



THE COURT OF APPEAL

Record No. 10/2016

**Birmingham J.
Mahon J.
Edwards J.**

BETWEEN/

**THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS**

- AND -

STEPHEN CAHOON

RESPONDENT

APPELLANT

JUDGMENT of the Court delivered on 28th the day of November 2017 by Mr. Justice Mahon

1. The appellant has appealed his conviction on the 3rd December 2015 for the murder of Jean Quigley on the 26th July 2008 at her home in Derry, Northern Ireland. The trial commenced on the 27th October 2015 and continued for twenty days, before concluding with a unanimous jury verdict. The trial was conducted in the Republic of Ireland pursuant to s. 2 of the Criminal Law (Jurisdiction) Act 1976.

2. The trial was the third of the appellant for the murder of Ms. Quigley. The jury disagreed in the first and the conviction of the appellant in the second was earlier set aside by this Court for reasons unrelated to the issues arising in this appeal.

3. Ms. Quigley was a 30-year old, separated mother of four young children and was ten weeks pregnant at the time of her death. She had been in a relationship with the appellant between the 17th March 2008 and the 12th July 2008, when it was ended by the deceased. Attempted reconciliation, later in July 2008, was unsuccessful. In the early hours of the morning of the 26th July 2008, the appellant visited the deceased whose children were staying overnight with their father at a different address. The evidence of a taxi driver was that he drove the appellant to a point close to the deceased's address in the early hours of the 26th July 2008, and that he was carrying a holdall bag with him. The appellant denied that he was carrying a bag.

4. Although the appellant maintained that the deceased voluntarily admitted him into her home, there was evidence of damage to the locking mechanism to the door and it appeared to have been forced open.

5. The deceased's naked body was found in an upstairs bedroom on the 27th July 2008 by her mother who had become concerned about being unable to contact her. The cause of death was manual strangulation. Bruises were found on her head, lips, neck, chest, flank, legs, ankles and arms. Some were described as likely defensive wounds. Pieces of parcel tape were found in the bedroom on each side of the bed and in the bathroom. One piece contained blood with DNA from the deceased. Traces of the appellant's DNA were found in the toilet bowl and on cigarette butts in the sink of the bathroom. The deceased's DNA was also found on blood staining on a white t-shirt found in the appellant's apartment. Vaginal swabs from the deceased also contained semen matching the DNA of the appellant. It was also established that the appellant was highly likely to have been the father of the deceased's 10-week old fetus.

6. The appellant maintained his right to silence throughout a number of interviews conducted by gardaí in Donegal. Subsequently, he admitted having killed the deceased but maintained that he had had a row with her in the aftermath of consensual sexual activity, and that he had lost control and grabbed her, pushing her onto a bed and placing his hand on her throat after she had told him that her baby was not his and that she intended to have an abortion. He maintained that he when he left the deceased's home he believed that she was alive and merely unconscious. He did not call an ambulance or otherwise seek assistance for Ms. Quigley.

7. Shortly after 6 a.m. on the 27th July 2008, the appellant summoned a taxi to collect him a short distance from the deceased's home. He gave the taxi driver a false name and exited the taxi a short distance from his own home.

8. On the morning of the 27th July 2008, the appellant attended at the Letterkenny home of an acquaintance, James Casey, who subsequently made statements to the PSNI in Strand Road police station in Derry on the 29th July 2008 and on subsequent dates. These statements and their admission into evidence pursuant to s. 16 of the Criminal Justice Act 2006 are at the core of this appeal.

9. In the course of its investigation into the deceased's death the PSNI sought the assistance of the gardaí in apprehending the appellant. He was apprehended by the gardaí in Donegal town on the 5th August 2008. He initially gave the gardaí a false name, but shortly thereafter admitted his true identity. He was cautioned and arrested. He was interviewed extensively by the gardaí, but maintained his right to silence. He did not return to Derry and was never questioned by the PSNI.

The Grounds of Appeal

10. The appellant's grounds of appeal are as follows:

- (i) The learned trial judge erred in law in admitting the statements of James Casey into evidence pursuant to Section 16 of the Criminal Justice Act 2006;
- (ii) the learned trial judge erred in law in finding that the statements of James Casey were both '*reliable*' and '*voluntary*' within the meaning of Section 16(2)(b)(ii) and (iii) of the 2006 Act and
- (iii) the learned trial judge erred in law in admitting the statements of James Casey as it was unfair to the accused and not in the interests of justice.

Section 16 of the Criminal Justice Act 2006

11. Section 16 provides as follows:

"16(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as 'the statement') may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination:-

- (a) refuses to give evidence,*
- (b) denies making the statement, or*
- (c) gives evidence which is materially inconsistent with it.*

(2) The statement may be so admitted:-

- (a) the witness confirms, or it is proved, that he or she made it,*
- (b) the court is satisfied:-*

- (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,*
- (ii) that it was made voluntarily, and*
- (iii) that it is reliable,*

and

(c) either:-

- (i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or*
- (ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.*

(3) In deciding whether the statement is reliable the court shall have regard to—

- (a) whether it was given on oath or affirmation or was video recorded, or*
 - (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,*
- and shall also have regard to:-*

- (i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or*
- (ii) where the witness denies making the statement, any evidence given in relation to the denial.*

(4) The statement shall not be admitted in evidence under this section if the court is of opinion:-

- (a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or*
- (b) that its admission is unnecessary, having regard to other evidence given in the proceedings.*

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(6) This section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Act of 1984."

The Statements

12. The Court has had the benefit of reading the seven transcripts of the PSNI interviews of Mr. Casey in addition to his statements based on the said interviews.

13. Statements were made by James Casey to PSNI officers investigating the deceased's murder. The first of these was made to Detective Sergeant Hobson and Detective Constable Dayne at Strand Road police station following Mr. Casey's voluntary attendance at the police station on the 29th July 2008. The statement was partly audio taped and Detective Constable Dayne took notes. Mr. Casey expressed a preference to speak off tape and the audio recording was then switched off. Ultimately, a written statement was agreed by Mr. Casey and he signed each page of that statement. The statement contained a statutory declaration at its commencement which was acknowledged by Mr. Casey's signature.

14. Mr. Casey was again invited to make a further statement on the 1st August 2008. He was interviewed by Detective Constable McKinney in Derry on that date. This interview was video recorded. He was requested to return on the 8th August 2008 and his interview on that date was again video recorded. A statement was compiled based on the interviews on both dates. It was read to Mr. Casey and he signed each page at the end of the statement. The statement also contained a statutory declaration.

15. In the course of the statements, Mr. Casey stated that the appellant had attended his Letterkenny home in the early hours of the morning of the 27th July 2008, prior to the deceased's body being discovered, and that he was upset and shaking and stated to him that he had "done something bad" to the deceased. He told Mr. Casey that the deceased was unconscious or dazed when he had left her. He said that he had taken her forcibly upstairs and had assaulted her around her head and body and had used tape, and that he had either taped or covered her mouth to stop her screaming. Mr. Casey also gave a description as to what the appellant was wearing and also said that he had noticed spots of blood on his t-shirt. Mr. Casey gave the appellant a glass of water but did not bring him into his home. It was his understanding that he had then returned to his home in Derry.

The Trial Court's rulings

16. Mr. Casey did not give evidence in the first two trials, as he had declined to attend at either. Following a Mutual Assistance Request to the authorities in Scotland where Mr. Casey was then residing, Mr. Casey gave evidence by live link with the trial court from Glasgow Sheriff's Court, with Judge Jones presiding. While Mr. Casey acknowledged his signature on both statements, and also that he had met the appellant on the 27th July 2008, he claimed lack of memory regarding much of the content of both statements. Falsely, he maintained to have attended a memory clinic on referral from his GP. Following an application by the respondent to have the statements admitted pursuant to s. 16 of the Criminal Justice Act 2006, on the basis that evidence given by Mr. Casey was materially inconsistent with the statements that he had made, a *voir dire* took place in which evidence was heard from Mr. Casey, Detective Sergeant Hobson, Detective Constable Dayne and Detective Constable McKinney. Following detailed submissions from both sides, the learned trial judge gave her ruling on the 19th November 2015. She directed the admission of both statements pursuant to s. 16.

17. The learned trial judge's ruling was lengthy and detailed and dealt in turn with a number of issues raised in submissions made to her. It is useful to quote some extracts from her ruling.

18. In relation to the issue of *voluntariness* the learned trial judge addressed the concerns of the appellant's counsel, Mr. O'Higgins S.C., in relation to the allegation by Mr. Casey that he had been threatened by members of the PSNI. She stated:-

"The court should first of all say that it had been impressed by each of the three PSNI officers who gave evidence on this issue, Sgt. Hobson, Sgt. Dane and Constable McKinney. They struck the court as a capable, competent witnesses and each had a proper understanding of their role as interviewers. The court accepts the evidence of Sgt. Hobson that Mr. Casey was a difficult interviewee who jumped all over the place and the court having had an opportunity to see Mr. Casey can better appreciate that difficulty and the court accepts that it was for that reason that it was decided to tape his interview and later video his subsequent interviews.

When, in the course of the second interview, he mentioned that he had been threatened he was given the opportunity to have the matter investigated there and then by bringing the matter to the attention of a supervisor. He declined that opportunity. The suggestion that the threat might have been operative during the course of the interview is in the court's view dispelled by two things: 1. The demeanour of Constable McKinney who conducted the interview, both in the witness box and in the transcripts of interview, she came across as a mild, calm, even gentle interviewer, a (less) threatening presence would be hard to imagine. Secondly, a reading of the transcripts of interview following that allegation show a free flowing engaged conversation in which there is not any sense of menace or threat. The court also takes into account that at the time of interview Mr. Casey was residing in Letterkenny, Co. Donegal. He travelled to Northern Ireland to meet the PSNI not once, but three times. The first, on the 28th July 2008, the second, on the 1st August 2008, and the third time, on the 8th August 2008 when he signed his second statement. The court has no concerns about the issues of the alleged threat and has no concerns as to the status of Mr. Casey during the course of his interviews and the court finds that the interviews were properly conducted by the members of the PSNI."

19. The learned trial judge then addressed the issue of reliability. She said, *inter alia*:-

"Now, one of the matters that the court has to take into consideration in assessing reliability is the reasons given or the reason given by the witness for his failure, as it were, to give evidence and that gave rise to an issue in respect of memory. On the 16th November Mr. Casey - first of all he appeared on the 10th November and gave the evidence that I have already outlined. He again outlined on the 16th November via video link from the Sherriff's Court in Glasgow to give evidence. On that occasion he identified his statements and his signature on the pages of those statements. On this occasion Mr. Casey gave evidence for the first time that he was attending a memory clinic hospital. He stated that he suffered with depression and memory loss and that he had started to attend the memory clinic a couple of months ago. He claimed to have attended the clinic on two occasions and also stated that he was due to return this Tuesday. He stated that he had attended to see a specialist memory doctor for trials and that they had wanted to try a new treatment for him. He stated that he believed his consultations had lasted for a couple of hours. When asked by counsel for the accused whether the consultant had given him any comfort or explanation as to why his memory might be frail, Mr. Casey responded "just said to me the depression and the drink and your brother getting lost, the loss of your brother". When asked whether had he attended the clinic or if he had been referred Mr. Casey responded "I'm getting referred by my doctor". He confirmed that he had been complaining to his G.P. about his memory loss and that this was how his attendance at the memory clinic came about.

On the 17th November, having obtained consent from Mr. Casey and having been provided with contact details for his G.P., the Scottish prosecuting authorities contacted Mr. Casey's named G.P. who informed them in a letter, which is presented to the court on the 17th November 2015, that he, the G.P., had no record of any complaints from Mr. Casey in regard to memory loss nor of referring Mr. Casey to the memory clinic. On the 18th November 2015 Mr. Casey again gave evidence before this court via video link with the Glasgow Sheriff's Court. Mr. Casey confirmed his recollection of signing a consent form and providing Ms. Laura Miller of the Scottish Prosecuting Authority with the details of his G.P., Dr. Connaughton. He confirmed that Dr. Connaughton was his G.P. and stated that he had joined him a couple of months ago. Mr. Casey however on this occasion stated Dr. Connaughton had in fact not referred him but rather was going to refer him. He explained that he had provided Dr. Connaughton's details to the prosecuting authorities as the doctor he was seeing at the time. He confirmed that Dr. Connaughton was indeed the doctor who he went to for advice in relation to his memory loss. He had attended Dr. Connaughton last week in this regard. He stated that he had never attended the memory clinic but had attempted to go to the clinic on the previous Friday, that is Friday the 13th November and had failed to find it. According to his evidence, he also attempted to attend the clinic without a referral a couple of months previously but again had been unsuccessful in finding it. He stated that he had become worried about his memory, in the week of the 13th November, three days before first giving evidence as he had got depressed. He stated that he forgets things such as appointments and that his partner is in the practice of leaving notes for him on the fridge to assist him with his memory problems. Mr. Casey played an audio voicemail to the court from his mobile phone which

appeared to be a woman from the Glasgow Memory Clinic returning his call. The time and date of that message was not played to the court but Mr. Casey gave evidence that it had been left on the 8th November 2015 at 9.28 a.m., the 8th November was a Sunday. Mr. Casey gave evidence that he returned that call and spoke to a woman called Donna. He told her about his memory loss and his alcohol and tablet intake. According to Mr. Casey he was informed that he would have to cut down on his alcohol intake and obtain a referral from his G.P. He confirms that he attended his G.P., Dr. Connaughton, after the 8th November 2015 but stated he had no memory of attending the G.P. just of making the appointment. However, he went on to state that he had seen Dr. Connaughton in relation to a referral, that Dr. Connaughton had told him he would have to write to refer him but that he told Dr. Connaughton he would go himself. He then stated that he had first gone to Dr. Connaughton at 3 p.m. on the previous day, the 17th November, to find out about attending a memory clinic. He stated however that Dr. Connaughton never said anything in response to his request.

In this circumstance the defence at first sought a discharge of the jury to give them the opportunity to test the issue in relation to memory. However, in the overall circumstances of this case, the court is quite satisfied that Mr. Casey, that this is merely the latest in a series of attempts by Mr. Casey to avoid giving evidence and the court takes into account the fact that despite warrants and subpoenas Mr. Casey failed to turn up on two previous occasions for this trial. He turns up on this occasion and two days before he first gives evidence there is on his mobile phone a memo or an audio voicemail from a memory clinic. He then went on and clearly lied to the court about his contact with his G.P. He lied to the court about having had consultations already with the memory clinic and in the circumstances the court is quite satisfied that the issue of memory is merely the latest attempt by Mr. Casey to avoid his responsibilities to give evidence in this case."

20. The learned trial judge then went on to deal with the issue of general unfairness. She said:-

"The court therefore the next issue that the court should address is the "general unfairness" as it were that may arise from the admission and that is what one would count as unreliability as to substance and whether in the circumstances it would be unfair to allow this evidence to be admitted in a trial."

21. She continued:-

"While the sequence of events does alter in Mr. Casey's telling and re-telling, the core it seems to the court doesn't change and I think that the jury, as the trier of fact, is entitled to everyman's evidence in this instance including this evidence."

22. On the subject of the necessity of the evidence contained in the statements, the learned trial judge stated:-

"The final ground upon which objection was made is that as a prerequisite of admission of a statement pursuant to s. 16 the court must be satisfied that the evidence is necessary and Mr. O'Higgins, I hesitate to use the word ingeniously, but Mr. O'Higgins has submitted to the court that the evidence isn't necessary because a verdict has previously been given in this case, albeit on the basis of a misdirection, in circumstances where this evidence was not included...In those circumstances this is the only evidence of the circumstances surrounding the killing that is in the case. It cannot be obtained from any other source and it becomes particularly material in the light of a proposed defence of provocation. So, for all of these reasons the court proposes to admit the statement."

Submissions to this Court

23. The core of the appellant's case is that the learned trial judge erred in admitting the statements pursuant to s 16 on the basis of their lack of voluntariness and reliability. It is contended that neither was sufficiently assessed or addressed by the learned trial judge thereby undermining the appellant's right to a fair trial. The concluding section of the appellant's written submissions to this court state as follows:-

"It is respectfully submitted that "the appellant's" right to a fair trial was significantly undermined by the admission of Mr. James Casey's statement pursuant to s. 16 of the Criminal Justice Act 2006. It is submitted that Mr. Casey is a witness on whom it is very to place any reliance on what he says in the absence of it being, in some way or another, independently confirmed. Mr. Casey gave a number of interviews regarding the appellant. Mr. Casey appeared in court by way of video link from Scotland. It should be noted that this was the appellant's third trial in relation to the offence of murder. Mr. Casey did not attend to give evidence at the first two trials. The prosecution proceeded to prosecute the appellant and obtained a conviction against the appellant absent the evidence of Mr. Casey.

It is submitted that the manner in which Mr. Casey made his statement was unsatisfactory. The police gave evidence that they decided to tape Mr. Casey's interview because a witness is more inclined to tell the truth when being taped. First, there is an audio recorded interview, then there is an off audio conversation, then there are six video recorded statements. That is the material taken from Mr. Casey, but the prosecution put forward a statement or two and were saying "that is his statement" but, in fact, it's the appellant's submission that it is not Mr. Casey's statement. It is submitted that the second one is not Mr. Casey's statement. It is submitted that Constable McKinney came along and read hundreds of pages of transcript and extracted material from it and presents that as his statement, but it is respectfully submitted that it is not. It is submitted that if the prosecution brought this application properly they ought to have done so on the basis of the videos and they did not do so. The statement as proposed is not a statement and certainly the second one is not, and ought not to have been considered during a s. 16 application.

Mr. Casey made a complaint that he was threatened by the police prior to giving his statement. The police witnesses readily accept that this matter should have been investigated. In the absence of such investigation, which was mandatory, it is respectfully submitted that the prosecution did not prove beyond reasonable doubt that Mr. Casey's statements were made voluntarily and it is submitted that the court should not have been satisfied beyond all reasonable doubt that Mr. Casey's statements were voluntarily. Further, without the mandatory investigation having been carried out, the appellant was in the unenviable position of trying to carry out the investigation seven years post allegation. It is submitted that this significantly hindered the (appellant's) defence and dissipated his constitutional right to a fair trial.

Further it is abundantly clear from the prosecution's concluding comments, that Mr. Casey's statement was not necessary and as a result falls short of the threshold the prosecution must meet in a s. 16 application.

The court erred in admitting Mr. Casey's statement. In admitting the statement, the applicant's right to a fair hearing was extinguished. For the above reasons it is respectfully submitted to this honourable court that the verdict of guilty of murder returned unanimously by the jury in this case is unsound and unsafe."

24. The prosecution, for its part, submits that the statutory preconditions for the admission into evidence of statements pursuant to s. 16 were satisfied, and that it had been established beyond reasonable doubt that they were both voluntary and reliable.

Discussion and decision

25. A crucial pre requisite for the admission of a statement pursuant to s. 16 is its voluntariness.

26. Mr. Casey commenced his evidence on day seven of the trial. In the course of being examined by Mr. Marrinan S.C. (counsel for the prosecution), Mr. Casey acknowledged that he had been a friend of the appellant for the previous two years. He recalled that in the early hours of the morning of the 27th July 2008 the appellant knocked at his door. Mr. Casey said he answered the door and saw the appellant, whom he described invariably as *very shaken, a bit shaky and frightened or something*. Mr. Casey said he thought the appellant had been *in a fight or something*. He said that the appellant simply wanted a drink of water and that he gave him a drink of water. He said that he spoke to him for five or ten minutes, but did *not really* have a conversation with him. He said that the appellant simply told him that he was *out on the town..having a couple of beers*. He said he then left.

27. When pressed to recall in detail what the appellant said to him, Mr. Casey said he was unable to remember. He claimed he could not remember anything else in relation to their meeting. Mr. Marrinan proceeded to seek admission of the statements pursuant to s. 16 and a *voir dire* took place.

28. This is not a case of a witness refusing to give evidence or denying that he made a statement. It is, rather, a case of a witness giving evidence *which is materially inconsistent with it* (s. 16(1)(c)). In reality it is a *lack of memory* case. Mr. Casey did not deny making statements to the PSNI, or, indeed, the content of those statements. When asked at the outset of his evidence by Mr. Marrinan to recall what the appellant had said to him over a period of five or ten minutes which occurred at Mr. Casey's home in the early hours of the morning, Mr. Casey maintained that he had no memory of same. In the course of his *voir dire* evidence, Mr. Casey maintained he had difficulties with his memory and that he had been referred by his G.P. to a memory clinic in Glasgow. It transpired that that particular evidence was untrue and that he, in fact, had never been referred to a memory clinic.

29. The issue of memory or lack of memory also arose in *DPP v. Rattigan* [2013] 2 I.R. 221. In delivering the judgment of the Court of Criminal Appeal, O'Donnell J. stated (at p. 229):-

"The issue of the effect of section 16 arose in this case because in the immediate aftermath of the stabbing a number of witnesses had given statements detailing the events leading up to the killing of Mr Gavin. By the time they came to give evidence at the trial however the position had changed. While they could give precise evidence about the events of the night, when asked to describe the stabbing or the knife man, they professed to have no memory whatsoever. The trial judge refused one prosecution application that a statement of a witness be admitted under section 16 on the grounds that it was unnecessary but permitted statements of two other witnesses to be admitted under the section. The significance of their evidence was that it showed that the perpetrator, after stabbing Declan Gavin, had pursued him all the way to the door of the Abrahebabra premises. The evidence put the assailant at the door of the premises on which the blood of the victim and the handprint of the applicant were found. While there was some argument as to whether section 16 could be said to apply to a situation in which a witness had given some evidence and then professed a lack of memory on other matters, this Court is satisfied that it can be said of the two relevant witnesses here that they had given evidence that was materially inconsistent with their statements and therefore came within the terms of the statute, if it was properly applicable in the case. The central issue raised therefore was whether the section was indeed applicable."

30. Mr. Casey alleged that he had been threatened by a policeman that he would be taken into a room and given a *kicking*. In the course of his evidence, Sgt. Hobson acknowledged that such a claim had been made by Mr. Casey when he said:-

"Judge, I was told by one of the other detectives that that had been made, and Mr Casey had been told at the time that if he wished to complain to the Police Ombudsman of Northern Ireland to make an official complaint against me, he was more than willing to do so. No complaint has ever been made about the conduct of that interview.."

31. The making of the allegation by Mr. Casey was also confirmed in evidence by Det. Constable Dane and Det. Constable McKinney. Mr. Casey declined to make any complaint or follow up in relation to the allegation made by him. Det. Sgt. Hobson categorically denied in his evidence that he had made any threats or inducements to Mr. Casey. Det. Constable Dane also denied that any threat had been made. There was therefore a complete conflict between Mr. Casey on the one hand and the policemen on the other hand, on the issue of whether or not Mr. Casey had been threatened. That being so, it was a matter ordinarily for the trial judge to determine if threats were made, and if they had been made, the circumstances in which they were made.

32. Having heard evidence from the various interested parties, the learned trial judge rejected Mr. Casey's contention that he had been threatened. She said:-

"The Court has no concerns about the issue of the alleged threat and has no concerns as to the status of Mr Casey during the course of his interviews and the Court finds that the interviews were properly conducted by the members of the PSNI."

33. The decision of the learned trial judge in relation to the issue of the allegation by Mr. Casey that he had been threatened was conducted as openly and comprehensively as was possible. Evidence relating to all the relevant issues was heard. No formal complaint was made by Mr. Casey to the Police Ombudsman or to any other senior police officer. In all the circumstances, the learned judge's ruling in relation to the issue of the alleged threat was *detailed and discursive*, to use the words McKechnie J. in *DPP v. Murphy* [2013] IECCA 1, both of which he felt were lacking in the s. 16 ruling by the trial judge in that case.

34. In particular, the learned trial judge referred in positive terms to the interview skills of Det. Constable McKinney. She also expressed the view that the relevant interview transcripts *show a free flowing engaged conversation in which there is not any sense of menace or threat*.

35. In the course of her charge to the jury, the learned trial judge emphasised that the weight to be attached to the content of the statements made to the PSNI by Mr. Casey were a matter for decision by the jury. Specifically, in relation to the allegation of a

threat been made to Mr. Casey, the learned trial judge told the jury:-

"And you have the -- you now have the evidence, which only emerged in the trial, that if somebody makes a complaint it should -- the requirement is it goes to the Ombudsman. You have heard Detective Constable McKinney give her explanation for that and you can assess that. She says she wasn't aware of the protocol at the time; that she was a bit taken by surprise by the complaint, and she dealt with it as best she could by giving Mr Casey a number of opportunities to follow up on that complaint if he wanted to do so. So that's the context in which you have to consider his evidence, the evidence in his statements to the PSNI. It's a matter for you and I just wanted to make sure that you had the context in which you must approach the evidence."

36. The mere fact that a threat was made, if indeed it was made, did not necessarily prevent the admission into evidence of a statement pursuant to s. 16. In *State v. Treanor and Ors* [1924] 2 I.R. 193 at 208, Fitzgibbon J. stated:

"A confession made to any person under the influence of a promise or threat held out by a person in authority, calculated to induce the confession, is inadmissible, unless it be clearly proved to the satisfaction of the Judge (whose duty it is to decide the question), that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat."

37. In *DPP v. Shaw* [1982] I.R. 1 at 60-61, Griffin J. stated:

"...the decided cases show that a statement will be excluded as being involuntary if it was wrung from its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods which have in common the result or the risk that what is tendered as a voluntary statement is not the natural emanation of a rational intellect and a free will."

38. Furthermore in *Murphy* the court remarked:-

"The motive or intention of such person is irrelevant. The test has both objective and subjective elements. Even if such inducement is found to have been made, but it did not in fact influence the mind of the person in making the statement, the same shall be regarded as having been made voluntarily and therefore is admissible in evidence."

39. In the instant case, there is nothing to suggest that Mr. Casey was induced or threatened to say the things that were said by him in his statements, if indeed he was threatened or believed he had been threatened. In any event, and importantly, the learned trial judge having had the benefit of hearing all relevant witnesses, assessing the demeanour of the different witnesses, and viewing the video recordings made available proceeded to reach her conclusion to the effect that the statements were voluntary.

40. Considerable weight will attach to views formed by a trial judge in the course of a trial. In *Murphy* McKechnie J. said:-

"Notwithstanding the expanse of this power however, the developed jurisprudence shows that on certain aspects its role is more limited. One such matter relates to findings of fact made by the trial court which are later integrated into an appeal point on which the C.C.A. is asked to intervene. Case law shows that in such circumstances the appellate court is very reluctant to, and will rarely interfere with such findings. This is for much of the same reasons as apply on the civil side, namely the unrivalled advantage which the trial court has in its ability to see and hear witnesses and to observe their manner and demeanour when giving evidence. Whilst this applies to all factual conflicts it has particular resonance where not only accuracy, but also truthfulness is an issue."

41. It is also the case that Mr. Casey attended voluntarily at the PSNI police station on three separate occasions. It involved travelling between two jurisdictions. Arguably, if he felt under threat or in any way uncomfortable as to the extent to which pressure was being applied upon him to make statements or make particular statements, he would not have freely travelled across the border to make statements when he did. He himself was not under suspicion of any involvement in the crime.

42. The court is therefore satisfied as to the voluntary nature of the statements.

43. The next issue for consideration is the reliability of the statements. This is described by Ní Raifeartaigh in *Evidence in Criminal Trials* as *"the essential touchstone of admissibility"*.

44. Section 16(3) provides as follows:-

(3) In deciding whether the statement is reliable, the court shall have regard to:-

(a) whether it was given on oath or affirmation or was video recorded, or

(b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,

and shall also have regard to:-

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement..."

45. In this case the first statement made by Mr. Casey was read over to him and its content agreed, in the course of a video recording on the 1st August 2008. The statement was partly based on video recording and partly on notes in respect of periods in which the tape recording had been switched off. The second statement, taken by Det. Constable McKinney, was based on video recording. Both statements contain statutory declarations.

46. In *DPP v. O'Brien* [2011] 1 I.R. 273, Macken J., in the course of delivering the judgment of the court said (at p. 294):-

"It seems relatively clear that the Act, in requiring that the statement be found to be "reliable", appears to mandate the court to examine the circumstances and factors surrounding the making of the statement, to ensure that it is a reliable

statement in the sense that it is one which can be relied upon, rather than requiring the court to be satisfied that the actual content of the statement is reliable in the sense that it is true."

47. She also stated:-

"A consideration of later subsections of the Act of 2006 also suggests that the emphasis is on the circumstances of the making and taking of the statement itself, rather than the reliability of the content of the statement, and this appears to be in line with case law from other jurisdictions, such as the United Kingdom and Australia.."

48. Reference was made to the fact that the video tape was switched off on one occasion. However, there is a credible explanation for that, namely, Mr. Casey himself requested that this be done. Importantly, the statements were read over and agreed to by Mr. Casey at their conclusion. Reference was also made on behalf of the appellant to certain suggested inconsistencies in Mr. Casey's statements. It does not appear to this court that they were of a crucial nature and were well within the ability of the jury to adjudicate on. Furthermore, it is important to emphasise that had Mr. Casey given evidence in the ordinary way in relation to the contents of these statements, such inconsistencies might have been the subject of cross examination.

49. The existence of inconsistencies in a statement will not necessarily render the statement unreliable. The lengthy list of inconsistencies as identified and provided to the Court is not entirely accurate. The crucial part of Mr. Casey's account of what the appellant had told him in the course of their early morning conversation, and as relayed to him to the PSNI interviewers, related to information as to what the appellant told him as to what had happened between himself and the Deceased. (In the appellant's list the material in question was headed 'Where events occurred'). Much of that information was borne out by evidence of what was found at the scene of the murder. The use of tape, for example, could only have been known by Mr. Casey if told to him by the appellant.

50. In her ruling the learned trial judge acknowledged that the statements included inconsistencies. She referred to the fact that *"the sequence of events alter in Mr. Casey's telling and re-telling..."*. She felt however that the "core" of the information provided by Mr. Casey in his contact with the PSNI had not changed.

51. Extracts from the s. 16 ruling by the learned trial judge are quoted earlier in this judgment. They do not do justice to the very comprehensive manner in which the learned trial judge dealt with the issue, and in particular, the so called inconsistencies in Mr. Casey's statements. It is often said, and is no less a fact in this case, that a trial judge is best placed to determine if the essential ingredients of voluntariness and reliability are evident in a statement sought to be admitted into evidence pursuant to s. 16. In the instant case, the learned trial judge had the opportunity (and benefit) of hearing first hand the evidence of Mr. Casey himself and the PSNI officers. The decision of the learned trial judge, while not finally determinative in the context of an appeal to this Court, nevertheless carries considerable weight.

52. The issue of the statements and their admission pursuant to s. 16 was addressed in considerable detail by the learned trial judge in her charge to the jury. She meticulously and carefully reviewed the evidence of Mr. Casey and the PSNI officers over approximately forty five pages of transcript. While somewhat laborious to so do in this judgment, it is nevertheless useful to quote from the learned trial judge's charge to the jury in relation to this issue, and in particular to quote the following extracts:-

"Then we come on to the evidence of Mr Casey. I think it is universally acknowledged that Mr Casey has a very tenuous concept of what truth is. He's a man who, clearly, can contradict himself in the same sentence and you have had evidence of that as we have gone through the trial. He first gave evidence on the 10th of November by video-link from Glasgow. On that day he confirmed that in July 2008 he lived at 24B Ard Ghlass in Fairgreen Park, Letterkenny, and that he had for the previous two to three years been a friend of a person called Stephen Moore, who is in fact Stephen Cahoon. He confirmed that he often drank with Mr Cahoon in the Ice Wharf Tavern on the Strand Road in Derry. He stated that he vaguely remembered the time that Jean Quigley was killed in Derry."

"...Now, it does bring up issues, of course, of reliability because if somebody says one thing one day and another another day, then you're going to have to be concerned about the reliability. But what I'm going to do for you now is I'm going to say the law says this evidence can go in and I'm going to remind you what the evidence was and the cross-examination on foot of it was, and then I'm going to tell you what the law says, how you should approach the evidence. But for centuries our system has depended on people getting into a witness box and being cross-examined because that's the best test. That's the best way of conducting a trial. But in the very particular circumstances, the law has changed now and the reality is the statement of Mr Casey made to the PSNI is evidence in the case. What weight you're going to give to it may be another matter."

"...So there, you have a whole load of conflicting evidence. He first gets into the box and tells you that, yes, Mr Cahoon did come to him on that night but he can't remember what the conversation was. By the time he's finished giving evidence to you and under cross-examination he's telling you: "Oh, no, actually he never came at all". And in the middle, he made two statements to the PSNI. Now what the law says is that those statements that he made are part of the evidence and you're going to have to decide what weight you give to those statements. What the law says is in estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. So you must look at all the surrounding circumstances in which the statement was made."

"...Now, just as we finished yesterday we were talking about the weight that you, how you approach the problem or the issue of what weight you give to Mr Casey's statement. And it's ultimately a matter for you, but everybody is agreed that you should approach that issue with caution."

53. There were no requisitions made on behalf of the appellant in relation to that part of the learned trial judge's charge to the jury concerning Mr. Casey's statements other than the following:-

"Whilst, Judge, I do accept the Court did carefully and diligently read out the cross-examination of Mr O'Higgins of Mr Casey and did identify these matters, I think it would be appropriate that the Court would also direct the jury's attention to Mr Casey's demeanour, his recantation of the statement et cetera."

54. The learned trial judge readdressed the jury in relation to this issue in the following terms:-

"Now, I've been asked to say a number of things to you in relation to the evidence, and Mr Casey's evidence in particular. I think I said yesterday that first of all it's been established that some of the things in Mr Casey's statement

are clearly true. They've been accepted, the going to Mr Cahoon's flat on various days, and having tea and looking at websites and so on. But the fact that he is correct ..is shown to be correct about that, doesn't follow that he's correct about everything else and that he's correct about the..what he says in the statement happened with Mr Cahoon. Because, as you've seen, Mr Casey is a practised liar. Whether he's a successful liar is another matter but he is certainly a practised liar. And liars can weave truth and falsehood in the one statement. So you don't go from that being proved correct to saying, well, he almost must be correct then about the meeting.. And, again, I think I said to you yesterday if you're satisfied the statement was given to the PSNI, you look at the statement and you see is there anything in it that could only have come from Stephen Cahoon..And so that you have to exclude that the information could have come from any other source, and you have to be satisfied beyond reasonable doubt and that was the only potential source of the information which he gave the PSNI."

55. The learned trial judge then went on to specifically address, again, the manner in which the PSNI took the statements from Mr. Casey. She specifically referred to the issue relating to the blood on the t-shirt and what the PSNI had apparently been told by Mr. Casey in that regard.

Conclusion

56. This was a difficult trial in many respects. Having regard to the fact that the appellant was convicted of murder in an earlier trial (that verdict being subsequently quashed by this Court) in the absence of evidence from Mr. Casey the extent of the contribution of his evidence (including his statements) to the guilty verdict in this trial is uncertain. It is however clear that the learned trial judge considered the s. 16 issue with great care before reaching the decision to admit the statements into evidence. This Court is satisfied that that decision was correct and that the requirements of s. 16 were satisfied in the making of that decision. The Court is also satisfied that the charge to the jury on this issue was both fair and comprehensive and, if anything, was weighted in favour of the appellant.

57. In the circumstances, the Court will dismiss the appeal.