THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Appeal No.: 269/2012

The People at the Suit of the Director of Public Prosecutions

Prosecutor/Respondent

- V -

Jonathan Douglas

Applicant/Appellant

Judgment of the Court delivered on the 21st day of December 2015 by Mr. Justice Mahon

1. Following a trial at the Central Criminal Court which lasted nine days, on 23rd July 2012 the appellant was convicted by a jury (on a majority vote of 11 to 1) of the murder of Aidan Byrne at Drumalee Avenue in the City of Dublin on 20th February 2010. He was duly sentenced to life imprisonment. The appellant has appealed against his conviction.

2. The prosecution case against the appellant was that on the evening of 20th February 2010, and while Mr. Byrne was sitting in the front passenger seat of a motor vehicle, the appellant fired a total of ten bullets into his body. He was taken by ambulance to the Mater Hospital where he was pronounced dead. The appellant was arrested on suspicion of the murder of Mr. Byrne on 6th March, 2010. Having being questioned over a period of time he was then released from custody and re-arrested on 11th March 2010, and was charged on that date with the murder of Mr. Byrne.

The grounds of appeal
3. The appellant relies on seven grounds of appeal. For convenience, these can be considered under the following four broad headings:-

(i) The admission into evidence of certain statements

(ii) The reference to "gangland killing" in the course of the trial

(iii) The accomplice issue

(iv) The refusal to discharge the jury

The admission into evidence of certain statements

Section 16 of the Criminal Justice Act 2006

(1) Where a person has being sent forward for trial for an arrestable offence, a statement relevant to the proceeding made by a witness (in this section referred to as "the statement") may, with the leave of the court, 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.

(d) gives evidence which is materially inconsistent with it.

(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 para (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 court if the court is of the opinion –

(a) having had regard to all the circumstances, including any risks 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 be admitted, or

(b) that its submission 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 s. 3 to 6 of the Criminal Procedure Act 1865 and s. 21 (Proof by Written Statement) of the Act of 1984)."

4. In the course of their investigation of the murder of Mr. Byrne, the gardaí, on 6th March 2010, called to 23 Ashford Street, Dublin 7 at about 8.55 am, being the home of Stacey Douglas and her partner, Andrew Sheridan. Ms. Douglas is a step-niece of the appellant. The gardaí, acting on foot of a search warrant, searched the couple's home. In the course of the search, a small number of drugs, believed to be the property of Mr. Sheridan were found and seized by the gardaí. Ms. Douglas and Mr. Sheridan were conveyed in separate garda patrol cars to the Bridewell Garda Station, where statements were taken from both individuals. The statements were not video taped, although video tape facilities were available in the Bridewell Garda Station. Subsequent to the taking of the statements, the statements were read back over to the two individuals whereupon they signed them page by page. The reading back of the statements and their signing was video recorded.

5. In her statement, Ms. Douglas said that the appellant, her step uncle, knocked at her front door at around ten to, or five to, nine on 20th February 2010 and walked into her kitchen. She said he was wearing green working gloves and showed her a gun under his hoodie. Ms. Douglas said that the appellant told her that he had shot somebody outside a particular house in the cattle market area, which was also known as Drumalee Estate, that the individual had been a passenger in a car, and that he was named 'Byrne'. Ms. Douglas also said that the appellant washed gunpowder off his hands at her kitchen sink and changed his track suit bottoms.

6. Mr. Sheridan, in his statement, said that the appellant had come to his, and Ms. Douglas's, home and that he saw the appellant washing his hands. He said that the appellant was pacing around the house and showed him a gun inside the waist band of his track suit bottoms.

7. It was accepted by one of the investigating gardaí that he had stated to Ms. Douglas that he believed that the gun used in the murder of Mr. Byrne had been left in her house, when in fact he did not have any such belief.

8. It was maintained by the gardaí that the statements made by Ms. Douglas and Mr. Sheridan had been made voluntarily and in the absence of any coercion, that both had come to the garda station voluntarily for the purposes of making such statements, and that there had been no mention of arrest during this process.

9. It is contended by the appellant that the statement of Ms. Douglas ought not to have been admitted into evidence. On the second day of the trial a voir dire took place in the course of which the learned trial judge heard sworn evidence from Ms. Douglas and Det. Sgt. Kevin Daly. Ms. Douglas claimed that her statement had not been made voluntarily, that she had been intimidated and coerced by the gardaí, that she was frightened and was induced into saying things which were not her words, and which were in fact untrue. All of these assertions were denied by the relevant garda witness although it was accepted that Ms. Douglas was fearful at the time.

10. Ms. Douglas gave evidence on the second day of the trial. In the course of her sworn evidence, she stated that she could remember little about the occasion of the appellant's visit to her house on the evening of 20th February 2010. Ms. Douglas said that on that evening the appellant came into her house, having got sick on his clothing, changed his track suit bottoms and washed his hands. She was unable to recall any other detail relating to his visit, in stark contrast to what she had said in her statements to the gardaí. An application was duly made by Senor Counsel for the respondent for the admission into evidence of her statement pursuant to s. 16 of the Criminal Justice Act 2006. This was opposed on behalf of the appellant. In the voir dire that followed evidence was heard from Det. Gda. Kevin Daly and Ms. Douglas. The learned trial judge ruled in favour of the respondent.

11. The learned trial judge also heard the following in evidence from Ms. Douglas:-

(i) that she recognised her signature on each of the pages of the statement.

(ii) that subsequent to making her statement Ms. Douglas attended at the garda station *"loads of times",* and told the gardaí that her statement was incorrect.

(iii) that she had signed the solemn declaration as to the truth of her statement at its conclusion.

(iv) that she had attended at the Bridewell Garda Station in the company of Mr. Sheridan's parents on two occasions seeking to retract her statement.

(v) that she had told the gardaí that she wished to make a fresh statement, but was informed that this was not allowed.

(vi) that she had made her statement under threats and coercion, including being roared at into her face and a threat that her child would be taken from her.

12. The learned trial judge also viewed the early part of the video recorded reading of Ms. Douglas's statement to her.

The voir dire ruling relating to the s. 16 statements
13. At the conclusion of the voir dire the learned trial judge ruled as follows:-

> *"As it happens, I was the trial judge in the case which led the Oireachtas to enact s. 16 and I have always been concerned that it should not become part of the ordinary furniture of the criminal law, particularly having regard to the situation which prevailed in the last case where I was concerned with Mr. Clarke, that the Director of Public Prosecutions was operating the section against the wife of the accused in a case which many saw as a family law issue attracting the attention of the criminal law. Now, this case is entirely different however. This case is in the category that this provision was intended for, and I am satisfied to the standard of beyond reasonable doubt that the prosecution have brought themselves fully within the provisions of s. 16, and in particular, I might say, where there is a conflict between the detective sergeant and Stacey Douglas, I accept the garda evidence and would be wholly dissatisfied with hers."*

14. Ms. Douglas's statement was duly admitted into evidence. The video recording of the reading back of the statement to Ms. Douglas was, in due course, viewed by the jury.

15. Counsel for the appellant then sought to have the jury discharged on the basis that such was warranted having regard to the fact that the jury would have to be informed that Ms. Douglas had retracted her statement, but that the statement would nevertheless be admitted into evidence pursuant to s. 16 of the Criminal Justice Act 2006. This application was refused by the learned trial judge.

16. The jury were then re-called, and the trial continued. At the outset the learned trial judge addressed the jury in the following terms:-

> *"Now, Madam Foreman, I want to give you an explanation of something that is going to happen. In the ordinary course of events, the witness gets into the witness box, gives the evidence the party who is calling the witness is seeking and then is cross examined by the other side, and that is the form evidence takes. Now, there is one circumstance where the Oireachtas … that's the ladies and gentlemen down in Leinster House .. has decided that a statement which the witness made at an earlier stage can be given in evidence as evidence of the factual matters it contains. So, you are going to be allowed to hear as evidence something that this witness said at the time of these events, and that constitutes evidence in the case, and you are allowed treat it as evidence, but, as with all evidence, you have to consider the weight of the evidence. That's entirely a matter for you. You could accept it in its entirety, you could reject it in it's entirely, you can accept some bits of it and reject others, you can give it great weight, little weight, or no weight at all. That is entirely a matter for you."*

17. It was contended on behalf of the appellant that the learned trial judge failed to adjudicate fairly in relation to the admission of Ms. Douglas's statement pursuant to s. 16 of the Criminal Justice Act 2006. It was also argued on behalf of the appellant that the jury ought to have been discharged because of the prejudice to the appellant arising in consequence of the jury being informed that the statement made by the appellant been challenged by her on the basis that it had not been made voluntarily.

18. A similar application was made in relation to the statement provided by Mr. Sheridan and a similar ruling was made by the learned trial judge as had been made in the case of Ms. Douglas's statement. In the course of his ruling on that occasion, the learned trial judge stated as follows:-

> *"I am satisfied to the standard of beyond reasonable doubt that the statement is admissible in evidence pursuant to the provisions of s. 16 of the Criminal Justice Act 2006. .. so far as any conflict between Mr. Sheridan and the guards are concerned I accept the garda evidence."*

The charge to the jury relating to the s. 16 statements
19. The prosecution in this case very much based its case on the evidence of Ms. Douglas and Mr. Sheridan and more particularly, their unsworn evidence. For this reason the admission of these statements into evidence was a crucial feature in the trial, and, having regard to the outcome of the trial, constituted evidence which was crucial to the decision of the jury.

20. The appellant maintains that the learned trial judge erred in law and in fact, and was wrong to admit the s. 16 statements, and portions of the videos of those statements being read over to the witnesses. It was argued that a number of features in the taking of the unsworn statements from the two individuals ought to have rendered them inadmissible. The respondent, on the other hand, contends that the statements were properly admitted into evidence in circumstances where the learned trial judge, prior to making the decision to admit them into evidence had the opportunity to hear the evidence and assess the demeanour of the witnesses involved in the making of those statements, (being Ms. Douglas, Mr. Sheridan and the relevant gardaí), and to view the videos of those statements being read back over to them, and being signed by them.

21. While the learned trial judge's ruling in relation to the statements of Ms. Douglas and Mr. Sheridan was certainly brief, it was nevertheless abundantly clear that in arriving at his decision, the learned trial judge accepted the evidence of the garda witnesses entirely, and rejected the evidence of the two witnesses. He did so, having had the opportunity of hearing the evidence, seeing the witnesses and seeing the video recording of the statements being read over to them and been signed by them. This court does not have the advantage of viewing the video recording of the statements being read over to the witnesses, nor has it had the opportunity to hear the witnesses giving their evidence, and should therefore be slow to substitute its own view of the issue, if contrary to that of the learned trial judge.

22. The court is satisfied that the learned trial judge did not err in his decision to admit the evidence of the statements of Ms. Douglas and Mr. Sheridan, on the basis that they were a matter ultimately for the jury to decide as to their truthfulness and voluntariness, and to do so in the context of their subsequent rejection of their content and the steps taken to withdraw the statements and/or make new statements.

23. The learned trial judge addressed the jury at the conclusion of the trial in similar terms to his address to them following the *voir dire* in relation to his decision to admit the statements into evidence.

24. The manner in which the s. 16 statements were referred to by the learned trial judge in the course of his charge to the jury is criticised by the appellant. The learned trial judge addressed the jury in the following terms:-

> *"Now there is an unusual feature of this case in that I suppose the most important evidence in the case you are being offered are unsworn statements which are made to the gardaí shortly after the events which are not repudiated. And the Oireachtas in s. 16 of the Criminal Justice Act 2006 has enacted that in certain circumstances with the leave of the court, those statements may be put in evidence as evidence of the factual matters referred to in them. Now, during one of your absences, I gave leave that that procedure should operate in this case. And it is important to note that this evidence which you are being invited to act upon by the prosecution is unsworn. All other evidence in the case is sworn testimony; this is unsworn so bear that in mind. And also the Oireachtas in enacting this procedure provided, "in estimating the weight, if any to be attached to the statement, regard should be had to all the circumstances for which any inference can reasonably be drawn as to its accuracy or otherwise." So in relation to these statements I decide on their admissibility, their weight is a matter for you. You can attach no weight to them whatsoever, you can attach little weight to them, or you can attach a lot of weight to them. That is a matter for you and of course you decided on those matters in conjunction with all the other evidence in the case and also in relation to those statement, and this applies to all other evidence – you can reject evidence in its entirety, you can accept evidence in its entirety, or you can accept part of a piece of evidence and reject other parts of that evidence. This is a matter entirely for you. And for as long as this case lasts, you are (as) much judges at the Central Criminal Court as I am, so you can act judicially."*

25. Also, in the course of his charge the learned trial judge revisited and restated in detail the evidence of the content of the statements and the manner in which they were repudiated by Ms. Douglas and Mr. Sheridan on the basis they did not represent the truth, and had not been made voluntarily.

26. When the jury duly retired, Mr. O'Higgins, S.C., (for the appellant) made a detailed requisition in relation to certain aspects of the learned trial judge's charge to the jury. In order to fully appreciate the purpose and essential content of that requisition, it is necessary to refer to a number of extracts from it, and more particularly, the following:-

> *"…taking them in more or less chronological order, in the course of the case as the prosecution has mounted, in effect, on two statements made in garda custody, during the hearing the statement was read into evidence. The witnesses were cross examined, or not examined.. were examined line by line on it. There was a video played to the jury of the statement being read back and that was done in respect of both witnesses. And in effect the jury heard the account of what happened in the house six times. And in the course of your lordship charging the jury, they heard the full statement from start to finish again, and they have now heard it, in effect, eight times."*
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> *".. But in my respectful submissions, this is evidence like any other evidence in the case, subject to certain legal qualifications. And it does not have any special status. It does not deserve to be read out from start to finish, no more than if I said to the court "Well, I thought a particular cross examination of a witness was very effective from the defence point of view. I want all that read out from start to finish"*
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> *".. But in my submission, we now have the situation where the charge is very lopsided. That is the difficulty."*
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> *"Now, the second difficulty, my lord, which is one that can be readily overcome in my respectful submission is the effect of s. 16(5) and if I could just, I know your lordship is familiar with it, but just to familiarise the court with the exact wording .. it states that:-*
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> > *"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. And I am reading now from the judge's charge in Criminal Trials (at page 757) – the trial judge should ensure that the jury is made aware of all the relevant circumstances".*
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> *And it goes on to make reference to a practice direction from Queensland, which has a similar provision, and which it suggests might be of assistance to a judge in an Irish court. And could I just read that passage so as to what is envisaged in that practice direction when dealing with that evidence "the prosecution relies on a statement by A to the police on the event that ..and the contents are to be summarised.." The witness gave evidence on oath before you that the statement was made but was not true.. " and summarised what their evidence was." The previous statement made by the witness is evidence of any fact stated in it. Now, can I say in advance, my lord, many of the points which are in this has already being covered by your lordship, and I acknowledge and concede that, but not all of them. It is a question for you whether you accept the evidence and, if so, what weight you attach to it. The court has said that very clearing – "in estimating the weight that can be attached to the statement you should have regard to all the circumstances from which an inference can reasonably be drawn as to its accuracy or otherwise". I am satisfied the court has said that, or said something so close to that it makes no difference: bear in mind both that the statement was not given on oath and that you did not have the advantage of seeing and hearing the witness make the statement as you do have when witnesses give their evidence before you. The first part of that has been given "in dealing with a statement such as this made out of court and more damaging to the defendant than the evidence the witness gave here in court, greater care is needed. The statement is not in the same category as sworn evidence before you". And my recollection is, your lordship did say that it was unsworn evidence. I am not sure about the phase "the need for greater care". This, my lord, is I suppose, more particularly my concern. "Consider also whether A had any incentive to conceal or misrepresent the facts". It is a very significant part of the defence here that the witnesses that they were in fear, that drugs had been found in their house, and that they thought, that's their testimony, that they were implicated in a crime. That the guards had told them in advance what the case essentially was, and they are making the case that they said things to placate and please the guards. Now, I am not saying any of that is true, but, in my respectful submission, that is what their evidence is and if that evidence is to be assessed by the jury, which it must, and if they*

are inclined to think that it might be true even, in my respectful submission, there is an incentive to conceal or mis-represent matters. "Consider also any specific factors that may call the reliability of the prior statement into question, you should take into account the reasons A gave for giving the statement in the first place and for changing his versions of events. If you find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this court, and you find that no acceptable explanation has been provided for the inconsistency it may cause you to be hesitant about the witness's accuracy, honesty, reliability and credibility generally" and in that regard, in my respectful submission, it is an important element too that the witnesses claimed that they went to the guards several times, including at a meeting with their parents for the purposes of highlighting the statement was not true before they came to court. And furthermore, there was more than good reason and more than ample opportunity for the guards on the occasion of those visits, and in particular what I would classify as the formal meeting in the conference room, to take a statement from people, and they elected not to do so."

27. Mr. O'Higgins then proceeded to refer to s. 10 of the Criminal Procedure Act of 1993. He stated:-

> *"Could I also draw the Court's attention, my lord, to what would appear to be a mandatory requirement, but one which I will readily acknowledge you would not immediately think of in a case such as this. But Section 10 of the Criminal Procedure Act of 1993 does appear to be engaged. And if I could just refresh the Court's memory as to what that says.*
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> > *"Where at a trial of a person on indictment evidence is given of a confession made by that person, and that evidence is not collaborated, the judge shall advise the jury to have due regard to the absence of collaboration. And, two, it shall not be necessary for a judge to use any particular formal words under this section".*
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> *Now again, my lord, what the legislature had primarily in mind were confessions taken in custody. There is no two ways – no doubt whatsoever about that – but the manner in which it is drafted, perhaps for good reason, does appear to make it mandatory in any case in which there is a confession. And it feeds back into the point which I was making with regards to s. 16(5). That, here, part of the defence case is that there is a motive to misrepresent things and there is evidence by the witnesses themselves that they did so deliberately mis-represented. Your lordship said .. my lord, this is not a significant matter, and I would not press it unless the court is recalling the jury anyway, because I do not believe it is a matter of .. it is a factual matter, but not one of any great overall significance.*

28. The learned trial judge responded to Mr. O'Higgin's requisition, *stating "I will recall them on s. 10"*. Mr. O'Higgins then again briefly addressed the learned trial judge, in the course of which he *"formally"* applied to have the jury discharged. Mr. O'Higgins also again referred to the requested s. 10 warning addressing the learned trial judge in the following terms:-

> *"And if your lordship is giving the s. 10 warning, would your lordship consider saying that there is no corroboration, I think everyone is agreed on that, and the factors which I have highlighted, namely their evidence, that they may have a motive to mis-represent things, is something they have to take into account in assessing that."*

29. Mr. Clarke S.C. took issue with the learned trial judge's indication that he would give the jury a s.10 type warning in circumstances where there was no evidence of a confession having been made to An Garda Síochána. In any event, the jury was recalled and the learned trial judge addressed them in the following terms:-

> *"Now, in the aftermath of various cases, like the Birmingham Six and Guildford Four, the Oireachtas brought in a provision, a statutory provision which is not, strictly speaking, on its strict terms applicable to this case. Nonetheless, the spirit of it justifies its being mentioned. Now, corroboration is a term which you may be familiar with. What corroboration means is evidence independent of the person making a complaint or making a statement which tends to confirm the truth of their story and implicates the accused. Now, the Oireachtas became concerned about confessions which emanated from the bowels of police stations in the aftermath, as I say, of Guildford Four and Birmingham Six. Now, we are not concerned here with the confession of the person, but we are concerned with the statements which went to you under s. 16. And in the spirit of the section, I call your attention to the fact that there is no corroboration in relation to those matters. That's independent evidence which confirms the story and implicates the accused. What the Oireachtas enacted in s. 10 is the following provision:*
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> > *"Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration."*
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> *Now, I am giving you that warning conscious of the fact that it is not directed at the evidence of an accused person, as the Statute says, but the evidence of witnesses whose testimony has been admitted under s. 16 of the 2006 Act."*

30. The issue to be decided is; was the jury adequately charged in relation to the s. 16 statements of Ms. Douglas and Mr. Sheridan? An analysis of the information provided to the jury in relation to the s. 16 statements discloses the following:-

(i) The jury heard the evidence of Ms. Douglas and Mr. Sheridan in relation to the circumstances in which their statements were made. They heard the relevance of the relevant garda witnesses and the evidence of Ms. Douglas, Mr. Sheridan and Mrs. Pauline Sheridan (Mr. Sheridan's mother) as to their rejection of their truthfulness and voluntary nature of the statements and the efforts to withdraw them and/or make new statements. It would therefore have been clear to the jury that a central theme in the trial was the issue of the truthfulness and voluntary nature of these statements. The jury would have been well aware that the case against the appellant depended almost entirely on their acceptance of the truthfulness and voluntary nature of these statements.

(ii) The evidence referred to at (i) above was re-iterated in detail by the learned trial judge in the course of his charge to the jury.

(iii) At the conclusion of the *voir dire* relating to the admissibility of the s. 16 statements, and the decision of the learned trial judge to admit those statements into evidence, the learned trial judge addressed the jury to the effect that while it was his, the learned sentencing judge's decision to admit the statements into evidence, it was entirely a matter for the jury to accept or reject the content of those statements or to accept or reject parts of those statements.

(iv) The learned trial judge again directed the jury's attention to s. 16 of the Criminal Justice Act 2006 (albeit it briefly) in the course of his charge to the jury. He emphasised the fact that the statements constituted unsworn testimony and

again emphasised the entitlement of the jury to attach whatever weight they deemed appropriate to those statements, and their content, and their freedom to accept or reject all, or parts of, the statements.

(v) Following requisitions raised by Mr. O'Higgins the issue was again re-visited with the jury, although on this occasion, and somewhat unusually, on the basis of a s. 10 type warning. While s. 10 of the Criminal Procedure Act 1993 was not directly relevant to any issue which had arisen in the course of the trial, the learned trial judge's reference to it in the course of his re-addressing the jury did serve to emphasise the extent to which the jury should approach the task of their consideration of the s. 16 statements and whether their content was truthful and that they had been made voluntary, with particular caution and care.

31. Mr. O'Higgins, S.C., again addressed the learned trial judge in the absence of the jury, and stated:-

> *"I am assuming your lordship has ruled against me when I asked you that you would particularly highlight to the jury in the context of s. 10 that they had given evidence that they'd a motive to tell lies and all the rest of it. And I am just taking it you have ruled against me on that. If that is the case, the end of the matter."*

32. In the short exchange that followed between Mr. O'Higgins and the learned trial judge it is clear that the learned trial judge in effect confirmed Mr. O'Higgins's observation.

33. Section 16 of the Criminal Justice Act 2006 was subsequently considered by the Court of Criminal Appeal in the case of DPP v. Jason Murphy [2013] CCA 178/10. Certain extracts from the judgement of McKechnie J. on 18th January 2013 can usefully be quoted including:-

> *".. 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."*

and

> *"Section 16 of the 2006 Act, is as yet a relatively new provision; there is to the Court's knowledge, only one case to date at equal or higher jurisdiction in which issues of voluntariness and reliability have been considered: that is, O'Brien. In that case, Mr. O'Brien, as part of his appeal against conviction on charges of sexually assaulting two children, alleged that the trial judge misapplied the provisions of the section in admitting, as being voluntary and reliable, statements given by one child, aged 9, to a psychologist as part of the pre-trial interview process. Counsel on his behalf made a number of points in support of this submission including the fact that the interview took place at an assessment centre which the child had no choice but to attend, that she seemed uncomfortable, guarded and had to be persuaded to discuss certain matters and that events may have arisen external to the interview room which could have had a baring on her free will.*
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> *In dismissing the appeal and in determining that the statements were both voluntary and reliable, the C.C.A. (Macken, Birmingham, and O' Keefe JJ.), noted with obvious approval, the careful and "conscientious" approach of the trial judge who, having viewed the video(s) of the interview process in its entirety, placed much reliance upon it. In his decision the learned judge considered the child's demeanour, her character – being such that in his opinion she fully understood all questions and was "not open to suggestion" – her manner of telling the story and how she coherently moved the narrative forward. He concluded that the statements, which were consistent with others, had not been "cajoled", in any way out of her. The appeal Court fully agreed with this impressive reasoning and was quite satisfied that the approach, assessment and ruling of the trial court had been such, that its conclusions were fully supportable. As there was no evidence to suggest that anything untoward had taken place which was not recorded, the appeal was disallowed."*

34. McKechnie J. also stated:-

> *"In reaching the decision as to voluntariness and reliability, the C.C.A. in O'Brien did not draw on any authorities, believing that the trial judge correctly determined the issue by viewing the videotapes which was sufficient for this purpose .."*

35. In relation to the learned judge's charge in relation to a statement submitted pursuant to s. 16, McKechnie J. stated (at p. 37) the following:-

> *"This matter must be considered in the specific context of the provisions of s. 16(5) of the 2006 Act, as well as at a more general level, given the type of evidence which results from and is facilitated by that provision. Although subs. (5) has been quoted previously it helps to do so once more. It reads:*
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> > *"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."*

36. McKechnie J. also stated (at p. 28):-

> *"It is scarcely open to argument but that appropriate directions must be given to the jury, so that they are properly equipped to conduct the exercise demanded. This means that all matters directly and indirectly relevant to accuracy and reliability must be brought to their attention. In the instant case these would include the circumstances by reference to which the statements were admitted, and on the gardaí side, the fact that each was supported by statutory declarations and on the lay witnesses' side, the individual explanations offered by them for making the statements and for later recanting them. These are but examples of specific matters and do not take from the more general instruction which is required. Unless the jury is so fully informed, their critical role in this context will almost certainly be impaired and could easily be fatally jeopardised."*

37. In the very recent judgment of this Court in *DPP v. Campion* [judgment delivered November 2015), it was said of the decision in the *Murphy* case:-

> *"In the court's view there can be no quarrel with the general approach identified by the Court of Criminal Appeal.*

However, it should be borne in mind that the Court of Criminal Appeal was offering assistance rather than being prescriptive. Indeed there are points of detail where this Court might take a difference approach to the Court of Criminal Appeal. This Court is not convinced that most juries are likely to be assisted by an exposition of the here say rule. The position though is that the trial judge in this case, although called on to charge the jury long beforethe Murphy decision was given, in fact succeeded in addressing all the major issues identified by the later decision as requiring to be addressed."

38. This court is satisfied that the jury in this case was adequately charged by the learned trial judge in relation to same, and was, in the overall context of the trial, made aware that the issues arising in relation to the unsworn statements concerned their truthfulness and voluntary nature. It is most unlikely that the jury did not fully understand and appreciate their task in relation thereto.

The reference to "gangland killing" in the course of the trial
39. It is contended that the learned trial judge erred in law and in fact in wrongly refusing to discharge the jury following a reference to "gangland killings" by Det. Gda. Quirke in the course of his evidence. It was suggested that there was a repetitive use of the word "gangland", and that the learned trial judge ought *"not to have referred to the term gangland whatsoever"* when addressing the jury.

40. The reference to *"gangland murder"* arose in the course of the evidence of Det. Gda. Quirke on the first day of the trial when responding to a question while being examined by Mr. O'Higgins S.C. as to the garda interest in other people relating to the death of Mr. Byrne, besides the appellant. Det. Gda Quirke responded as follows:-

"There was, if I summarise it, there would be .. this would have been classed as a gangland murder."

41. On the second day of the trial, an application was made to discharge the jury because of the garda witnesses reference to, as Mr. O'Higgin's described, *"a gangland killing".*

42. The learned trial judge did not discharge the jury, but addressed it at that time in the following terms:-

"Now, madam foreman, members of the jury, there was a reference made in the course of examination to this being a gangland killing. That should not have been said. I know precisely as much about this case as you do. I have not read any papers on it. I am listening to the evidence unfold in the same way as you are. And this is a trial in due course of law in relation to the alleged killing of Aidan Byrne on a particular date. The word "gangland" has connotations. It should not have been said. We have to listen to the evidence first of all, that when you have heard all the evidence, you have to listen to my legal directions, which you will get at the conclusion of the case. So forget about any words like "gangland" which have connotations and bear connotations. You decide the case on the evidence and strictly on the evidence, and on that basis alone, and in particular, as I say, subject to the legal directions to be given by me, which won't be given until all the evidence is in. Thanks."

43. Clearly, the reference to "gangland murder" ought not to have been uttered by the garda witness. It was however a reference made at a very early stage of a lengthy trial, and was made very much "out of the blue" and without any prior warning that it, or anything similar, was about to be stated. It was comprehensively addressed with the jury on the following day by the learned trial judge, and in a manner which is likely to have negated any risk of prejudice towards the appellant that may have arisen from the use of the term.

44. This ground of appeal is therefore rejected.

The accomplice issue
45. It is contended on behalf of the appellant that the learned trial judge erred in law and in fact in holding that Ms. Douglas and Mr. Sheridan were not accomplice witnesses, and that he failed to caution the jury of the danger of acting on the un-corroborated testimonies of both these witnesses.

46. The basis for this contention (that Ms. Douglas and Mr. Sheridan ought to be treated as accomplice witnesses) was that they could have been accused of assisting a person involved in a crime, and thereby be enticed into making statements for the purposes of deflecting attention away from themselves or to curry favour with the investigating gardai and thus avoid their prosecution. To this extent, it was argued, Ms. Douglas and Mr. Sheridan were not ordinary prosecution witnesses and were in reality accomplice witnesses in respect of which a mandatory warning ought to have been given to the jury as to the danger of acting on the uncorroborated accomplice testimony of these individuals.

47. The status of the witnesses, it was submitted, should be viewed in light of s. 7 of the Criminal Law Act 1997, and in particular s. 7(1) and (2).

"7(1) Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender."

7(2) Where a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or of some other arrestable offence, does without lawful excuse any act with an intent to impede his or her apprehension or prosecution, shall be guilty of an offence."

48. These submissions were based on the evidence that the appellant was permitted to wash himself and clean up in Ms. Douglas's home, and was given an item of clothing as well.

49. Prior to the learned trial judge's charging the jury, Mr. O'Higgins made the following submission in support of his contention that the witnesses should be treated as accomplice witnesses and that the jury should be addressed on that basis:-

"..they were never ordinary witnesses: they are, in my respectful submission, accomplice witnesses and witnesses in respect of whom a mandatory warning would have to be given to the jury in respect of their testimony."

50. Mr. Clarke S.C. submitted that there was no basis in law or in fact for treating the witnesses as accomplice witnesses.

51. The learned trial judge declined to treat Ms. Douglas and Mr. Sheridan as accomplice witnesses, stating simply, *"I don't find them to be accomplices"..*

52. There have been a number of judicial definitions of what constitutes an accomplice. In *DPP v. Morgan* [2011] IECCA 36, Finnegan J. defined an accomplice as "a person who is chargeable either as a principal or as an accessory. In *Davies v. DPP* [1954] AC378 Lord Simonds focussed on the liability of the witnesses to prosecution for the offences charged against the accused. However in many cases a broader definition has been given to accomplice".

53. In *McNee v. K.* [1953] VLR 520, Scholl J. said:-

> *"The temptation to exaggerate or make false accusations would appear to be much more related to the nature and possibly punishment of the offence of the witness than to its technical identity with that alleged against the accused.. I should consider the true principle to be that a person is an accomplice within the common law rule who is chargeable in relation to the same events as those found in the charge against the accused, with an offence (whether the same offence or not) of such a character that he would be convicted thereof and liable to such punishment as might reasonably tempt that person to exaggerate or fabricate evidence as to the guilt of the accused."*

54. A more general definition of an accomplice might be; a person who knowingly, voluntarily, or intentionally gives assistance to another in, (or in some cases fails to prevent another from), the commission of a crime.

55. It was submitted on behalf of the respondent that in no legal sense could Ms. Douglas and Mr. Sheridan be regarded as accomplices, and that in any event, it was most unlikely that they would have been charged with any offence.

56. While it is arguable that there was at least the potential to charge Ms. Douglas and Mr. Sheridan on the basis that, based on information provided by them to the gardaí (and contained in their written statements, subsequently repudiated by them), they provided assistance to the appellant in the knowledge that he had been engaged in the commission of a crime, it is extremely unlikely that any such prosecution would have been seriously contemplated in the circumstances of the facts in this case. They were certainly not accomplices in the sense that they had had any involvement in the commission of the murder, even at the most minimum level. Furthermore, the active steps taken by both witnesses to repudiate the content of their written statements could only have very much diluted any suggestion that they could reasonably be considered as accomplices, or should reasonably be viewed as accomplices for the purposes of requiring a warning to be given to the jury.

57. Furthermore, the jury were, in reality, warned by the learned trial judge to approach their deliberations in relation to the evidence of Ms. Douglas and Mr. Sheridan with a degree of caution and care, and they also received a s. 10 type warning in relation to their evidence.

58. This ground of appeal is therefore dismissed.

The refusal to discharge the jury

59. At the close of the prosecution case, an application was made on behalf of the appellant to discharge the jury. A number of grounds were identified in support of this application but, essentially, these related to the issues concerning the s. 16 statements, and the extent to which these statements were the subject of conflict in the course of the trial.

60. The Court has already expressed its view that the learned trial judge was entitled to admit the s. 16 statements into evidence, although his ruling in relation thereto left something to be desired in terms of its lack of detailed reasoning, particularly in response to the very clear and reasoned submissions made. It is apt to recall the following extract from the judgment in *DPP v. Cleary* [2009] IECCA, 1, where the single ground of appeal related to the failure of the trial judge to discharge a jury after the close of the prosecution evidence:-

> *"The decision on whether or not to discharge a jury is a matter within the discretion of the trial judge. The exercise of the discretion will be interfered with on appeal only where there is a real and substantial risk of an unfair trial. On appeal regard will be had to all the facts and circumstances of the trial. Relevant in this case is the circumstance that the learned trial judge at the time of the application to discharge the jury had before him the entire prosecution case including the video evidence. He had also heard the evidence of Mr Roels, the first of two witnesses called by the defence. The learned trial judge was thus in an excellent position to evaluate the significance of what had occurred in the context of the trial as a whole. This court while it has not the benefit of seeing and hearing the witnesses it nonetheless has a full transcript of the proceedings to assist it in evaluating the significance of the question objected to in the context of the trial as whole in reviewing the exercise of his discretion by the learned trial judge.*

61. In this case, the court is satisfied that the learned trial judge correctly when he declined the application to discharge the jury for any of the reasons submitted to him in the course of the trial. It is this court's view that it was appropriate that issues relating to the evidence of Ms. Douglas and Mr. Sheridan were matters properly left to the jury for determination, and that any need for caution or care in their evaluation of that evidence was adequately spelt out to the jury in the course of the trial, and in the course of the charge to the jury.

62. All the grounds of appeal are therefore dismissed.