



THE COURT OF APPEAL

Edwards J.
McCarthy J.
Ní Raifeartaigh J.

Record No: 172/2019

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

Respondent

V

KEVIN WALSH

Appellant

**JUDGMENT of the Court delivered by Mr Justice Edwards on the 18th of December
2020.**

Introduction

1. On the 1st of July 2019, the appellant was convicted before the Dublin Circuit Criminal Court of three offences said to have been committed on the 1st of July 2018. These comprised two counts (Counts No's 1 and 2 respectively) of threatening to kill or cause

serious harm, contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997, and a count (Count No 3) of threatening to damage property, contrary to Section 3 of the Criminal Damage Act, 1991.

2. Counts No's 1 and 2 involving the making of threats to one Amanda Burke, intending her to believe that they would be carried out, that in one instance she herself would be killed or caused serious harm, and that in a second instance her son Jordan Burke would be killed or caused serious harm. The threat underpinning Count No 3 involved the making of yet another threat made to Amanda Burke, intending her to believe that damage would be caused to her family home.

3. On the 25th of July 2019, the appellant was sentenced to six years and six months imprisonment in respect of each of the three counts, the said sentences to run concurrently. The sentences were backdated to the 10th of July 2018, to take account of time spent in custody on remand. The appellant has now appealed against both his conviction and sentences.

4. This judgment deals solely with the appeal against conviction.

Background to the matter

5. It requires to be stated immediately by way of background that a complicating feature of the case was that two of the main prosecution witnesses sought, when giving evidence before the jury, to resile from statements they had made to An Garda Síochána. This gave rise to the jury then being asked to retire, to each of the witnesses in question being stood down, and to applications by the prosecution pursuant to s. 16 of the Criminal Justice Act, 2006 (the Act of 2006), for leave to introduce the statements in question before the jury. These applications required the court to hear certain evidence, including further evidence from the two witnesses in question, during separate *voir dire*s. Following each *voir dire*, the trial judge

ruled in favour of the prosecution. The jury was then brought back and heard evidence concerning the making of the controversial statements by the witnesses in question and concerning the contents of those statements, as well as hearing further evidence from the witnesses in question.

6. Although by no means the sole basis on which the appellant seeks to challenge his conviction, the appellant seeks to argue, *inter alia*, on this appeal that the trial judge was wrong to admit the witnesses' disavowed statements in evidence before the jury.

7. Because the evidence in the case did not unfold smoothly, with evidence being given at different stages both before the jury and in the absence of the jury, and with witnesses being called, then stood down, then called again, then stood down again, it is not the easiest task to sketch the background to the case with clarity and to succinctly summarise the relevant evidence that was ultimately adduced.

8. To assist in that regard, it is proposed to summarise the case which the prosecution ultimately relied upon, and to rehearse the key evidence presented in support of it. Where the admissibility of evidence was the subject of a challenge or dispute, there will also be a description of evidence given during relevant *voir dire*s.

The Prosecution's Case

9. The prosecution maintained that on the 1st of July 2018, Ms Amanda Burke was present in the home of her partner Darren O'Brien at 304 Tallaght Cross in Dublin 24, and had been drinking heavily. Also present were her son, Jordan Burke, and Mr O'Brien. Ms Burke described herself in evidence as a recovering alcoholic. While at 304 Tallaght Cross, she received a phone call from a number with a 500 in it. This transpired to be her friend, Lauren Beresford, whom she proceeded to invite to the house. Lauren Beresford was the girlfriend of the appellant, Kevin Walsh, but Mr Walsh was not personally known to Amanda

Burke and she had never spoken to him at any stage prior to that date. Upon the arrival of Ms Beresford, the pair purchased more alcohol and continued drinking.

10. During that afternoon Ms Burke received numerous phone calls to her phone from a caller using a phone whose number she recognised, namely the number with the 500 in it from which Lauren Beresford had telephoned her earlier. Upon answering the first of them, having recognised the number, she assumed it was intended for Ms Beresford and handed her the phone. She did not recognise the caller's voice, as Mr Walsh was not known to her, but inferred that it was him from the reaction of Ms Beresford when she passed the phone to her. There were numerous subsequent phone-calls all coming from the same number during the afternoon, with the phone being similarly passed from Amanda Burke, who would answer them, to Ms Beresford. There is no dispute but that the caller on each occasion was the appellant. However, it became apparent that the appellant and Ms Beresford were having an argument, and as the afternoon went on, Amanda Burke became reluctant to continue to pass the phone to Ms Beresford. Ms Burke later suggested that in response to her exhibited reticence about continuing to pass the phone to Ms Beresford, the appellant had become threatening and abusive and that threats were made to her, the import of which was that she and her son would be killed or seriously harmed, and that their home would be damaged.

11. Then, at a certain point in the afternoon Ms Burke received a phone call from a neighbour to say that her home at 22 Kilmartin Gardens, Tallaght, was being smashed up and that she should come home straightaway. Ms Burke and her son returned home, accompanied by Darren O'Brien and Lauren Beresford, to find that all the windows and doors had been smashed, and that gardai had arrived at the scene. Amanda Burke told Gardaí that she believed she knew who was behind the attack on her house and agreed to make a formal complaint. A statement was taken from her at the scene implicating the appellant in the offences of which he was ultimately convicted, but which she later sought to resile from.

Despite this, the prosecution maintained before the jury that her original statement was both credible and reliable and that they could safely act on it. Her friend Lauren Beresford also made a statement at the scene tending to implicate the appellant, and which again she later sought to withdraw. Once again, the prosecution case was that her original statement was credible and could be relied upon.

Key evidence in the case

The evidence of Detective Garda Jennifer Brogan

12. The court below heard evidence from Detective Garda Jennifer Brogan, who was stationed at Tallaght Garda Station, and who was on patrol with her colleague Garda Stephen Kinneavy on the evening of the 1st of July 2018. She related that they received a call over their command-and-control system to go to 22 Kilmartin Gardens, where it was alleged that people had entered a house and were smashing it up. When she and her colleague got to the scene, they found that all of the windows were smashed and there was extensive damage done to the house. Shortly afterwards, the owner of the house, Amanda Burke, arrived at the scene accompanied by her partner at the time, Darren O'Brien, and her friend Lauren Beresford. Her son Jordan Burke had arrived a few minutes before. Detective Garda Brogan spoke to Amanda Burke, who told her that she knew who had done this damage to her house. She had been adamant in that regard and stated that she wanted whoever had done this to her house charged and arrested and brought to court.

13. Detective Garda Brogan explained to Amanda Burke that she would be required to make a statement of complaint, and that she would later be required to attend court as a witness and give evidence in support of her complaint. Amanda Burke stated that that was what she wanted to do, and Detective Garda Brogan then sat down with her in the kitchen of her damaged house and took a formal statement from her.

14. At the commencement of taking the said statement Detective Garda Brogan had written the following at the top of it: *“I hereby declare that this statement is true to the best of my knowledge and belief and that I make it knowing that if it is tendered in evidence I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true”*. Detective Garda Brogan stated that she then read this out to Amanda Burke, following which Ms Burke’s statement was recorded in writing. The statement having been recorded, Amanda Burke was then asked to sign the document and she did sign it. Detective Garda Brogan said that she then witnessed it. The original statement was produced as an exhibit. While giving evidence during a *voir dire*, to which further reference will be made later in this judgment, Amanda Burke accepted that she had made this statement and that she had signed it.

Amanda Burke’s original statement of complaint

15. The statement in question was in the following terms:

“My name is Amanda Burke, and I live at 22 Kilmartin Gardens with my son, Jordan. He is 22 years of age. I understand the legal declaration that you have read over to me. Last night I left my house as I was staying in my partner's apartment for the night. I went down to his, Darren O'Brien's, at 304 Tallaght Cross yesterday, 30th of June 2018 in the evening. I stayed there for the night. Yesterday, Lauren rang me off a number, there was 500 in it. I said to her: 'Jesus, I thought you were dead', I didn't know whose number it was, but it was Lauren Beresford talking to me. I used to work with Lauren in Just Wing It at the Square. I was a chef in there. I'm not working there since the 9th of January 2018. I got on very well with Lauren, she's a good girl. While we were working together, we used to have chats, and she told me that she had met a fella and was living in Tallaght Cross with her son. She said she had met this fella, she had not told me his name. She then started meeting him more and more.

She got evicted. I was just trying to be a friend to her. So, before Lauren ringing me yesterday, I hadn't spoke to her since the week before. When I spoke to her yesterday on the phone, she sounded grand, and I told her to call down, because I hadn't seen her in ages. Today, Lauren rang me again off that same number at about 3 o'clock. She asked me where I was, and I told her I was in Darren's, and she said she would ring me, and I told her to pop up. She rang me again off that number, and she said she was on the Luas and asked was I still in Darren's. I told her I was. She came down to the apartment to me on her own. She arrived down at about 3:30/4 o'clock. We were sitting in the apartment watching Catchphrase; me, Jordan, Lauren, and Darren. Then the phone calls started from him, I knew with the 500 number that it was him, so, I kept giving the phone to her. I did, at the start, they were on the phone, but he kept ringing and shouting down the phone to me. He asked me to put her on the phone, and then I said: 'She's not here', and that's when he started shouting: 'I'm going to smash your house up, watch what I'm going to do to you and your son. I know where Jordan works, he's dead.' The phone number that was on, 0851735004, and my phone number is 0857866707. It was today that I twigged that it was her ex-fella's phone when she was in my fella's today. She was ringing me off it yesterday, and then today when Lauren was in Darren's, he was ringing me. Her fella's name is Kevin Walsh. He was ringing, threatening me constantly, and I did answer sometimes. Sometimes Lauren answered. When I answered, he threatened to smash my house up. I got a phone call tonight off Debbie, telling me to get home, that all my windows were gone. My son got home before me, and yous were here when I got here. Every window in my house is broken, front, upstairs, and downstairs, and back upstairs and downstairs. All my internal doors, my cooker, my telly; it's all smashed up. I was only trying to be a friend for Lauren. I don't know what I'm going to do.

I'm living here 20 years. I'm giving you my Huawei phone, PIN code is 4070, and you can take what you need off it. While you were sitting here, I got a call off a private number, and it was 110% him again. He was laughing down the phone and telling me to go and have a look at my house. I didn't give anyone permission to be in my house, and he, Kevin, has never been in my house before. I'm worried for my son's safety, and my own safety. I think he would 100% carry out those threats. The fella who was ringing me today, threatening me, and laughing down the phone was Lauren's ex-fella, Kevin Walsh”.

16. Detective Garda Brogan confirmed in the course of being cross-examined that the taking of the statement in question was not recorded on video tape. She stated that she did not see it as being necessary. She stated that she had taken certain notes in her notebook on the occasion in question and she provided her notebook to defence counsel so that he could view the entries she had made, which were on 3 pages thereof. The evidence was that these notes did not contain anything relating to a discussion between Detective Garda Brogan and Amanda Burke concerning what the implications of Amanda Burke making a statement would be.

17. The court of trial further heard that at the end of her statement Amanda Burke provided her mobile phone to Detective Garda Brogan, who downloaded data from it and saved it on a DVD which she then handed to Garda Stephen Kinneavy. Detective Garda Brogan had gone on holidays two days after she had taken the statement from Amanda Burke and the ongoing investigation was left in the hands of Detective Sergeant Kinneavy.

*The evidence of Garda Stephen Kinneavy
concerning his dealings with Amanda Burke*

18. Detective Sergeant Kinneavy gave evidence that he printed off an extraction report from the DVD that had been provided to him by Detective Garda Brogan, and this revealed,

inter alia, that on the 1st of July 2018 some thirty-nine calls were received on Amanda Burke's phone from what was accepted to be the accused's phone number, and details of the time and duration of each call were given in evidence.

19. Detective Sergeant Kinneavy further gave evidence concerning subsequent dealings which he had with Amanda Burke on the 16th of July 2018. He related that on that date Amanda Burke left a message for him in his office caller indicating that she wished to speak to him. He had called her back and she told him that she was considering withdrawing the statement she had made on the 1st of July. He urged her to think about it. A while later she rang a second time leaving a message to the effect that she wanted to withdraw her statement. Detective Sergeant Kinneavy then telephoned her back and made an appointment with her to meet her at her home.

Amanda Burke's statement withdrawing

her statement of complaint

20. Later that day Detective Sergeant Kinneavy met with Amanda Burke at 22 Kilmartin Gardens and took a further statement from her in the following terms:

"I hereby declare that this statement is true to the best of my knowledge and belief, and that I make it knowing that if it is tendered in evidence I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true. I am Amanda Burke of the above address. On the 1st of July 2018, I made a statement of complaint to Garda Jennifer Brogan. The statement I made was true to the best of my knowledge and belief. Due to current stresses in my life, I now want to withdraw my statement. I am withdrawing my statement on my own freewill. I am not being threatened. This statement has been read over to me and is correct."

21. It was uncontroversial that this withdrawal statement was signed by Amanda Burke and witnessed by Detective Sergeant Kinneavy. However, during the appellant's trial, and in

the course of a *voir dire* concerning whether the court would permit the prosecution to place Amanda Burke's original statement of the 1st of July before the jury pursuant to s. 16 of the Act of 2006, Detective Sergeant Kinneavy testified that after the taking of the withdrawal statement had been concluded, Amanda Burke had asked him if she could get a receipt for it. He said that he then asked her, "*Why would you want a receipt for making that statement?*" She said, "*To prove I withdrew my statement.*" Detective Sergeant Kinneavy stated that he then asked her, "*And who would you want to prove that to?*"; to which she had replied, "*Oh, it doesn't matter.*"

22. Under cross-examination, Detective Sergeant Kinneavy testified that he had not sought to video record the taking of the withdrawal statement, stating that, "*It was not the practice. She agrees that that's the statement she made.*"

23. It was put to him that the appellant Kevin Walsh had made an application to the High Court for bail and that Amanda Burke had given evidence during that bail application. He confirmed that he was aware that bail had been sought, and that he had been present in the High Court for the purpose of objecting to bail on a number of occasions on which the bail application had been listed but not dealt with for one reason or another. He stated that when the bail application was ultimately heard he had been out of the country on holidays and somebody else had dealt with it. His evidence was to the effect that he was not *au fait* with the details of what had happened on the day of the bail application, beyond becoming aware subsequently that bail had been granted.

24. Detective Sergeant Kinneavy was handed a copy of a transcript of Ms. Burke's evidence at the bail hearing and was directed to a question asked of her by the High Court judge and her reply. The judge had asked "*Why did you decide to withdraw your statement?*" According to the transcript Amanda Burke had responded, "*It's just there's an awful lot going on with my family at the moment. I assumed a lot and subsequently to everything that's going*

on, I now believe that it was somebody else. It was nothing got to do with Mr Walsh whatsoever. It's just an ongoing case now with my family and my brother."

25. Detective Sergeant Kinneavy was asked if it was possible that she had said anything along those lines to him when he went out to see her on the occasion that she made her withdrawal statement. The witness responded that she had told him she had a lot going on in her life. He believed that she had mentioned that her father was in hospital having had a heart attack or suspected heart attack around that time. She had stated there was a lot going on, but she did not go into too much detail. It was put to Detective Sergeant Kinneavy that Amanda Kenny had testified earlier in the trial that there were issues going on connected to her family, in particular connected to her brother, and he was asked if it was possible that she had referred to such matters. The witness responded, *"It's possible she did, but I did ask her was she being threatened, and she informed me she wasn't being threatened."* Detective Sergeant Kinneavy was adamant, and reiterated several times when pressed on the issue, that she had never mentioned her brother; only the fact that she had stresses in her life and that her father had ended up going to hospital.

26. In circumstances where Amanda Burke had referred to a lot going on with her family, and to an ongoing case involving her family and her brother, the defence in this case sought, and received (albeit late in the day), disclosure of Garda pulse records in relation to members of Amanda Burke's family and persons with whom she was connected.

Further cross-examination of Detective Sergeant Kinneavy concerning

Garda Pulse Records made available in late disclosure

27. Evidence was elicited during the *voir dire* that Garda Pulse records showed that Amanda Burke's brother, Mark Burke, had a history of being in trouble with the law. He had convictions including for several assault type offences, intoxication, breach of a barring order and safety order, public order offences, criminal damage, arson and attempted

robbery/robbery. It was put to Detective Sergeant Kinneavy that Mark Burke had had mental health difficulties and also that he suffered from drug addiction. While Detective Sergeant Kinneavy could not confirm the suggested drug addiction difficulty he was able to say that the Pulse records recorded that in 2007 Mark Burke had been detained under s. 12 of the Mental Health Act, 2001, when, following an earlier domestic disagreement with his then partner, which had resulted in his partner and their child leaving the house they shared together and going to stay with a friend, he had deliberately set fire to the family home. He was subsequently charged with, and was convicted of, the previously mentioned arson offence and had received a suspended sentence of 3 years imprisonment in respect of that. During the currency of that suspended sentence he had been convicted of a robbery/attempted robbery in respect of a Costcutter shop and a Spar shop during which persons had been threatened with a large kitchen knife. The evidence was that he received suspended sentences of 3 years imprisonment in respect of those offences but that his conviction for those matters triggered the reactivation of the earlier suspended sentence for the arson matter.

28. The Pulse records also disclosed that on the 1st of August 2018 Mark Burke was himself the subject matter of a serious assault as a result of which he was hospitalised. In the course of that assault he had received a serious stab wound to the chest and he had had a portion of an ear bitten off. It was acknowledged by Detective Sergeant Kinneavy that there had been extensive newspaper coverage concerning that assault.

29. Detective Sergeant Kinneavy was asked about a Pulse record in respect of an incident at the address of the parents of Amanda Burke's ex-boyfriend Darren O'Brien. He related that the ex-boyfriend Darren had in turn a son also called Darren, whom the witness referred to as Darren Junior. He stated that following a Garda call to a domestic incident at that address on the 20th of July 2018 Darren O'Brien Junior had been apprehended at the scene with a concealed knife in his trousers.

30. Detective Sergeant Kinneavy was further asked about Mark Burke's son, Mark Twomey, and he confirmed that pulse records showed that he had been arrested, and had subsequently pleaded guilty, in connection with the robbery of a young woman who had had her face slashed in the course of that incident and was left with permanent scarring. This was said to have occurred on the 14th of August 2018.

31. Detective Sergeant Kinneavy also confirmed in evidence that he had had a further dealing with Amanda Burke subsequent to the making by her of her withdrawal statement. He had called to her home to advise her that, on the direction of the Director of Public Prosecutions, it was intended to prosecute the appellant notwithstanding that she had sought to withdraw her original statement of complaint. She had responded "*Sure, what it is is what it is*". The witness said that he then asked her how things were, and she said, "*Stressful at the minute*", and had gone on to say that her brother had had his ear cut in town. The witness testified that although he had read about the incident in the newspapers he had not realised that the man who had been assaulted had been Amanda Burke's brother. Accordingly, when she mentioned it he said to her "*I'm sorry to hear that*" and "*Oh, was that your brother*". However, he remained adamant when pressed again in cross-examination that Amanda Burke had not previously mentioned her brother in the context of reference to troubles and stresses in her life.

Lauren Beresford

32. The court below also heard evidence that a statement had been taken from Lauren Beresford at Amanda Burke's home on the 1st of July 2018, and further that Ms Beresford had later made a second statement resiling from, and purporting to withdraw, her original statement. At the trial Ms Beresford gave evidence which the prosecution maintained was inconsistent with her original statement and again, as had occurred in the case of Amanda

Burke, the prosecution applied for leave to place her original statement before the jury in reliance on the procedure contained in section 16 of the Act of 2006.

*The evidence of Garda Stephen Kinneavy
concerning his dealings with Lauren Beresford*

33. Ms Beresford's original statement, and indeed both of her statements, had been taken from her by Detective Sergeant Kinneavy. He testified that on the 1st of July 2018 she had expressed a willingness to make a statement. She had informed him that she had had two drinks that day and she had appeared sober and coherent to him. He had a lot of experience over the years in dealing with drunk people and intoxicated people and he said that he would not take a statement from someone if he did not think they were in a sober enough condition.

Lauren Beresford's original statement

34. The statement Detective Sergeant Kinneavy took from Ms Beresford was 4 pages long. She signed each one of the 4 pages and the statement was headed with the declaration: "*I hereby declare that this statement is true to the best of my knowledge and belief and that I make it knowing that if it is tendered in evidence I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true.*" Detective Sergeant Kinneavy stated that he read out the declaration to her before he took the statement. The statement was in the following terms:

"I am Lauren Beresford, I am the ex-partner of Kevin Walsh from Allenton Green, Tallaght, Dublin 24, we have been broken up for the last ages but he just won't leave me alone. Today I've been with Amanda Burke all day since about 4 o'clock. I met Amanda at her partner's apartment in Tallaght. Then at about 5 o'clock Kevin rang Amanda's phone asking where I was and asking am I in Tallaght. He asked can I stay in my mam's because he is staying in his mam's house. He wanted me to walk up to Ballycragh, and if I wasn't, that he'd go back to my hotel with me, at what time was I

leaving at, and when would I be ready. I just said: 'I will be leaving in a few minutes' to fob him off. I said: 'I'll ring back in a few minutes.' Then that was the end of the first phone call. Then after about 10, 15 minutes, Kevin called back to Amanda's phone and asked: 'Did you leave yet?' And then he was asking: 'What time are you leaving at?' Then I said: 'Why don't you just stay in your mam's?' He said: 'No, I want to come with you.' I said: 'I'll let you know when I'm going to my mam's', just so he'd go away. We hung up the phone then. Kevin Walsh's phone number is 0851735004. After about 10 minutes or so, Kevin rang Amanda's phone again. Amanda answered and said: 'You should not be speaking to her like that.' Amanda said that I was gone. I could hear him saying then: 'I know she's fucking there', and then Amanda goes: 'She's not here.' Then Kevin started threatening something about Amanda's son and something about house and then hatchets. Then there was more phone calls to Amanda's phone, they were from Kevin's, and he kept threatening her. Amanda was answering back by saying: 'No one will go near my son or my house.' Then Amanda put Kevin on speaker and he said that: 'This is your last chance', then the phone call was gone. Then there was more phone calls like this, I think regarding the house getting smashed up. Then there was another phone call, and I think it was one of the neighbours who rang Amanda's phone, but her son answered and they said the house was damaged and all of the windows were put through. Then a phone call came through on private, and it was Kevin laughing on the phone just saying: 'Ha, ha, ha, ha, ha, ha.' Then I came to Amanda's house with her and met with the guards. I could see the house is completely smashed up. When I was in the house, Kevin rang a second time laughing down the phone. I also rang my mother to see if her house was okay off Amanda's phone. She said Kevin hadn't been near the house. As to this incident, I was disgusted and horrified. The amount of damage is unreal."

35. Detective Sergeant Kinneavy confirmed that this statement was read over to Ms Beresford before she signed it.

Lauren Beresford's statement of withdrawal

36. Detective Sergeant Kinneavy went on to testify that Lauren Beresford made a subsequent statement at Tallaght Garda station on the 16th of July 2018. The witness stated that the circumstances in which that came about were as follows. He had met Lauren Beresford on the 6th of July when, a call having been received at Tallaght Garda station to the effect that there was a male unconscious on a green area in the Avonbeg area in Tallaght, he had attended at the scene. When he and some colleagues got there some other Gardaí were already at the scene. In follow-up inquiries, he and his colleagues had gone to a particular address and had found Lauren Beresford at that address. She was sitting on a couch in the sitting room area and was very distressed and had two black eyes. In an interaction with Detective Sergeant Kinneavy, Ms Beresford informed him that she wished to withdraw the statement she had made on the 1st of July 2018. He arranged with her that she would make an appointment to meet with him at a later stage so that she could do so, but that she failed to make that appointment. Rather she left a message for Detective Sergeant Kinneavy to ring her back. He did so and they then set up an appointment for the 16th of July 2018 at Tallaght Garda station.

37. On that occasion Lauren Beresford made a second statement in these terms:

"I hereby declare that this statement is true to the best of my knowledge and belief and that I make it knowing that if it is tendered in evidence I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true. I am Lauren Beresford of the above address. On the 1st of July 2018 I made a witness statement to Garda Kinneavy at my friend's house at Kilmartin Gardens, Tallaght, Dublin 24. I made a statement but I can't recall what I may have said. I

was drinking from earlier that evening. I told Garda Kinneavy I had only two drinks. I am here by my own free will. I have not been forced to come to the garda station and withdraw my statement. I have not been threatened. I can't truly say what happened that day. This statement has been read over to me and is correct."

38. Detective Sergeant Kinneavy confirmed that Ms Beresford signed this second statement after he had read it over to her. He accepted in cross-examination that he had not taken any notes in his Garda notebook on the occasion in question. Neither had he video recorded it because he had felt there was no need. He stated that when she told him that she wanted to withdraw her statement he had asked her why and inquired if she had been threatened or was under pressure. She stated that she was not. Detective Sergeant Kinneavy then said that Lauren Beresford stated that she could not really remember what she said, and that she wanted to withdraw her statement. The witness inquired of her if she was sure she wanted to withdraw it and she said she was. She had been adamant in that regard.

Amanda Burke and Lauren Beresford as witnesses at the trial

39. Both Amanda Burke and Lauren Beresford testified at trial. They both gave evidence before the jury and in the absence of the jury at *voir dire*s concerning whether their original statements of complaint could be placed before the jury pursuant to s. 16 of the Act of 2006.

Evidence of Amanda Burke

40. In her evidence, which began before the jury, Amanda Burke, having been asked to relate the events of the 1st of July 2018, volunteered that prior to that date she had been getting a number of threats due to a family conflict. She claimed that in the course of these calls, the life of her brother and also that of her sister had been threatened, as well as her family home. Arising from the feud, her brother had been tortured requiring hospitalisation, and her grandparent's house was vandalised on the same night as her own.

41. Ms Burke gave an account of events, the uncontroversial aspects of which the court has sought to distil into a coherent summary at paragraphs 5 to 7 of this judgment. However, in further aspects of her testimony she deviated in several respects from what she had said to Detective Garda Brogan in her statement of the 1st of July 2018, which statement had been included in the Book of Evidence.

42. Ms Burke claimed in her testimony before the jury that when Mr Walsh had telephoned that afternoon, she handed the phone to Ms Beresford, who proceeded to take his initial call and some subsequent calls from him, on the balcony. Ms Burke gathered that she and the appellant were arranging to meet at some point after visiting their respective mothers.

43. Ms Burke stated that while Ms Beresford was engaged in talking to Mr Walsh on the balcony, she herself received threatening phone calls on her ex-partner Darren's phone, of which she was also in possession. Several such calls were received. She received threats on this phone in relation to her sister, brother and family home arising from an ongoing feud. However, she stated, she could not go into detail about this because "*it's an ongoing thing*" and "*there's a trial*". She was asked:

Q. Yes. And is your evidence to the Court, that you don't know who these people were?

A. No. Well, now we do know who they were, do you know what I mean? But at the time -- this is an ongoing thing, I don't know if I can mention it, my brother was actually -- he was tortured, he ended up in hospital, he died a few times, my --

Q. Okay.

A. -- grandparents' house was vandalised the same night as my house".

44. After finding her house vandalised, Ms Burke claimed that a neighbour informed her that two or three vandals had carried out the offence and had fled the scene before she arrived.

45. In explaining why she identified the appellant as the culprit to the gardaí in her initial statement, Ms Burke explained that having overheard Ms Beresford and the appellant arguing on the phone, she assumed the appellant had been the culprit. She said:

A. *“So, I assumed –do you know—took the assumption upon myself—because Lauren and her partner had been arguing that, well it must be him.”*

Q. *When you say, “Him”?*

A. *Mr Walsh”.*

46. When provided with her statement in the witness box, Ms Burke told the court: *“I’ve just been given the statement that I made...And I went through it and I can’t actually recall most of it, but obviously it must have been what I said at the time”.*

47. While agreeing that the statement did accurately reflect what she had said at the time, Ms Burke claimed that she had been very upset at the time, that she had been *“20 years building that house”*, and that her *“emotions were everywhere”*, due to the shock of seeing the damage caused to her home.

48. She acknowledged that she had made a later statement on the 16th of July 2018, and by way of explanation for that stated:

A. *“Well, when I found out exactly who it was that had damaged my property, I realised that I had pointed out a wrong person. I didn't realise that Mr Walsh had been arrested or -- do you know what I mean? And then I knew I'd made a mistake and I just wanted to fix that. I didn't realise, do you know, how much trouble I had caused”.*

49. At this point the jury was asked to retire, and counsel for the prosecution indicated a desire to invoke s. 16 of the Act of 2006 on the basis that Ms Burke had given evidence materially different to that in her statement of the 1st of July 2018, and to that end he was seeking leave to place Ms Burke's original statement of the 1st of July before the jury. This application gave rise to a *voir dire* in the course of which Ms Burke gave further evidence in the absence of the jury.

50. Her statement of the 1st of July 2018 having been put to her, and acknowledged, Ms Burke was then cross-examined by defence counsel. She was asked about the evidence she had given at the bail application (see paragraph 20 above), and whether she had been telling the truth on that occasion. She answered: "*On this occasion, yes*". When asked for details about her brother's situation she asserted that threats to her brother had been ongoing, before adding:

"Do you know, it was very scary, do you know? The threats were ongoing. It was through his daughter which now I know what happened to my house, because I -- his daughter, Courtney, had been staying with me because she was in fear, because the threats were coming to her, they were coming to my brother. Then they were coming to me. We'd all been threatened, so I thought she'd be safe in my house, but, subsequently, she wasn't safe."

51. Ms Burke denied any awareness of her brother's involvement in the robbery / attempted robbery of the Costcutter and Spar shops but did acknowledge that he had been convicted of arson some years previously, and that he had been having mental problems at the time. She accepted that he had had a drug addiction problem, stating:

"Well, he had, years ago, but he's medicated at the moment, you know. He's fighting his demons, but at the end of the day, this all came about through his daughter and

her involvement with these people, do you know, and this is why I had Courtney in my home, because I thought she'd be safe."

52. She was asked about the incident on the 1st of August 2018 when her brother had had part of his ear cut off, and she claimed that he had been tortured for four hours and that:

"These people are not people to mess with. I don't be involved with stuff like that. I didn't realise that Mr Walsh -- I didn't realise this was going to happen. I thought it was just over and done with, do you know. I didn't realise that this was going on. So, when I did find out that Mr Walsh was still in trouble over my house, I just felt so guilty because I know that he didn't do it. So, he's in trouble for something that's going on in my family, so I just felt that I had to step forward and tell the truth, you know, tell what was going on in my own family."

53. At no stage did Amanda Burke give any indication as to the identity of the persons she repeatedly referred to as *"those people"* or *"these people"*.

54. She acknowledged information put to her from the previously mentioned Pulse records concerning Darren O'Brien Junior, and gave evidence of hearing that Darren's mother's house had been vandalised and stated that that had affected her belief as to what had happened to her own home.

55. When giving evidence in the High Court during the bail application for the appellant, Ms Burke gave the following explanation for withdrawing her statement: -

"its just there's an awful lot going on with my family at the moment. I assumed a lot and subsequently through everything that's going on, I now believe that it was somebody else. It was nothing got to do with Mr. Walsh whatsoever. It's just an ongoing case now with my family and my brother".

56. Under cross-examination, Ms Burke claimed not to remember making the original statement, "*because half of that doesn't make sense*". She accepted she had said the words ascribed to her from the transcript of the High Court bail application.

57. With reference to Darren O'Brien Junior, she described him as very unstable. She went on to state:

A. *"Darren Junior. So, I've -- I'm after having to get restraining orders, barring orders. He's volatile. You just don't know what they're capable of.*

Q. *Okay. And you have said that after you heard that Darren's mother's house was vandalised --*

A. *Yes.*

Q. *-- that that affected your belief about what had happened to your home?*

A. *Yes.*

Q. *In what way?*

A. *It was just I wasn't clear, because I didn't realise the extent of what was going on with Courtney and my brother, and I knew there was threats and -- do you know? Then I started getting the threats when Courtney stayed with me, but then again, Darren was after being released from prison, so I was getting --*

Q. *Is that Darren Junior?*

A. *Junior. So, I was getting threats from him. Do you know what I mean?*

...

Q. *When you had your meeting with Sergeant Kinneavy, that's when you gave a statement, withdrawing your previous statement; is that correct?*

A. *Yes, because I told about -- I had informed him what had happened with my brother, do you know, and I informed them about Darren, do you know, so I could not, hand on heart, you know, accuse Mr Walsh because --*

Q. So, when you say you told him --

A. Yes.

Q. You've already given evidence to say that there were threats being made against Darren?

A. Yes.

Q. Sorry --

A. Against myself.

Q. -- there were threats being made against Mark?

A. Yes. Oh, yes.

Q. Yes, on an ongoing basis?

A. Yes.

Q. And you've said that Darren was actually making threats?

A. Yes.

Q. Now, you've just said that you told the garda about matters connected with that; is that correct?

A. I told garda about the matters connected with my brother.

Q. Yes. Did you mention anything in relation to Darren Junior, do you recall?

A. I can't remember. I don't think I did.

Q. Okay. But in any event, what you said in the High Court, and what you've said in court here, is basically to explain that you were assuming it was Mr Walsh that had done it?

A. Yes.

Q. But that because of information you had, you believe that --

A. I now know -- yes, I now --

Q. -- other people did it?

A. -- believe it was nothing to do with him”.

58. Amanda Burke was asked what she had meant when she had said in her statement of withdrawal that the statement she had made (on the 1st of July 2018) was true to the best of her knowledge and belief. She replied:

A. *“I meant I gave the statement. I know I gave it, but -- do you know what I mean? I gave the statement, but when I gave this statement -- I don't know if this is relevant. I'm actually going through treatment at the moment --*

Q. *Yes?*

A. *-- so it was blurry. Everything was blurry. It was only after the fact that, when everything started coming out, that I sort of stopped, thought about it, and realised, 'Oh, my God. I've accused this lad in the wrong'.*

Q. *Okay. So, were you getting across that you weren't deliberately telling lies, you weren't deliberately making a false statement?*

A. *I didn't deliberately. At the time, it's what I believed, but subsequently, I know now -- you know when all the facts start coming out? I knew it wasn't true”.*

59. At the conclusion of the voir dire, the trial judge ruled in favour of the prosecution on the s. 16 application and allowed Ms Burke’s statement of the 1st of July 2018 to be placed before the jury. Amanda Burke then gave further evidence before the jury in which she acknowledged before them that she had made that statement, and also the later statement of the 16th of July purporting to withdraw her first statement. During cross-examination of Ms Burke by defence counsel, the jury learned of what she had told the High Court during the bail application concerning her reasons for withdrawing her original statement, and heard evidence from Ms Burke concerning the threatening phone calls that she claimed she had been receiving on Darren O’Brien’s phone on the 1st of July 2018. Asked about her brother having particular troubles, she told the jury:

“A. Before anything happened, we were receiving threatening phone calls. My brother was, the family was. It was in relation to his daughter. And so I allowed his daughter to come and stay with me because we thought she'd be safer. She was being threatened, my brother was being threatened, the whole family was being threatened --

Q. Okay?

A. -- at the time.

Q. Now, I'm going to --?

A. So --

Q. Sorry?

A. So, I allowed his daughter, Courtney, to come and stay with me. So, after -- when I made that initial statement, I was fairly intoxicated. And at the time I did believe what I was saying. But subsequently to that, I now know who damaged my house, it came to light. So, I know, fact, that was not Mr Walsh, and I'm just -- I can't apologise enough for -- you know, that's why I withdrew my statement. I didn't realise that this case was ongoing, because I went to the guards on a number of occasions to withdraw the statement, but the guard wasn't available. So, I withdrew it when he became available because I then knew the truth.”

60. The jury also learned about alleged difficulties with Darren O'Brien Junior. Amanda Burke told the jury:

“Well, he was making threats against his own family, say, myself, his grandparents, his aunts, his -- I've known Darren since he was 14 years old. You know, he's quite unstable.”

61. Amanda Burke also told the jury that she had assumed that the Kevin Walsh had wrecked her house, because she had perceived that he and Lauren had been arguing. She said:

"A. It was just the way it happened and how it happened and it was just -- everything was up in the air and, you know, it was frightening. And, do you know, I wasn't sort of thinking it through, I just panicked.

Q. Yes. You put two and two together --

A. And came up with five.

Q. -- and said it must have been Kevin who'd done this?

A. Yes.

Q. And afterwards then you discovered that Darren Junior's grandparents' place --

A. Yes.

Q. -- had been wrecked? And also you were aware that there were difficulties with your brother, but you got further information in relation to that as the time passed by; is that correct?

A. As the time passed by, yes.

Q. Okay. So, just in relation to your brother, I don't know if you mentioned this, but you certainly said in front of the jury that there were difficulties and that there were ongoing proceedings?

A. Yes.

Q. And you weren't comfortable speaking in too much detail about it?

A. Yes, because I didn't realise how bad it was. Do you know, I didn't realise how much trouble was going on, do you know, because I'm in Tallaght, they're all in town, and I sort of -- you know, I'm trying to go to college, as you know, I'm on a programme, I'm a recovering alcoholic, so I'm trying to get myself

together. But, with Mark, I was just thankful that my son and myself weren't in the house that night because Mark -- they tortured him -- what they done to him. So, thank God that myself and my son weren't there that night.

Q. Okay, well, now I just --?

A. Because somebody would have been --

Q. Sorry?

A. -- hurt badly."

62. Through the medium of further cross-examination of Ms Burke, the jury also learnt the details of the other matters contained in the Garda Pulse records, relating to Darren O'Brien junior and the witness's brother Mark, to which previous reference has been made.

Evidence of Lauren Beresford

63. Lauren Beresford testified on the third day of the trial, both before the jury and in the context of a *voir dire*. In her evidence before the jury she stated that she had been staying in Ballsbridge with her partner (the appellant) and that they had planned to go to Tallaght together so that they could visit their respective mothers. However, when she tried telephoning her mother to let her know that she would be coming, her mother was not at home. In the circumstances she then rang her friend Amanda Burke (who also lived in Tallaght) and Amanda said to her to "*pop up*" to her partner's (i.e., Darren O'Brien's) house at Tallaght Cross. Ms Beresford said she had used her partner's phone to telephone Amanda Burke as she had lost her own phone a week or two previously.

64. Ms Beresford testified that after she arrived there, she and Amanda were sitting down having a couple of drinks and playing darts. As they were doing so she received a telephone call from her partner, the appellant, on Amanda Burke's phone, wanting to know her plans in terms of going to visit her mother and meeting up with him afterwards. It appears that either the appellant may not have been provided with any clear answer, or that if he was provided

with one it was not an answer that satisfied him, because Ms Beresford's evidence was that she and Amanda Burke had continued on drinking, that the appellant rang her yet again on Amanda's phone and she took the call on the balcony, and that an argument developed between them.

65. Ms Beresford's went on to testify:

"A. Then I said, "Yes, I'll be ready in a couple of minutes" and then we were sitting back in then in the house and then I was getting ready to go and -- but Amanda and her partner were -- when I was out on the balcony there was arguing between them on the phone.

Q. Between who on the phone?

A. I don't know. I couldn't see because I was out on the balcony, but I think it was her partner. I wasn't 100% sure if it was Amanda on the phone or them two arguing to each other, like. I was out on the balcony. I didn't see anything, like.

Q. Yes?

A. And there was -- when I came back in, there was shouting on the phone and then there was another phone call made. I think -- I don't know if it was Amanda's or her partner's phone.

Q. Yes?

A. And they were saying that something happened to Amanda's house, to go up to, to go up to the house, like".

66. Asked if Amanda Burke had received any other phone calls, Ms Beresford said she was not sure. She implied, however, that there had been other calls and that her lack of certainty related to on whose phone they were received *"because it was her partner's phone and then her phone that was ringing. I'm not sure, like, whose phone. It was all in confusion*

...” She stated that *“they were arguing over -- with someone over the phone.”* She herself had been *“in and out on the balcony all through the day.”*

67. Ms Beresford then stated:

“A. Like, I'm not 100% on what happened because we were drinking, like, all day, like. So, I - there was something -- they were arguing when we came out we were sitting down and then there was, like, arguments -- I don't know 100% sure what was going on, but there was a phone call made then saying there was an incident that happened up at her house.”

68. Although pressed for more details, Ms Beresford did not provide any, beyond stating:

“A. ...when they were arguing, the phone was put on speaker --

Q. Yes?

A. -- and there was -- but when I was coming in, I think she was arguing on the phone to someone, but I was thought it was Kevin because I didn't know Amanda had problems that, like, family problem”.

69. She added:

A. “When I was coming in, see, she was arguing, but I didn't know Amanda was - - I thought it was -- I thought she was on her phone, but it was her partner's phone. I'm not 100%, like, but I kind of know now what Amanda's told me ...”.

70. She stated that it had been a man’s voice on the phone and that he had said *“something about ‘house’ or something like that.”* She could not say for sure how many calls there had been. When asked if she could remember what she had later said to Gardaí, she said she could vaguely remember speaking to Detective Sergeant Kinneavy, and remembered giving the first statement *“briefly”*. Asked if she remembered giving a second statement, she stated *“yes”*, and that it was *“a withdrawal”*. Asked if she remembered what she had said, she stated that she could not be 100% sure because she had been drinking. She confirmed that

she had said in her second statement *“I’m not being threatened. I can’t truly say what happened that day”*.

71. At this point the jury were asked to retire and Lauren Beresford was stood down from the witness box. Counsel for the prosecution applied to the trial judge for leave to admit her original statement before the jury pursuant to s. 16 of the Act of 2006 in circumstances where the prosecution maintained that the evidence she had given was materially inconsistent with what she had stated in that statement. During a *voir dire* which ensued, the court heard further evidence from Detective Sergeant Kinneavy as to the circumstances in which both the original and withdrawal statements by Lauren Beresford were taken by him, following which Lauren Beresford returned to the witness box and gave further evidence in the absence of the jury. When her original statement was put to her, she accepted that it bore her signature, but contended that she did not remember saying half of what the document contained. When her withdrawal statement was put to her, she also accepted that she had made that statement.

72. Under cross-examination by the appellant’s counsel, when it was put to her that a download of Amanda Burke’s phone had revealed perhaps up to 30 calls to and from the appellant’s phone on the afternoon in question, but that she had not mentioned in her statement that there had been that many calls, she responded:

A. *“It could be, I can’t be 100% sure, like, because when we were in the house we were drinking obviously, like, we were arranging to go home so, like, whilst we were drinking I obviously didn’t take knowledge of the phone ringing, like”*.

73. Lauren Beresford accepted that she and the appellant had been arguing but disputed that it had been intense. She maintained that she and the appellant had had difficulty hearing each other due to *“what was going on in the background, but I wasn’t aware what was happening inside”*.

74. The cross examination continued:

“Q. Okay. Ms Amanda Burke has given evidence to say that when she heard that her home had been wrecked and saw that her home was wrecked, she assumed it was Kevin Walsh who had done it, that she had assumed that because of the row that had been going on, because of the argument that had been going on between yourself and himself and --?”

A. Yes, because I -- when I was leaving I used to go to -- I was on the balcony having a cigarette before I was leaving and there was -- they were inside and well before I was leaving I think she -- there was -- I'm not 100% sure but the phone's ringing and she was saying -- she was shouting down the phone -- I don't know if it was her partner or her, but only before that, I was only previously talking to Kevin because I was getting ready to leave. I assumed that it was me partner.

Q. Okay. Now, Amanda has given evidence to say that because she believed that Kevin had actually done the damage, that that was actually the reason why she was alleging that he'd made the threats, but he hadn't in fact made threats?

A. Yes, because I was unaware of Amanda's personal business that was going on. So, I -- at the time, I thought it was me partner, but when -- I don't know, after the next day, I -- when I went home I was talking to -- I was down in my mother's and I rang, rang Kevin, to see what the hell was going on and he was shocked that we came down -- he saw me go down to my mam's house and we went to Molloy's for our dinner and he was saying, "Like, why would you think that it was me, I was ringing you? Why would I start ringing on private calls and I don't know where Amanda -- I don't even know where she lives."

75. It was further put to Ms Beresford:

“Q. In your statement you said, that you heard on the phone when Amanda was actually speaking on the phone with somebody you heard, "something about", is the word that's used. You said, "Then Kevin started threatening something about Amanda's son and about the house." First of all, is it possible that when you were using that language in the statement, that you were indicating that you couldn't hear actually what was being said and that that's why you used the phrase, "something about"?

A. Yes, because I wasn't aware, like, like we were, like, I'm not just saying that we were keeping on drinking, but we were, and I wasn't in my right state of mind when I was listening and I thought, because there was a bit of chaos inside when I was leaving. And only before I was having the conversation not long before that with Kevin, saying something -- because we were going to miss our lift home and it was getting late and we always go home together, so -- and I just thought, like, he was ringing back and that she was speaking, but I got it wrong obviously”.

76. The witness later added:

A. “When I was speaking to Amanda -- I don't know if it was the next day or the day after, she mentioned, like, she rang me, she -- well she didn't ring my phone because I didn't have one, but she rang my mam's phone and she asked to see why I was there, and she was, like, she was having a massive -- I think we're after doing something wrong, and I said, "What?" And she was, like, we're after accusing Kevin wrong, because she said -- she, she knows it wasn't Kevin because they found out what was on, but I think there was a family -- [Interjection]”.

The answer was not completed in circumstances where there was an interjection by prosecuting counsel objecting to her giving hearsay evidence. That concluded the evidence on the *voir dire*.

77. Following legal submissions, the court ruled in favour of the prosecution on the s. 16 application. The jury was then brought back and Lauren Beresford gave yet further evidence before the jury. Her statement of the 1st of July 2018 was read before the jury and she again accepted that she had made it, stating: *"I vaguely remember, but yes I must have"*. Her second statement, i.e., the so-called "withdrawal statement", of the 16th of July 2018 was also put to her, and she accepted that she had made it and had signed it, adding: *"Yes, because when I went down to the police station, I told Kinneavy what I know, and I knew that I wasn't -- found out that it wasn't me partner."*

78. Under cross-examination before the jury, Lauren Beresford was asked about the argument between herself and the appellant on the phone, and there were the following exchanges (*inter alia*) between counsel and the witness:

"Q ... And Amanda Burke has given evidence to say that there was an argument going on -- I think you yourself in front of the jury said there was a dispute going on between yourself and himself?"

A. Yes we were saying -- because I was -- we were meant to be going -- usually, like, we both go to our parents' house and then we meet up and then we go home, and that's what -- it was getting late and we were organising getting home but I was obviously drinking and obviously getting distracted, like -- do you know, that kind of way, drinking, like. And when I went out, there was noise in the background -- but he was like, "I can't hear you", and we were just like, "Yes, I'll be leaving in a few minutes", because I was leaving soon enough, like, but I just kept -- continued drinking.

Q. Okay. Now, Amanda Burke has given evidence to say that when she heard that her place had been wrecked and when she went back and saw it she was assuming because she was obviously aware that there was an argument going on between herself and Mr Walsh, she was in the middle of it because she was answering some of the calls. She said she assumed that Kevin Walsh must have done the damage?

A. Yes, because I wasn't aware of Amanda, that she had family problems like an ongoing thing with her family and the walls had big damage done to it -- her previous house -- because Kevin doesn't know Amanda or anything. I know he -- but at the time I said it was him because I was leaving to go home, but when I came out from the balcony, I had a smoke, and I said I was leaving, they were -- her and her partner were on the phone, but I assumed it was my partner because I don't know who was on which phone, but I assumed it was Kevin because I was the last one leaving the house and then ...”

79. The witness accepted a proposition put to her that, because she had used the expressions “*I think*” and “*something about*” in her statement on the 1st of July 2018, she had been “*uncertain*” in several respects. The witness then said:

“Obviously I was uncertain because I had to -- look, and it doesn't make sense, any of it. But, I couldn't recall what was exactly said or who it was, but Amanda got in contact, I don't know if it was the next day or the day after, and she was apologising because she found out who actually did do it because I think something happened at a different property. And the next day I actually rang Kevin off my mother's phone asking him why did he do this and that, and then he was obviously saying, "Why would you think I'd do that?" So, he cycled down to me mother's home and we

discussed it and then we didn't think any more of it because when I found out and we knew that it wasn't -- it wasn't obviously -- wasn't my partner, so."

80. Finally, Lauren Beresford was asked about the reference in her original statement to having heard laughing on the phone, "Ha, ha ha", and she responded:

"A. See, any time I was talking to Kevin it was number shown, so I don't know where the private calls were coming from, but I think he was in the other side of the room at the time, and there was people on the phone, but I couldn't tell who it was; but I just assumed at the time still it was Kevin because I didn't know what the actual reasons were behind Amanda's family business, but.

Q. Okay, but I just want to ask you; when this, "Ha, ha, ha", occurred, was that when -- the understanding I have from Amanda's own evidence was that she was on the phone at the time, and she was listening to this, "Ha, ha, ha." Is that how you heard it when she actually had the phone?

A. She just repeated what, I think, what I recall, like, I can't really remember anything but I think she just repeated it, and I just said that could be Kevin, like, but I wasn't 100% sure at the time.

Q. Okay. It appears on the evidence, Amanda was convinced that Kevin had done it. Now, is it possible that you were assuming that the laughing was coming from Kevin in that context?

A. Yes, I assumed".

Other evidence

There were no other witnesses for the prosecution. The defence did not go into evidence.

The Grounds of Appeal

81. The appellant rests his appeal on the following grounds:

- i. In all the circumstances the trial was unsatisfactory, and the verdicts are unsafe, in particular having regard to the various applications, submissions and requisitions made on behalf of the appellant and the adverse rulings made by the trial judge in respect of same;
- ii. The trial judge erred in law and in fact in admitting the statement of Amanda Burke pursuant to Section 16 Criminal Justice Act, 2006;
- iii. The trial judge erred in law and in fact in admitting the statement of Lauren Beresford pursuant to Section 16 Criminal Justice Act, 2006;
- iv. The trial judge erred in refusing to direct verdicts of not guilty at the close of the prosecution case on the grounds that the evidence was insufficient to ground a conviction and in all the circumstances that it would be unfair to allow the case to be considered by the jury;
- v. The trial judge erred in refusing to direct verdicts of not guilty at the close of the prosecution case on the grounds that the evidence in respect of Counts 1 and 2 was insufficient to ground a conviction in that a jury properly charged could not conclude beyond reasonable doubt that the words used amounted to a threat to kill;
- vi. Having regard to all the circumstances relating to the trial judge's charge to the jury, including in that the defence case was not adequately put, and in particular having regard to the requisitions put forward on behalf of the appellant, the trial was unsatisfactory and the verdict is unsafe;
- vii. The trial judge erred in refusing to charge the jury in respect of Counts 1 and 2 in particular as to the issue relating to whether the words used amounted to a threat to kill;

- viii. The trial judge erred in law and in fact in failing to give adequate directions to the jury regarding essential matters relating to the statements admitted under the said s. 16 and the assessment of the reliability of same including but not limited to the fact that the statements were not video recorded; and in refusing to recharge the jury as to whether the accuracy of/reliability of the content of the said statements had been challenged in the trial;
- ix. The trial judge erred in refusing to charge the jury sufficiently as to the presumption of innocence and the fundamental importance of same in the context of a criminal trial;
- x. In all the circumstances, the trial was unsatisfactory and the verdicts are unsafe.

82. For the purposes of his presentation at the oral hearing of the appeal, counsel for the appellant stated that he would be concentrating on three main areas, namely (1) the admissibility of the statements of Amanda Burke and Lauren Beresford under s. 16; (2) the ingredients of the offence of threatening to kill or cause serious harm, contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997; and (3) the adequacy of the trial judge's charge to the jury. It is proposed to follow the same template for the purposes of this judgment, and to the extent that there are grounds of appeal relating to the conduct of the trial generally that do not fall to be dealt with under these headings to deal with them separately in a final section of this judgment.

The admissibility of the statements under s. 16

The relevant statutory provision

83. Section 16 of the Act of 2006 is in the following terms:

“(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”.

The statement made by Amanda Burke on the 1st of July 2018

84. The prosecution sought to have this statement admitted pursuant to s. 16 of the Act of 2006 on grounds that she had given evidence before the jury that was materially inconsistent

with what she had stated in that statement. After hearing evidence in a *voir dire*, the trial judge agreed to admit the statement at issue.

85. The trial judge, in her ruling admitting the statement of Amanda Burke, noted that she accepted that the statement was made willingly and voluntarily, and that she understood the statutory declaration read over to her at the time. Although counsel for the appellant had pointed to the fact that Ms Burke, by her own admission, had been drinking heavily, the complainant had never suggested that the reason she withdrew her original statement was because she was drunk when she made it and that it was therefore unreliable. Furthermore, Detective Garda Brogan had had no concerns about the complainant's sobriety.

86. On the contrary, the trial judge noted, the reason she gave during the course of the bail application on the 26th of October 2018 was: *"There's an awful lot going on with my family at the moment, I assumed a lot and subsequent to everything going on, I now believe it was somebody else. It's got nothing to do with Mr Walsh whatsoever"*. Further, the trial judge noted that in her withdrawal statements on the 16th of July 2018 she had said: *"The statement I made was true to the best of my knowledge and belief. Due to current stresses in my life, I now want to withdraw my statement"*.

87. Noting the detailed contents of Ms Burke's statement of the 1st of July, the trial judge commented that it contained serious allegations of threats to kill both the complainant and her son, as well as a threat to damage her home. The trial judge noted that the accused was not, however, charged with having caused actual criminal damage. She further noted that the forensic analysis of the complainant's phone supported the complainant's statement that she had been receiving continuous phone calls from the accused and it also supported her evidence that there had been calls to her phone from a private number.

88. The trial judge observed that in stark contrast to her statement, the evidence given in court by Amanda Burke was far from clear about what occurred on the night in question,

notwithstanding that she was sober in giving that evidence. The complainant's evidence had been that Kevin Walsh, had been ringing her friend, Lauren, and they were talking on the phone making arrangements. Kevin Walsh was making contact with Lauren on the complainant's phone. The complainant had said that she only knew it was Mr Walsh by Lauren's reaction; she never heard his voice prior to that day. At the same time, the complainant's evidence was that she was receiving threatening phone calls on the phone belonging to her 'ex', Darren. These calls were from people she cannot name because there is a trial pending or going on in relation to same. These threats were targeting her brother, her sister, and her family in general. There was also reference to her parents' house having been vandalised on the same night as hers.

89. The judge noted that evidence provided by the PULSE records that had been disclosed showed that Ms Burke's brother, Mark Burke, was seriously injured on the 1st of August 2018. Her ex partner's son was involved in an incident on the 20th of July 2018, and her ex partner's house was vandalised after the 1st of July 2018. There was no evidence of Ms Burke's parents' home being vandalised. There was no evidence regarding complaints by her sister or her parents or her brother made to Gardaí in or around that time. There was no supporting evidence before the court of a trial taking place, or of complaints having been made against those she said had made the threatening calls to her and Darren O'Brien's phone on the 1st of July 2018.

90. The trial judge noted that although the complainant had handed over her own phone for analysis, Darren O'Brien's phone had not been handed over for analysis.

91. The trial judge further noted reliance by the defence:-

"... on the evidence of Detective Sergeant Kinneavy when he says; he, Detective Sergeant Kinneavy, was told by the complainant that the reason for her assuming that it was Mr Walsh who threatened her and her property was because Lauren and he

had been arguing on her phone on the 1st of July 2018. Detective Sergeant Kinneavy said the complainant told him this when she was withdrawing her statement, as well as the fact that her father had been sick and that this was a stressor. The complainant did not repeat the evidence about the reason for her assumption being due to Lauren and the accused arguing in this Court.”

92. In fact, the trial judge was incorrect in her recall of that aspect of the evidence, although we are satisfied that nothing turns on it.

93. The true position as confirmed by the transcript was that the complainant did testify in court that the reason for her assumption was that Lauren and the accused had been arguing. However, Detective Sergeant Kinneavy had testified that when Amanda Burke was withdrawing her statement the only reason given to him for her supposedly having wrongly implicated the accused, was that her father had been sick and that this had been a stressor. There was no evidence from Detective Sergeant Kinneavy that Amanda Burke had said to him that her assumption was due to Lauren and the accused arguing. Detective Sergeant Kinneavy did acknowledge in cross-examination that he had heard Amanda Burke say in court that her assumption had been due to Lauren and the accused arguing, but he was adamant that the only explanation given to him by the complainant was she had been under stress, with her father’s illness being specifically referenced in that regard.

94. We think that nothing turns on it because, notwithstanding the trial judge’s incorrect recall of the evidence, the essential point she was endeavouring to make was still nonetheless valid, namely that the respective testimonies of Amanda Burke and Detective Sergeant Kinneavy did not align. The evidence was that the explanation that Amanda Burke put forward, during her evidence, for having made the “assumption” on foot of which she claims to have implicated Mr Walsh in her initial statement, was not one offered by her to Detective Sergeant Kinneavy.

95. The trial judge noted the upset described by the complainant on seeing what had been done to her home, and was satisfied that this was supported by the evidence of Detective Garda Brogan. The Court further noted in that context the immediate explanation and statement made by Amanda Burke to the gardaí concerning what had happened that day, with specific reference to receiving calls to her phone by the accused on an ongoing basis, even while she was with the gardaí.

96. The trial judge expressed the view that the rationale or explanation given by the complainant as to why she decided that it must be Mr Walsh, namely that this was because he and Lauren had been arguing all day, had to be considered against the background of her evidence before the trial court, i.e., that she had been receiving threats all day, and for some time before that day, in relation to what she now described as a family feud, on another phone that was Darren's phone. The trial judge observed:

“The complainant now says that when she found out who actually damaged her property, she realised that she had pointed out the wrong person. It will be noted that there is no charge re who actually caused the criminal damage on the indictment. And that such a realization does not affect the fact of the allegation being made regarding the threats to kill, or the threat to actually damage the property. The Court also notes that Detective Sargent (sic) Kinneavy gave evidence that the complainant asked him for a receipt when she signed her withdrawal statement. When asked why she would need this, she didn't pursue the matter further with him. This is a matter neither side further pursued in the voir dire.”

97. The court was prepared to accept from the PULSE evidence that there well may have been matters of stress in the life of the complainant in and around the relevant time, notwithstanding that the most recent matters outlined postdated the 1st of July 2018. The

court further noted the reference in her evidence to the complainant's niece living with her, and concerns she had for her.

98. The court was prepared to accept the evidence of Detective Sergeant Kinneavy relating to his conversations with the complainant. The trial judge further accepted that he did not know of the complainant's brother prior to the visit when she told him about her brother.

99. The trial judge observed that she had not been referred to any authority suggesting that video recording of the complainant's evidence had been required, or even recommended as best practice and remarked that the wording of s. 16 appeared to acknowledge this "by providing an alternative means of consideration for the court".

100. The trial judge then ruled:

"Having considered the statutory requirement and how I should exercise my discretion, I made the following findings: the statement has been proven to the required standard; the evidence in ordinary course would be admissible; it was made voluntarily; it contains the required statutory declaration. And while this is an alternative, I'm stating that it is also in addition to that, the witness understood the requirement to tell the truth and this is from her own evidence. The Court is satisfied when considering the issue of reliability that the circumstances in which the original statement was made, are supported by other sufficient evidence, and this is the voluntary handing over to Garda Brogan of the complainant's phone, to have it analysed, to support her claim; that in the course of attempting to make contact with Lauren on the complainant's phone, Mr Walsh, had threatened her, her son and her property when she refused to hand her phone to Lauren. The analysis of the phone is noted in this regard. As already set out in the context of section 16 application, I have had regard to the explanation of the complainant for giving evidence which is inconsistent with the statement. And, nonetheless, I remain satisfied as I must be in

accordance with the statute as to the reliability of the original statement. In considering what is the definition of reliability, I refer to the DPP v. O'Brien where it says: "It seems relatively clear that the act in requiring that the statement be found to be reliable appears to mandate the Court to examine the circumstances and factors surrounding the making of the statement to ensure this is a reliable statement in the sense that it is one which can be relied upon, rather than requiring the Court to be satisfied that the actual content of the statement is reliable in the sense that it is true." In coming to this decision, I refer in particular to that.

Further, having observed the demeanour of the witnesses and heard their evidence, I am satisfied that the requirements of section 16 have been met. The evidence of Detective Sergeant Kinneavy and Detective Brogan have been persuasive, notwithstanding the issues raised by Mr Ó Lideadha. A number of matters raised by Mr Ó Lideadha are matters that go to weight and can be tested in cross-examination. The admission of the statement is necessary and this has been agreed between the parties. The Court will give all necessary warnings relating to this procedure, to the jury in due course, and protect the rights of the accused to a fair trial. Given the findings I have made, the interest of justice requires the admission of the statement. This is so, having considered any unfairness to the accused, the complainant can be cross-examined in due course. The original statement therefore complies with the statutory requirement, and is reliable in the Court's opinion pursuant to case law and statute and can be admitted into evidence."

*Submissions on appeal with respect to the s. 16 application
concerning the Amanda Burke Statement of the 1st of July 2018*

101. The case made on appeal was essentially a re-iteration of the case made at first instance and amounts to a contention that the trial judge was incorrect in how she assessed the evidence and in the weight which she attached to various factors.

102. In particular, the following points had been made and emphasised by counsel on behalf of the appellant:

1. The evidence was unchallenged from the state that Ms Burke had been drinking alcohol all day and all night and it was asserted there was no garda assessment on whether or not she was under the influence of alcohol. There was, it was suggested, unchallenged evidence the witness was wrong in what she was now saying and that she had made an assumption that was incorrect and that she had made an incorrect allegation of threats having been made. Furthermore there was, it was suggested, unchallenged evidence that when she withdrew the statement, she gave an explanation similar to the explanation that she gave on oath in direct examination and before the High court.
2. The garda was said to have been unclear in terms of his recollection of what exactly was said. He had acknowledged it was possible that the witness had referred to various difficulties in her family.
3. It was claimed there was independent evidence, all of it unchallenged, to back up the surrounding circumstances involving difficulties with her brother and involving difficulties in respect of her ex-partner Darren's family home.
4. McKechnie J. in *People (Director of Public Prosecutions) v. Murphy*, had characterised the s. 16 procedure as representing a fundamental departure from traditional common law principles which placed a high regard on sworn evidence given directly, immediately and spontaneously before the facts adjudicator. Accordingly, both the section's interpretation and application had

to be viewed not only in the light of the public interest but also within the bedrock of criminal justice overall.

5. Regard was to be had pursuant to the statute to whether or not the statement was given on oath or affirmation or was video recorded. Neither circumstance obtained in this case. While the court was also entitled in that event to consider whether by reason of the circumstances in which it was made, there was other sufficient evidence in support of its reliability, it was contended that there was no such evidence. Rather, such evidence as existed relating to alcohol consumption, to the stress the witness was under, and concerning her claimed assumption, all tended to suggest its unreliability.
6. It was asserted that the unchallenged evidence was the threats were ongoing and that it would be unfair if a ruling would essentially deem the stabbing to be of no consequence (it being post the withdrawal of the witness' statement) and where the witness' unchallenged evidence had been that Mark was being subjected to threats at the time.
7. It was not being disputed that the necessity requirement specified in the section was satisfied and it was accepted the prosecution case depended on this statement.
8. No notes were taken of any of the conversations with Ms Burke.
9. The onus was on the prosecution to prove all matters.

103. In reply to the appellant's complaint, it was submitted on behalf of the respondent that the trial judge had acted entirely properly and that she had been correct in admitting the statement at issue. Moreover, it was submitted that she had correctly applied the statutory provisions of s. 16 and there was no error of law or fact in her ruling.

Discussion and Decision

104. We agree with counsel for the prosecution. Many of the issues disputed by the appellant relate to findings of pure fact by the trial judge which, in circumstances where there was a basis for them in the evidence, and we are satisfied that there was, are unreviewable. We are an appellate court and our function is one of review, not of re-hearing and deciding matters of fact afresh. The trial judge expressly referred to the evidence on which she was basing key findings, and noted and made observations concerning how she viewed the credibility and reliability of the various witnesses who had testified before her on the *voir dire*, and concerning the weight she was prepared to attribute to various aspects of the evidence. She was best placed to make these assessments.

105. In so far as there is complaint concerning mixed questions of fact and law determined by the trial judge on the admissibility application, we are again satisfied that there was a basis in the evidence to support the facts as found by her. Further, we are satisfied that the trial judge applied the law correctly, and that she had full regard to express statutory requirements of s. 16. She was entitled to come to the view on the evidence before her that the statement was capable of being relied upon. The respondent's submissions seek to elide or slide over important extrinsic evidence, admittedly circumstantial but none the less potentially probative in conjunction with other evidence, tending to support the reliability of the complainant's contested statement, e.g., the handing over by the complainant of her phone for analysis, and the subsequent phone analysis (which showed 39 calls from the appellant's phone to the complainant's phone on the afternoon in question) to which the trial judge made express reference. We are satisfied that the trial properly considered the complainant's explanation for giving evidence different to the contested statement, and we are also satisfied that the trial judge properly considered the overall issue of fairness to the accused in making her determination. That she did so conscientiously and properly is manifest from her ruling in which she notes expressly that she has had regard to that. Moreover, in that context we note

that she was moved to observe that even if the statement were to be admitted, counsel for the appellant would retained the right to cross-examine the complainant before the jury, and that she was taking that into account. We have considered every aspect of the ruling in controversy and can find no error of principle such as might justify intervention on our part

106. Accordingly, the complaint based on the admission of Amanda Burke's statement pursuant to s. 16 of the Act of 2006 is rejected.

The Statement made by Lauren Beresford on the 1st of July 2018

107. The appellant also complains that the trial judge was in error in admitting the statement of Lauren Beresford of the 1st of July 2018 pursuant to s. 16. In that regard, the trial judge ruled as follows:

“JUDGE: “In the context of what I say in relation to the statutory provisions that I've already dealt with this morning, they're incorporated in the decision I'm going to give. Simply, I'm not going through them in great detail because of the fact that they have been dealt with this morning. The prosecution seek to admit into evidence the statement of Ms Beresford where they say her evidence in Court has been materially inconsistent with her statement. Statutory provision has been outlined to the Court previously as well as the case law and the issue of reliability. The defence see her evidence as not necessary given that the prosecution can rely on the evidence of Amanda Burke, and in circumstances where her evidence is that she can't recall saying what was in her statement, that she was drunk and that at its height, her evidence is based on her saying, "something about", and, "I think." The prosecution rely on the evidence of Detective Sergeant Kinneavy to say that he is satisfied that she was not drunk, and that he found her to be coherent in the night in question. Both he and the witness agree that she told him she had two drinks on the night in question.

In considering this application, I have had regard to demeanour of the witness before the Court, I find the evidence of Detective Guard Sergeant Kinneavy persuasive, and the evidence of Ms Beresford to be incoherent, and at times confused. When considering the issue of reliability of the original statement, I shall have regard to the surrounding circumstances, and have regard to the explanation given for the withdrawal of the statement. Having regard to the surrounding circumstances and the account of the events given originally by the witness, in particular the cohesion with that of Amanda Burke, where there's no suggestion of both statements being taken together, or that they had colluded in advance. In fact, the evidence of this witness is that they have not discussed matters prior to giving of the statement. The interest of the accused are protected by Mr Ó Lideadha's right to cross-examine Ms Beresford whereas it is the jury's decision to give what weight it will to her evidence. I will give all appropriate warnings in due course, and I am satisfied that giving my findings, as I have outlined, that the interest of justice are served by the admission of the statement having taken into account any unfairness to the accused. These will be addressed by warnings which I will give in due course should the case arrive at that point.

Having considered all the statutory provisions of which I have to be satisfied, I am satisfied that all the statutory requirements have been met, and having been satisfied of that, I am further satisfied that the original statement of Ms Beresford should be admitted pursuant to section 16(1)(c).”

*Submissions on appeal with respect to the s.16 application
concerning the statement of Lauren Beresford of 1st July 2018*

108. Once again, the case made on appeal was essentially a re-iteration of the case made at first instance and amounted to a contention that the trial judge was incorrect in how she assessed the evidence and in the weight that she attached to various factors.

109. In particular, the following points had been made and emphasised by counsel on behalf of the appellant:

1. It was submitted the evidence was not necessary in circumstances where she goes no further than saying ‘something about’;
2. None of the safeguards were utilised in this case as per the act (Video recording, note taking). Moreover, the evidence confirmed a lot of drink was taken by this witness on the day in question.

110. In reply, counsel for the respondent argued that Ms Beresford’s evidence had been materially inconsistent with her statement of the 1st of July 2018. The evidence established that it was made voluntarily and that it was capable of being relied upon. It was further submitted that admission of the contested statement was necessary as it was corroborative of the evidence of Ms Burke.

Discussion and Decision

111. We re-iterate that complaints with respect to findings of fact are non-justiciable on an appeal such as this, once there was evidence to support them which we are satisfied there was in this case. In so far as determinations involving mixed questions of fact and law are complained about, we again are satisfied that there was an evidential basis for them and that the law was correctly applied. We find no error of principle either in the trial judge’s understanding of, and application of, the relevant statutory provision and the jurisprudence in respect of same.

112. The complaint based on the admission of Amanda Burke’s statement pursuant to s. 16 of the Act of 2006 is also therefore rejected.

Conclusion on s.16 issues

In the circumstances we must dismiss the appeal on grounds (ii) and (iii) respectively.

The ingredients of the offence of threatening to kill or cause serious harm,

113. The complaint under this heading embraces ground (iv) and (v), and is essentially to the effect that the trial judge erred in refusing to direct verdicts of not guilty at the close of the prosecution case on the grounds that the evidence in respect of Counts 1 and 2 was insufficient to ground a conviction in that a jury properly charged could not conclude beyond reasonable doubt that the words used amounted to a threat to kill or cause serious harm. In addition, there is a more generic but related complaint that a direction should also have been granted on the grounds that the evidence generally was insufficient to ground a conviction and that in all the circumstances it would be unfair to allow the case to be considered by a jury.

114. Counsel for the appellant submitted that the evidence of Ms Beresford and Ms Burke did not disclose a threat to kill or cause serious harm. In particular, it was argued that the expression "*He's dead*" was an expression of abuse but it could not be elevated to the level of a threat to kill or cause serious harm. Counsel further asked, in the alternative, for a distinction to be made between Amanda Burke and her son Jordan, on the basis that while the words "*Watch what I'm going to do to you and your son*" were attributed to the appellant, they had to be read in conjunction with the phrase "*Your son, he's dead*". While the primary argument was that none of it constituted a threat, the alternative argument was that if there was indeed a threat it was confined to Jordan, and that in so far as the words "*Watch what I'm going to do to you*" may have been directed to Amanda Burke these words could not on their own amount to a threat to kill or cause serious harm.

115. Counsel for the respondent replied that this was a classic matter for a jury to determine. The trial judge ruled that, taking the prosecution case at its height, she would let the matter go to the jury for their consideration.

Discussion and decision

116. We find ourselves in complete agreement with the submission on behalf of the respondent. Apart from indicating that the appellant disagrees with the trial judge's ruling, the appellant's submission offers nothing at the level of principle to suggest that the approach of the trial judge was wrong or in error. We consider that it was not tenable on any reasonable view of the matter to suggest that the words spoken were incapable of constituting a threat to kill or cause serious harm to Ms Burke and her son. Manifestly they were capable of being interpreted as conveying such a threat. It has never been the law that a threat to kill or cause serious harm has to be explicit in its terms. The offence can also be constituted by an implicit threat. In another case the words at issue might be equivocal rendering it debateable as to whether there was even an implicit threat, but the evidence in this case left no room for doubt in that regard. The issue for determination was whether the words attributed to the appellant did in fact constitute such threats when uttered on the occasion and in the context in question, and whether they were understood as such by the party who received them. These were quintessentially issues of fact to be resolved by a jury. We are satisfied that the trial judge's decision to refuse the direction sought was correct in circumstances.

117. We are further satisfied that there was no other basis on which a direction could justifiably have been granted for insufficiency of evidence.

We therefore dismiss grounds of appeal no's (iv) and (v), respectively.

Complaints about the trial judge's charge

118. The complaints under this heading embrace: (a) an alleged failure to adequately put the defence case in the course of the charge – ground (vi); (b) an alleged failure to instruct the jury properly concerning the ingredients of the charge of threatening to kill or cause serious harm – ground (vii); (c) asserted inadequacy of the instructions given to the jury in the charge, and in response to requisitions raised, concerning how they should approach evidence admitted pursuant to s. 16 of the Act of 2006 – ground (viii); and (d) asserted inadequacy of the instructions given to the jury concerning the presumption of innocence and the fundamental importance of that concept – ground no (ix).

The alleged failure to put the defence case

119. While the complaint is made in terms that there was a failure by the trial judge to put the defence case to the jury, the submissions made on behalf of the appellant do not specify with any particularity in what respect it is alleged the trial judge's remarks in that regard were deficient. More specific complaints were certainly made separately in relation to the adequacy of the charge in relation to how the s. 16 evidence required to be treated, and the defence position on that, and how the judge dealt with it, and also concerning the judge's instructions concerning the ingredients of the offence of threatening to kill or cause serious harm. These will be discussed separately in a later section of this judgment.

120. Perhaps unsurprisingly, the respondent's reply to the appellant's bald assertion is equally bald and is confined to a counter assertion that the trial judge was very fair in her charge and put the defence case to the jury in a balanced manner.

121. As we understand it there were three essential components to the defence case, namely: (i) that the words that were said to amount to the threats to kill or cause serious harm were never uttered by the defendant; but rather, if uttered, were uttered by another person or other persons to Amanda Burke on her partner's phone, (ii) that in any case the words uttered, if indeed they were uttered, did not in any case amount to threats to kill or cause serious

harm, and (iii) that the statements of Amanda Burke and Lauren Beresford of the 1st of July 2018, admitted under s. 16, and attributing such words to the appellant, ought to be rejected as unreliable; those statements having been withdrawn by the witnesses concerned in circumstances that had been laid before the jury, including (*inter alia*) that they had been made following significant alcohol consumption, that they had not been made on oath or video recorded, and that they were later explained as being based on mistaken assumptions and withdrawn on that account, and in the case of Amanda Burke in circumstances where her assumptions had been made while she was under significant extrinsic stresses, and had been subject to separate threats from parties not before the court.

122. We have carefully considered the transcript of the trial judge's charge. As to the generality of the defence case (ignoring for the moment the technical legal issue as to whether the words said to have been uttered could amount in law to a threat to kill or cause serious harm), the jury were told that:

“Mr Walsh denies that he uttered these words and has pleaded not guilty to the charges. You have heard senior counsel, Mr Ó Lideadha, elicit from the witnesses that they both made a mistake as to the identity of the accused, and that the threats being made to the complainant, that is Ms Burke, on that day, of which she made complaint to Detective Garda Brogan when Detective Garda Brogan took her statement, were actually made by others to her on her partner's phone, and that those threats were related to stressors in her family life at that time.”

123. Later in the charge the trial judge added:

“The significance of the evidence of criminality associated with the extended family of Ms Burke is a matter for you to assess. While the majority of events relied upon by the defence all post-date the 1st of July 2018, the defence rely on them, and indeed there were a number of issues regarding the criminal history of Ms Burke's brother

going back to the early 2000s in relation to domestic violence, arson and other matters -- I think damage to an innocent girl's face -- the defence rely on these to support the complainant's evidence in withdrawing her original statement, as they say that they support her evidence that due to family issues and family stressors she was receiving threats on her partner's home that day from others then unknown. These are all matters which you may wish to consider or not, and the other reason that the defence are pointing out to you the issues that post-date the 1st of July 2018, I believe is because they are relying on them in support of the fact that in advance of matters happening after the 1st of July 2018, in support of her withdrawal statement, Ms Burke says she was receiving threats on the 1st of July 2018.

So, the defence are relying on the extended criminality that has been outlined to you in support of the fact that there were threats being made on Darren's phone that day, and the reason they say they should and you should consider those to support Ms Burke's claim is because of the prior criminal history of members of the extended family, and because of the fact that events happened thereafter which they say support the fact that she says she was being threatened by unknown persons on the day in question on Darren's phone. This is all a matter for you to consider."

124. In the quotations above we have not included what the trial judge said specifically in relation to the s. 16 statements, and the points being made by the defence in respect thereto, as we intend dealing separately with that issue momentarily. However, apart from that, and the other technical issue as to the ingredients of the offence alluded to earlier and which we will also deal with separately, we consider that the passages we have quoted are apposite to demonstrate that the essentials of the defence case were unquestionably put in general terms and properly explained to the jury. Moreover, having considered the overall charge, we are

completely satisfied that the defence case was in fact adequately put and that the generic complaint in that respect must be rejected as having no foundation.

*The alleged failure to instruct the jury properly concerning the ingredients
of the charge of threatening to kill or cause serious harm*

125. The trial judge told the jury in that respect:

“Section 5 of the Non-Fatal Offences against the Person Act 1997 states: “A person who without lawful excuse makes to another a threat by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person, shall be guilty of an offence.” It is the prosecution's case that the accused, Mr Walsh, shouted down the phone at the complainant, Ms Burke, the words, “Watch what I am going to do to you.” And that when he allegedly said this to her, he intended her to believe that he would cause her serious harm, or kill her. To be satisfied that the accused committed this offence, you have to be satisfied, beyond a reasonable doubt, that the accused intended the complainant, Ms Burke, to believe what he was saying to her, to believe the threat alleged. So, you must be satisfied that he uttered the words in the first place, and you must be satisfied that he intended her to believe what he was saying he would do and that this was to cause her serious harm or to kill her.

The general principle with regard to establishing intention is that every man is taken to have intended the natural and probable consequences of their actions. Intention means that the accused's purpose was to make Ms Burke believe that he would actually cause her serious harm or kill her. So, what's serious harm? Serious harm is defined in the 1997 Act as: “Injury which creates a substantial risk of death, or which causes serious disfigurement, or substantial loss, or impairment of the mobility

of the body as a whole, or of the function of any particular bodily member or organ." And you also need to be satisfied that the complainant believed the alleged threats. So Count No. 2 again, it's a threat to kill or cause serious harm contrary to section 5 of the Non-Fatal Offences against the Person Act 1997. This relates to the charge where the accused allegedly threatened to kill or cause serious harm to the complainant's son, Jordan Burke. And the statement of the offence is that: "Kevin Walsh did on the first day of July 2018 at 304 Tallaght Cross, Tallaght, Dublin 24 in the County of the City of Dublin, without lawful excuse, make to Amanda Burke a threat intending the said Amanda Burke to believe it would be carried out to kill or cause serious harm to Jordan Burke.

Section 5 of the Non-Fatal Offences against the Person Act 1997 states: "A person who without lawful excuse, makes to another person a threat by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person shall be guilty of an offence. It is the prosecution case that the accused, Mr Walsh, said to the complainant, Ms Burke, "Watch what I am going to do to you and your son. I know where Jordan works. He is dead." And that when he said this to her, he intended her to believe that he would actually kill or cause serious harm to her son, Jordan Burke. It is the prosecution's case that not only did he say the words, but that he also intended for Ms Burke to believe that he would do what he said. I have already referred you to the general principle with regard to establishing intention as being, "That every man is taken to have intended the natural and probable consequences of their actions." Intention means that the accused's purpose was to make Ms Burke believe that he would actually kill her son or cause him serious harm. So, what you have to be satisfied, members of the jury, to convict the accused

in relation to count No. 2, is that the accused uttered the words alleged, that he intended Ms Burke to believe that he would actually kill or cause serious harm to her son, that he intended Ms Burke to believe that he intended her to believe what he was saying, that he intended her to believe the threat -- so, I'm not suggesting that he intended to actually carry it out, what the charge is is that he intended her to believe that he would do it, and that she believed it, okay? And I've already referred you to Ms Burke's statement where she went on to state that she feared for the safety of herself and her son and she says that she thought he would 100% carry out those threats. So, if you accept her evidence you have evidence of her belief that she believed that the threats would be carried out also."

126. Following this charge the defence raised a requisition in the following terms:

"Well, Judge, on a distinct matter, I'm asking you to give a specific direction to the jury in terms of the actual offence of the threat to kill, that the prosecution is required to prove not only that the actual words as alleged were spoken, but also that the meaning of the words amounted to a threat to kill. And this is important in respect of both of the threat to kill charges. The way you've expressed it is that the prosecution has to prove that the words were spoken, and that there was an intention that Kevin Walsh intended the recipient of the threat to believe what was said. But it should, in my respectful submission, be an explicit direction to the jury. There is a question to be considered as to whether the actual words used amount to a threat to kill or cause serious injury."

The trial judge refused to revisit the matter with the jury, giving as her reason that *"that's a matter for the jury"*. We are satisfied that she was correct to refuse the requisition. We have already expressed the view that it was not tenable on any reasonable view of the evidence in this case to suggest that the words spoken could not be capable of constituting of constituting

a threat to kill or cause serious harm to Ms Burke and her son. Accordingly, what required to be determined was not whether the words attributed by the prosecution to the appellant were capable in principle of constituting a threat to kill or cause serious harm to Ms Burke and her son, but rather whether, if they were being correctly attributed to the appellant, they in fact constituted such a threat in the circumstances and context in which they were uttered; and whether such a threat, if made, was made intending that Amanda Burke would believe that it would be carried out. The trial judge was right that these were issues of fact for the jury to determine. In our judgment there is nothing to suggest that the instructions to the jury as to the ingredients of the offence, which we regard as having been a model of clarity, were deficient. In the circumstances, we reject this complaint.

*The charge, and response to requisitions raised, as to the evidence
admitted pursuant to s. 16 of the Act of 2006.*

127. The appellant complains that the trial judge erred in law and in fact in failing to give adequate directions to the jury regarding essential matters relating to the statements admitted under s. 16 of the Act of 2006 and the assessment of the reliability of same including but not limited to the fact that the statements were not video recorded; and in refusing to recharge the jury as to whether the accuracy of/reliability of the content of the said statements had been challenged in the trial.

128. The charge with respect to the s. 16 evidence was lengthy and detailed. Moreover, it dealt separately, but in a similar way, with the respective statements of Amanda Burke and Lauren Beresford.

129. In summary, the trial judge set out the evidence given by both witnesses in relation to why they now said the original statements were not true; in particular the stressors in Ms Burke's life and the fact that both stated that they had been drinking prior to making their statements; she told the jury that they alone could estimate the weight to be attached to the

original statements and gave examples of some factors that could be taken into account when estimating weight such as the timing of the statement, the statutory declaration, the fact that the statement was signed, whether the statement was made under pressure from interviewers, whether any explanation had been given for the inconsistency, the evidence of Detective Garda Brogan, and the evidence of Detective Sergeant Kinneavy. She said that the original statement was not in the same category as evidence which the jury had heard in the witness box. She said that the jury might find that they could not give any credence to a witness who gives such inconsistent evidence and if that was the case then the accused must be acquitted. The trial judge then turned to the evidence of Ms Beresford. She summarised the oral evidence of the witness and her explanations for saying that the original statement was not correct. She set out a list of factors that the jury might wish to take into account in assessing the weight to be attached to her statement: the timing of the statement; the statutory declaration; whether the statement was signed; whether the statement was made under pressure from interviewers; the explanation given for the inconsistency; and the evidence of Detective Sergeant Kinneavy. She added:

“In dealing with a statement such as this read out in court and which is more damaging to the accused than evidence the witness gives in the witness box, members of the jury, I am telling you care is needed. The statement is not in the same category as sworn evidence before you, but as it has been admitted into evidence by the Court pursuant to section 16, it is evidence which you will consider in the same manner as the evidence you have heard in the witness box. As with all evidence it is for you to decide its importance, or otherwise. So, members of the jury, you should consider whether the witness had any incentive to conceal or misrepresent the facts she alleged originally. You should consider also any specific factors that may call the reliability of the original statement into question.”

130. The trial judge then listed factors that might call the reliability of the original statement into question: referring to the fact that the witness said she was drinking all day, the evidence of Detective Sergeant Kinneavy, and the reason the witness had given for changing her evidence. The trial judge continued:

“If you find that there are significant differences between the prior statement of Ms Beresford and the evidence she gave in court, and you find that no acceptable explanation has been provided for its inconsistency, it may cause you to be hesitant and to be careful about the witness's accuracy, honesty, reliability and credibility, generally. Members of the jury, you must exercise care and caution and you must consider whether you can give any credence to a witness who gives such inconsistent evidence. However, having considered all the circumstances surrounding the making of the original statement, where you are satisfied that you can give her credence to the required standard, you then go on to consider what part or parts of that witness evidence you can accept. If you cannot believe the totality of the account that the witness has given, either in her original statement, her withdrawal statement or the statement of her oral evidence, or her oral evidence in court, as with all witnesses you disregard that which you do not accept and you proceed to consider the evidence which you do accept and believe to the required standard of beyond reasonable doubt.

So, to explain to you, members of the jury, why I urge you to take care is because a hearsay statement, which is a statement out of court, is not normally admitted in evidence and it is an exception where admitted in evidence under section 16 of the Criminal Justice Act 2006. The Court's longstanding preferences, I have said to you, is to have the guilt or the innocence of an accused determined by direct sworn

evidence, and that is because it is tested by safeguards which exist, for example, cross-examination. So a hearsay statement of evidence limits the cross-examination of the witness, and may limit the testing of the reliability of the witness, the nature of the witness's withdrawal limits the effectiveness of cross-examination on the previous statement. It's difficult to carry out.

So, members of the jury, I must alert you to: 1) the differences between sworn oral evidence and the witness's statement made out of court, which was made without judicial control, or it wasn't sworn, and a court prefers to have oral sworn evidence before it to determine the guilt or the innocence of the accused, but as I have said to you while I am cautioning you about that, having considered it the Court has admitted it and you having considered it, if you are satisfied of it, you are to treat it as -- sorry, because I have admitted it, you are to treat it and assess it like all the other evidence you have before you. And you can accept its contents or reject its contents, or you can accept some of it, or all of it, or reject some of it, or all of it. Secondly, I must alert you to the existence of the oral statement and to sworn evidence which denies the contents of the oral statement, and which is materially inconsistent with the oral statement. I must alert you to the difficulties of reliability presented by such conflict involving the same witness, and to the potential dangers of relying on anything which that person may have said, either then or on oath before you, the jury, and whether you can rely on that evidence. I stress to you, members of the jury, it remains a matter exclusively for you to determine what weight or value, if any, you place on the witnesses' -- and I mean both witnesses' -- overall evidence, whether given outside trial or before you in court, because once I rule that it is admitted it then goes before you for your consideration, and for you to assess it and for you to decide on it.

Nonetheless, the original statement is to be treated like any other admissible evidence. It can be accepted as the truth of what it relates to, it can be accepted in part or in full, or it can be rejected in part, or it can be rejected completely. In assessing the statement, the jury should have regard to all the circumstances in which it was made and to the totality of the evidence that has been placed before you.”

131. The trial judge was requisitioned in several respects on this aspect of her charge. It was urged that it was essential that the jury receive an emphatic direction to the effect that there are particular difficulties in how the evidence admitted under section 16 can be properly assessed. Defence counsel sought to convey his belief that the charge had not been strong enough in that respect. The judge was also asked to direct the jury that, because a s. 16 statement is given in circumstances which cannot be independently tested, this is the fundamental problem with it. Counsel then continued:

“Now, unfortunately, Judge, at other parts in your charge, you put particular emphasis on a proposition which I have a particular concern about, and that is that, Judge, you have repeatedly put to the jury the proposition that these two witnesses have not contested the accuracy of what was written in the statements. But they have both said in evidence that they had concerns about the reliability of what was said, and words to the effect that they couldn't really remember what was said.”

132. After some further submissions defence counsel returned to this theme, stating that,

“I then ask you, as a distinct matter, to re-charge the jury on the question of this issue about whether or not the witnesses have queried the words that were spoken. The defence has queried the reliability of the process, and that is something which must be put to the jury as a matter of fairness. The defence has challenged it, and one of the important factors that are being put forward is that the statements were not taken on video, and they weren't confirmed on video.”

133. Defence counsel further asked the trial judge to emphasise to the jury that in the ordinary course, *“evidence is witnessed by the jury and is subject to immediate cross-examination. Whereas in the case of section 16, we actually do not know about demeanour and we have to rely on what a particular garda has said about demeanour, and about the exact words that were spoken, and the manner in which they were spoken.”*

134. The trial judge did not agree with all aspects of the requisitions made, but did agree to re-charge the jury on two matters, stating:

“I'm satisfied in relation to the other matters, but what I will readdress the jury on is the part where you want me to tell them that the reasons why the Court says that evidence should be given in court in terms of the consideration of it, and that you would prefer that I say to them that the delivery of the evidence is witnessed by all and subject to cross-examination. And that where you were relying on the evidence of the garda regarding what they said and their demeanour in giving those statements, and that the defence has questioned the reliability of the process of the withdrawing of the statements made by the two individuals. Okay, so, I'm satisfied I'll readdress them in relation to these two matters.

135. The trial judge then further addressed the jury in the following terms:

“... section 16 statements, which is (sic) the original statements in this case, is (sic) they're unusual, and why they're admitted by the Court, and why I have urged you to take care in your assessment of them is because, as I said to you, it's the Court's preference that the guilt or the innocence of an accused is dealt with by viva voce evidence, which is oral evidence in the witness box, and the reason that is so, is because their evidence can be tested before you by virtue of cross examination, and all the things that I have urged upon you in relation to assessing witnesses. So, if somebody goes into the witness box, makes a statement, you have the opportunity to

observe their demeanour, assess their credibility by the manner in which they give their evidence, as well as the words that they use in giving their evidence. So, where a statement, an out of Court statement is admitted, and is given to you, you don't have the opportunity to hear that evidence being given, in the sense of the person who gave it out of Court. A statement has been read out to you by Ms Leech, and you have heard Ms Leech reading out the statement that was given, but you have not had the opportunity to see the person giving that evidence, and that person who gave the evidence being cross examined in the witness box. And the whole point about that is that it therefore cannot be independently tested, that is the reason why we prefer to have evidence given in the witness box, and it can be independently tested through cross examination, but in this case such a statement can't be.

So, as I've said to you, you would have had the opportunity to watch the delivery of the evidence, and what you have to do in the absence of that individual giving that evidence under oath, what you are left with is the evidence of the gardaí who took the statement, and the evidence of the garda who says what he, or she, observed of the person giving the statement, and you were left with the evidence of the gardaí speaking about the demeanour of the individual giving the statement, and what was said, okay? So, those are the matters why the Courts prefer for evidence to be tested before a jury in Court, and that is why I am telling you to be careful, but I have admitted it to you having followed rules that govern their admission, I have admitted it to you, and having admitted it to you it goes before you, me urging that care upon you in relation to it, but you now having the opportunity to assess it, as you assess all the other pieces of evidence before you. And I should also bring to your attention the fact that the defence in this case have questioned and queried the process surrounding

the withdrawal of the statements, okay? So, those are the two matters that I wanted to bring to your attention. Just make sure that there's no other issue. And the reliability of the process related to the issues of drink and stressors, and I think I already addressed you in relation to those, and how you should consider those in the context of the overall circumstances of the case.”

136. Counsel for the appellant's point in this appeal is that his requisitions were not adequately dealt with and the combined charge and re-charge as to how the jury should approach their assessment of the s. 16 statements was inadequate and deficient.

137. Counsel for the respondent has in turn submitted that the trial judge fully engaged during her charge with the evidence given by both witnesses and did highlight certain matters that could be regarded as affecting the credibility and reliability of the evidence given by the complainant. It is submitted that the credibility and reliability of a complainant's evidence are matters solely within the domain of the jury, as finders of fact, to assess and this was emphasised to them. The respondent's position was therefore that the trial judge had dealt with the issue in a wholly appropriate fashion.

138. We have no hesitation in rejecting the appellant's complaints as not being made out. The trial judge's instructions to the jury on how to approach the s. 16 statements were correct in our judgment and she performed that task conscientiously and meticulously. We consider her charge to have been impeccable and a model of how to properly address this difficult topic. It was thorough, clear and legally correct in all respects. She was not required to give the jury any particular warning arising from the non-video recording of the taking of the statements, or from the failure by the Gardai to take notes other than recording the actual statement in writing. It was unnecessary to do so in the circumstances of the case. The statements had been admitted on the basis that, arising from the circumstances in which they were made, there was other evidence, sufficient to enable a tribunal of fact to be satisfied as

to their reliability. The trial judge reviewed that evidence in the course of her charge. It was ultimately a matter for the jury as to whether they were in fact satisfied as to the reliability of the controversial statements. We are satisfied that the trial judge's charge properly equipped them to make that decision.

139. We uphold the trial judge's decision not to re-charge the jury on those matters on which she felt it was unnecessary. The judge was scrupulously fair in her approach, and this finds reflection in her decision to accede to the two requisitions made by counsel that were reasonable in the circumstances. We are satisfied that the recharge on those issues was sufficient to address the concerns prompting those requisitions. There was in our view no error in the trial judge's approach, and we neither find evidence of any deficiency in her instructions to the jury nor evidence of any misdirection.

In the circumstances we also dismiss ground of appeal no (viii).

Alleged inadequacy of the charge concerning the presumption of innocence.

140. In regard to the presumption of innocence, counsel for the appellant acknowledged in raising a requisition following the charge that the trial judge did instruct the jury as to that presumption. His complaint, however, was that she did not, in his view, sufficiently emphasise its fundamental importance. We reject that submission. Having considered the transcript, it is clear to us that the instructions with respect to the presumption of innocence were orthodox and thorough. As counsel for the respondent points out in his written submissions, the trial judge's explanation of the principle was a lengthy one, covering three pages of the transcript and was illustrated with a number of examples. We find no error in how she instructed the jury on the presumption of innocence, and therefore reject ground of appeal no (ix).

Other complaints

141. There are two remaining grounds of appeal, namely grounds (i) and (x), respectively, which are generic in form and which are in fact repetitive in substance. It is clear that they were not intended to represent standalone grounds but rather were to be considered in conjunction with the other more specific complaints made in the Notice of Appeal. However, for completeness they should be addressed. Both allege that the trial was unsatisfactory and that the verdicts are unsafe. We are satisfied following our detailed consideration of the case, that neither complaint is made out. Accordingly, we also reject grounds (i) and (x) respectively.

Conclusion

142. In circumstances where we have not seen fit to uphold any of the appellant's grounds of appeal, the appeal against his conviction is dismissed.