



**THE COURT OF APPEAL**

**Birmingham P  
Edwards J.  
Hedigan J**

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

**And**

**Stephen O'Reilly**

**[131/2017]**

**Respondent**

**Appellant**

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

**Mr. Justice Hedigan**

1. The appellant stood trial for the following offences, alleged to have occurred on 7th May, 2016:

Count 1: Assault causing harm contrary to Section 3 of the Non-Fatal Offences Against the Person Act 1997

Count 2: Criminal damage contrary to Section 2(1) of the Criminal Damage Act 1991.

Count 3: Criminal damage contrary to Section 2(1) of the Criminal Damage Act 1991

Count 4: Production of an article capable of inflicting serious injury contrary to Section 11 of the Firearms & Offensive Weapons Act 1990

Count 5: Production of an Article capable of inflicting serious injury contrary to Section 11 of the Firearms & Offensives Act 1990

Count 6: Assault causing harm contrary to Section 2 of the Non-Fatal Offences against the Person Act 1997

Count 7: Resisting/obstructing a police officer contrary to Section 19 (3) of the Criminal Justice (Public Order) Act 1994 as amended by Section 185 of the Criminal Justice Act 2006

Count 8: Threatening, abusive or insulting behaviour in a public place contrary to Section 6 of the Criminal Justice (Public Order) Act, 1994 as amended by Section 22 of the Intoxication Liquor Act 2008.

2. The learned trial judge directed an acquittal on counts 7 and 8. The appellant was found guilty on counts 1 – 6 by a unanimous jury verdict. The appellant was sentenced to 7 years imprisonment with the final 2 years suspended. This appeal is against that conviction.

**Background**

3. On 7th May, 2016, Alan Greer and Gerard Malone drove to the home of Adam Doherty at 45 Marian Square, Clara, Co. Offaly. Mr Greer dropped some tobacco into Mr Doherty's house while Mr Malone waited in the car. On exiting Mr Doherty's house, Mr Greer was met by a man holding a knife. Mr Greer ran back into Mr Doherty's house and Mr Greer and Mr Doherty held the front door closed while someone kicked and pushed the door from the other side.

4. Mr Malone saw some of these events happen, but stated that he had seen two men rather than one. He was then himself set upon when the two men attacked the car, breaking glass and striking Mr Malone several times with a knife. Mr Malone managed to get into the driver's seat and made his escape in the vehicle.

5. Gardaí later arrived on the scene and were informed by Mr Doherty that the appellant, who lived next door to Mr Doherty, had been involved in the attack. The appellant was not co-operative upon arrest and Gardaí summoned a regional support unit to assist with an arrest. The appellant was subsequently arrested after being disabled by a taser gun.

6. Mr Malone and Mr Greer could not identify who attacked them. Both Mr Greer and Mr Malone had indicated, in their respective statements to Gardaí, that they would recognise the culprit if they saw him again. Neither Mr Greer nor Mr Malone was asked to participate in any form of formal or informal identity parade. Both Mr Greer and Mr Malone made second statements to the Gardaí withdrawing their initial statements.

7. Mr Doherty made a statement to the Gardaí on the night of the incident, identifying the appellant as the man holding the knife when Mr Greer exited Mr Doherty's house:

"When he [Mr Greer] walked out my front door the lad from next door, O'Reilly [the appellant], approached him with a machete in his hand. I can't remember what Reilly said, but Reilly said something like 'Who are you looking for?' Reilly pulled this machete out of the front of his trousers and was waving it around."

8. Mr Doherty made a later statement on 8th November, 2016 to the Gardaí withdrawing his initial statement. At trial Mr Doherty gave evidence that the appellant had not been involved:

"Yes, a lad approached him outside the house and he had a knife, something like that, but I've since seen that person walking around and that's why I retracted my statement so. [...] It wasn't this man here. [...] That's the reason I pulled my statement out, like."

9. Garda Andrew Dolan gave evidence that all three witnesses (Mr Doherty, Mr Greer and Mr Malone) had alleged to Garda Dolan that they were threatened with 'a bullet' if they did not withdraw their statements against the appellant. All three witnesses denied ever making any such allegation to Garda Dolan.

10. On the application of the prosecution, leave was granted pursuant to Section 16 of the Criminal Justice Act 2006 to admit Mr Doherty's initial statement into evidence.

### **Grounds of Appeal**

11. The learned trial judge erred in law, or in a mixed question of fact and law, in admitting the statement of Mr Doherty pursuant to Section 16 of the Criminal Justice Act 2006 as evidence of the facts stated therein.

### **Section 16 of the Criminal Justice Act 2006**

12. Section 16 of the Criminal Justice Act 2006 (hereafter "section 16") sets out the statutory template for the admissibility of certain witness statements. It provides the following:

"(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 if—

- (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."

### Submissions of the Appellant

13. Counsel for the appellant submits that the learned trial judge erred in admitting Mr Doherty's statement as Mr Doherty's oral evidence was not materially inconsistent with his statements notably his second statement. The learned trial judge erred in failing to consider the relevance of the 'consistent' statement on the question of whether Mr Doherty gave evidence that was 'materially inconsistent'. In the context where Mr Doherty gave evidence at trial that was materially inconsistent with one of his out of court statements, but consistent with another of his out of court statements, it is submitted that it was not permissible for the learned trial judge to exclude the 'consistent' statement from his deliberations when deciding on the applicability of Section 16(1).

14. It is submitted that the learned trial judge did not properly assess the circumstances surrounding Mr Doherty making his statement. The statement was given by the witness 20 minutes after the incident occurred; he was in shock trying to figure out what had happened; on his own account, he was 'all muddled up'. In *D.P.P. v O'Brien* [2011] 1 IR 273, the Court of Appeal stated that a trial court is mandated "to examine the circumstances and factors surrounding the making of the statement, to ensure [that it] is a reliable statement". Accordingly, the learned trial judge misdirected himself as to the test of reliability proscribed by section 16 (3).

15. The judge did not accept Mr Doherty's explanation that he had changed his account due to seeing the real perpetrator in Penney's in Athlone. The judge stated that if this had been the case, Mr Doherty would have informed the Gardaí. He did not believe Mr Doherty's explanation that he did not inform the Gardaí of seeing the real perpetrator, as he did not know his name, and that he did not think it was relevant to inform the Gardaí that the actual perpetrator had not been the appellant. Further, the judge had regard to the demeanour of Mr Greer and Mr Malone, which was irrelevant to his consideration as to whether he should admit Mr Doherty's previous statements. He commented as follows;

"I observed carefully the demeanour of each of the witnesses and I haven't the slightest doubt that Garda Dolan is telling the truth about the matter and I'm absolutely satisfied that the three witnesses, for whom I have huge sympathy, were subjected to intimidation and that it is as a result of that intimidation they decided to withdraw their statements".

It is submitted that the demeanour of Mr Malone and Mr Greer were irrelevant considerations, and that had the evidence of their demeanour been excluded from consideration, the judge could not have been satisfied of Garda Dolan's account beyond reasonable doubt, and thus he would have been duty bound to refuse the section 16 application and accept Mr Doherty's explanation.

16. The judge did not consider whether the admission of the statement was fair to the appellant, or whether the admission of the statement was in the interests of justice. It is submitted that the judge erred in failing to address these issues in his decision on the Section 16 application.

17. Further, the judge did not consider whether the admission of the statement was necessary, having regard to other evidence given in the proceedings. The prosecution had numerous other means available to them of identifying the culprit, by means of identification parade or forensics, however, they did not pursue those means. A court should be slow to admit an out of court inculpatory statement where the prosecution had a scientific means available to them to inculcate or exculpate a suspect, unless it is proven that the scientific evidence can be of no real value.

### Submissions of the Respondent

18. The appellant argues that the judge erred in failing to consider the relevance of the 'consistent' statement on the question of whether Mr Doherty gave evidence that was 'materially inconsistent'. It is submitted that the judge gave adequate and full consideration to the second statement in the context of the explanation given for the previous inconsistent statement and the failure by Mr Doherty to inform Garda Nolan that he was mistaken as to the appellant's identity.

19. As to the reliability of the statement, Mr Doherty confirmed that he made the initial statement shortly after the incident and that he was more likely to remember events more accurately closer to the event rather than later on. He confirmed that he knows the appellant who at the time of the incident had been his neighbour for three to four weeks. In addition, he stated in the initial statement that, "[he] looks like he's drinking, Reilly. He has big red eye on him." Such a vivid description suggests proximity to the perpetrator. Further, Mr Doherty confirmed that he understood that he was making a statement to the Gardaí and that he was required make a truthful statement. He made a statutory declaration in this regard.

20. In addition, Counsel for the Respondent relies on the case of *DPP v Larry McCarthy* [2018] IECA 163, wherein the Court of Appeal considered the reliability of statements in the context of support by other evidence. It is submitted that Mr Doherty's initial statement was evidentially supported by other evidence in the case relating to the machete, the description of the assault and the criminal damage.

21. The learned trial judge considered but did not accept Mr Doherty's explanation that he saw the real perpetrator some months later. He also did not accept that Mr Doherty did not tell Garda Nolan that he had been threatened. As was stated in *DPP v Murphy* [2013] IECCA 1, while the determination of the admissibility of a statement pursuant to section 16 is appealable, the standard of review in relation to the findings of fact bearing on the credibility of the witness is highly deferential.

22. There is no evidence to support an argument that the admission of Mr Doherty's initial statement pursuant to section 16 was prejudicial or unfair. The Court of Criminal Appeal stated in *DPP v Rattigan* [2013] 2 IR 221 that "[it] cannot be the case that the invocation of s. 16 per se is unfair or a prejudice to the accused. Indeed the absence of a provision such as s. 16 could be seen as a defect in the law. Therefore something more must be shown than the mere fact that a provision, otherwise fair, was applied at a trial."

23. It was very much at the forefront of the mind of the learned trial judge that the admission of the initial statement into evidence was necessary. The learned trial judge stated during the application to admit the initial statement that "[at] the end of the day the only evidence of identification against the accused will be the section 16 statement." Further, the trial judge stated in the course of his charge to the jury that the only person who could identify the appellant as the perpetrator of the offences was Mr Doherty. This is another example of the trial judge's awareness of the necessity of the admissibility of the initial statement.

24. In response to the submission that the prosecution failed to pursue other means available to identify the offender, such criticism must be viewed in the context of the evidence that was available to the Gardaí less than an hour after the incident, and in particular the identification of the appellant by a neighbour as being the perpetrator. Furthermore, the failure to pursue other means available to identify the culprit is not a bar to bringing an application to admit a previous inconsistent statement pursuant to section 16.

### Decision

25. The nature of s. 16 of the 2006 Act was considered by the Court of Criminal Appeal in its judgment in *DPP v. Jason Murphy* [2013]

*"... s. 16 has reformed the law in a most material way on the use and admissibility of such witness statements, so that those given to the Gardaí (and it would appear, any other person) can be read into evidence and their substance relied upon for the truth of their content, even where the witness refuses to testify in court.*

*21. Moreover, under its provisions a person could be convicted of the most serious crimes known to law, on an out-of-court statement which is subsequently disavowed on oath by its maker, despite the fact that he and his story may be subject to rigorous scrutiny under strictly controlled court conditions. Consequently, s. 16 is a fundamental departure from traditional common law principles which for good reason, have always placed such high regard on sworn evidence given directly, immediately, and spontaneously before the fact adjudicator. Such principles have their foundation, not solely in the rule against hearsay, but far more deeply rooted in our criminal law system.*

*22. The preceding events said to have given rise to the enactment of Part 3 of the 2006 Act, of which s. 16 forms part, are well known and do not require repetition in this judgment. It can be said however that its provisions were largely intended to deal with gangland or organised criminality and criminals, many of whom prided themselves as being beyond the law's reach: in this regard recourse to the most violent means available so as to intimidate witnesses against doing their civic duty in giving evidence was common place. The Legislature, as is its right, responded inter alia with the section in question. Its provisions however do not appear to be so limited in their application, as the instant case shows, where there is an entire absence of any of the features said to have underlain its creation. One way or the other, both the section's interpretation and application must be viewed not only in light of the public interest which it is said to enhance but also within the bedrock of criminal justice overall."*

26. Thus an application under s. 16 for the admission of a statement previously made by a witness out of court but inconsistent with the evidence given in court should be most carefully scrutinised. If however following careful consideration by the learned trial judge it appears permissible under the provisions of the section to do so, then such statements should be admitted.

27. In the same judgment, at para. 14 – 17, McKechnie J. dealing with the role of the Court of Criminal Appeal also stated as follows;

*"...As one can see, this jurisdiction is extensive and covers multiple grounds of appeal, many of which are identified by O'Malley at para. 23.09 of The Criminal Process, (Dublin, 2009). Clearly such is not confined to errors of law: indeed arguably any matter of substance, which renders the trial unsatisfactory or defective, may be sufficient.*

*15. 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.*

*16. It has been said that such findings to which the credibility of a witness is central, should be left untouched, unless they are "so clearly against the weight of the testimony as to amount to a manifest defeat of justice": see The SS "Gairloch", Aberdeen Glen Line Steamship Company Ltd. v. Macken [1899] 2 I.R. 1 at p. 18. This case was cited with approval in The People (D.P.P.) v. Madden [1977] I.R. 336 at p. 339, where having noted the distinction between findings of fact and inferences of fact, the Court went on to describe its function, as it touches on both, as being "to consider whether any inferences of fact drawn by the court of trial can properly be supported by the evidence; but otherwise to adopt all findings of fact, subject to the admonitions in the passages cited above". See also People (D.P.P.) v. Kelly [2005] IECCA 50 where the C.C.A. adopted, almost formally, the Hay v. O'Grady principles on the civil side ([1992] 1 I.R. 210)."*

28. In this case Adam Doherty was called to give evidence before the jury on the 2nd February 2017. He was questioned as to the events on the night of the 7th May 2016 when his friend Alan Greer together with a friend Gerard Malone drove to his house. He stated that Mr Greer came into the house to deliver a pack of tobacco. He left after a short time. He stated that a man approached Mr Greer after he left the Doherty house and had a knife with him. He made a statement to the Gardaí that same evening in which he identified that man as his neighbour Stephen O'Reilly. In his evidence in court however, he stated that this man was not in fact the accused i.e. the appellant herein but another person whom he had since seen walking around, as he put it. This, he stated, was why he had withdrawn his statement. At this stage counsel for the DPP informed the judge that he had an application to make in the absence of the jury. The judge directed the jury to retire and subsequently also directed the witness, Mr Greer, and Mr Malone to leave the courtroom. Counsel then informed the judge that he wished to make an application under s. 16 of the 2006 Act that the witness's statement to the Gardaí be admitted or failing that, the witness should be treated as a hostile witness.

29. Counsel then read the statement made by the witness on the 7th May 2016;

*"My name is Alan(sic) Doherty. Tonight, the 7th May 2016, Saturday, at around 9.30 pm, my friend Alan Greer brought me over a packet of tobacco. When we walked out my front door the lad from next door, O'Reilly, approached him with a machete in his hand. I can't remember what Reilly said, but Reilly said something like 'Who are you looking for?' Reilly pulled his machete out of the front of his trousers and was waving it around. My friend, Alan Greer, ran back into my house. Reilly pulled out this machete as if he was going to chop him with it. Alan ran into my house at this stage. I held the door closed and Alan got inside my house. My partner, Catherine Kidney, and my three-year old daughter were in the house watching all this going on. Reilly was kicking and chopping the front door of the house with his legs and the machete. The front door came off the hinges, he was kicking and chopping it so hard. All I was thinking was that if he gets in how am I going to save my family from this lad. It just stopped then all of a sudden. I called Alan to come hold the door. I won't lie, Guard, I got a weapon, a meat cleaver, while Alan held the door. When Alan looked out the door he noticed his car was gone. It's a '03 Audi A4. Alan went outside when he noticed his car was gone. When Alan went outside, Reilly went after Alan with a machete again. Reilly came back and then he smashed the glass off the front door, the bottom and top of the door, smashing the glass. He then smashed in the window of the sitting room with the machete. My house is broke up completely. I am afraid for my partner's and child's safety. I don't know why any of this happened. He looks like he's drinking, Reilly. He has big red eye on him. This statement has been read over to me and I have been invited to make alterations or changes and I do not wish to do so."*

30. Counsel informed the court that on the 8th November 2016 Adam Doherty made a further statement as follows;

*"My name is Adam Doherty and I made this statement to you on the 7th May 2016. I now wish to withdraw this complaint. This statement has been read out to me and I have been invited to make alterations or changes and I do not wish to do so."*

Counsel for the DPP also informed the court that statements made by Mr Greer and Mr Malone had also been withdrawn by them. A voir dire commenced.

31. Adam Doherty then gave evidence. He confirmed his statement of the 7th May 2016 and that he had given it 20 minutes to a half hour after the incident. He also accepted that Mr O'Reilly was his neighbour. He then went on to state that a couple of months later he saw a "lad" walking around Athlone and was 100% sure that he was the man with the knife that night and not the appellant Stephen O'Reilly. He said about a week or maybe two weeks later he went to Garda Dolan and told him he was withdrawing his statement. He agreed he had not told the Garda that he had seen the man who had attacked his house and Mr Malone on the 7th May 2016. He denied that anyone had threatened him with "getting a bullet".

32. The judge then heard the evidence of Garda Dolan. He gave evidence of taking a statement including the statutory declaration at its beginning. He confirmed that on the 8th November 2016 Adam Doherty had come to the garda station and informed that he wished to withdraw his statement. He would not include in his withdrawal statement the reason why. Garda Dolan stated however that he told him that someone had called to his house and threatened him with being shot if he did not withdraw his statement. He made no mention of the man he later stated he saw in Penny's in Athlone. Garda Dolan stated that it was in court for the first time that he had heard of the alleged mistaken identity. He stated that he did not note in his notebook the threat that had been made but he did make a report to his superiors about it.

33. Alan Greer then gave vivid and dramatic evidence of the events of the 7th May 2016. He stated he would know the man with the knife if he saw him again. He was not however asked to identify the person from photos or an identification parade. Gerard Malone then gave evidence of the events of that night, confirming the account of Mr Greer. He could not describe the two individuals he said were involved in the attack that night. He also stated he would know the man with the knife if he saw him again. He also stated that no attempt was made by Gardaí to have him identify this person.

34. The Court was then informed that two of the three witnesses withdrew their statements on the 8th November 2016 and Gerard Malone withdrew his on the 10th November 2016. Garda Dolan was recalled and he read to the court the report he had made to Sergeant Collins in respect of witness intimidation;

*"Re: Intimidation of witnesses in the case of DPP v. Stephen O'Reilly, assault causing harm, affray, criminal damage, production of articles in the course of a dispute, etc."*

*With reference to the above, I wish to report that on the 9th November 2016 both Adam Doherty and Alan Greer withdrew their statements of complaint in regard to the incidents which occurred at Marian Square, Clara, Offaly, on the 7th May 2016. Both Mr Doherty and Mr Greer alleged that an unknown male called to their homes on Friday, the 4th November 2016 and threatened them that if they did not withdraw their statements against Stephen O'Reilly, they would get a bullet. On Thursday, 10th December 2016, the final witness, Gerard Malone, withdrew his statement of complaint after he alleged he received a phone call from an unknown person on Wednesday, 9th November 2016 threatening him to also withdraw his statement against Stephen O'Reilly or he would get a bullet. All of the above are in fear of the threats issued against them and have denied to make complaints in regard to those threats."*

The Garda also stated the Pulse case number and the addresses of the injured parties.

35. Alan Greer was then recalled by counsel for the DPP in support of the case for the s. 16 application. He was questioned about the withdrawal of his statement. He was asked why. He said he wanted nothing to do with the incident anymore. He expressly denied having told Garda Dolan that he had been threatened to withdraw the statement. It was put to him that Adam Doherty had told him about withdrawing the statement; he answered that maybe someone had called to him. He then said he did not know. He agreed that Adam Doherty might have said someone called to his house. He however continued to deny that he had been threatened. Garda Dolan was then recalled and he confirmed Alan Greer had told him that the reason he wished to withdraw his statement was that someone had called to his door and threatened to shoot him. Gerard Malone then gave his evidence of withdrawing his statement on the 10th November. He also denied telling Garda Dolan he had been threatened. He said that sometime before he withdrew his statement he was shown a photo of the appellant. He said he did not recognise him. He could not recollect who showed it to him or where he was at the time. He acknowledged he had not told the Garda that the man in the photo was the appellant. He agreed he had talked with Mr Greer and Mr Doherty about withdrawing their statements. He said he did not know when this had occurred. He stated that what he called "all of this" he wanted to get out of his head. Garda Dolan then gave evidence of a conversation with Mr Malone on the day he made his second statement. He said he had received a phone call from an unknown male. He said he had been threatened to withdraw his complaint in relation to the allegations he had made against the appellant. He never said anything about having seen the appellant's picture. He refused to make any formal complaint about the threats.

36. Starting at p. 107 of day 1, line 11, the learned trial judge set out his decision on the s. 16 application. He summarised the evidence above and on p. 108, at line 17, he continued as follows;

*"I observed carefully the demeanour of each of the witnesses and I haven't the slightest doubt that Garda Dolan is telling the truth about the matter and I am absolutely satisfied that the three witnesses, for whom I have huge sympathy, were subjected to intimidation and that it is as a result of that intimidation they decided to withdraw their statements. I am satisfied that the testimony given by Mr Doherty to this court is materially inconsistent with the statement he made to Garda Dolan on the night of the 7th May 2016. In his statement to Garda Dolan, Mr Doherty clearly identified the accused as the perpetrator of the criminal damage to his house and the person who was in possession of the machete. His testimony to this court – to the court that he is now sure that the accused was not the perpetrator is materially inconsistent with the statement he gave to Garda Dolan. During the voir dire, Mr Doherty acknowledged that he had made the statement voluntarily and that it contained a caution and that he signed it. This satisfies the requirements of sub-s. 2 of s. 16. I am further satisfied that the statement is reliable, despite the fact that it was made in the immediate aftermath of what was clearly a very terrifying incident. I do not accept Mr Doherty's explanation that the reason he changed his testimony from that in the witness statement is because he has now positively identified the perpetrator from viewing him in Penny's in Athlone. With respect to Mr Doherty, if this was the position he would certainly have advised Garda Dolan of this and it is clear that he did not do so. In the circumstances, I*

*am satisfied that the criteria set out in s. 16 has been complied with and accordingly I am ruling that the statement can be admitted."*

37. Thus the learned sentencing judge found that the witnesses had been subject to intimidation. The testimony of Adam Doherty was inconsistent with the statement of the 7th May 2016, in which he clearly identified the appellant; the appellant had acknowledged the statement was voluntary, contained a caution and that he signed it. The judge was satisfied the statement was reliable. This court must give great weight to the fact that the judge was making a judgment as to the credibility of the three witnesses whom he found were intimidated. We can see no reason whatever why the judge would not take into account the intimidation of two of the witnesses in coming to the conclusion that Mr Doherty had been intimidated. We are satisfied that the learned trial judge had ample evidence before him to determine that the statement he had made was materially inconsistent with Adam Doherty's evidence and that it was reliable. He made it shortly after the incident and he named therein the appellant as the attacker. He had been his neighbour for three or four weeks and he gave a vivid description of him. He confirmed he was obliged to tell the truth and made a statutory declaration in that regard. The learned trial judge clearly was unimpressed by Adam Doherty's explanation of why he withdrew his identification of the appellant and did not believe it. He had ample grounds for this finding. There was no unfairness involved in invoking s. 16 which is a provision specifically designed for this type of situation. The hearing on the issue was thorough and the appellant's counsel had every opportunity to resist the application. Admission of the statement was clearly necessary as it was the only evidence of identification of the appellant. As to the failure of the prosecution to pursue other avenues of identification such as an identification parade, it may well be that some criticism could be made here as it effectively meant that all the prosecution eggs were in the one basket. However this is not a bar to making an order under s. 16.

38. Thus in the court's view the provisions of s. 16 were properly invoked in the circumstances of this case. The learned trial judge conducted an appropriate hearing to ascertain the existence of an inconsistency between the evidence given by Adam Doherty in court and the statement he had previously made to the Gardaí. He considered the issues of reliability, the explanation by Adam Doherty of his withdrawing of his statement, fairness and the interests of justice and necessity. He had ample evidence upon which to base his findings and we can find no error in his decision on the s. 16 application. The appeal is dismissed.