



THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

V

Archilli Mindadze

32/2017

Respondent

Appellant

JUDGMENT of the Court delivered on the 6th day of March 2018 by

Mr. Justice Birmingham

1. On 19th October 2016, the appellant was convicted of a count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. Particulars of the offence in respect of which the conviction was recorded were that he on 1st November, 2014 at a named address in Lucan, assaulted Valdis Cunckis. He was subsequently sentenced to two and a half years imprisonment with the final year suspended. It may be noted that the jury returned a verdict of not guilty in relation to a second count of assault causing harm which appeared on the indictment and that a count of aggravated burglary had resulted in a not guilty verdict by direction of the trial judge.

2. A number of grounds of appeal have been formulated but in summary two grounds of appeal have featured in written submissions:

(i) that the judge erred in acceding to an application by the prosecution to admit an out of court statement from a witness pursuant to s. 16 of the Criminal Justice Act 2006; and

(ii) that having admitted the statement the judge's charge when dealing with this issue with the jury was inadequate.

However, the oral appeal has been confined to the issue that the judge ought not to have admitted the statement of a witness pursuant to s. 16.

3. The background to the trial is to be found in the fact that on 31st October, 2014 Ms Tea Kaplanishvili was celebrating her birthday. This involved dinner and drinks with friends at her home in Lucan, and then later in the evening the group made their way to the Morgan bar in Temple Bar where tables had been reserved to continue the celebrations. Upon arrival, it became evident that an ex-boyfriend of Ms Kaplanishvili, one George Azrumelashvili, was present. It is now not in dispute that also present was the appellant though he was not noticed by Ms Kaplanishvili. At one stage an altercation developed between Mr Azrumelashvili and the then boyfriend of Ms Kaplanishvili, Valdis Cunckis. Security personnel intervened, and those involved were separated and escorted off the premises. Ms Kaplanishvili and others who had been in her company decided to return to the home of Ms Kaplanishvili. When they got there, Valdis Cunckis was outside the premises.

4. A short while later, while Ms Kaplanishvili, Valdis Cunckis and several others were in the house, three men broke into the house. Two of the three were armed with what was described as daggers. These would seem to be ceremonial daggers or traditional Georgian daggers. Ms Kaplanishvili was hit over the head with the handle of a dagger. Valdis Cunckis ran into the kitchen and was pursued by the men in possession of the daggers. They proceeded to stab, punch and kick him while he was lying on the ground. The third man stood at the kitchen door and prevented Ms Kaplanishvili and one of her companions Angela Boichenco from offering assistance to Mr Cunckis. Those involved in the attack on Mr Cunckis ceased their activity and all three left the house. Emergency services and Gardaí were summoned.

5. Among the Gardaí who attended were Garda Warren Farrell and Garda Natalia McIntyre. In the presence of the jury Garda Farrell explained that although attached to Clondalkin Garda Station he had responded to reports of an incident in Lucan in a situation where Lucan Gardaí were dealing with a serious road traffic accident. He explained that he spoke to the injured party and the householder and it was mainly the householder who explained what had happened that night and this was confirmed by the injured party. In direct examination, he said that the householder was able to identify one of the assailants as her ex-partner George Amiran Ashvili. In cross examination he was asked:

Q. Ok. And what you record is that Tea was able to identify one of the three males that entered her house as her ex-boyfriend George Amiran Ashvili?

A. That's correct.

Q. She said that he broke up over a year ago, but she didn't know his date of birth or address?

A. That's correct.

Q. And then you say she was unable to identify either of the two attackers?

A. That's correct. She didn't name anybody else. No.

6. Ms Kaplanishvili provided a statement to Garda Natalia McIntyre of Lucan Garda Station at that station on the afternoon of 1st November, 2014. Given its central significance to the issues in this appeal it is appropriate to set it out in full and do so likewise with two supplemental statements:

"My name is Tea Kaplanishvili and I live at [Lucan, Co. Dublin]. I decided to celebrate my birthday on Halloween night,

31st October, 2014 in my own house at Lucan, Co. Dublin. I invited about 15 or 17 friends around to my house so the party started at 6 pm in my house. We had a meal and a few drinks in my house and I ordered two taxis. Some people took taxis and some people drove into town. I had reserved tables in the Morgan bar, Temple Bar, for to celebrate my birthday. So when we arrived, maybe 10.30 pm on the 31/10/2014 in Morgan's bar, my friend, Kenza Hezachovitz [...] from somewhere in Blanchardstown, I don't know what her address was, was waiting for us. When we arrived, my boyfriend Valdis Cuncis [...] travelled in with me, my best friend, George Kapanadze, he's Georgian, was visiting me from London, travelled with me in George's car. His girlfriend, Alexandra, who's Latvian and living in London with George travelled together in George's car, arriving at 10.30 pm. The other people travelled in a taxi and were in Morgan's bar when we arrived. The other peoples' names are as follows; Darco Gatzhovitz, Lena Golobuschkova. I don't have their address but I know they live in Maynooth, County Kildare. [...] Angela Boicenco, living in Blanchardstown, was also with them [...] There were another two groups of friends travelling in a taxi and a different car. I don't know who travelled in which cars. Natalia Helknik, she's Latvian, living in Lucan, I don't know her address, was in Morgans. Tatiana, I don't know her surname, she was with Natalia, I think. Tatiana is Latvian. There was also a Lithuanian couple, Natazja and her boyfriend, I don't know her surname, they live in Lucan, I don't know the address they live in and I don't know her boyfriend's name. The table that was in Morgans, so we used the main door to get in, we passed the hall, a dance floor and a long bar, and after that in a separate big room. I think there's five or six tables there. We had two tables booked under my name. They have a reservation email. I live in Lucan nine years, I know these people through shops, gyms, or friends of my friends. I think 2005 I started going out with Valdis Cuncis. We were together on and off for eight years. We lived together on and off for maybe three years. Last year, 2013, September or October, I broke up with Valdis. We have got back together within the last month. After breaking up with Valdis, I went out with George Amiranashvili, he's originally from Georgia. He used to live in Ashbourne a year ago. I don't know where he lives now [...] I went out with George for about five or six weeks. I broke up with George. I have seen George once since I broke it off with him. Then I saw George last night. He was sitting at the right hand side as you walk in the door. I saw him with another guy that I had seen in my house later that night. There were two security men, one in the hall as you enter the premises and one was outside. They were wearing black suits and trousers and were Irish. I made eye contact with George. I didn't want any problems, so I didn't say hello to him. Then we went to our tables. We sat and I ordered drinks from my friends. My boyfriend, Valdis, stayed behind, and George, my friend, told me that Valdis had told George, my ex, to leave. After this, Valdis came back to me and started arguing with me why George is here. Did he know it was my birthday? I told Valdis that I didn't know George, my ex, was here. I said we can leave, because I don't like people to fight. Valdis was drunk, and George, my ex, might be drunk. That's why I wanted to come home. Then Valdis started arguing with me, why should we have to and not George, my ex. So I started dancing with Valdis and started flirting with him to distract him. Valdis was calming down. Then George, my ex, appears behind Valdis, I could see him. I didn't say anything. George, my ex, touched Valdis on the shoulder to get his attention. So Valdis turned around to George, my ex. George asked him, 'Hi, what's your problem?' He gave Valdis his hand. Valdis didn't shake his hand. He said to George, 'You have to leave.' Valdis punched George, my ex, on the face with his left fist. George fell down on the floor. Then George got up and picked up glass from the table and smashed it on Valdis's head twice with two different glasses. Then security men came. They took Valdis and George, my ex, outside. Then me and my friend, Angela Boicenco, went looking for Valdis. Security told us that they left him outside on a corner. Then we walked to that corner. We couldn't find them. George, my friend, called over from his car. I turned around and asked him where Valdis was. George was very angry that I had went out with the other George. Me, Angela, Darco and his wife Lena got a taxi home [...] When we came to my address, Valdis was outside. He had taken a taxi home. Then the five of us, me, Valdis, Darco, Lena and Angela, went back into my house. Darco and Valdis discussed what happened in Morgans, they were standing in front of us and all the women were sitting on the couch. I was opening my presents. Then I heard a bang, once, twice on the front door of my house. Three men jumped in my door into my living room. It happened so fast and I recognised George Amiranashvili, my ex, and one other fella, I know him from being with George, my ex. His first name is Achico, I don't know his surname, I don't know anything about him. The third male I didn't know, he was not so tall. I think he was bald, I think he had dark, very short hair. He spoke in Georgian. The three males were swearing in Georgian. This happened around 12.30 am on today's date. George and the third male I don't know were both carrying daggers. I recognised those daggers as being a weapon from my country. Traditionally it can be used for hunting but are often given as presents for a special occasion. It is a weapon. I stood up with my friends. I was shocked. The three males started beating Valdis with the daggers in the living room, then Valdis ran away through small room into kitchen, and the three males followed him. Valdis was inside. George, my ex, and a third male, who I don't know, was attacking Valdis who was on the floor, who had his hands over his face to protect his face. Me and Angela were fighting with Achico to get in to Valdis. Lena and Darco seemed to disappear from the room. I told Achico, when I took the kitchen chair, that I was going to kill him with it if he didn't open the door as he had closed the door and stopped me trying to get in. Then he opened the door and told George and the third male to 'Stop, that is enough.' The conversation was in Georgian. I want to mention, before Valdis was brought into the kitchen, I was begging these men not to touch Valdis and to stop. I was standing between Valdis and them. The small third guy attacked me. He punched me with a weapon on my head, like a dagger. He broke my head, which I mean to cut. I probably lost consciousness or something. I went on my knees, then I got up and run after them. By that time, Valdis is in the kitchen, as I described earlier. I don't know how long this went on for, it could have been 15 to 20 minutes. I remember Valdis screaming, 'Help me.' He was screaming in Russian, he is Latvian, when the door was open. The third small guy, he told me, 'You bitch.' George my ex said, 'Leave her alone.' The three males then just walked out of the house. I couldn't see Valdis' face because it was all covered in blood. I tried to help him to sit him up. I rang 999 and the Gardaí and ambulance were informed. The Gardaí came very fast. I'd like to add that George, my ex, knew my address, as he has been in my house on previous occasions. The three males left the following behind them in my house – a mobile phone, a cover from the dagger. I gave these to the Gardaí when they came. I know that they didn't cover their face or weren't wearing gloves during their attack on my house. Also I would like to mention that Darco told one of the Gardaí that he saw the males travelling in a Lexus. I realised after the attack that Darco and Lena were not present during the attack. I would recognise these males again if I saw them. These three males attacked my house, my guests and me, they broke into my house and I didn't do anything wrong. I then went to Blanchardstown Hospital and we were checked by doctors, due to our injuries caused. I would also like to mention that the reason my friend George was angry that I went out with George Amiranashvili was because I didn't tell him that I went out with George, my friend George was against it. He knew George and he knew I was still with Valdis. I didn't give anyone permission to enter my home, or break my door to get in or to damage anything or cause injury to me or my guests. I have had this statement read over to me and it is correct. I have been invited to make any alterations or additions I deem necessary. I do not wish to make any."

The statement was signed by Ms Tea Kaplanishvili and was witnessed by Garda Natalie McIntyre and Garda Gabriel Newton.

7. Ms Kaplanishvili was back in Lucan Garda Station on 3rd November, 2014 and provided another statement to Garda Newton and Garda McIntyre. The statement provided on this occasion was as follows:

"You have asked know clarify a number of issues regarding my complaint. I first met George Amiranashvili through my friend, George Kapanadze. I met him three years ago on the 14/2/2011. It was George Kapanadze's birthday. He had rented a house somewhere outside Dublin. I don't know where the house is. George Kapanadze and George Amiranashvili are friends. Both the Georges' are from Georgia. I know my friend, George Kapanadze, for the last eight years. I do not have any pictures of George, my ex. I have checked with my boyfriend, Valdis, as he too was at the same party; that is George Kapanadze. He tells me that the party was in Virginia, County Cavan. There were around six - eight people at his birthday party. Valdis knows my friend George through me. Valdis would have spoken to George Kapanadze, and George Amiranashvili on the night of the party. There was nothing between me and George, my ex, at this stage. I believe that George, my ex, lived in Ashbourne, County Meath because I was never in his house. I don't know what he works at. He used to travel to Spain a lot. I also must say that the individual named Achico who assaulted me at Halloween night was at George Kapanadze's party [...] I don't know what any of these men for a living. My friend, Tumuna King [...], who lives in Tallaght, rang me yesterday at 11.04, the 2nd of November, 2014, to tell me that she was at a party on the 1st of November 2014. She said that Achico's wife, Macha, was there. Tumuna and Macha are friends. Apparently Achico rings Macha to speak to Tumuna, Macha gave the phone to Tumuna. Achico asked Tumuna to get me to give back George, my ex's phone, to George, my ex. This is the phone that was left behind in my house on the night of the assault. He said that "We tried to call Tea, but she didn't answer." Macha has told Tumuna also that Achico's car was used in the assault, that she found blood in the car. She asked him about it and he said it was from a fight in the Morgan. I am telling you I was told when Tumuna phoned me yesterday. Achico drives a Lexus car, I believe, from what Tumuna says to me. I have had this statement read over to me and it's correct."

8. A further statement was provided on 31st March, 2015 to Garda McIntyre and Garda Newton at Lucan Garda Station. The statement was as follows:

"You have asked me to clarify a couple of issues regarding my complaint. I don't know Achico well, and I don't know him by the name of Archilli. With regard to the birthday party in 2011 in Cavan, I didn't know Achico at the party. I wasn't introduced to him. I recognised Achico from being at the party in 2011, but I didn't know his name at the time. In the intervening years, I didn't meet Achico, except on one occasion when I was in the Morgan Hotel in 2013 with George, my ex. Achico was in the company of George, who was in my company. As I've said in my previous statement I knew Macha, his wife. It was only subsequently that I realised that Macha was married to Achico. I have been in the Georgian restaurant where I believed Achico worked or owned. I didn't know he had any connection with the restaurant. I never met him working there. The last time I ate in his restaurant was on the 26th of October 2014. I went to that restaurant regularly. I know that that restaurant is opened since February 2014. I didn't see Achico in the Morgan hotel on the night of the assault. I only saw George, my ex. This statement has been read over to me and it is correct."

9. It is appreciated that the statements contain much material that is not directly germane to the present grounds of appeal and also include a considerable amount of inadmissible hearsay, which required a degree of editing, but given the significance of the statements *qua* statements it was felt by the Court that it would be useful to set them out in full.

10. Ms Kaplanishvili was the first witness called in the trial. Early in the course of the direct examination dealing with the aftermath of her arrival at the Morgan hotel, she commented:

"Okay, yes, me and Valdis Cunckis we were together.

We were together in a bar, so and I saw his name, he is my ex.

Q. He's another ex boyfriend, is that correct?

A. Yes.

Q. And what's his name?

A. That's very - George.

Q. And what's his second name?

A. I don't remember now his second name. Something - I don't remember. I was with him only for a few weeks; I don't remember now his second name."

11. Later into her evidence dealing with the time when they were back in Lucan she refers to a big bang on the door and that three men came in. She was asked,

Q. Did you recognise any of those people?

A. One, yes. That was my ex, George. But one of them, I don't remember him, I don't even know him.

Q. Okay?

A. That was the first time. And a third one, I don't remember really. At the time I thought that was a person who I know, but now I'm not sure if that was him.

Counsel then clarified that one of the three was her ex boyfriend George, another was someone that she had never met before and then he asked,

Q. And there was a third man?

A. Yes.

Q. Do you know who that was?

A. At the time I thought that I know, but I don't - I don't, I'm not sure if that was him.

At that stage, counsel asked for the jury to withdraw and in the absence of the jury asked the judge to put the case back to the following morning so he could take instructions.

12. The following morning Ms Kaplanishvili was recalled. Prosecution counsel rehearsed the same ground as had been covered the previous afternoon. Having brought her to the point where a number of people entered her home, he then asked,

Q. And I think you gave evidence there was three people; is that correct?

A. Yes, three men.

Q. And I think one of those people was your – you gave evidence of your ex boyfriend George; is that correct?

A. Yes, correct.

Q. You said another of the three was a person who you'd never met before; is that correct?

A. Mm – hmm.

Q. And then in respect of the third person, do you know who that is?

A. Actually, I don't know.

Q. You don't know?

A. I don't know.

Q. Okay?

A. Because at the time I thought that I knew, but I don't know.

Q. Okay?

A. Because that man – I can describe that man but I don't know him.

Q. You don't know him?

A. Okay.

Q. Okay. And you don't know him at all?

A. No, I don't.

13. At that stage the jury was again asked to withdraw and counsel in their absence indicated that he was seeking leave to admit the statement of Ms Kaplanishvili, pursuant to s. 16 of the Criminal Justice Act 2006. The Court then embarked on a *voir dire*. During the course of that *voir dire*, the Court viewed the video of the statement recorded on the afternoon of 1st November, 2014, a tape that lasted approximately one hour and thirty minutes. In the course of the *voir dire* Garda witnesses were cross examined about why no identification parade was organised to see whether Ms Kaplanishvili and Mr Cunckis would pick out the accused, Mr Mindadze. In summary, the Garda's response was that Ms Kaplanishvili had personally identified someone that she had previously known. It was pointed out to Gardaí that Mr Mindadze, when questioned, had said that he knew Ms Kaplanishvili, and when asked how he knew her, responded:

"She used to come over to the Georgian restaurant in Dublin. I am the owner. She used to have dinner. That's how I know her."

14. Ms Kaplanishvili was called to give evidence during the course of the *voir dire*. In response to prosecution counsel she confirmed that she had no problems with the Gardaí and that there was no suggestion of them putting her under pressure at any stage. She was asked did she tell the truth to Gardaí at that stage and she said, "Yes". Prosecution counsel asked her whether it was fair to say that the evidence she had given in the witness box on Monday up to a particular point was very detailed and she accepted that that was so, but he asked that when it came to the time for her to name the person who was one of the three that were in her home, she said she forgot the person's name. She responded,

"I am just thinking, I forgot, I just don't remember."

She was then questioned with reference to the video that had been viewed and it was pointed out that when on the tape she had described a person named Achico that she wrote down the spelling of the name and handed it to Gardaí and then gave more details about him. She responded, "I was sure that was him." Counsel asked, "You were sure." Answer: "Yes, at the time." It was suggested to her that on the video she had used words to the effect "He was always with George," and she responded, "No, always when I was with him – we met probably three times." She was asked whether she had a bad memory in general, to which she responded, "Not really – it's just I have blocked spot in my memory right now," adding "because I remember things and then I don't remember some things right now." She was asked,

Q. And when did you forget, or lose memory of who was the person that in effect kept you in your living room while your then boyfriend of a number of years was being assaulted with daggers: When did you forget who that person was?

A. I started forgetting all about that night. I needed to start a new life. That's all.

At another point she said, in response to the question:

Q. So you've told gardaí on three separate occasions that you knew this person, and this person held you against your will, and now you've forgotten who this person was?

A. Well, I'm not sure just that that was him because

Q. You're not sure it was him?

A. The things I know at the time that I was right, and that was the right, I was wrong. So that's why I'm saying right now, I'm not sure that the person who sits there, the same person – okay – who was in the kitchen or outside the kitchen, I'm just not sure about it because many things I don't remember.

15. The witness was asked,

Q. Did you speak to anyone else about this case prior to it coming up to trial, apart from the Gardaí?

A. (No answer).

Q. Did anybody approach you on behalf of the accused in respect of your evidence?

A. About the case? No.

Q. No?

A. I'd been asked to return the phone.

Q. By who?

A. By as I remember, I think that was Tamuna, [sic] you have in a statement. I don't even remember that.

16. Counsel asked her whether she was working at present, to which she said no, and asked whether anyone had offered her money, to which she said no, confirming that she was sure about that. She was asked whether her friend Tamuna was a member of the Orthodox church in Donnybrook to which she said that she didn't know. She was asked whether she was religious and responded "Yes, you could say so." When asked did she believe in God, she said "I do believe in God, I don't go to church" and it was pointed out that when she started her evidence she had chosen to affirm.

17. In submissions, counsel on behalf of the Director contended that the fact that the statement had been made had been established and indeed accepted by the witness. There was no doubt that direct oral evidence of the material contained in the statement would be admissible. He suggested that there was no issue about the voluntariness of the statement, that the court had seen the video and had viewed the interaction between witness and Gardaí. He then addressed the question whether the statement was reliable. In that regard he pointed out that the statements each contained a statutory declaration and that the principle statement was video recorded and the video had been viewed by the court. He submitted that the interests of justice required that the statement would be admitted, describing the statement as the very kernel of the prosecution case. Counsel for the appellant accepted that there was no question of the statement having been other than voluntary or indeed there was no dispute about the fact that the statement was made, but pointed out that the controversy was arising in the area of identification/recognition. He said that that being the context, the doctrine of fairness and fair procedures and all of the constitutional architecture meant that it would be inappropriate for the Court to accede to the application by the prosecution.

18. The judge ruled on the matter as follows:

"I want to deal with the application by the DPP for an order under section 16 of the Criminal Justice Act 2006, to admit a particular statement or statements made by the witness Ms Tea Kaplanishvili in this matter in the context of the hearing on the *voir dire*, and I propose to grant the application, having taken into account the video evidence and the oral testimony and the cross examination and the interrogation of the guards as well. And I do so being satisfied that the criteria set out in section 16 have been satisfied, namely that there is a situation here where evidence which is materially inconsistent with the statement made of the witness has been given. I am satisfied that the oral evidence of the fact concerns would be admissible in the proceedings, that it was made voluntarily and that this is reliable.

And I'm also satisfied as is clear from the evidence that was made on oath or affirmation, it was also videoed and I've had regard to the manner in which the statement was made. I am also satisfied that it's in the interests of justice, in this particular case, given the circumstances and the evidence, to admit the statement. And so I've had regard to all of the evidence that I've heard and the video in arriving at that decision, and so I am granting the application under section 16."

19. Section 16 of the Criminal Justice Act 2006 has been the subject of consideration in quite a number of cases in recent times. It provides as follows:

"(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 videorecorded, 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."

20. In this case, as was acknowledged both at trial and on the appeal, areas that are often in controversy such as whether the statement was made, or whether the statement was voluntary, or any other issues in relation to the circumstances in which the statement was made do not arise. In this case, there is no doubt that the statement was made, that the principal statement was video recorded, that all statements contained a statutory declaration, that the facts contained in the statement would be admissible, and there is no dispute about the fact that the statement was a voluntary one. There remains for consideration the issue of reliability and whether the admission of the statement would be contrary to the interests of justice. The circumstances in which the statement was made, the fact that the original statement was video recorded and made on the afternoon after the incident and that the principal statement and the three statements combined provide an extremely detailed account are all strongly suggestive of reliability. Ms Kapanashvili's claims that she is acquainted, not a word used by her, with Mr Mindadze are confirmed by the contents of his responses when interviewed.

21. There remains for consideration the question of whether the interests of justice are served by the admission or exclusion of the statement. Certainly, if a witness provides a statement and in that statement expresses a degree of certainty about particular matters, but then reflects further and finds that their certainty has been overstated or misplaced and that they are in fact uncertain about matters in relation to which they had originally expressed confidence, then the interests of justice would not be served by the admission of such a statement pursuant to the provisions of s. 16 of the Criminal Justice Act 2006.

22. However, a reading of the three statements and the manner in which Ms Kaplanishvili gave her evidence leaves one confident that that is not what occurred here. Rather, the irresistible conclusion is that Ms Kaplanishvili simply decided that she was going to change her evidence so that it did not implicate Mr Mindadze. That may be explained by the fact that she was friendly with Mr Mindadze's wife or simply by the fact that they were members of a relatively small group with links to each other. Prosecution counsel raised the spectre of the payment of money or intimidation. There is, though, no evidence supporting either of these possible explanations. However, while that is so, it remains the case that there was a very clear change of heart on the part of Ms Kaplanishvili. In those circumstances the trial judge's decision to permit the prosecution avail of s. 16 of the Criminal Justice Act was one that was open to her and so the Court is not prepared to uphold the sole ground that has been argued.

23. While not raised in the course of the appeal hearing, the written submissions had dealt with the question of how the judge charged on this topic. Accordingly, the Court has considered the charge in that regard. The judge dealt with the issue as follows:

"And, so, I'm now going to move on to three particular issues which are particular to this case. And the first deals with the application which counsel referred to as the section of the Criminal Justice Act 2006 which was brought in to deal with a situation where a statement to be made by someone and then an inconsistent piece of evidence is given, and that relates to Tea Kaplanishvili in this case. She was interviewed by two Gardaí and you saw that in a video, a pretty lengthy video of her being interviewed and being asked questions and answering. And in the course of that, she described the

three men coming in and identified George her ex and then a small unknown man and the third man she identified as Achico. She didn't know his full name. His surname or his full name, his proper name. She knew him as somebody called Achico. She'd met him through her ex. She didn't know what he worked at. And then in the course of the evidence given in the witness box here, where she took an affirmation as opposed to an oath, that may or may not be significant - it's a matter for you - she couldn't be sure, she just couldn't be sure of the identity of the third man. And it's for that reason that an application was made and the statement which she made to the guards was admitted as part of the evidence in this case. And you can regard the evidence which is contained in the video and the two subsequent statements which she made as part of the evidence in this case and also her oral testimony, but it's up to you to decide what weight to give to the testimony that she gave, taking into account the fact there's inconsistencies and taking into account the circumstances under which she gave the interview which was within a matter of hours of the incident. Was she calm? Was she still in shock? Was she credible? What was her demeanour? Was she under pressure? Was it voluntary? Did she know the consequences of making of that statement? Was it explained to her by the guards? Did they say 'you've got to tell the truth, and you know, affirm that you have' in the interview? And so what I say to you is there has been an inconsistency in the evidence and it's up to you to identify what weight to give to the evidence taking into account all the circumstances and taking into account the demeanour of the witness, her credibility and who she is and what she is. So, that's a matter for yourselves, using your common sense and your judgement."

24. It is the case that the trial judge did not state specifically that while she had affirmed in court, what she said outside of court was neither the subject of an affirmation nor was it on oath, and it would have been preferable had she done so. The Court feels that the judge had highlighted issues surrounding Ms Kaplanishvili and what she had to say out of court. While both sides had a number of requisitions, there was no requisition directed to how the jury should approach the evidence admitted pursuant to s. 16 as such. Rather, defence counsel commented that the judge had dealt with the surrounding circumstances but identified two surrounding circumstances that he would like to see the judge address specifically. First of all, the judge ought to have addressed the fact that there had been evidence of a direct confrontation between Ms Kaplanishvili and the person who on the State's case was the accused, which involved her picking up a chair and threatening to kill him. This close and direct confrontation was then followed very shortly after by Ms Kaplanishvili telling Garda Farrell that the only person she recognised was her ex boyfriend. Secondly, counsel for the appellant pointed out that the injured party had said that he had seen George the ex boyfriend and also the accused in the Morgan Bar, but had not purported to identify Mr. Mindaze as one of the three persons who entered the home in Lucan. Prosecution counsel submitted that the injured party's evidence in relation to the third person involved in the incident as distinct from the two involved in the actual assault on him in kitchen was that he could not see the third person clearly, that it was blurry and he could not make it out. In response, the judge recharged the jury, referring to the incident where the householder had lifted the chair and threatened to kill the person that the prosecution contended was Mr Mindadze. The judge did not refer specifically to the evidence of Garda Farrell again, the judge said that she had dealt with it on two occasions during the course of her charge and did refer to the fact that the injured party had identified Mr Mindadze in the Morgan hotel but had not claimed to have seen him in Lucan.

25. In the Court's view the judge's charge on this topic, while it could have been fuller, was in the circumstances of the case adequate and so the Court will not uphold the ground in relation to the adequacy of the judge's charge, which in any event was not the subject of oral argument. Accordingly the Court will dismiss the appeal