THE COURT OF APPEAL

Record No. 226/2016

Birmingham J.
Mahon J.
Whelan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

MARTA HERDA

APPELLANT

JUDGMENT of the Court delivered on the 12th day of October 2017 by Mr. Justice Mahon

1. The appellant was convicted on the 28th July 2017 of murdering Csaba Orsas, a Hungarian national on the 26th March 2013 by a jury at the Central Criminal Court and was sentenced to life imprisonment. She has appealed against her conviction.

2. The appellant is a Polish national born in 1987. She came to live in Ireland at the age of nineteen, and at the time of the offence was working in a hotel in Arklow where the deceased was also employed. They had known each other for approximately two years. Both lived in Arklow, but in different parts of the town, with the deceased residing in a part closer to the harbour area. It was alleged by the appellant that the deceased had been, for some period of time, infatuated with her, regularly followed her and attempted to contact her, and in general terms, harassed her to the point of annoyance and concern on her part.

3. Early on the morning of the 13th July 2013 the appellant drove her Volkswagon Passat car, with the deceased in the front passenger seat, through a barrier and railing at Arklow harbour and into deep water. The appellant succeeded in exiting the car and swam to safety. The deceased's body was later found washed up on the nearby shore, having died from drowning. Immediately following the incident, the appellant was found by local people in a saturated state close to the harbour area and was taken by ambulance to hospital. At the trial, evidence was heard from people who came to her assistance, ambulance personnel and from two nurses who tended to her in hospital. The appellant did not sustain any physical injury.

4. At the time of the incident the appellant had been living and working in Ireland for approximately seven years and had a reasonably good, although not perfect, command of the English language. She advised D/Sgt. O'Brien at the commencement of her second garda interview on the 2nd August 2013 that she had a good understanding of English but might need help with some words.

5. The prosecution case against the appellant was that she had deliberately and intentionally driven her car at speed into the water with the intention of killing the deceased or causing him serious harm. Although the appellant did not give evidence at the trial, and no evidence called on her behalf, it was nonetheless clear from the cross examination of witnesses in the course of the trial by her counsel and from what he said in the course of his closing speech to the jury that the appellant vehemently challenged the allegation that she deliberately drove her car into the water or that she intended to kill or seriously harm the deceased. It was contended on her behalf that she did not have a full recollection of events immediately prior to the incident, and that aspects of statements made by the appellant immediately following the incident, and another some three to four months later did not convey information which the prosecution claimed they did. A similar position was taken in relation to a video taped interview of the appellant by the gardaí. Furthermore, some of the evidence given by the witnesses who came to the appellant's assistance after she emerged from the water on the morning of the incident and the evidence of the two nurses who tended her in hospital were robustly challenged by the appellant. In general, the appellant claimed to have little or no recollection of the events in the period leading up to driving into the water, including, in particular, the circumstances in which the deceased came to be in her car.

6. In particular, the appellant challenged the suggestion that she had said in statements or in her recorded interview that the deceased had suddenly appeared at her car outside her residence shortly after 5 a.m. on the morning of the incident while she sat in the car alone having been driven home by a work colleague, and that he got into the car and ordered her to drive. CCTV evidence established that shortly after that time the appellant was seen driving her car alone through the town of Arklow, and in the general direction of the deceased's address, and the harbour area generally. Telephone evidence also established that in or around this time the appellant had made three calls on her mobile phone to the deceased, and CCTV evidence showed her on a mobile phone making one of these calls as she drove through the town. There was also evidence from a witness that the appellant was on her mobile phone in her car and appeared to be engaged in very agitated conversation. There was also evidence that the appellant had driven her car at speed in the harbour area and through the barrier and hand rail into the water, and that the handbrake, (and not the footbrake), had been applied immediately before the car plunged into the water. There was also the suggestion that the appellant may have fully opened her electrically operated driver's window immediately prior to the car entering the water, although there was evidence that an electronically operated window could have been opened within one minute of a car entering water, and that a car may float briefly. The appellant was aware that the deceased was unable to swim and had a fear of water, while she was able to swim.

7. The grounds of appeal as originally filed by the appellant and which were generally expanded upon in the course of the oral hearing of the appeal (some to a greater extent than others), are as follows:

> (i) The trial was unsatisfactory and the verdict was unsafe, in particular having regard to the various applications, submissions and requisitions made on behalf of the appellant and the adverse rulings made by the learned trial judge in respect of same.
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> (ii) The learned trial judge erred in ruling admissible the evidence of Nurses Best and Ging as to words alleged to have been spoken by the appellant during the triage process in the hospital to which she was admitted shortly after the events, the subject of the said charge.

(iii) The learned trial judge failed to adequately put the defence case to the jury rendering the trial unsatisfactory and the verdict unsafe.

(iv) The learned trial judge erred in directing the jury as to the law relevant to murder and manslaughter, and in failing to put the appropriate legal directions in the context of the relevant evidence and the main contentions of the defence and prosecution.

(v) The learned trial judge erred in refusing to direct the jury as a matter of law:-

> (a) that the burden of proof was on the prosecution to exclude accident as a reasonable possible cause of driving through the barriers into the river;
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> (b) that if the prosecution failed to prove that the actus reus of driving through the barriers into the river was an intentional or deliberate act, then the verdict in respect of the murder charge must be not guilty; and
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> (c) that the statutory presumption that the accused intended the natural and probable consequences of her actions applied only in respect of the consequences of actions which were proven to be voluntary or non accidental actions and that the statutory presumption did not apply to the effect that the appellant intended to drive through the barriers into the river.

(vi) The learned trial judge erred in refusing to direct the jury as a matter of law, that if the prosecution failed to prove that the appellant intended to cause serious harm or death to the deceased, but if the prosecution did prove that the appellant was reckless in that she deliberately drove in a manner which she knew involved a substantial risk of serious harm or death, or had adverted to the fact that such might be caused but proceeded in such highly culpable circumstances disregarding such risks, then the appellant should be found not guilty of murder but guilty of manslaughter. Further, or in the alternative, having regard to the legal submissions made before the closing speeches, and the response of the learned trial judge to those submissions in regard to criminal / gross negligence and recklessness, the trial was unsatisfactory and the verdict is unsafe.

(vii) The learned trial judge erred in law in directing the jury as to the law on manslaughter, including in particular by directing the jury to the effect that such a verdict was appropriate if the jury found that the death occurred as a result of the carelessness of the appellant, to a degree to be determined by the jury.

(viii) The learned trial judge erred in refusing to charge the jury that manslaughter was the appropriate verdict if the prosecution proved that the appellant deliberately drove through the barriers into the river and intended to cause harm to the deceased, but not serious harm or death.

(ix) The learned trial judge erred in refusing to charge the jury that manslaughter was the appropriate verdict where the death resulted from an unlawful / criminal and dangerous act.

(x) The learned trial judge erred in charging the jury as to circumstantial evidence and in refusing to charge the jury regarding the prosecution's claims as to circumstantial evidence to the effect that as a matter of law, the matters identified by the prosecution as being relevant items of circumstantial evidence could not ground a conviction (and in positively conveying to the jury the proposition that the circumstantial evidence in this case could support a murder conviction); or to give necessary guidance to the jury as to how such claims should be approached.

(xi) The learned trial judge erred in refusing to warn the jury as to the statements allegedly made by the appellant to both Nurse Best and to gardaí in a statement made on the date of the relevant incident having regard to the law including s. 10 of the Criminal Procedure Act 1993, and having regard to the fact that the prosecution appeared to suggest that by inference these amounted to confessions to murder or consistent with murder or supporting a murder conviction.

(xii) The learned trial judge erred in law in failing to direct the jury as to the application of the appropriate legal rules to the consideration of the various statements attributed to the appellant, including the prosecution had established beyond reasonable doubt what precisely had been said by the appellant and that the meanings and implications attributed to those statements by the prosecution were correct, in particular having regard to the concessions made by various witnesses including; Det. Sgt. Crehan and Det. Sgt. O'Brien to the effect that key statements of the appellant were open to interpretation; and Nurse Best to the effect that there could have been a misunderstanding or a misinterpretation.

(xiii) The learned trial judge erred in refusing to charge the jury as to the suggestion made by counsel for the prosecution in his closing address to the effect that the appellant might have intended to commit suicide; including by directing the jury that such a suggestion was unsupported by any evidence and had not been put to the appellant in garda interviews; and relevant considerations had not been raised with any witness other than medical witnesses who had given evidence inconsistent with such a proposition.

(xiv) The learned trial judge erred in law in directing the jury as to the burden of proof including in particular by conveying to the jury that a reasonable doubt should be of sufficient weight as to be decisive on a matter of importance in the affairs of a member of a jury, as opposed to be of sufficient weight so as to cause a delay in making a decision on such a matter on the available evidence.

(xv) Having regard to all the circumstances, the learned trial judge erred in refusing to charge the jury that while it was the duty of the members of the jury as a collective unit to make all proper efforts to reach a verdict, the individual members of the jury were bound by their oath not to subscribe to a verdict with which they did not truly agree in the exercise of their independent judgment.

(xvi) The learned trial judge erred in law in refusing to withdraw the charge of murder from the jury. In all the circumstances, no reasonable jury properly charged could properly convict; and the verdict of the jury was perverse.

(xvii) In all the circumstances the trial was unsatisfactory and the verdict unsafe.

8. Section 10 of the Criminal Procedure Act 1993, (referred to in ground (xi) above), provides:-

> *"(1) Where at the trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.*
>
> *(2) It shall not be necessary for a judge to use any particular form of words under this section."*

The trial judge's review of the evidence

9. The learned trial judge reviewed for the jury the evidence given in the course of the trial. He referred, *inter alia*, to the following:-

> (i) The evidence of the security man in the harbour area, Mr. Nolan, that he heard a vehicle approaching the harbour area at very high speed and in low gear, and how he thought nothing more about it until he heard the appellant screaming and in a state of hysteria. He alerted the gardaí.
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> (ii) The evidence of three local residents who heard and saw the appellant in a very distressed state and soaking wet. Two of these witnesses said they heard the appellant saying that she had been raped although one accepted that she may have been mistaken in what she had heard.
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> (iii) The evidence of Mr. John McCarthy who had installed the barriers at the water's edge and his view that it would have taken a lot of force generated by speed, for a vehicle to crash through them.
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> (iv) The evidence of Gda. Harding, a forensic police collision investigator, who stated that the tyre mark close to the quay side was caused by the application of the hand brake rather than the footbrake of the vehicle. In relation to the fact that the driver's electrically operated window was open when the vehicle was found underwater there was uncertainty as to whether or not, and for how long, it would have been possible to open the window under water.
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> (v) The evidence of witnesses who knew both the appellant and the deceased and who were in a position to give some insight into their relationship.
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> (vi) The psychiatric evidence excluding mental illness or suicidal ideation.

10. The learned trial judge also reviewed some of the evidence provided by garda witnesses, including the circumstances in which statements were taken from the appellant, including two statements, one short and one lengthy, on the day of the incident. He referred to the garda evidence that these statements were taken at a time when the suspicion by the gardaí was confined to the possible commission of offences arising from damage to public property and the manner in which the car was driven.

11. The learned trial judge also reviewed the undoubtedly crucial evidence of the two nurses who had tended to the appellant while in Loughlinstown Hospital, and what the appellant may or may not have said to them, (the admissibility of such evidence is considered below).

12. Nurse Best had a ten to twenty minute conversation with the appellant. At an early point in her conversation she asked the appellant if she had any injury or was in any pain. She described the response from the appellant in the following terms:-

> *"…she didn't answer any of my questions in order, initially there was a lot of words spoken and then she answered my question about being hurt, she said that she didn't give him the chance."*

And:-

> *"..Essentially she said that the gentleman, in the car, had been hurting her and that all her work, where they worked together, all their work mates knew. ..But she just said that she didn't give him a chance to, she didn't give him a chance to hurt her this evening…And that he didn't think that she would it and that she knew he couldn't swim."*

13. She also stated:-

> *"..The conversation was quite disjointed. She would be - she was crying on one hand, upset, asking had he been found and then saying he couldn't swim and also then saying several times "He didn't think I would do it"."*

14. Mr. Ó Lideadha SC, counsel for the appellant pressed Nurse Best, in the course of his cross examination of her, as to what had been said to her by the appellant and her understanding of the meaning of what had been said. Nurse Best was firm as to her recollection.

15. Nurse Ging also gave evidence. She replaced Nurse Best on the completion of her shift. She spoke to the appellant for ten to fifteen minutes. She gave an account as to her recollection of what the appellant had told her what had occurred in the period immediately prior to the incident. It was her understanding that the appellant told her that the deceased called to her house and got into her car at that location. She was pressured by counsel for the appellant to concede that her recollection was not accurate, but to little avail. Her position in relation to her recollection was finally explained by her in the following terms:-

> *"It's very hard to say, because all I remember is what she said to me. Now, it was broken, I can't recall that, but the flow is what she said to me, that she was at her house, this person got into her car, she drove to Arklow into the water and that's what I recollect."*

16. In general terms the learned trial judge provided the jury with a very fair and detailed account of what Nurses Best and Ging had said in evidence in relation to their conversations with the appellant in the course of his charge.

The trial judge's charge as to the verdicts available to the jury

17. Of central importance to the prosecution case is the allegation that the appellant deliberately drove her car into the water with the intention to kill or seriously harm the deceased. Evidence relied upon in this respect includes that relating to the speed and last minute attempted hand braking of the car, the possible opening of the electrically operated driver's window before entering the water and the words spoken by the appellant to the two nurses subsequent to the incident, and the content of statements made to the

gardaí.

18. In particular it is submitted on behalf of the appellant that the learned trial judge erred in refusing to direct the jury as a matter of law that:-

> (i) the burden of proof was on the prosecution to exclude accident as a reasonable possible cause of driving through the barriers and into the river;
>
> (ii) that if the prosecution failed to prove that the actus reus of driving through the barriers was an intentional or deliberate act, then the verdict in respect of the murder charge must be not guilty, and
>
> (iii) the statutory presumption that the accused intended the natural and positive consequences of her actions applied only in respect of the consequences of her actions which were proven to be voluntary or non accidental actions and that the statutory presumption did not apply to the effect that the appellant intended to drive through the barriers into the water.

19. In the course of his charge to the jury, the learned trial judge strongly emphasised that the onus of proving any allegation against the appellant rested firmly with the prosecution. He emphasised that the appellant was entitled to the presumption of innocence and explained the concept of establishing proof *beyond reasonable doubt*. He carefully explained the ingredients of the crime of murder. In particular, he said:-

> *"…a person can be convicted of murder even though he or she does not intend to kill, but only intends to cause serious injury. Everybody is presumed in law to intend the natural and probable consequences of his or her actions…That presumption is rebuttable, it can be set aside, destroyed, rendered naught, rendered irrelevant. And it is for the prosecution to prove in every case that it has not been rebutted, set aside or renders naught because the burden of proof lies at all times on the prosecution."*

20. He also stated:-

> *"Thus, unless subjectively speaking the individual before you can be proved to have the necessary state of mind, the accused cannot be found guilty of murder. In this instance the potential verdicts which are open to you are in fact three. There is a verdict of guilty, there is a verdict of not guilty simpliciter and there is a verdict of not guilty of murder but guilty of manslaughter. …In this particular instance, it would be open to you on the evidence should you take that view that the accused was not guilty of murder, and guilty of manslaughter. Guilty., or not guilty. Three verdicts, in other words".*

21. The learned trial judge, as already indicated, advised the jury that they had options in terms of their verdict, namely guilty of murder, not guilty of murder but guilty of manslaughter, and not guilty simpliciter. The jury could not but have have been clear that a conviction of murder could only arise if they were satisfied, beyond all reasonable doubt, that the appellant deliberately drove her car into the water in order to kill or seriously harm the deceased. Any suggestion that the act of driving a car off a harbour pier into deep water at speed was deliberate but at the same time was not intended to kill or cause serious injury to the victim is fanciful. It is difficult to see how much more clear the charge might have been in that respect.

22. The learned trial judge stated to the jury:-

> *"So, in what circumstances could the offence of manslaughter arise on the evidence in this case as an alternative to murder? And in this case, it arises in these circumstances, if I kill another person by virtue of my gross negligence then I am guilty of manslaughter. You can see there is a distinction then between a situation where I kill somebody with an intention to kill that person or cause that person serious injury and the situation where I do not have that intention or state of mind, but rather I am grossly negligent to the point that I bring about his or her death. Now, much ink has been split and much said in our law as to what gross negligence is in this particular context. And I am going to try and give you, if I could read it, some assistance in that regard. Alright, and I hope this is of assistance to you. The negligence I mean - in this connection, means a failure to observe such a course of conduct as our experience shows to be necessary, if the risk of injury to others is to be avoided. So an example of that frequently given in our courts and one obviously highly relevant to the present case would be a failure to behave as a reasonable driver would. Most of us are drivers, probably you all are. You must be satisfied that the negligence alleged was responsible for the death. So, were you to find that the car ended up in the water because of the gross negligence of the accused, you would have to be satisfied that that gross negligence caused the death.*
>
> *Now there are different degrees of negligence obviously. The words "gross negligence" may or may not be of assistance. It is thought helpful however to tell juries about potentially different types of negligence which might arise. (He then went on to explain the different degrees of negligence that can occur).*

23. He said:-

> *"You must be satisfied that the fatal negligence was of a very high degree and was such as to involve in a high degree of risk or likelihood of substantial personal injury to others".*

24. In what was clearly intended as an explanation or example for the jury as to how the incident in question might have occurred as a result of an accident, rather than a deliberate act or a grossly negligence act, the learned trial judge stated:-

> *"..I suppose, maybe many of us have been in a situation of say parking on a pier, maybe holidays or something like that. And sometimes one might perhaps come quite close to the edge of the pier. If one did not for example apply one's brake in time in a situation analogous to the parking situation and hitting another car. Yes, in principle one could go over the pier and yes, one would be guilty of carelessness. It would not, I would have thought if that is how it happened, give rise to anything remotely near the gross negligence required for a manslaughter conviction. You could see, however that accidents do not happen. They are caused and that if one finds oneself in the sea off a pier, then it is almost unthinkable that some level of carelessness is not involved. The issue you will have to determine in respect of the state of mind of the accused is whether or not she was grossly negligent on the occasion in question."*

25. He also went on to say:-

"…But it seems inevitably that there was some degree of carelessness in driving into the water, or causing the car to be in the water because it doesn't just happen for no reason. That as I stress to you, is not to say that there was gross negligence, that would be a matter for you. Now, you only have to consider that if you take the view that there - the prosecution have failed to prove that the accused drove into the water with the intention of killing the deceased or causing serious injury to the deceased. Only if you take that view that you pass onto the second topic. In other words, if it is not a death willed or consciously intended with the stated mind to which I have referred, but then - but rather one which was caused or brought about by what objectively speaking in your opinion was gross negligence on the part of the accused, that you would have come to the question of manslaughter."

26. A requisition made by Mr. Ó Lideadha in relation to the charge was that the *"..the jury be told about this recklessness and the advertence to the serious risk of death"*.

27. Mr. Ó Lideadha complained that the charge *"Did not clearly demonstrate to the jury the fact that the Dunleavy decision makes it clear that the jury must be clearly given to understand that the level of negligence required in a manslaughter case is not to be compared with the careless driving end of the scale, but is to be compared and this is something that Dunleavy says as well, that should be compared with the level of recklessness required in dangerous driving. And that is to be regarded as more serious than that"*.

28. The learned trial judge responded:-

"What you're really saying is that on the topic of gross negligence manslaughter, you want me to say to them that what is required is in truth recklessness".

29. Mr. Ó Lideadha replied *"Advertent, recklessness adverting to…and gone ahead regardless."*

30. The subsequent requisition by counsel for the appellant was at variance with what the jury had been told. In making the requisition, Mr. Ó Lideadha said:-

"…in the first instance, in my respectful submission, it is absolutely crucial that the starting point to me and that a clear direction be giving to the jury that in order to sustain the murder charge, the prosecution must prove beyond reasonable doubt that the action, the actus reus of driving through the barriers into the water was an intentional act. That is the first fundamental proposition that has not been clearly stated to the jury…"

31. The learned trial judge, correctly in the court's view, declined to re-address the jury in relation to this particular requisition. The foregoing extracts from the charge to the jury illustrate the extent to which the learned trial judge carefully distinguished the concepts of murder, manslaughter and the act of driving into the water in a non criminal manner.

32. The decision referred to by Mr. Ó Lideadha was that of the Court of Criminal Appeal in *The People (Attorney General) v. Dunleavy* [1948] I.R. 95. In the court's judgment, delivered by Davitt J., guidance was provided to judges directing a jury as to the standard of negligence necessary for manslaughter. Davitt J. stated

"Bearing this in mind, we are of opinion that whatever words are used by the trial Judge in his charge, the jury should be given clearly to understand as follows:-

(a) That negligence in this connection means failure to observe such a course of conduct as experience shows to be necessary if, in the circumstances, the risk of injury to others is to be avoided,- failure to behave as a reasonable driver would.

(b) That they must be satisfied that negligence upon the part of the accused was responsible for the death in question.

(c) That there are different degrees of negligence, fraught with different legal consequences; that ordinary carelessness, while sufficient to justify a verdict for a plaintiff in an action for damages for personal injuries, or a conviction on prosecution in the District Court for careless or inconsiderate driving, falls far short of what is required in a case of manslaughter; and that the higher degree of negligence which would justify a conviction on prosecution in the District Court for dangerous driving is not necessarily sufficient.

(d) That before they can convict of manslaughter, which is a felony and a very serious crime, they must be satisfied that the fatal negligence was of a very high degree; and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others."

33. In their book *"The Judges Charge in Criminal Trial"*, Coonan & Foley state, at para. 9-43 the following.

"Thus, the following principles may be gleaned from the decision in Dunleavy -

(a) the trial judge should not use the direction from Bateman alone in explaining the concept of gross negligence to the jury. The court clearly considered it to be circular and not of great assistance.

(b) the trial judge should avoid using either the phrase "reckless disregard for life" or "reckless disregard for the safety of others" as the court considered the first phrase to "ordinarily, but perhaps not universally, amount to general malice sufficient to justify a conviction for murder" and the second as potentially mounting to "no more than dangerous driving". The trial judge should also avoid using these two phrases together (i.e. "a reckless disregard for the life and safety of others") as this will only confuse the two standards, and, in turn, the jury.

(c) The trial judge should instruct the jury that there are different degrees of negligence and if possible, he should compare those differing degrees (i.e. compare ordinary carelessness with gross carelessness). He should then instruct the jury that before it may convict the accused of manslaughter, it must be satisfied "that the fatal negligence was of a very high degree" and was such as to involve in a high degree, the risk or likelihood of substantial personal injury to others."

34. In *DPP v. Cagney and McGrath* [2007] IESC 46, Hardiman J. described this category of manslaughter as occurring *"where the*

death of the victim is caused by a criminally negligent act or omission…".

35. The task of a trial judge is to advise the jury as to the relevant legal principles which they are required to follow, and to explain them, particularly those that are complicated or nuanced, in ordinary language and in as comprehensible a manner as possible. Perfection in this task should not be expected. A trial judge enjoys a wide discretion as to how he discharges this task. What is important is that the directions to the jury are reasonably clear and that complex legal terminology and principles are explained in ordinary language to the greatest possible extent. In an often quoted passage from a judgment of the Ontario Court of Appeal in *R. v. Baltovich* [2004] OJ No. 4880, it was stated:-

> *"Much has been said in recent years about the complexity of jury charges and the need to simplify them. Trial judges face a difficult task in this regard, especially when it comes to explaining complicated issues of law. In R. v. Jacquard, Chief Justice Lamer observed that while "accused individuals are entitled to properly instructed juries" there is "no requirement for perfectly instructed juries". Those words are as true today as they were then. No one expects perfection in a jury charge. Mistakes are bound to occur."*

36. It is important that a trial judge's charge be realistic, be relevant to the facts in the case and, where possible and appropriate, contextualised with reference to the evidence heard by the jury. It should aim at precision over complexity and conciseness over prolixity (as per the judgment in *R v. Jackson* [1992] Crim. L.R. 214.

37. *Coonan and Foley* (Chapter 9) refer to two general categories of manslaughter, namely "voluntary manslaughter" and "involuntary act manslaughter". The former is clearly not relevant to the instant case. The latter includes "unlawful and dangerous act manslaughter" and "gross negligence manslaughter". In their introduction to Chapter 9, the authors say:-

> *"Unlawful and dangerous act of manslaughter arises where the accused commits an unlawful act that results in the victim's death but does not intend to kill or cause serious injury to the victim. Gross negligence manslaughter occurs where the accused causes the victim's death through the performance of a lawful act with gross negligence."*

38. The only category of manslaughter that could be relevant in the instant case is that of gross negligence manslaughter. In this respect the learned trial judge very comprehensively and appropriately charged the jury. He said, *inter alia*,:-

> *"So, in what circumstances could the offence of manslaughter arise on the evidence in this case as an alternative to murder? And in this case, it arises in these circumstances, if I kill another person by virtue of my gross negligence, then I am guilty of manslaughter. You can see there is a distinction then between a situation where I kill somebody with an intention to kill that person or cause that person serious injury and the situation where I do not have that intention or state of mind, but rather I am grossly negligent to the point that I bring about his or her death. Now much ink has been spilt and much said in our law as to what gross negligence is in this particular context. And I am going to try and give you, if I could read it, some assistance in that regard…the negligence means - in this connection, means a failure to observe such a course of conduct as our experience shows to be necessary, if the risk of injury to others is to be avoided. So an example of that frequently given in our courts and one obviously highly relevant to the present case would be a failure to behave as a reasonable driver would. Most of us are drivers, probably you all are. You must be satisfied that the negligence alleged was responsible for the death. So were you to find that the car ended up in the water because of the gross negligence of the accused you will have to be satisfied that gross negligence caused the death."*

39. The learned trial judge went on to identify the different degrees of negligence that can exist. He told the jury:-

> *"..You must be satisfied that the fatal negligence was of a very high degree and was such as to involve in a high degree of risk or likelihood of substantial personal injury to others."*

40. And:-

> *"Now, what is or is not gross negligence is objectively to be decided. What do I objectively think was the situation on the facts proved as to the way in which this car entered the water on the occasion in question? Objectively speaking, am I satisfied that there was gross negligence on the part of the accused in bringing about the consequence of the car entering the water, however it occurred. And I say it that way because I don't want to presume to suggest that it happened in any particular way. But it seems inevitably that there was some degree of carelessness in driving into the water or causing the car to be in the water because it doesn't just happen for no reason. That as I stress to you, is not to say there was gross negligence, that will be a matter for you. Now, you only have to consider that if you take the view that there - the prosecution has failed to prove that the accused drove into the water with the intention of killing the deceased or causing serious injury to the deceased. Only if you take that view can you pass on to the second topic. In other words, if it is not a death willed or consciously intended with the state of mind to which I have referred, but then - but rather one which was caused or brought about by what objectively speaking in your opinion was gross negligence on the part of the accused then you would come to the question of manslaughter."*

41. He also said, touching on the issue of accident:-

> *"Yes, in principle one could over the pier and yes, one would be guilty of carelessness. It would not, I would have thought if that is how it happens give rise to anything remotely near the gross negligence required for a manslaughter conviction. You can see, however, that accidents do not happen, they are caused and that if one finds oneself in the sea off a pier, then it is almost unthinkable that some level of carelessness is not involved. The issue you will have to determine in respect of the state of mind of the accused is whether or not she was grossly negligent on the occasion in question."*

42. In the court's view, the jury were left in no doubt as to the difference between the ingredients required to convict for murder on the one hand, and manslaughter (to the extent that it could arise in the particular case) on the other hand, and the circumstances in which they might consider that guilt under either heading did not arise. It is difficult to conclude how the issue of murder versus manslaughter might have been better explained to the jury, a comparison which is often found difficult and complex by lay people. What is important is that the learned trial judge's charge left the jury with a sufficient understanding of the concepts involved. Even if it is arguable that the charge might have provided greater clarity in relation thereto, it could not reasonably be considered to have left the jury in any doubt but that the core issue for decision by them was whether the driving of the car into the water was or was not a deliberate act, and if it was not, was it grossly negligent or accidental. Ultimately, and having regard to the particular

circumstances of the incident, these were not issues that could reasonably be contended as complex, nor were the principles as explained by the learned trial judge difficult to apply to those circumstances on the basis of the evidence placed before the jury.

The extent to which the defence case was put to the jury
43. The appellant contends that the learned trial judge inadequately advised the jury of the defence case rendering the trial unsatisfactory and the verdict unsafe.

44. On this basis, Mr. Ó Lideadha requisitioned the learned trial judge that *the defence case had not been clearly put to the jury*.

45. The basis of the application was rejected by the learned trial judge. He said:-

> *"The way one ensures that both - that one tells - one reprices (sic) the facts, one addresses the law both in principle in respect of the case before one and in respect of any particular legal issue germane to the case by reference to the evidence. One does not then in general, address each piece of evidence, break it down or otherwise as to which side it might support or what issues arise. One doesn't, as it were, repeat in a somewhat different way, somewhat different way I'll accept, the cases made by the parties in their speeches. And that is what you have just asked me to do, and that is why I am saying no…"*

46. The law on the subject of what a trial judge should say to a jury in relation to the defence case is well settled. In *DPP v. Bishop* [2005] IECCA 2, Geoghegan J., in delivering the judgment of the court, said:-

> *"While it is always important that the trial judge summarises for the jury the defence case as well as the prosecution case he is not obliged to refer to every piece of evidence that the jury heard and still less is he obliged to refer to every argument put forward in speeches to the jury."*

47. In the instant case, the appellant elected, as she was quite entitled to, not to give evidence. Neither was any evidence called on her behalf. Nevertheless, there is an obligation on a trial judge to explain the defence as inferred by the plea of not guilty and such evidence as emerges from the cross examination of witnesses. In this case, it was clear that the allegation that the appellant deliberately drove her car into the water, or that she was grossly negligent in so doing was denied by her. The onus of proving the case made against the appellant rested with the prosecution and this was made abundantly clear to the jury by the learned trial judge in the course of his charge.

48. The defence case, such as became apparent in the course of the trial, and based largely on the cross examination by Mr. Ó Lideadha of the many prosecution witnesses, was generously referred to throughout the learned trial judge's charge to the jury. In the course of the learned trial judge's summary of the evidence given by the various prosecution witnesses, there is a reference in almost every paragraph to Mr. Ó Lideadha's cross examination. In particular there are many references to the robust cross examination of a number of garda witnesses, the witnesses who confronted the appellant in the immediate aftermath of the incident, the two nurses and the forensic witnesses. It is difficult to identify a single aspect of the defence case which was not referred to by the learned trial judge in the course of his lengthy charge.

The admissibility of the nurses' evidence
49. It is argued by the appellant that the evidence of Nurses Best and Ging ought not to have been admitted because it was not reliable and its prejudicial effect outweighed its probative value, and that the learned trial judge's decision to admit the evidence was an error.

50. At the commencement of the *voir dire* in relation to this issue (on day 3), Mr. Ó Lideadha sought to exclude the nurses' evidence on a number of grounds, including its accuracy, reliability, prejudicial effect versus probative value, public interest privilege and the issue of privilege attaching to the appellant's medical records. This appeal is concerned only with the issues of reliability and the contention that the prejudicial effect of the evidence outweighed its probative value.

51. Nurse Best came in contact with the appellant in her capacity as a clinical nurse manager at St. Colmcilles hospital, Loughlinstown after the appellant was taken there by ambulance. She described medically assessing her and noted that she was in a distressed state. In line with normal practice she asked the appellant what had happened to her. The appellant's response was that *"she had been driving a car and that he had been hurting her and he did not think that she would do it"*. She said that the appellant denied that the deceased had hurt her, stating *"No, that I didn't give him the chance"*. She said that the appellant told her on a number of occasions that the deceased was unable to swim. Nurse Best said she sought the attendance of a gardaí because she *"felt…that she was making an admission to something that had happened"*. She denied however *"performing a role like a garda..asking questions."*, insisting that she was at all times performing a medical role.

52. Of particular concern to the appellant was the statement by Nurse Best that the appellant had said to her *"he didn't think I would do it"*. No specific reference was made to such words as having been spoken by the appellant in the medical attendance notes written up by Nurse Best. Nurse Best said that the words in question were stated to her on a number of occasions by the appellant over a period of approximately fifteen minutes or so.

53. Nurse Ging also gave evidence. She took over the care of the appellant after Nurse Best had finished her shift. She also asked the appellant what had happened. She said that the appellant told her that the deceased had got into the passenger seat of the car, and that she had then driven the car into the water.

54. The learned trial judge decided to admit the evidence of the two nurses. He said:-

> *"…But I turn separately to that, because - it is submitted in substance under that heading that the court should exercise its discretion to exclude this material as having a greater probative, or greater prejudicial value than probative value. Its probative value being, as it were, weak or so weak as to render it inadmissible because of infirmities, if I can tell it that, that's - listed in cross examination are - and in the totality of the context of the evidence. I don't accept that, it seems to be the issues really are matters which I must address in the first place. I must make an assessment and I do make an assessment and I found the witness in question an extremely reliable and impressive witness. Very coherent witness, an exceptionally strong witness and she made notes not of everything of what was said, but part she - what was said, which she is an experienced triage nurse of quite a number of years standing and made the notes in the immediate aftermath of her interview.*
>
> *I reject the idea that she was engaged in any sense in some form of investigative process for, if you like, non medical*

purposes. It seems to me quite clear that what was asked was for that purpose, she wasn't required for example to confine herself to questions about whether the person had a temperature or was feeling ill."

55. In relation specifically to Nurse Best's recollection that the appellant had said to her *"He didn't think I would do it",* the learned trial judge stated:-

> *"…she is clear in her mind that what was said was, of course it is perfectly possible that there was a miscommunication or misunderstanding, that goes without saying as a matter of principle, and it may or may prove to be the case here. But the point about it is, she is telling us what she understood to have been said and a jury will decide that and properly so in due course."*

56. The learned trial judge's decision to admit the evidence of the two nurses was, in the court's view, correct. It was simply evidence of words spoken by the appellant in the immediate aftermath of the incident in circumstances which were in no way contrived or part of any investigation. To have ruled against the admission of this evidence could only have been on the basis that anything said by the appellant in the immediate aftermath of the incident to any third party was inadmissible, which of course is not the case, save in particular circumstances, such as a statement made to a garda officer in circumstances which involved a breach of constitutional rights. The two nurses were disinterested witnesses who were persons of integrity, and whose demeanour was open to assessment to the learned trial judge.

Section 10 of the Criminal Procedure Act 1993

57. Section 10 of the Act of 1993 provides:-

> *"(1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.*
>
> *(2) It shall not be necessary for a judge to use any particular form of words under this section."*

58. A requisition made by Mr. Ó Lideadha after the conclusion of the learned trial judge's charge to the jury was as follows:-

> *"Then the Court is required by law to give a warning to the jury with regard to reliance on a confession to a garda, that's a statutory requirement now."*

59. The learned trial judge responded *"No. Only if it is the sole ground or main ground upon which the prosecution is based."*

60. The learned trial judge then went on to say:-

> *"All right. So you're saying I must give a warning under the 1993 Act if and insofar as the prosecution case relies upon the second statement as constituting an admission of guilt to the effect, to put it briefly, that there are dangers about convicting on the uncorroborated evidence of a statement made to the gardaí."*

61. Although not specifically referred to in the course of the appellant's written submissions to this court, Mr. Ó Lideadha, in the course of his oral submissions argued that a s. 10 warning ought to have been given to the jury in relation to certain words said by Nurse Best to have been spoken to her by the appellant, and referred to above.

62. Furthermore, the second statement, taken after formal caution by Gda. Crehan, the appellant made what may constitute admissions amounting to confession, including the following:-

> *"I remember I turn and not go for beach. I remember I hit accelerator and I think I have enough of this I have enough him I can no longer take this. All I see is his angry face and screaming. I know that I drive to water. I could not take it any more..*
>
> *When I drove in the water I wanted to stop all this, to get away from him to make him leave me alone.."*

63. A confession is a statement admitting to the commission of a crime or words clearly inferring same. It is arguable, if not likely, that the words attributed by Nurse Best to the effect that the deceased did not believe that she would drive the car into the water constituted an admission or an inference that she had done so deliberately and that the jury would have so interpreted them. Same might equally be said of what was said by the appellant to Gda. Crehan.

64. Section 10 was introduced because of concern relating to coerced or unreliable *confessions* made to police or gardaí. It remains unclear if confessions or admissions of guilt to civilians also come within its ambit. On its face there is no compelling reason to suggest that s. 10 does not relate to all *confessions*, whether or not made to a police officer. In its 4th edition, Stroud (Words and Phrases) Legally Defined, "confession" *includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise (Police and Criminal Evidence Act 1984, Section 82(1)).* The 5th edition of Stroud defines "Confessions" as being *"mere incriminating statements..not in themselves sufficient to constitute a confession"*.

65. There are a number of judgments from the Court of Criminal Appeal which deal specifically with s. 10. All concern confessions or admissions made to gardaí and the issue of the presence or absence of corroboration evidence in the context of a s. 10 warning. In his book, *Evidence (2nd edition)*, Declan McGrath S.C. states (at p. 574) the following:-

> *"One matter that is left unresolved in the aftermath of the decision in Connolly ([2003] 2 I.R. 1) is the circumstances in which it not necessary to give a warning. The judgment of Hardiman J. in Connolly seems to indicate that a corroboration instruction pursuant to section 10 is required even where there is evidence that could amount to corroboration if the jury accepted it, because the trial judge cannot know in advance whether they will accept it or not. However, it appears from the wording of section 10 that the requirement to give an instruction to the jury as to the need to have due regard to the absence of corroboration only arises where the confession is not corroborated. If there is corroboration, no instruction is necessary. This was the view taken in People (DPP) v. Brazil (Unreported) Court of Criminal Appeal 22nd March 2002). The applicant submitted that the trial judge should have warned the jury in accordance with section 10 in relation to inculpatory statements made by him in custody. However, that contention was rejected by the Court of Criminal Appeal on the basis that the jury were entitled to act upon the identification evidence in the case which had been properly left to them, and thus, the statements were not uncorroborated.*

66. In *DPP v. Murphy* [2005] 2 I.R. 125 at p. 158 / 159, Kearns J. (as he then was), in delivering the judgment of the Court of Criminal Appeal in a case where the trial had taken place in the Special Criminal Court, said:-

> *"Applying by analogy the obligation placed upon a judge conducting a jury trial to the circumstances of a non-jury trial such as this, it seems clear that the only obligation upon the trial court in this case was to have regard to the fact that there was potentially a danger in convicting the accused on the basis of his admissions in circumstances where there was no corroboration of same. It is clear that if the accused had been tried before a jury then the trial judge would have been under no obligation to give the advice required by s. 10(1) of the Act of 1993 in the event that there was any corroboration within the proper legal definition thereof. Provided there was any such corroboration, then the question whether any of the other evidence which might or might not technically qualify as corroboration but which might nonetheless offer support to the prosecution case would be a matter for the jury. Therefore, even if not all of the conclusions of a trial judge conducting a trial with a jury as to what amounted to corroboration were correct, a conviction would nonetheless stand in the absence of the advice required by s. 10 having been given to the jury provided that there was some corroborative evidence."*

67. In this case, there was no requirement for a corroboration warning as the confession evidence (if indeed it amounted to such) was not without corroboration. Firstly, both the statements of the appellant made to Nurse Best and Gda. Crehan were capable of corroborating each other. Secondly, additional evidence of corroboration can be found in the evidence in relation to the speed of the vehicle as it drove through the harbour area and, possibly, the use of the hand brake to brake the vehicle, instead of the foot pedal.

68. The court is therefore satisfied that the decision of the learned trial judge to refuse the request to give a corroboration warning pursuant to s. 10 of the Act of 1993 was correct.

Suicide

69. The learned trial judge is criticised by the appellant for his refusal to charge the jury in relation to the suggestion made by counsel for the prosecution, Mr. Grehan SC, in the course of his closing address to the effect that the appellant might have intended to take her own life, including making it clear that such a suggestion was unsupported by any evidence and had not been put to the appellant. Mr. Ó Lideadha requisitioned as follows:-

> *"And I am asking the court to give an explicit direction to the jury that it would be accurately entirely wrong and unfair for the jury to convict on the basis of a theory about suicide in circumstances where that - there is absolutely no evidence from any of the medical staff who examined her.."*

70. The learned trial judge declined to do so.

71. The court is satisfied that the learned trial judge was correct in the stance he took. The issue of suicide was raised by prosecution counsel in the course of his closing speech to the jury, but was done do in a particular context. Suicide had not been an issue in the course of the trial and, in any event, if the motivation for driving the car into the water was indeed suicide such could not amount to a defence to a charge of murder in circumstances where the instrument used to achieve that purpose was a motor car in which the deceased was a passenger.

Circumstantial evidence

72. It was contended on behalf of the appellant that the learned trial judge erred in charging the jury as to circumstantial evidence and more particularly in refusing to charge it in relation to the prosecution claim that as a matter of law, those matters identified by it as being relevant circumstantial evidence could not ground a conviction, and also in positively suggesting to the jury the proposition that the circumstantial evidence could support a murder conviction, and failing to give necessary guidance to the jury as to how such claims should be approached by them. The prosecution evidence in the case, while not entirely so, was largely circumstantial in nature.

73. In the course of a wide ranging discussion between counsel and the learned trial judge following the conclusion of his charge, and in the course of a number of requisitions made by Mr. Ó Lideadha, it was stated:-

> *"As far as circumstantial evidence is concerned, I don't believe there is any difficulty or error on the part of your lordship in terms of what your lordship said to the jury and I don't think there is anything wrong with what I said to the jury either. I made it perfectly clear what the general rule is as far as to inferences from any particular fact. I said that it is modified in the context of circumstantial evidence. I said that one looks at each item of evidence and then one looks at all items together."*

74. There was a brief reference to circumstantial evidence by the learned trial judge in his additional closing remarks made to the jury when he stated:-

> *"…and it is just to be absolutely clear as to how you - as to how circumstantial evidence - and I think I hope at the risk of repetition what I want to just remind you of is this, each piece of evidence might not prove guilty beyond reasonable doubt on its own. But the inferences which you could draw from the evidence as a whole could freely leave you to that conclusion, otherwise - I see some of you nodding. One piece might be quite innocent, one might not. You put them together, all right…."*

75. The court sees no merit in the submissions made relating to the issue of circumstantial evidence, and is satisfied that it was adequately canvassed with the jury by the learned trial judge.

Reasonable doubt

76. It is contended by the appellant that the learned trial judge erred in the manner in which he directed the jury as to the burden of proof, including, in particular, by conveying to them that a reasonable doubt should be of sufficient weight as to be decisive on a matter of importance in the affairs of a member of a jury, as opposed to being of sufficient weight so as to cause a delay in making a decision on such a matter.

77. In the course of his charge to the jury, the learned trial judge stated:-

> *"The prosecution's responsibility is to prove the guilt of the accused person if you were to convict the accused to the standard of proof known as proof beyond reasonable doubt. People use all sorts of phrases like, "Beyond all reasonable doubt", or "Beyond any reasonable doubt", and so on. None of that is particularly helpful. The prosecution must prove*

the guilt of the accused in a criminal case to the satisfaction of the jury to that standard known as beyond reasonable doubt. And the question then arises as to what is or is not a reasonable doubt. You can see, ladies and gentlemen, that in this world there are no certainties. We are not accordingly speaking about something like mathematical or scientific certainty, that could never be achieved. And accordingly if that were the standards of proof which the prosecution are required to reach nobody could ever be convicted of a criminal offence, however strong the evidence may be, I speak in principle not about this case necessarily.

The prosecution accordingly have to reach a standard of proof based upon reason. And a reasonable doubt has been defined in various ways. It can sometimes be put negatively. In the first instance, the word "Reasonable" is the key because it is a doubt based on human reason, not a fanciful doubt, not an absurd doubt, not a contrived doubt. But a doubt which is the product of the application of human reason, gathering together as you will, your resources of common sense and experience of life. If for example you had arrangements to meet someone this evening, let us suppose at lunch time you were to phone up and say, "Cancel our arrangements for this evening, a judge in the Criminal Courts of Justice is speaking about doubts and reasonable doubts. Of course there is a doubt as to whether or not I will be able to reach you this evening, the sky might fall in, well perhaps I might be run over by a bus, I might break my leg on the street because I slipped on something." No reasonable person would proceed in his or her daily affairs upon that basis, it would be an example, I think, of an unreasonable doubt. But what is or is not a reasonable doubt and what is or is not proof beyond reasonable doubt is what you think it is. And judges can do no more than assist juries with either examples of what might or might not be regarded as a reasonable doubt, and in several other ways. But a reasonable doubt is what you think it is, no more and no less.

Now, a reasonable doubt has sometimes been defined as that sort of doubt which one might entertain in dealing with a matter of the utmost seriousness in one's life. And having considered a particular course of action, uphill and down dale, decided at the end of the day not to proceed with it, because one was left in a certain degree of doubt, so one would perhaps be deciding, saying on a decision of the utmost seriousness in one's life. Say for example, whether or not to emigrate, that perhaps would be a very significant one. Whether or not to marry, that in all its seriousness requires a very serious life time commitment. One is dealing here in a criminal case of this type with that type of class, that type or class of decision. The most serious type or class of decision which one could be called upon to make in one's life. And you can appreciate in that situation one would look at the thing uphill and down dale in the most thorough possible fashion. And on a rational basis calling, upon all one's resources as I have outlined. And if having done that, one was still in a position where one was not happy to proceed and turned away from the contemplated course of action and did not pursue it. That can sometimes be taken - sometimes given, I should say, as what a reasonable doubt is. It is the sort of a doubt a reasonable person would entertain on a matter of the (most)importance which would cause them to turn away from the proposal or idea or course of action which one was contemplating.

The - a reasonable doubt - or the standard of proof in a criminal case is proof beyond reasonable doubt. That is sometimes distinguished from the standard of proof in a civil case. In civil cases, for example cases where people seek damages for injuries suffered in road traffic accidents, people - a person who is injured and who is claiming damages must prove his or her case on the balance of probabilities. …

And he would do that to the standard of proof known as proof on the balance of probabilities. He would decide which version of events was the more probable version.…

You can see, ladies and gentlemen, that a decision on the balance of probabilities and a decision based on a higher standard of proof known as proof beyond reasonable doubt are two totally different things. And the standard of proof in criminal cases is accordingly higher than that which is applicable in civil cases, not impossibly high, but nonetheless, quite different. …

... You would require, you would - you would adopt the view favourable to the accused on any particular piece of evidence unless the prosecution had proved the view favourable to it to the criminal standard of proof beyond reasonable doubt. You would accordingly proceed in respect of any particular piece of evidence to take the view favourable to the prosecution…you will be giving the benefit, you will give the benefit of the doubt to the accused because the prosecution, by definition, wouldn't have satisfied you to the relevant standard. …"

78. Mr. Ó Lideadha requisitioned the learned trial judge in the following term:-

"Now, I say first of all I have a point to make which your lordship is very familiar with and it's been rejected in the Court of Appeal, I'm going to articulate it and move immediately on, because I want to preserve my position. And that is that I respectfully submit that it is not a sufficient direction to tell a jury that a reasonable doubt is the type of doubt that would be sufficient to cause a person to turn away from a course of action, because that imports a standard of probabilities sufficient to make a decision one way or the other in one's life… I would ask your lordship to give a direction to the jury in the context of saying, while mathematical certainty is not required, certainty to the extent of not having a reasonable doubt is required… So in the sense of having no reasonable doubt, one comes to a position of being certain for practical purposes in the sense of not having a reasonable doubt. .."

79. While the term beyond a reasonable doubt might be second nature and carry an obvious meaning to a lawyer, its intended meaning to a lay person will not be quite so clear. It is a difficult enough concept to explain to a lay person, and in particular, between *any doubt* and *reasonable doubt*. In his charge to the jury on this subject, the learned trial judge directed the jury that they should approach the cases on the basis of making a particularly important decision in one's life. He advised them to consider their verdict on the basis of making such a decision having considered it *uphill and down dale in the most thorough possible fashion*. His concluding remarks to the jury on the subject was in the following terms:-

"…It is the sort of doubt a reasonable person would entertain on a matter of the (most) importance which would cause them to turn away from the proposal or idea or course of action which one was contemplating."

80. The suggestion of an analogy between the decision the jury has to make and similar life changing decisions in order to illustrate the height of the standard is an approach which has found general approval in this jurisdiction.

81. For example, McGuinness J. in *DPP v. Kiely* (Unreported, Court of Appeal, 21 March 2001) described the trial judge's explanation of reasonable doubt as *comprehensive and thorough and would be understood by the ordinary man or woman on the jury*. An extract from the charge in that case is as follows:-

> *"There is another type of decision which is much more fundamental which we all again make. Are we going to get married or if we are already married, are we going to leave our marriage partner and go with someone else? Are we going to sell our house in a rising property market? Are we going to leave Limerick and go and live in Australia? Are we going to change the job we have being doing for twenty five years with all its security and go out into a more fashionable job if you like? They are all decisions which we all have to make from time to time, not very often, but we have to make them, but you make those decisions in a much more fundamental and careful way than the kind of decisions that you are going to watch Gay Byrne and the Late Late Show or you are going to buy a lottery ticket. They are a totally different kind of decision. Now the civil standard of proof that I spoke about, the traffic case injury at work, that kind of thing, you can equate that to the trivial kind of decision and the much more serious decision is equated with the criminal case, so the difference between the trivial decision and the serious decision gives you some idea of the difference between the civil standard of proof which is lower and the criminal standard of proof which is much, much higher. I do not think I can explain it much better than that to you.."*

82. In *DPP v. Doyle* [2015] IECA 131, this court, in a judgment delivered by the President considered that the concept of *reasonable doubt* was adequately explained to the jury by the trial judge in broadly similar terms what was stated in the instant case.

83. In *The People (Attorney General) v. Byrne* [1974] I.R. 1, the Court of Criminal Appeal, in its judgment (at p. 9) said:-

> *"The correct charge to a jury is that they must be satisfied beyond reasonable doubt of the guilt of the accused, and it is helpful if that degree of proof is contrasted with that in a civil case. It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt."*

84. The extract from *Byrne* was quoted with approval by Geoghegan J. in his judgment *in DPP v. Cronin* (No. 2) [2006] IESC 9.

85. In the court's view there is no basis for criticising the learned trial judge in relation to his direction to the jury how the concept of reasonable doubt considered and applied to the evidence in this case.

The jury verdict

86. It is contended on behalf of the appellant that the learned trial judge erred in refusing to charge the jury that while it was the duty of the members of the jury as a collective unit to make all proper efforts to reach a verdict, the individual members of the jury were bound by their oath not to subscribe to a verdict with which they did not truly agree in the exercise of their independent judgment.

87. On day 13, immediately prior to the jury retiring to commence their deliberations, the learned trial judge advised them that they must be *"unanimous"* in their verdict. They were told *"to proceed on the basis that unanimity is required"*. Subsequently, on day 16, Mr. Ó Lideadha requested that the learned trial judge, prior to the jury being requested to consider a majority verdict, requested that the jury should be advised that *"no one should be pressured into returning a verdict or sign up to a verdict which in conscience they do not agree with"*. This application was rejected by the learned trial judge. Their final individual decisions dictate the trial's outcome.

88. The admonition subsequently given to the jury by the learned trial judge in relation to bringing in a majority verdict included the direction that it be *"the verdict of ten at least of you"*. This was a direction in plain language to the effect that at least ten members of the jury had to agree on a verdict. It in no way suggested, nor is it likely to have been interpreted by the jury as such, that individual jury members ought not to exercise their independent judgment in deciding on the appropriate verdict. It was simply advice that at least ten jurors were required to agree on a verdict if a verdict was to be recorded.

89. From the judgment in the case of R v. Watson [1988] QB 690, and to which this court was referred in support of this ground of appeal, it is clear that a specific direction to a jury that they should approach their task *not only as individuals but collectively* is a matter entirely for the discretion of the trial judge. The judgment in Watson states:-

> *"It is a matter for the discretion of the judge as to whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought to the necessary or desirable they are probably best included as part of the summing up or giving or repeated after the jury have had time to consider the majority direction."*

90. The submission made on behalf of the appellant presupposes that directions given to a jury by a trial judge while directed to the jury as a whole, are not intended as directions to the individual members of the jury, and that, generally, they are not received in this manner. This is as untrue as it is illogical. A jury consists of a group of randomly chosen citizens, usually unknown to each other, who are required to individually assess evidence and reach a verdict in due course, either unanimously or by majority where such is possible. In assessing such evidence they are free to discuss and analyse that evidence as between themselves before proceeding to individually reach a decision.

91. The learned trial judge exercised his discretion not to address the jury in the manner suggested by Mr. Ó Lideadha. In the circumstances he was entitled to make that decision and there is no error found by this court in his decision to so do.

Conclusion

92. All grounds of appeal have been rejected and accordingly the appeal is dismissed.