was also argued that s. 27 did not apply to evidence admitted pursuant to s. 16 and furthermore it was not specified in s. 16 that statements made by persons under fourteen years of age may be made otherwise than on oath.

Counsel for the appellant fully contended that there is a lacuna in the legislation as it is presently drafted as it does not provide for a statutory exception for the admission of unsworn evidence.

21. Counsel for the appellant rejected the suggestion that a presumption of satisfaction could exist merely by virtue of the fact that the defence did not raise the issue of the capacity of the complainant at trial which it is contended may have arisen if the court had engaged in such an inquiry. It was also the appellant's contention that a presumption of satisfaction cannot equally arise on the basis that no action was taken on behalf of the trial court. The trial court must be satisfied and such satisfaction can only be established when a court having inquired into the competency of the child witness or child complainant declares itself satisfied. The appellant submitted that inactivity, inaction or acquiescence on the part of a court in the continuing receipt of evidence of this nature can never and ought never to be taken as a substitute for definitive satisfaction. It was the ultimate contention of the appellant that the language of s. 27(1) indicates that the receipt of evidence of a person under fourteen is not mandated by the courts, but is qualified by the introduction of the conditional tense *"may be received otherwise than on oath or affirmation if the court is satisfied"*.

22. Counsel for the appellant in relying upon the analogous provision referred this Court to the decision of the Court of Criminal Appeal in *The People at the Suit of Director of Public Prosecutions v. Mallen* [2011] IECCA 19 in which O'Donnell J. conducted a review of the law in relation to search warrants and, citing *Byrne v. Grey* and *The People at the Suit of the Director of Public Prosecutions v. Kenny*, stated:-

> "The warrant in *Kenny* was in a standard form and provided merely that the undersigned peace commissioner being satisfied on the information of the garda granted the warrant. The warrant did not however state that the peace

commissioner was himself satisfied there was a reasonable ground for suspecting the possession of a drug. Furthermore, the evidence in the case showed that the peace commissioner had not made any inquiry as to the nature of the garda's belief and, therefore, could not have been satisfied himself that there was a reasonable ground for suspecting the possession of the drug. In narrow but simple terms, both the evidence and the warrant showed that the garda had grounds for suspecting the possession of a drug, but not that the peace commissioner was satisfied that there was a reasonable ground for suspecting that a person was in possession of a controlled drug in the named premises."

23. Counsel for the appellant noted that the difficulty in *Kenny* was that the District Court judge appeared to adopt the view of the deponent of the sworn information without any inquiry. Thus, counsel made the analogous argument that in the present case the trial court did not apply any judicial process or determination as is mandated by the statutory exception. In short prior to s. 16 of the Act of 1992, being engaged, there is a duty imposed upon a court to conduct an inquiry to ensure that the child is capable of giving an intelligible account of the events and the appellant relied upon the decision of *O'Sullivan v. Hammill* [1999] 2 I.R. 9, in this regard.

24. Counsel for the respondent submitted that while it was clearly preferable for a court to conduct an inquiry, the failure to do so in the circumstances of this case was not fatal. Counsel submitted that all the requirements under the Act had been complied with including the defence being advised of the intention of the DPP to introduce the evidence under s. 16(1) (b) and that a copy of the video recording had been made available to the defence prior to the trial and, further, that no issue arose at the trial as to the admissibility of the video recorded statement. Counsel for the respondent also noted that three video recorded interviews conducted by the HSE with the complainant were also given to the

defence and that they had formed part of the cross examination of the complainant. It was clear from the transcript that the defence had examined the video recorded interviews in depth prior to the trial and no application had been made to the trial court to exclude the evidence or any portion of it on the basis that it was deficient in any respect or otherwise created an unfairness to the accused. Ultimately the Court was being asked to examine the admissibility of evidence against a background where no issue was raised at the trial or indeed arises on appeal as to the quality of the evidence and in particular whether the evidence was in some way unintelligible.

25. Counsel for the respondent further submitted that the Criminal Justice Act 1992 does not set out any procedure for the determination of the competency of a child witness. The Court merely has to be satisfied that the child is capable of giving intelligible evidence and in this regard the statutory threshold is low and does not envisage any sort of in depth inquiry.

26. The key submission from the respondent was to the effect that at a very minimum it would be incumbent on the appellant to demonstrate some potential unfairness arising out of this ground of appeal. It was the respondent's submission that the appellant had failed to identify any potential unfairness and no attempt had been made to undermine the capacity of the complainant to give her evidence pursuant to the Act of 1992. Counsel for the respondent submitted that should this Court hold that there should have been a preliminary ruling by the trial judge where no potential unfairness actually arises, then this Court should apply the proviso under s. 3(1)(A) of the Criminal Justice Act 1993, where it is clear that no miscarriage of justice has actually occurred.

27. In relation to s. 27(1) of the Criminal Evidence Act 1992 the Court has considered the submissions made by counsel for the appellant and the respondent. Evidence introduced by way of recorded DVD interview pursuant to the section does not have to be

sworn. While this Court accepts the respondent's submission that s. 27 of the Act of 1992 does not prescribe the manner or form in which the inquiry should be embarked on, it is the view of this Court that it is preferable that such an inquiry be held prior to placing the evidence before the jury. The question for this Court is whether in the circumstances of this case, the failure to carry out a formal inquiry in advance rendered the trial unsatisfactory. This question must be considered in light of a number of matters. Firstly, the absence of a formal inquiry did not result in any unfairness to the appellant. Secondly, it requires to be considered in light of the cross examination of the child witness. She was subjected to a relatively short but focused cross examination in which she was asked general questions about her family and then more specific questions about her memory, did she know what pretending meant, and had she discussed the case with her mother. Following this she was then asked to view three DVD interviews in which she had been questioned by a member of the HSE. She was asked was she telling the truth in these interviews. She replied that she was and it is evident from the transcript that she answered all the other questions in a coherent manner. It is clear from this cross examination that the child witness was not only capable of giving an intelligible account but actually did so. There is no doubt that the witness satisfied the requirements of the section so there is no basis for any other conclusion. The failure to carry out a formal inquiry in advance to establish that fact cannot render the trial unsatisfactory. Accordingly this Court dismisses this ground of appeal.

Allowing jury to receive s. 16 DVD as exhibit

28. Counsel for the appellant submitted that the trial judge had erred in refusing the defendant's application at trial which requested that any replay of the s. 16 DVD be done in open court and in so doing permitted an unfairness to enter into the process which was prejudicial to the appellant.

29. Two trained specialist garda interviewers had conducted and recorded their interview with the complainant in a specialist interview suite pursuant to s. 16(1) of the Criminal Evidence Act 1992. At the trial the s. 16 DVD was played to the jury in open court as the evidence in chief of the complainant. Prior to the trial, the defence became aware that on three occasions, the HSE had conducted and recorded interviews with the complainant (hereinafter referred to as "the HSE interviews") concerning the subject matter of this trial. In the course of the trial the s. 16 DVD was played in open court and the complainant was available in the court complex for cross examination through video link. As part of the cross examination process the DVD's of the three HSE interviews were also played.

30. At the end of the trial it was the defence's contention that while a s. 16 DVD and HSE interviews were exhibits, they were a form of oral evidence. Such recordings were to be regarded in the same way as oral evidence tendered by any other witness and where the jury wished to be reminded of any aspect of that, it was appropriate that this should be done in open court. The matter of whether the jury should have the s. 16 DVD and HSE interviews in their jury room to replay at their discretion arose during the requisition stage. The trial judge noted that while there were English authorities to suggest that it should be done in open court, he was reluctant to follow those authorities, his own preference if there was consent being for the jury to view them in their own room. The jury was thus provided with the recordings.

31. Counsel for the appellant points to a number of reasons as the basis for this ground of appeal:

1. The purpose of s. 16 of the Criminal Evidence Act 1992, is to assist in assembling evidence for use in court in the case of child complainants or child witnesses and not to equip the jury with the recording of evidence in

chief of the complainant to play and replay if they so wished in the jury room.

2. When such a recording of the evidence in chief is provided to the jury in their room there is a possibility that a jury could spend a considerable amount of time watching the replay of s. 16 evidence in chief and consequently not deliberating amongst themselves on the issues of the case. Furthermore, such replaying of such recordings could distort in a manner impossible to investigate the statutory intent behind s. 25 of the Criminal Justice Act 1984 which provides for a court to receive a majority verdict after the jury has had such period of time for deliberation as the court thinks reasonable in all the circumstances which shall not in any case be less than two hours deliberation.

3. If the jury were equipped with s. 16 DVD, it may result in the jury having before them evidence in chief of the complainant which can often be extremely emotional and is not balanced by having before them at the same time the evidence of the cross examination. Therefore there exists a risk of such evidence being disproportionately persuasive when not put in a balanced way by the trial judge.

32. Counsel for the appellant further submitted that while the s. 16 DVD was an exhibit it must be regarded as the oral evidence in the case. Reliance was placed upon the English Court of Appeal decisions in *R. v. Rawlings* and *R. v Broadbent* [1995] 1 WLR 178, which held that it was a matter for the judge's discretion to accede to a request by the jury after retirement for the video to be played having regard to the need to guard against unfairness deriving from the replay of only the evidence in chief of the complainant and should normally only allow the video or part of it to be replayed, if the jury wished to be reminded

of how the words were said.

33. Counsel for the appellant further stated that where a judge exercised his discretion in favour of allowing the recording to be replayed, it should be done in open court and the judge should give a warning to the jury with regard to giving disproportionate weight to it. It was further specified that after the replay of the recorded interview, the judge should remind the jury of the cross examination and re-examination of the complainant from his notes. This dicta was subsequently approved in *R. v. John Baird* [2007] EWCA Crim. 287, where the English Court of Appeal (Criminal Division) further held that even where the video was not replayed to the jury, that where the complainant's evidence was recapped from the transcript it is still incumbent on the judge to remind the jury of the complainant's cross examination and re-examination from his own notes and where appropriate any relevant part of the accused's own evidence.

34. Counsel on behalf of the respondent placed reliance upon the fact that at the trial, both counsel for the prosecution and the defence consented to the s. 16 DVD and the HSE interviews being exhibited in the case and thereby being available to the jury. Counsel for the respondent stated that at the time of the trial, the objection from counsel for the appellant went only so far as to suggest that the usual practice was for videos to be viewed in open court and at no time was it indicated to the trial judge that to equip the jury with the video evidence in their jury room would lead to any unfairness to the accused or have the potential to render the decision of the jury unsafe. Counsel for the respondent submitted that counsel for the accused at trial acknowledged the status of all the video recordings, not only as evidence in the case, but also as exhibits which the jury were fully entitled to view as with other exhibits handed in during the course of the trial.

35. It was further submitted by counsel for the respondent that the trial judge was correct to allow the jury the facility of viewing the exhibits in the privacy of the jury room

and that any potential danger of unfairness in this case was effectively none existent.

36. In regard to the s. 16 DVD going to the jury in their room, the defence objection during the course of the trial was cursory in nature. There was no need in the circumstances for the jury to be reminded of the cross-examination in the event that they decided to watch the s. 16 DVD interview. As this Court has already noted the defendant's cross examination of the complainant was short focused and limited to general questions about herself and her family, her memory, did she know what pretending meant, had she discussed the case with her mother and then asking her if she had told the truth in the three HSE interviews. There is no question of any injustice resulting from the jury viewing the s. 16 DVD in their room along with other exhibits and accordingly the court dismisses this ground of appeal.

Error in permitting the prosecution to introduce evidence that the appellant visited certain adult pornographic websites

37. The Computer Crime Investigation Unit of An Garda Síochána had carried out a forensic examination of a laptop computer taken from the appellant. Counsel for the appellant had objected to that evidence being put before the jury on the basis that it was not relevant to any of the counts before the jury and as an alternative if it was deemed to be relevant in some circumstantial way, its prejudicial effect far outweighed any probative value. In this regard, counsel for the appellant relied on the following cases: *Attorney General v. O'Neill* [1964] 1 I.R., *People at the Suit of the Director of Public Prosecutions v. Cahill* [2001] 3 I.R. 494, *People at the Suit of the Director of Public Prosecutions v. Mileady* (Unreported, Court of Criminal Appeal, 20th March, 2001, Geoghegan J.).

38. Counsel for the prosecution had contended at the trial, that such evidence was highly relevant in relation to the count of exploitation contrary to s. 3 of the Child Trafficking and Pornography Act 1998, as amended, namely inviting, inducing and/or

coercing the complainant to view pornographic images. The evidence was highly significant in that the complainant was correct in her assertion that the appellant was at the material time, in possession of pornography and was in a position to show it to her. It was further submitted that the evidence was admissible because the accused was confronted with same during the course of an interview and he accepted that he had watched pornographic material. Counsel for the prosecution had argued that the admissions in the memorandum of interviews and the findings of the content of the appellant's laptop were admissible against the appellant on the basis that there was coincidence of fact which supported the complainant's assertion. In this regard counsel for the prosecution relied on the following cases: *People at the Suit of the Director of Public Prosecutions v. Mileady* (Unreported, Court of Criminal Appeal, 20th March, 2001, Geoghegan J.), *People at the Suit of the Director of Public Prosecutions v. Brian Kearny* (CCA 9th October, 2009) and distinguished the present case from that of *Attorney General v. O'Neill* [1964] I.R. Jur. Rep. 1. Counsel for the respondent concluded that the evidence of the accused having viewed pornographic material during the relevant time was highly relevant to the count of exploitation on the indictment. Further the manner in which the jury should view this evidence was fully and adequately dealt with in the trial judge's charge to the jury.

39. The court dismisses this ground of appeal and holds with the respondent on this matter. Evidence of the accused having viewed pornographic material during the relevant time was relevant to the count of sexual exploitation on the indictment. Both pieces of evidence were relevant and with regard to any potential prejudicial effect which counsel for the appellant argued for it, weighed any probative value it is clear to this Court that the trial judge's charge adequately dealt with these issues.

Ground 3 repeated use by the specialist interviewing garda of the phrase "victim"

40. In fairness to the appellant he did not seek to place great reliance on this ground

during the course of his oral submissions to this Court.

41. In the course of her evidence on the first day of the trial the specialist trained garda who had interviewed the complainant referred to her as a "victim". Counsel for the defendant at the trial objected and thereafter the garda used the term "alleged victim". The trial judge refused to accede to an application on behalf of the counsel for the defendant to discharge the jury following the use of the phrase "the victim". Counsel for the appellant submitted that the use of the phrase in an unqualified fashion trespassed on the jury's exclusive role in the trial and both of the credibility of the complainant before the jury and/or implicitly affirmed the accuracy and truthfulness of the complainant's account. Counsel for the appellant relied on this ground of appeal as arising as part of an accumulation of other matters raised in the grounds of appeal which together gave rise to an unfair trial.

42. Counsel for the respondent submitted that the trial judge had adequately addressed the jury in relation to this issue reiterating that it quite clearly fell within the remit of jury to decide the guilt or innocence of the accused. Counsel for the respondent relied upon the decision by the Court of Criminal Appeal in *People at the Suit of the Director of Public Prosecutions v. Cunningham* [2007] IECCA (24th May, 2007) and submitted that the trial judge did not err in refusing to discharge the jury for the following reasons:

1. The timing of the impugned evidence followed the opening speech by counsel for the prosecution outlining the presumption of innocence.
2. There was no evidence of malice on the part of the witness and this was corrected after the appropriate intervention and
3. The jury were told in the clearest possible terms to decide the case on the evidence adduced during the trial and not on the opinions of witnesses.

43. It is clear to this Court that in the circumstances of this case, both in the manner in

which the omission of the word "alleged" was dealt with followed by the judge's direction to the jury that this ground must also fail.

Ground 4 the charge in relation to the appellant's interviews

44. Following the trial judge's charge to the jury, counsel for the defendant made a requisition in relation to the manner in which the trial judge had dealt with the status of the appellant's interviews with the gardaí and how the jury were to regard the s. 16 DVD recorded interview. The trial judge recharged the jury and explicitly directed the jury that the contents of the garda interviews with the appellant were to be considered evidence and the jury were to use their ordinary faculties and approach it as to its veracity, accuracy or otherwise as each jury member saw fit. Counsel for the appellant submitted that the trial judge's recharge in this respect did not emphasise to the jury that if the jurors concluded that they were not entirely convinced by the appellant's account but accepted that it might be reasonably true, then this should give rise to a verdict of not guilty. Counsel for the appellant further submitted that the trial judge should have emphasised that in the event that the jury rejected entirely the contents of the appellant's interviews, this should not mean an automatic verdict of guilty on one or more the counts. The obligation of the jury was to weigh the actual evidence and ensure that the standard of proof beyond a reasonable doubt had been reached, notwithstanding that they had disregarded the contents of those interviews.

45. Counsel for the respondent noted that no further requisitions were made arising from the trial judge's recharge to the jury and also submitted that the jury had been properly directed in relation to the burden of the standard of proof and ultimately contended that the trial judge had not fallen into any error in law or fact in his charge to the jury with regard to the evidential status of the memoranda of the garda interviews with the appellant.

46. It is clear to this Court that the trial judge did not fall into any error in his charge to the jury with regard to the evidential status of the memoranda of interview and holds with the respondent. The court therefore refuses to allow this ground of appeal. It is the last of the appellant's grounds of appeal and accordingly the appeals against conviction in this case are dismissed.

approved
Yanett Meehan
20th July 2015

This Judgement has been redacted and may be published on Courts Website
MJS.