**THE COURT OF APPEAL**

**Birmingham J.**
**Edwards J.**
**Hedigan J.**

**[No. 261 of 2016]**

**[No. 186 of 2016]**

**The People (at the suit of the Director of Public Prosecutions)**

**Respondent**

**And**

**Leszek Sychulec and Andrzej Gruchacz**

**Appellants**

**JUDGMENT of the Court delivered on the 30th day of January 2018 by**

**Mr. Justice Birmingham**

1. On 22nd April, 2016, both appellants were convicted of the murder and false imprisonment of Patryk Krupa in Athlone on 20th June, 2014.

2. The background to the case is that on the evening of 20th June, the deceased who was a young Polish man was walking through Athlone with two friends, Bartek Kurowski and Szymon Rutkowski, on his way to a gym. As they walked along Church Street, a black BMW came on the scene and two persons got out of that vehicle. There was a brief exchange and the deceased then went with those two men in the black BMW. The deceased's two friends were concerned for his wellbeing and started searching for him. On a hunch, they searched the area along the river Shannon under the M60 bridge where they found the deceased floating in the river. The deceased was found to have received serious injuries.

3. In the case of the first named appellant, Leszek Sychulec, the sole ground of appeal relates to a contention that the trial judge erred in the admission of identification evidence. Identification evidence is also central to the appeal by the second named appellant, Andrzej Gruchacz. However, in his case there are also subsidiary issues relating to a witness Tomsez Jaromin and the invocation of s. 16 of the Criminal Justice Act 2006.

4. Before dealing with the grounds of appeal, it is appropriate to refer in a little more detail to the facts, to what emerged during the course of the investigation and to what subsequently emerged in evidence. Mr. Kurowski, and Mr. Rutkowski, the deceased's companions, were in a position to give detailed descriptions of the two individuals who had emerged from the car. One of the men was very tall and he was described as being skinny, with dark hair and he spoke Polish. The second man was of a very striking stature, with a very imposing build, he was wearing three-quarter length trousers and his clothes were obviously bloodstained. It was evident that the men knew the deceased and it was of course evident that they were linked to the black BMW. Mr. Rutkowski was able to tell the Gardaí, and indeed subsequently gave evidence, that he saw Szymon Tarkowski and Kuba Zmuda, both of whom were known to him, in the car. The Gardaí were able to locate and arrest Szymon Tarkowski and Kuba Zmuda on 21st June, 2014. Mr. Tarkowski was subsequently charged and pleaded guilty to the offence of false imprisonment, while Mr. Zmuda was a prosecution witness at trial.

5. The investigation focused on a black BMW (06 D 20250). Gardaí harvested a considerable amount of CCTV footage from various locations around the Athlone area which allowed them to follow the movement of the deceased and his companions up to the time that he was abducted from the town centre. The footage also allowed the Gardaí to track the movements of the black BMW (06 D 20250) prior to and after the abduction. Part of the footage harvested by Gardaí came from Collins' Service Station on the Roscommon Road. It was apparent from the footage, and from witness statements taken from people who were there, that a minor incident had occurred at the service station in the vicinity of the Supermac's counter inside the premises. The two men who were involved in the incident were Polish and matched the descriptions of the men who had abducted the deceased. Blood was visible on their clothing. It is important to say that the CCTV footage from Collins' Service Station was of an exceptionally high quality and as a result, was central to the subsequent Garda investigation.

6. The Garda investigation focused to a degree on two other vehicles:

> i. A silver coloured Audi A6 estate, registration number 08 C 8052. This car was owned by Tomsez Jaromin. It was borrowed from the owner and was visible on CCTV being parked at the B&Q car park in Athlone. The occupants left the car and returned sometime later. The car was then driven to the Applegreen Service Station which is close to B&Q, again this could be seen on CCTV, as could the fact that an occupant left the car and bought whiskey. The car was next seen at Collins' Service Station where those who appeared to be its occupants were involved in an altercation, after which, it was driven off in the direction of Roscommon. Staff members from the garage made a note of the car registration and this was given to Gardaí.
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> ii. There was a third vehicle, also a black BMW, registration number 07 D 20106, which featured in the investigation. This car was owned by Marcin Rodziewicz, who regularly allowed the first named appellant to borrow it. There was evidence that the first named appellant drove away in this car after the silver Audi (08 C 8052) was returned to Tomsez Jaromin. This black BMW was found crashed in a ditch near Mountmellick in the early hours of 21st June, 2014. The car was examined and various items located in it. In particular, there was a driver's licence in the car. That licence was in the name of Tomas Stugazw and there were also four passport photographs matching the photo in the licence. One of those passport photos was cut out, given the identification EC1 and was subsequently shown to a number of witnesses. Gardaí identified and tracked down Tomas Stugazw and he was able to confirm that his Polish driving licence had been stolen from him in Dublin city centre in 2013. The document found in the vehicle was authentic except for the fact that the

photograph had been changed and was no longer the photograph of Tomas Stugazw.

7. Gardaí also investigated a particular house at Cloonera, Strokestown, Co. Roscommon, which had been rented to a Polish man who identified himself as Tomas. The estate agent who dealt with the letting produced a copy of the drivers licence that had been given to him for identification purposes and it was identical to the licence in the name of Tomas Stugazw retrieved from crashed vehicle.

**The appeal of Leszek Sychulec**
8. The prosecution case was that Leszek Sychulec was the larger of the two men who abducted the deceased from Athlone town centre. He lived in Roscommon and was known in the Athlone area. He frequented Collins' Service Station and the Supermac's outlet there, and he was known to the staff as "Taco fries" because it was his practice to order a large taco fries with extra taco sauce and extra cheese for himself and a small order for his girlfriend.

9. The appellant raises only one issue which was that the judge erred in admitting identification evidence. The companions of the late Patryk Krupa identified the appellant as one of those involved in the abduction from a still generated from CCTV footage from the Supermac's area of Collins' Service Station on the evening of the murder. It is to be noted that Mr. Sychulec did not challenge the fact that he appeared in the CCTV footage from the service station at trial. Given his very distinctive appearance and the quite exceptional quality of the CCTV footage, this was a realistic approach. However, he did challenge the fact that witnesses to the abduction were permitted to say by reference to the footage that he was one of those involved in the abduction. The appellant refers to the case of *DPP v. Rapple* [1999] 1 I.L.R.M. 113. There, the court commented:-

> "it seems to the Court that there are two separate and distinct situations in which photographs may be shown to a witness. Firstly, there is the situation where a suspect is being sought. Secondly, there is the situation where there is a suspect and the showing of photographs before a formal identification parade or other means of identification is clearly prejudicial and unfair. In the view of the Court that is a distinction which is a proper one to make. The situation in the present case falls within the first category and the Court can see no objection to the use of the photographs."

However, the appellant says that the present case falls into the second category as the identification from the CCTV stills occurred at a time after the arrest and charging of the appellant.

10. In the course of his judgment in *The People (Attorney General) v. Mills* [1957] 1 I.R. 106, Maguire C.J. approved of the following passage from *R. v. Dwyer and Ferguson* (1925) 18 Cr. App. R. 145:-

> "The Court has been asked to formulate some principles relating to the use of photographs in the detection and punishment of crime. It is not possible, nor indeed would it be useful, to attempt hastily to enunciate a series of rules upon the matter. They are to be collected from the various cases which have been decided. But this observation may be added. The circumstances of different cases differ greatly, and it is not easy to lay down general rules. One distinction, however, is quite clear. It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to persons in order to obtain information or a clue upon that question; it is another thing for a police officer to show beforehand to persons, who are afterwards to be called as identifying witnesses, photographs of those persons whom they are about to be asked to identify."

In this case it is not the situation that any improper use was made of the photographic stills, viewing the stills and CCTV footage was not the precursor to any form of formal or informal identification. There was no "corporeal identification", to use a phrase that appears in the appellant's submissions.

11. The observations of Maguire C.J. were made some 60 years ago and while his comment about how circumstances may differ remains valid, technology has changed beyond all recognition. In particular, CCTV is now ubiquitous, a fact which has been a significant feature of the lost evidence jurisprudence.

12. In this case, Gardaí had a detailed and, because it was suggested that the individual being described was of very distinctive appearance, valuable description. They also had information that at the time of the abduction, the appellant's clothing was clearly and obviously bloodstained. There was available CCTV footage which showed the suspect at a time and place close to the abduction with bloodstained clothing. There were also a number of witnesses from the filling station and the food concession who gave evidence to that effect. It seems to the Court that the footage from the garage was admissible as real evidence. The question arises whether there was anything to prevent the footage being viewed by Mr. Kurowski and Mr. Rutkowski or anything preventing them from commenting on it. The Court cannot see that there was. The appellant was of a striking, indeed one might say singular appearance. The appearance of the individual shown in the footage matched the description that was given.

13. In this case, the witnesses had given a description of a very distinctive, striking Polish man with bloodstained clothing. When Gardaí came into possession of CCTV footage it showed a very distinctive, striking Polish man with bloodstained clothing. The Court sees nothing unfair in permitting the companions of the deceased to view it. In the circumstances of the case, to have excluded the evidence would run contrary to reason and common sense. That is particularly so in a situation where there was very considerable additional evidence against Mr. Sychulec. DNA matching his was found in the black BMW (06 D 20250). Also found in that vehicle was blood and DNA matching that of the deceased. There was also blood and DNA matching that of the deceased on the watch worn by the appellant at the time of his arrest and there was evidence of blood staining on a sock that the appellant was wearing. There was also evidence that the appellant had used the Audi A6 silver estate (08 C 8052) on the evening in question and that when that vehicle was returned that the appellant then left in a BMW. When the appellant was arrested, detained and interviewed he denied having been in Athlone on 20th June and denied knowing the deceased notwithstanding the presence of the deceased's blood on the watch he was wearing.

14. In the circumstances the Court has no doubt that the trial of Mr. Sychulec was satisfactory and that the verdict that was returned was safe. Mr. Sychulec's appeal is therefore dismissed.

**The appeal of Andrzej Gruchacz**
15. Mr. Gruchacz has formulated a number of grounds of appeal. These were as follows:-

> i. "The learned trial judge erred in fact and in law in admitting into evidence the purported identification evidence of the accused (in so far as a man present at a location was referred to by the co-accused as being called Andrzej) by a witness Tomsez Jaromin as being part of the res gestae of the transaction/conversation which was occurring at the time the name Andrzej was mentioned.

ii. The learned trial judge erred in fact and in law in allowing the prosecution to benefit from an unfair procedure by admitting into evidence the purported identification of the Appellant by Tomsez Jaromin who had been shown a single photograph (said to be of the Appellant) and which was assigned Garda Exhibit No. E.C1, when no other photograph was shown to the witness by the Gardaí at the time of the purported identification.

iii. The learned trial judge erred in fact and in law in permitting certain parts of the evidence of Tomsez Jaromin to be admitted into evidence by virtue of Section 16 of the Criminal Justice Act 2006.

iv. The learned trial judge erred in fact and in law in refusing to grant the Appellant's application for a direction of no case to answer and in so doing:-

a) Ruled that it was permissible for the jury to consider the CCTV footage and stills in order for it to carry out the identification of the Appellant (there being no other available identification evidence in the case);

b) Ruled that the definition of available evidence, in the context of when an identification can be left to a jury, meant only that evidence which the jury were entitled to consider;

c) Allowed the prosecution to benefit from its own oversight in not serving the second statement of Robert Wierbowaski (who purported to identify the Appellant) by way of Notice of Additional Evidence – this evidence being clearly available to the prosecution and the witness was called to give evidence at the trial. As a consequence of this oversight there was no identification evidence in the case which resulted in the application for a direction which was refused and the case left to the jury to carry out the identification.

v. The trial judge erred in law by permitting admission of a portion of Tomsez Jaromin's testimony that was not the subject of a "section 16" application. This enabled reliance by the jury upon a purported naming of a person as "Andrej" allegedly overheard by an otherwise discredited witness.

vi. By admitting hearsay through the aforesaid witness, of a name being employed in his hearing consistent with a suggestion that this Appellant was the party present, the learned trial judge invited the jury to afford weight to the said hearsay evidence, and to rely upon this witness save where he denied having made a visual identification. The effect of the combined rulings as to hostility, the partial application of Section 16 and deviation from the rule against hearsay evidence, was unfair to the appellant, usurping of the jury's role in assessing the witness's testimony and selectively favourable to the prosecution.

vii. In all the circumstances the appellant's trial was unsatisfactory."

16. In summary, two issues are raised, namely issues relating to (a) identification and the relevance of the CCTV footage and the stills taken from Collins' Service Station and (b) issues arising from the testimony of Mr. Jaromin.

**The identification issue**

17. The Court will deal first with the CCTV footage. At the outset, the Court will point out that while the co-accused, Mr. Sychulec was prepared to accept that he was shown in the CCTV footage, no such concession was made on behalf of Mr. Gruchacz notwithstanding the very good quality of the footage.

18. The issue in relation to identification arose in circumstances where Kuba Zmuda, who had travelled in the car along with the deceased, told the jury that the man who was present at the scene along with Leszek Sychulec (who was known to him) and therefore was complicit in the killings, was the man who could be seen in the video stills. However, he never completed the circle by saying that the person in the footage was Andrzej Gruchacz. The prosecution had envisaged that identification evidence in relation to the person in the stills would be given by one of the investigating Gardaí, Detective Sergeant Curley. However, his entitlement to give evidence was challenged by the defence and following a *voir dire*, his proposed evidence on this point was excluded. In the course of discussions with counsel in relation to the issue, the judge made the point that in the event that the evidence of Detective Sergeant Curley was excluded, the question of the jury making their own assessment, which was the last option contemplated in the case of *The People (DPP) v. Maguire* [1995] 2 I.R. 286, would arise for consideration. Sergeant Curley's face to face encounter with Mr. Gruchacz was at a time when he was a prisoner in Saughton Prison in Scotland having been arrested when attending a Legia Warsaw match against Glasgow Celtic which was played in Murrayfield Stadium. The judge felt that the circumstances of the encounter with the appellant which came against the backdrop of extensive enquiries into him conducted by Detective Sergeant Curley, meant that the sergeant could not be permitted to give evidence.

19. In terms of the circumstances in which led the judge to permit the assessment to be made by the jury, for completeness it is necessary to refer to two other witnesses who appeared in the book of evidence. There was a female witness who appeared in the book and was in a position to make an identification, though defence counsel, in the course of argument, commented that he had instructions that she was likely to prove a frail witness. In any event, she failed to appear and so her evidence was not available to the trial. There was another potential witness, Mr. Robert Werbanowski. It seems that two witness statements were taken from him and in the second of these, he dealt with the question of identification. However, for some reason that has not really been explained, only the contents of the first statement were served on the defence. The defence argued successfully that it would be unfair if they were to be taken by surprise by the emergence unexpectedly of Mr. Werbanowski as an identification witness. The combined effect of the various rulings and the absence of one witness was that none of the three witnesses who the prosecution might have hoped to rely on for identification purposes were available.

20. The defence contended that the situation was governed by the decision of the Court of Criminal Appeal delivered by Barron J. in *The People v. Thomas Maguire* [1995] 2 I.R. 286. In that case, the evidence against the applicant comprised a video film taken by a security camera which showed a robbery, involving three men, taking place at a building society. No evidence was given by any individual that they identified the applicant or indeed either co-accused. The court referred to a number of English decisions including R. v. Dodson [1984] 1 W.L.R. 971, *Kajala v. Noble* (1982) 75 Cr. App. R. 149 and *R v. Grimer* [1982] Crim. L.R. 674. In the course of his judgment, Barron J. commented:-

"It is clearly unsatisfactory to ask a jury to identify an accused from a video film without adducing any evidence in support of such identification. There may be cases where no one can be found who can or who is prepared to come to court to identify an accused. In such cases, where the trial judge is satisfied that no such evidence is available, then the

matter can be left to the jury. That appears to have been the case here. There was apparently no evidence to identify the applicant as one of the two persons shown on the video film."

In that case the warning about the dangers of identification that was given was regarded as inadequate and a retrial was ordered. The fact that a retrial was ordered does show that the Court of Criminal Appeal was of the view that it was a case where there could be a conviction provided the jury was warned in suitable terms. The appellant says that this was not a case where there was nobody available to deal with the question of identification. There was a person who was available but failed to attend at court and there was a person who was willing and available, Robert Werbowski, but due to a culpable oversight on the part of the prosecution, his evidence was not admitted. The appellant therefore says that the prosecution cannot bring the case within the category of cases which Maguire says can be left to the jury.

21. The Court would make a number of observations. First of all, it would caution against setting the remarks of Barron J. in stone. The Court of Criminal Appeal was of the view that the jury in that case was entitled to view the footage in order to make an identification. Anything that was said about what the situation may be in other circumstances was, strictly speaking, obiter. It might be thought that there was always a degree of artificiality in suggesting that when an identification witness was available, that the function of the jury was not to make their own identification but to use the photos or the CCTV footage as a tool when assessing the reliability of the identifying witness. In any event, matters have moved on and, as this case illustrates, footage of a very high quality indeed is now sometimes available. In appropriate cases, the Court can see no reason why juries should not be permitted to make an identification. The Court is not laying down any universal rule in that regard and recalls what was said in *The People (Attorney General) v. Mills* [1957] 1 I.R. 106 all those years ago about the extent to which cases vary, subject to the usual entitlement of a trial judge to exclude evidence where its prejudicial value exceeds its probative. Ordinarily, CCTV footage, once its relevance is established, will be admissible as real evidence.

22. The essence of real evidence is that it is something that the tribunal of fact can scrutinise or examine for itself. There is no difficulty with a jury doing so where the image or recording is of high quality, both in terms of its resolution and definition, and is available for careful and unhurried viewing, and re-viewing if required. The reason the jury is in a position to do this is precisely because a high quality image has been preserved and is available to them. Heretofore, high quality CCTV images, both still and moving, were not routinely available to juries. Moreover, in any case where a piece of imagery constituting real evidence is not of high quality, or represents only a fleeting or partial image, it remains open for the trial judge to refuse to allow it to go to the jury in isolation without other extrinsic evidence of identification.

23. There is a world of difference between an identification by the jury conducted in circumstances where they have available to them a high quality image for comparison with the accused, or a witness, that they have had the opportunity of observing in person in the courtroom, and a witness's testimony concerning his/her out of court identification of a relevant person which is not recorded, but merely related in evidence in court. Such observations are frequently transient and fleeting and occur in circumstances where the opportunity for observation has been less than ideal. Such out of court identifications are recognised as being fraught with potential dangers necessitating the implementation of safeguards such as the convening of an identification parade, and the giving to the jury of a Casey/Turnbull type warning.

24. In addition, real evidence comprising high resolution digital imagery has an objective quality about it, thereby allowing it's use by a jury for the purpose of identifying the accused to be differentiated from the circumstances of a dock identification.

25. In the circumstances of this case, there was no reason whatever why the jury should not have been permitted to view the footage and make their own assessment. Once they were permitted to do so, it would have been very surprising indeed if they had come to any conclusion other than the one they did, having regard to the quality of the material available. This ground of appeal therefore fails.

**The issue in relation to Tomsez Jaromin**

26. Mr. Jaromin was a witness on the book of evidence, however, despite the service of a witness summons, he did not attend court initially. As a result, a bench warrant was issued on 8th April, 2016, day three of the trial. He attended court by arrangement on day four, 11th April, 2016. At that stage, the court was told that Mr. Jaromin was intent on catching a plane later that day which would take him out of the country. In the circumstances, the prosecution indicated that he would be called there and then which involved hearing his evidence somewhat out of turn. At that stage, counsel for the defence indicated that there was an objection to an aspect of his proposed evidence. In the course of legal argument it emerged that the prosecution's expectation was that there would be evidence that a member of An Garda Síochána showed the witness one of the passport-type photos recovered from the crashed black BMW (07 D 20106) and that the witness would say that at approximately 2 pm on 20th June that Mr. Leszek Sychulec, who was known to him, came to the home of a mutual friend along with another man in a car and that the witness would say that the other man in that car was the person in the passport photo. Counsel for the defence explained that his primary objection was to the witness giving evidence that the man known to the witness offered a name for the other individual, "Andrzej". Counsel said that, in the balance of his statement, Mr. Jaromin had referred to the companion of Mr. Sychulec as "Andrzej" but he said that the introduction of the name Andrzej involved inadmissible hearsay. The judge ruled on the matter as follows:-

> "Whether or not it is hearsay in the strict sense depends on the establishment of other matters. The event in question, the arrival of a car and a man being introduced as having a particular Christian name is certainly close in time to the central events in the trial but that may be a coincidence. It seems to me that all that this evidence establishes is, as a freestanding matter, that a particular person in a particular place was introduced as having a particular name and if it's not the accused well then in strict – on a strict view of the hearsay rule it would appear to be hearsay but on the other hand it does appear to me, and it may be unfair to use the term dustbin, but it does appear to me to be proof of a matter intimately concerned with the central transaction in issue. If that's all there is to the case, I think I can promise Mr. Devally [senior counsel for Mr. Gruchacz] a direction but as I've pointed out the difficulty with assessing cases based on circumstantial evidence is that one doesn't know where one stands until all of the evidence is in. If it turns out to be hearsay in the classical sense, I am nonetheless persuaded by Mr. Orange [senior counsel for the prosecution] that it falls within or is capable of falling within the res gestae exception. If there's no other evidence in the case, it's clearly entirely insufficient to convict Mr. Devally's client of murder or indeed anything else. But it has been indicated that there would be other circumstances the subject of proof which would tend to refine the focus of this and would in fact go to proof of the fact that it is not a hearsay statement, whether or not that is so is ultimately I suppose a matter for the jury, but it does seem to me that in those circumstances, if it is to be regarded as hearsay in the classical sense, it properly falls within the *res gestae* exception to that rule and ultimately we can't shy away from the fact that these cases are to be decided by a jury and I don't understand the squeamishness about allowing juries to make their own intelligent and rational assessment. They are well capable of dealing with these matters, capable of dealing with such arguments in cross examination as may be directed to them and capable of dealing with directions about circumstantial evidence. I refuse

invitations to have juries try these cases with a set of head gear on and I'm convinced that that's what's afoot here. So, I'm satisfied that this, if it is hearsay, and that is taking the best possible view of the case from the accused's point of view, is hearsay which falls within the relevant exception. So, I propose to permit the prosecution to proceed as indicated."

27. Mr. Jaromin was called to give evidence in the absence of the jury and his evidence at that stage, though he was somewhat equivocal and gave every indication of being a reluctant witness, was that he had overheard the companion of Mr. Sychulec being referred to as Andrzej. When called to give evidence in the presence of the jury, Mr. Jaromin explained that he was originally from Poland, had come to the Roscommon area and had made friends with members of the Polish community in the area, among them Marcin Rutowski. He went on to say that he knew Leszek Sychulec. The witness said that he was the owner of a large silver Audi A6, registration number 08 C 8052 and that he gave permission to Leszek Sychulec to use it from time to time. The witness said that he remembered the afternoon of 20th June. He was at Roscommon at the home of Marcin Rutowski and that, at around 2 pm, Leszek and "the other fellow" arrived in a car. Leszek borrowed his car and the other man went with him. He said that he had heard a name when the two men talked to each other and he thought the name was "André" (spelling as in transcript). Again, the sense one gets from the transcript is that Mr. Jaromin was a reluctant witness.

28. The evidence as presented to the jury was of a conversation that was overheard which included a name, as distinct from a formal introduction of an individual by name. That being so there was no breach of the hearsay rule. In that regard, the reference by the judge to res gestae in the course of his ruling is somewhat confusing. Mr. Jaromin was not saying that the person he encountered was actually named Andrzej, but simply that he overheard him being addressed by that name. One can imagine that there might be cases where the prosecution would have an interest in establishing that suspects were overheard addressing each other by names other than their real ones. In this case, the prosecution interest was simply to establish that the companion of Leszek Sychulec was addressed as Andrzej. It was therefore an admissible though relatively insignificant piece of evidence.

29. Having dealt with the events of the afternoon of 20th June with the witness, prosecution counsel then turned to contact between the witness and Gardaí over the days subsequent to that. The witness agreed that he met Garda Stephanie Treacy. However, when counsel asked "and I think she showed you something", the witness responded "No". Prosecution counsel's response was to indicate that he had an application to make and he requested that the jury would be asked to withdraw. In the absence of the jury, prosecution counsel indicated initially that he was making an application pursuant to s. 16 of the Criminal Justice Act 2006 to admit statements made by Mr. Jaromin to the Gardaí. However, after further discussion, he indicated that he was also applying to treat the witness as hostile. The judge said that he would deal with that issue and would "park" the question of the s. 16 application. When the application to treat the witness as hostile was granted, counsel for the prosecution was permitted to cross examine Mr. Jaromin. Then, after some hesitation, counsel renewed his application in respect of s. 16. The judge ruled on it as follows:-

> "At this stage we're dealing only with the admissibility of a portion of the statement which has been ventilated for credibility purposes in front of the jury. The prosecution want to take the further statutory step of admitting it by way of evidence of the contents. I'm satisfied that the witness in question has denied making this portion of the statement but of course has admitted all the rest of it. That is of course a factor that I can take into account at the relevant part of the assessment. The difficulty however, Mr. Orange, is it not in subsection 2? The witness confirms or it is proved that he or she made it. I mean he doesn't confirm but of course I could be satisfied that it was proved that he made it.
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> (…)
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> Well, I am satisfied as to that. He didn't confirm it but the guard, Garda Treacy, has given evidence that that's what he said. Personally for this purpose I'm satisfied beyond a reasonable doubt that her evidence is correct in terms of this being said or not being said. I am satisfied that this portion of the statement was given and what is referred to in that portion of the statement is an event that happened, i.e. a small photograph, EC1, was shown to the witness and he responded to that particular act. He has, for whatever reason, decided that that is not the case. I don't accept his evidence on that point and I accept the evidence of the guard on that discrete and narrow point. I'm satisfied that evidence of these facts would be admissible coming from the witness. Mr. Devally makes the point that this was a statement that was not made voluntarily and I shouldn't regard it as such. I don't accept that submission. I take into account the circumstances in which it was made. It was made in somebody's living room and I'm satisfied that this was made as an ordinary part of the guards' work in investigating this most serious matter and I'm satisfied that the witness, at that particular point in time, was cooperating and volunteering such information as he had of relevance to the garda investigation. I particularly reject the suggestion that in some way the garda, off her own bat, decided to make up these three sentences or to put them in and not read them over. They're the only two inferences that follow from what the witness is suggesting. I reject both of those as operative inferences based on both of the witnesses that I have seen and heard. I am satisfied that his current evidence is unreliable. I am satisfied that what he said to the guards at the time, given the circumstances in which it was made, is in fact reliable. I am satisfied that the statement contains the necessary statutory declaration by the witness. He was helping – cooperating with the guards and I am satisfied that he made and signed the declaration that appears in the statement and I am satisfied, by virtue of the fact that he appears to have said everything else to the guards and accepted that, that he understood perfectly well he was dealing with a police officer and indeed was being helpful and being helpful on a voluntary basis. It follows I reject any suggestion that he was forced into making this statement by being prevented from going to the toilet or any of that. All of that quite frankly is nonsense. So, that's the position. I believe that he knew perfectly well that he had a requirement to tell the truth in giving a statement on a most serious matter to members of An Garda Síochána. Of course it wasn't made on oath or video recorded because it was simply a witness statement taken in somebody's living room. They're the circumstances in which it was made and I'm satisfied that those surrounding circumstances lend a strong air of reliability to the material which so emerged. I'm having regard to the explanation given by the witness for giving evidence inconsistent with his statement and I have regard to it by rejecting it and therefore believing that that is the basis for acting in favour of the prosecution in respect to the application and I reject the evidence given in relation to his denial of making that particular statement.
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> In relation to subsection 4 there's no unfairness, of course other than the general prejudice that arises from an item of prejudicial evidence intended to be such, there's no overarching or overreaching or a necessary unfairness to the accused or either of them and I'm satisfied that, on the basis of at least the evidence that I've heard at the moment, the admission of this evidence is necessary and is very necessary in the interests of justice in this case."

30. One other matter of some potential significance emerged during the course of the *voir dire* in relation to Mr. Jaromin's evidence. When Garda Treacey was called to give evidence to prove that she had taken a statement from Mr. Jaromin which referred to the fact that he had been shown E.C.1., the passport photo, she was cross examined by counsel for the defence. In the course of that cross examination, she stated that on a day prior to the day when she had shown E.C.1 to Mr. Jaromin that, along with a detective,

she had met Mr. Jaromin at the garage where he worked and on that occasion Mr. Jaromin was shown an image on her phone which was taken from the CCTV footage from Collins' Service Station. This was not something that the defence or indeed it seems anyone else was aware of prior to her stating it in court.

31. This Court has taken some time to explain what occurred during the course of the various visits to the witness box by Mr. Jaromin. However, it seems to the Court that the application pursuant to s. 16 of the Criminal Justice Act 2006 was a proper one. It was an application that was dealt with in a careful and considered manner by the trial judge and his decision to permit this section to be invoked cannot be impeached. Insofar as there are grounds of appeal relating to Mr. Jaromin's evidence, those grounds are rejected.

32. There is a further global point made by counsel for the appellant that the way in which the trial proceeded, the way in which it ran, resulted in an unfairness to the defence. Counsel says that the fact that the jury was permitted to view the CCTV footage and the stills and was invited to make an identification of Mr. Gruchacz as the man shown in the footage was unfair, that it was unexpected and that he was in a sense "ambushed". He says that, had it been realised that the jury would have been permitted to make their own identification, the defence strategy might have been very different. The Court is not persuaded that the trial was unfair.

33. At the time Mr. Kurowski and Mr. Rutowski, the companions of the deceased, were invited to view the footage from the filling station, Mr. Gruchacz was not an identified suspect. It was only some considerable time later that Mr. Gruchacz was identified as a suspect. Insofar as Mr. Kurowski, Mr. Rutowski and Kuba Zmuda were saying that the two abductors were those who were visible in the filling station stills and CCTV footage, the appellant was aware that the prosecution would seek to establish that one of the two men clearly visible in the stills was in fact the appellant Andrzej Gruchacz. The expectation was that the prosecution would do that through the evidence of Detective Sergeant Curley. However, the admissibility of Detective Sergeant Curley's identification was challenged. It was, of course, the absolute entitlement of the defence so to do but they must have realised that if they succeeded, the prosecution would in all likelihood fall back on the option of having the jury make their own identification which was one of the possibilities considered in *The People (DPP) v. Maguire* [1995] 2 I.R. 286. It may be that the defence hoped that the prosecution would not succeed in such an application but that misplaced hope does not render the trial unfair. In fact, the Court takes the view that the trial of Mr. Gruchacz was a satisfactory and fair one and that the verdict is safe and so dismisses the appeal.

34. In summary, the Court dismisses