



THE COURT OF APPEAL

Court of Appeal Record No. [227/2020]

**The President
Edwards J
McCarthy J**

BETWEEN/

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

PROSECUTOR/RESPONDENT

AND

WILLIAM HARTY

ACCUSED/APPELLANT

JUDGMENT of the Court delivered on the 12th day of May 2022 by McCarthy J

1. This is an appeal against conviction. William Harty, the appellant herein, was on the 14th of October 2020 at Wexford Circuit Criminal Court, convicted of one count of criminal damage contrary to section 2(1) of the Criminal Damage Act 1991 and one count of endangerment contrary to section 13 of the Non-Fatal Offences Against the Person Act 1997, on Bill No: KKDP0018/2020. These charges arose in the prosecution's contention as a result of damage caused to the complainant's home when the appellant drove a car into a wall thereof. On the 23rd of October 2020, the appellant was sentenced to an effective custodial sentence of four years.
2. We consider it necessary to deal with evidence with a degree of detail. In the early hours of the 22nd of January 2020, the appellant, then aged 29, was observed at approximately 1:30am by a Detective Garda Liam Murphy (who was in an unmarked patrol car) at his wife's home in Killaloe, Callan, Co. Kilkenny. Detective Murphy noticed the lights of a vehicle parked adjacent to the home in a yard and pointing towards the main road. He pulled in at the open front gate of the premises and thereafter the vehicle was driven from the back of the yard but was stopped abruptly in front of his unmarked patrol car. Detective Murphy said *that "a male exited the vehicle who was known to me as William Harty of Killaloe and Mr Harty was drinking bottles of beer and throwing them on the ground"*. Detective Garda Murphy took note of the registration of the vehicle which was a silver Peugeot estate and after speaking with the appellant for a short period he left the scene. The complainant, the appellant's wife Josephine Harty, was at home with her four children aged eight, three, two and nine months. She made a 999 call at 2:14am seeking

emergency services, in particular the Gardaí, and a transcript of the call was read into evidence (in a slightly redacted form – the redaction is not relevant for present purposes). It is plain from the tenor of the call that it was made after the event giving rise to the charges had ended. The contents of the call is as follows: -

"ECAS: "Emergency services. Which service?"

Josephine Harty replies: "Hello."

ECAS: "Gardaí or ambulance?"

Josephine Harty replies: "Hello. Can I get Kilkenny Gardaí?"

ECAS: "Garda from Kilkenny?"

Josephine Harty: "Yes."

ECAS: "Stay on the line please caller. Connecting you now."

Josephine Harty replies: "Yeah."

Josephine Harty states: "Hello."

ECAS: "ECAS will connecting 0852005988."

Josephine Harty states: "Hello, Gardaí, Hello, Gardaí."

Josephine Harty: "Hello. Can I get Kilkenny Gardaí? William Harty, I was his partner and I recently separated from him and he is after driving his car into the front of my house."

Gardaí: "Okay. What's your address there?"

Josephine Harty: "Killaloe, Kilmanagh."

Gardaí: "Killaloe, spell that for me?"

Josephine Harty: "Killaloe, Kilmanagh, ah sure I have the full wall of the front of my house was knocked down, like my house is thrashed."

Gardaí: "Do you know your Eircode by any chance?"

Josephine Harty: "Ah no I haven't a clue what it is."

Gardaí: "You are not sure what your Eircode is?"

Josephine Harty: "No."

Gardaí: "What's your own name?"

Josephine Harty replies: "Josephine Harty."

Gardaí: "Okay, Josephine. No problem. Look we'll get the lads out there, all right."

Josephine Harty: "All right. Make sure you get them out because we'll be on our own inside and all in the house, like, I can't even put my kids to bed like."

Gardaí: "Yeah. No problem."

Josephine Harty: "Okay. Thank you. He is gone off driving a Peugeot car, I think it's a 04 or 05."

Gardaí: "Okay. What colour is it?"

Josephine Harty: "It's silver."

Gardaí: "04/05 Peugeot, perfect. Okay. No problem. Someone will be out there."

Josephine Harty: "Can you send someone out as fast as possible? Look he is after driving into the front of the house and he drove into the side of the house there as well when my kids were in bed."

Gardaí: "We will of course. No problem. All right."

Josephine Harty: "Okay. Thank you."

Gardaí: "Thank you, bye bye."

Josephine Harty: "Bye bye."."

3. Ms Harty subsequently made a statement to a Garda Anne Marie O'Brien outside her sister's house in the small hours of the morning in a Garda car describing what had occurred and it was as follows: -

"... earlier this morning on the 22/1/2020 my ex-partner, Willie Harty, called to my house at Killaloe, Callan. The time was about 2 am. He was looking to get into the house and I wouldn't let him in." Bear with me for a second. And I wouldn't let him in. He started calling me a whore and a prostitute. He was drunk. He got into his car, 04/05 Peugeot 7-seater silver and he started driving the car at the front door of the house. He hit it and the wall of the house by the front door. Part of it came down. He was angry because I wouldn't let him in. He drove at the house and hit it twice. He hit the corner of the house as well and he drove at the shed and he knocked part of it, part of the shed as well. During this I was in the house with my four children, Paddy eight, Johnny nine months, William three and Josie two. I was very scared when this was happening. The house is owned by the council and I am the only one paying rent to the council for the house. He did not have permission to damage my house and since Willie was released from prison two weeks ago he is living in a caravan in the field right beside my house."

4. Ms Harty made a second statement later that day retracting her original statement and this statement reads as follows: -

"I understand the declaration. I was at home at my house. I heard something crashing against the front door of my house. I got out of my bed. I rang my husband and told him that something had crashed into the front of my house. I didn't know where William was. He made a laugh out of me on the phone. He said he didn't believe me. He then put a woman on the phone. I didn't know who she was or she didn't say who she was but this girl told me that she was going out with William. William came back on the phone and I told him that he could keep his prostitute and then I hung up. I called the guards. I could not see out the window because of the damage to the house. The front door was damaged and I was afraid to try and get out in case the house fell down. When the guards came they helped me get the children out of the house and also myself. The guards brought me into town and I am temporarily living at McDonagh junction with my mother. Myself or my children were not injured. I did not hear the car or person outside or I didn't hear anybody outside the house. I made a statement to a female guard early this morning. I told her that my husband had caused the damage to my house with a car. I now wish to say that this version is untrue and that my husband did not cause the damage. The reason that I originally blamed William for the incident is because I was annoyed that he was cheating on me and then put the woman on the phone to me. I now know that I was wrong to have blamed William and I apologise for doing this."

5. At trial, Ms Harty refused to answer questions and said she "was not giving evidence". She asserted that she had lied in the 999 call and in her first (or original statement) to the Gardaí (made in the Garda car) and that she had had a number of drinks that evening. The contents of the 999 call was not yet before the jury. As a result, an application was made by the DPP to have Ms Harty declared a hostile witness and to admit Ms Harty's first statement to the Gardaí as evidence pursuant to section 16 of the Criminal Justice Act 2006. The judge ruled in favour of both these applications.
6. Garda O'Brien had arrived on the scene soon after the 999 call. She estimated that the call was received at 2am, but that was an estimate only. In fact, garda records made contemporaneously show the call as having been received at 2:14am. It then took Garda O'Brien approximately ten to fifteen minutes to journey to the locus in *quo*. She described the damage which she saw upon her arrival as: -

"one of the walls of the house where the front door was it was [sic] extensively damaged, part of it was knocked. The door frame and the door itself was at a slant. I could see straight into the hallway of the house. I recall there was a light on in the hall".

Garda O'Brien assisted Ms Harty in passing her children out of a window of the home as she felt it was too unsafe to allow the children go through the front door as further rubble could fall. Garda O'Brien also took four photographs of the damage to the front of the

house which were provided to the jury and Ms Harty and the children were taken to her sister's home as there was concern the appellant would return. Garda O'Brien saw a burnt-out car in the yard, and it was still smouldering.

7. The burnt-out car was also seen there by a Garda Mark Bolger, scenes of crime examiner, when he attended at the scene later on the 22nd of January 2020. The scene was photographed but had not been preserved from the time when the Gardaí left the premises in the small hours and the photographs taken by Garda Bolger showed markedly more extensive damage to the premises than that seen on those taken by Garda O'Brien. He found as can be seen from a photograph, a bumper of a Peugeot car adjacent to the damaged wall. One Alan Guildea, a chartered structural engineer acting for Kilkenny County Council who visited the property on the 26th of February 2020, described extensive structural damage. He referred to an album of photographs, which, from the context, must have been those taken by Garda Bolger. The damage could not be seen by him from the outside as a hoarding had been erected but he was in a position to assess the damage from the inside. In essence, he said that "*the structure was completely compromised*". The damage to the house was valued at €53,000 and it cost €80,000 in total to make the house habitable again. A sum of €34,900 was received from the insurance company.

Grounds of Appeal

8. The appellant raises the following grounds of appeal: -

- i. That the learned trial judge erred in law and in fact in admitting the 999 call;*
- ii. That the learned trial judge erred in law and in fact in categorising the 999 call as Real Evidence;*
- iii. That the learned trial judge erred in law and in fact in declaring Josephine Harty a hostile witness;*
- iv. That the learned trial judge erred in law and in fact in admitting the first witness statement of Josephine Harty pursuant to Section 16 of the Criminal Justice Act, 2006;*
- v. That the learned trial judge erred in law and in fact in admitting the evidence of Garda Liam Murphy;*
- vi. That the learned trial judge erred in law and in fact in admitting photographs taken by Garda Mark Bolger;*
- vii. That the learned trial judge erred in law and in fact in admitting the evidence of Alan Guildea, Chartered Structural Engineer;*
- viii. That the learned trial judge erred in law and in fact in failing to direct an acquittal on the Endangerment Count, at the close of the Prosecution case.*

Grounds 1 and 2

i. That the learned trial judge erred in law and in fact in admitting the 999 call

ii. That the learned trial judge erred in law and in fact in categorising the 999 call as Real Evidence

9. The issue of admissibility of the contents of the 999 call – and the prosecution opted to put a transcript thereof before the jury rather than the recording itself – was dealt with on the *voir dire* before the case was opened to the jury. It was submitted that the contents were not admissible since it was hearsay which did not fall into any recognised exception to the rule against admissibility of such evidence and also that it was inadmissible by virtue of the rule against narrative. At the trial, in support of the proposition that its contents were hearsay, it was *inter alia* submitted that in principle the transcript of the contents of the tape was the product of human intervention and hence not real evidence – as we understand it by this counsel meant the transcribed product was the work of a human transcriber. The transcript was not produced in some automated process. While this might have been true, we are not sure that it is of importance in the context of the legal issues being raised i.e., that the record which the prosecution sought to introduce (whether it was of voices recorded electronically, or a transcription of what was said by voices recorded electronically) ought not to have been admitted because the said record was hearsay and/or because it offended the rule against narrative. While there might, if strict proof was being insisted upon, have been an additional requirement in the case of a transcript of a voice recording for the prosecution to prove due execution and content of the transcript document in circumstances where the transcript was not generated by an automated process (in which case there would be a need to adduce evidence from the actual transcriber), we do not understand the defence to have been insisting on proof of due execution and content in this case. While there was some reference to the fact that the process was not automated, the gravamen of the defence objection had nothing to do with a failure to establish due execution and content, but rather it was firmly to the effect that the evidence, in whatever form it was being adduced, was inadmissible as hearsay and/or as offending the rule against narrative.
10. The rule against hearsay, and the rule against narrative, both potentially applied to the "999 call" regardless of the form of the record, i.e., whether it was an electronic recording of voices, or a transcript of such a recording. We need to look at each in turn.
11. In the case of the rule against hearsay, the rule would not be offended unless the record (in whatever form it might be in) was being adduced as "*testimonial evidence*", i.e., as proof of the truth of its contents. It could also be adduced simply as "*original evidence*", i.e., with the intention of proving that something was said, but not necessarily that what was said was in fact true. In that eventuality it would not be hearsay and there could be no objection to the admissibility of the record on grounds of hearsay. It could also be adduced as "*real evidence*", if it were the situation that some feature of the record spoke for itself. In the case of a voice recording a matter such as the speakers' accents, or timbre of voice, or the cadence with which a statement was made, or perhaps the existence of extraneous sounds on the recording, might be of significance or evidential in

and of themselves. In the case of a document, such as a transcript, there might be something about the physical document itself that could potentially be probative e.g., a stain or a marking of significance on the paper. Again, a record introduced as real evidence would not be hearsay and there could be no objection to the admissibility of it on grounds of hearsay. Accordingly, the critical consideration is the purpose for which the out of court statement consisting of the 999 call was sought to be introduced, not the form of the record.

12. In so far as the rule against narrative is concerned, this is otherwise known as the rule against self-corroboration. In this case, however, it is hard to see how the rule could be breached by the admission of the record of the 999 call. The relevant witness, Ms Harty, was not seeking to self-corroborate by pointing to the contents of the 999 record as supporting her testimony. On the contrary, by the time of the trial she had resiled from what she had reported during the 999 call and was saying that she had in fact lied in what she had said to the Gardaí during the 999 call. As we point out later in this judgment, it was a prior statement showing consistency with Ms Harty's first statement to the Gardaí – that received pursuant to section 16(1) – but not otherwise and was admissible as such as an exception to the rule against narrative.
13. At trial the respondent's basic proposition was that the recording was admissible. The voice recording was real evidence and relevant *inter alia*: "*...in terms of the manner in which Ms Harty made the call, the fact that she made the call, the response of the Gardaí as to what their state of mind was what action they took on foot of that and is also relevant, judge, the context of what will be in to speak to be, as I said, section 16 are hostile witness application*"; it was submitted that the evidence "*...provides the jury with a looking glass into the time where the call was made... [and was] ... highly probative in that the jury can hear the voice of Ms Harty, they can hear the background of the house the time and they can hear- as I said, it gives them the best possible view of the state of mind at the time when she made that call. So, as an item of real evidence, judge, it is admissible*". Moreover, the transcript, if that were to be admitted (and this is what was ultimately opted for) represented original evidence in that it established that certain things were said (whether or not they might be true).
14. The respondent refutes the appellant's submissions that the admission of the recording (or, in the event, a transcript) offended the rules against hearsay and narrative; certainly, it was never explicitly submitted at trial that the contents of the recording was being relied upon to prove that what Ms Harty claimed had happened in the course of the call had in fact happened and was true; and the judge expressly told the jury that: -

"Now, the next thing I want to deal with is you heard the evidence of the 999 call being read out and you heard that the accused Ms Harty said that the accused was driving the car, you heard that on the 999 call and you heard her saying that what she said on the 999 call was a lie and what she said in her statement was a lie. Now, in relation to the 999 call, what she says in the 999 call, that is not evidence or proof that the offence was committed by the accused. So, what she

says in the 999 call does not prove that the accused was driving the car. You cannot take or rely on the 999 call as evidence of the truth of the fact asserted in it, in other words you cannot take it as evidence that the accused was driving. The reason for that is when she says on the 999 call that the accused was driving the car, that is hearsay. So, the 999 call is not proof that the accused was driving the car. The issue in relation to whether or not he was the driver of the car, the evidence the prosecution rely on in relation to that is the first statement admitted under the Criminal Justice Act and I have explained to you how you deal with that."

15. The appellant's contention is that it was, in fact, put in for this purpose. The fact that the actual "physical" recording or item itself may be real evidence properly so called does not *per se* render what is said admissible. If that were so the law would be making a distinction between reported speech which happened to have been recorded on tape (to put the matter shortly) and speech not so recorded – the former being admissible regardless of the rules whether against hearsay or narrative or otherwise and the latter being inadmissible. This cannot be so; the fact that the speech in question happens to have been recorded, and the form of recording, is irrelevant to the application of the rules against hearsay or narrative.

16. As to whether or not it was hearsay to decide this one looks at what was said. The trial judge held that the evidence was admissible and could be categorised as "real evidence" but this does not appear to be the core reason for his decision; he outlined his conclusion as follows: -

"...the central issue as far as I can see is one of hearsay and that's dealt with in McGrath's Second Edition textbook at page 282, which indicates that, "The mere fact that a statement is made out of court does not render it inadmissible if it is tendered not to prove the truth of its contents but the fact that it was made" and it refers to Cullen v. Clarke [1963] I.R. 368, 378. It goes on at paragraph 5-20 to refer to Ratten v. R [1972] AC 378: "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action of by a human being. If the speaking of the words is a relevant fact a witness may give evidence that they were spoken. A question of hearsay only arises where the words spoken are relied on testimonially as establishing some facts narrated by the words. And I should add again in this particular case the person who the prosecution say spoke the words is a witness and will be available for cross examination. At paragraph 5-21 the textbook refers again to Cullen v. Clarke and the English case of R v. Baltzer: "Essentially, it is not the form of the statement that gives it its hearsay or non hearsay characteristics but the use to which it is put" and it goes on to deal with it in more detail. At the top of page 283 it refers to Wigmore who stated: "The prohibition of the hearsay rule then does not apply to all words or utterances merely as such. If this fundamental principle is clearly realised its application is a comparatively simple matter. The hearsay rule excludes extra judicial utterances only when offered for special purposes, namely

as assertions to evidence the truth of the matter asserted." Now, in this particular case the statement is recorded in the manner set out. The person who is supposed to have made it is available as a witness. I'm satisfied that this evidence falls into the category of a contemporaneous report of an allegation made by Josephine Harty to the Gardaí. It does not of itself constitute direct proof of its contents and in due course I will direct the jury as to the weight they are to attach to it. So, I'm therefore satisfied that it is relevant and admissible. It is more probative than prejudicial and I will allow it."

17. As a matter of principle, one could not object to the receipt of the record if the state of mind of the complainant was relevant (it wasn't), was a recording of the *res gestae*, for example the event could be heard on the recording because it was ongoing (it wasn't). In principle it was admissible to prove the circumstances in which and the reasons why the Gardaí went to the scene; reported speech, say what was said to the emergency services in a call like the present one, can be the subject of an application to exclude otherwise admissible evidence by virtue of the discretionary power of the judge on the basis that it is more prejudicial than probative.
18. We have no doubt but that the judge was right in finding that the evidence was admissible. It was a prior statement showing consistency with Ms Harty's first statement to the Gardaí – that received pursuant to section 16(1) – but not otherwise; this is an exception to the rule against narrative. This in fact was the only basis upon which it was used and indeed perfectly properly, the witness was cross-examined out of it. The judge had not alluded to the aspect that it was admissible as a prior consistent statement at that point when so ruling even though the prosecutor had referred to the fact that an issue under section 16 might arise. He was right not to do so at that juncture and having regard to the way in which the argument progressed before him. In the heel of the hunt, the contents of the telephone call record were dealt with in that way and correctly so.

Grounds 3 and 4

iii. That the learned trial judge erred in law and in fact in declaring Josephine Harty a hostile witness;

iv. That the learned trial judge erred in law and in fact in admitting the first witness statement of Josephine Harty pursuant to Section 16 of the Criminal Justice Act, 2006;

19. These two issues are rightly dealt with together as they overlap. We have set out above what was said by Ms Harty when initially called. The judge ruled on the hostility issue as follows: -

"I am... observing and taking into account her demeanour which I have had the opportunity to view first hand, it's fair to say she is not a person who is a shrinking violet in any way and in layman's terms it's quite fair to say that she is quite hostile in the witness box. Now, is she hostile in the legal sense? I am taking into account her refusal to answer certain questions, her demeanour and I am taking into account the matters that I have referred to in her evidence. In relation to senior counsel's submission that the second statement is consistent with her evidence and therefore that I should only rely on the second statement or that the second

statement constitutes sufficient evidence, I am satisfied the prosecution case is that they are relying on the original statement. So, I am satisfied for the purposes of this application that she is a hostile witness and can be treated in that way."

20. In her submissions, counsel for the prosecution quotes from McGrath on Evidence, 2nd Edition, (para 3-80) as to the criteria for a finding of hostility: -

"Among the matters that may be taken into account by the trial judge in deciding whether to classify a witness as hostile are the witnesses refusal to answer questions, the exercise of an obvious disregard on the part of the witness of his or her duty to the proper administration of justice and the extent to which any prior statement made by him or her is inconsistent with his or her testimony..."

We think that on any view of what was said by her, there was a proper basis on the evidence, and having regard to those criteria, for the judge's conclusion and indeed it is scarcely possible that a judge would have reached a different view.

21. We turn then to the receipt of a statement under section 16 of the 2006 Act. It is submitted that the judge failed to take into account and give appropriate weight to the fact that the witness had in the immediate aftermath of giving her first statement to the guards given a second statement to the guards (both of which were included in the book of evidence having been served pursuant to the Criminal Procedure Act 1967 as amended) explaining that she had told lies in her first statement and why she had told those lies. The appellant further contends that the trial judge failed to have regard to the circumstance in which the statement was made, those being that it was made in the early hours of a January morning, in the rear of a garda car following a fairly traumatic incident without being video recorded. The appellant also relies on Ms Harty's statement that she was intoxicated when she made the first statement, had fabricated the statement due to an argument she had had with the appellant and later sought to retract the statement due to the fact it was untrue. Garda O'Brien, who took Ms Harty's statement, refutes that Ms Harty was intoxicated and was adamant it was voluntary, appropriate in terms of place and time, and otherwise that she had acted correctly in taking a statement contemporaneous to events. Thus, the basis of criticism is fact based.

22. On this issue, the trial judge held: -

"I am satisfied that she is a person who is well able to speak up for herself. Now, in relation to the issues I am satisfied there was no oppression in the taking of the statement. The statement was voluntary. Ms Harty wanted to make a statement. I am satisfied the words of the statement came from Ms Harty. I am satisfied that she was fit to make the statement. She was not intoxicated. The declaration of the statement was read to her and she signed it and understood it and I am satisfied that it was appropriate to take the statement as soon as possible after the events in the manner described.

Now, then applying the statute in relation to section 16 (1) it provides that, "A statement may, with the leave of the Court, be admitted of evidence if the witness, although available for cross examination, (a) refuses to give evidence", and to some extent she said she wasn't giving evidence. Paragraph (b) "Denies making the statement." She did deny making the statement. And (c) "Gives evidence which is materially inconsistent with it", and to an extent she has also done that. Now, subsection (2), "The statement may be so admitted if (a) the witness confirms or it is proved that she made it." I am satisfied that in this case she confirmed she made it and it was also proved that she made it. Subsection (b) "The Court is satisfied that (i) direct oral evidence of the fact concerned would be admissible in the proceedings." I am satisfied that that is the situation. "(ii) that it was made voluntarily." And I am satisfied that it was made voluntarily for the reasons I have set out. "(iii) that it is reliable." And subsection (3) gives information in relation to that. "In deciding whether the statement is reliable the Court shall have regard to ..." and it's subparagraph (b), I am satisfied that, by reason of the circumstances in which it was made, there is other sufficient evidence to support its reliability and I also have regard to the explanation by Ms Harty and her denials which I have dealt with in relation to my findings.

Now, the statement -- I also have to take into account subparagraph (c), "That the statement contains a statutory declaration as set out" and subparagraph (ii) also that she was she understood the requirement to tell the truth. I have taken into account subparagraph (4) also but I am satisfied that the statement may be admitted under section 16 of the Criminal Justice Act 2006 and I will, in due course, charge the jury in relation to the weight they attach to the statement."

23. We think it appropriate to set out relevant portions of the 2006 Act: -

"16(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."*

24. We think it could not be clearer but that the judge considered all relevant legal principles under section 16 and evidence pertaining to the receipt of statements under the Act. We have no doubt but that his conclusion was right.

Ground 5

v. That the learned trial judge erred in law and in fact in admitting the evidence of Garda Liam Murphy;

25. The appellant submits that the judge erred in admitting the evidence of Detective Garda Liam Murphy in which he describes seeing the appellant in a Peugeot car at the locus of the incident some 30-45 minutes prior to the offences. It appears that the objection is grounded upon the basis that the evidence was inadmissible because it showed misconduct and that the prejudicial effect of the evidence outweighs the probative value. The judge ruled as follows: -

"JUDGE: This is an application on behalf of the defence to exclude the evidence of Garda Liam Murphy and the objection is that it's more prejudicial than probative in that it relates to his presence at the scene, that he is intoxicated and it relates to the car at a time which is 44 minutes prior to the time of the allegation, the subject matter of the charges. Now, in relation to the evidence itself, I am satisfied that it is more probative than prejudicial and it is admissible. However, I will exclude the four lines from the bottom of the statement, "Mr Harty was highly intoxicated", I will exclude that reference. So, the reference to highly intoxicated should not be given but the guard can say he was drinking bottles of beer and throwing them on the ground. So, I am excluding the reference to "highly intoxicated".

MR POWER: May it please the Court.

JUDGE: Now, in relation then to the issue of recognition evidence, I am familiar with the case law, and I am satisfied that this evidence in relation to the garda identifying Mr Harty can be given. Now, if the defence wish the prosecution can give evidence that he is known that the garda knows him innocently from the community or if the defence wish it can simply be given in the format that it's given in the statement without explanation as to how the garda knows him. I will leave that to you."

26. We think that the judge was right. The appellant's proposition is clearly unfounded; it was highly relevant that the appellant was seen in the vicinity of the house a relatively short time before the offences were committed.

Ground 6

vi. That the learned trial judge erred in law and in fact in admitting photographs taken by Garda Mark Bolger;

27. The appellant submits that the photographs taken of the scene, and in particular the burnt-out car, should have been excluded on the basis of the failure to preserve the scene. The judge refused the defence application and admitted the evidence. He ruled: -

"In this particular situation what we're talking about is simply photographs that were taken. So, I am satisfied that the scene in this particular case doesn't have to be preserved fully. In relation then to the photographs themselves, I am satisfied that they are probative. They are more probative than prejudicial. I am satisfied that more than one garda can give evidence in relation to these types of matters and in relation to the scenes of crime. This particular garda, Garda Bolger, is a trained scenes of crime examiner. In relation to any differences in relation to the evidence, any particular details, he can be cross-examined on this and these are matters which go to the weight of the evidence rather than the admissibility. So, I am satisfied that this evidence is admissible".

28. The appellant refers to the undoubtably marked contrast between the photographs (which we have seen) taken by Garda O'Brien in the aftermath of the incident, and those taken by Garda Bolger, which, they contend, portray an entirely different scene. It was submitted that the trial judge merely stated that the witness could be questioned in relation to the anomaly and that any issue went to the weight of the evidence not its admissibility. It was further submitted that the ruling did not take into account such difference in the absence of any explanation as to how further damage occurred and the fact that the photographs taken by Garda O'Brien represent the best evidence of the scene. Counsel for the respondent maintains that it was both appropriate and lawful for the trial judge to determine that all the issues raised by the appellant could appropriately be dealt with during cross examination and any issues regarding weight could be put to the jury.
29. We think that the judge was right. The fact that the crime scene had not been preserved is merely one factor in any such decision (and to be taken into account or not on a case by case basis) if it arises. We think that the judge identified what he considered as the decisive factors. It is plain from his ruling that the judge addressed the issue of preservation of the crime scene and he was entitled to take the view he did on the evidence and referring as he did to what he considered other relevant factors. As he said, it was a matter for the jury to decide on the weight, if any, to be given to the evidence in question.

Ground 7

vii. That the learned trial judge erred in law and in fact in admitting the evidence of Alan Guildea, Chartered Structural Engineer;

30. The appellant also contends that admitting the evidence of Mr Guildea was more prejudicial than probative. Following an application the judge ruled: -

"This is an application to exclude the evidence of the engineer. There are two counts on the indictment; one is criminal damage in relation to the house and shed and the second count is endangerment in relation to the house which it alleges (sic) driving a motorcar into a house while it was occupied by members of his family which created a substantial risk of death or serious harm. Now, in relation to Ms Leader's objection that the report wasn't he didn't inspect until the 26th of February 2020, I am satisfied that can be dealt with by way of cross examination if

there is any suggestions in relation to that. In relation then to the charges, I am satisfied it is relevant. I am satisfied it's probative. I am satisfied that it is more probative than prejudicial but I agree with the suggestion of prosecution counsel that the references to the conservatory and the front boundary wall not be given in evidence because there wasn't any direct evidence in relation to those."

31. The appellant argues that the issues for the tribunal of fact did not extend to an assessment of the level of *damage caused*. Furthermore, they argue Mr Guildea's visual inspection report addressing the "structural condition of the dwelling and make recommendations for remedial works" referred to matters that up to this point had not been established in evidence nor formed any part of the allegations. For instance, the report discussed a storage shed and cracks to a gable wall and damage to a conservatory to the rear of the property.
32. It is true that the value or cost of the damage *per se* is not relevant to the charges. It is also true that the extent of the damage is relevant to the charge of reckless endangerment. The real question, however, is whether or not having regard to the lapse of time what the engineer found could be regarded as relevant. The extent of the damage, as held by the judge, is probative of the manner in which the appellant drove the vehicle and endangered the occupants. The real issue, therefore, is whether or not such evidence was relevant because of the lapse of time or if so relevant that it ought to be excluded as a matter of discretion as having a greater prejudicial effect than probative value. We think that the judge was right when he took the view that it was relevant and that the lapse of time is something that could be dealt with on cross-examination. If admissible, as in our view the judge rightly held it was, it plainly had a probative value in excess of any prejudicial effect. We might add that the weight to be attached to it was a classic jury matter.

Ground 8

viii. That the learned trial judge erred in law and in fact in failing to direct an acquittal on the Endangerment Count, at the close of the Prosecution case.

33. The final ground of appeal refers to the trial judge's refusal of the defence's application for a directed verdict on count 2, to wit, endangerment contrary to section 13 of the Non-Fatal Offences Against the Persons Act 1997. Counsel for the appellant submitted that there was insufficient evidence in proof of the endangerment charge. The relevant statutory provision is as follows: -

"(1) A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another.

(2) A person guilty of an offence under this section shall be liable—

- (a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or*
- (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 7 years or to both."*

Refusing the application the learned judge said: -

"This is an application in relation to count No. 2 in the indictment which is a count of endangerment and it is an allegation that the accused intentionally or recklessly engaged in conduct in that he drove the motorcar or a motorcar into a house while it was occupied by members of his family which conduct created a substantial risk of death or serious harm to another. The terms death or serious harm, the term serious harm is defined in the act and death speaks for itself. Now, Ms Leader has submitted that there isn't sufficient evidence for the matter to go to the jury in that she has pointed out several submissions in relation to the evidence and she has quoted the DPP v. M. The prosecution has replied that the evidence is quite strong.

Now, obviously I have to take the prosecution evidence at its highest point. In relation to the statement of Josephine Harty which has been put in under section 16, if the statement is accepted by the jury, the jury would have evidence, dependent on what weight they give it, but taking it at its highest point, they would have evidence that the accused drove at the house and hit it hard. "He hit the wall of the house by the front door, part of it came down. He hit the corner of the house as well and during this I was in the house with my four children. I was very scared. He didn't have permission" et cetera. Now, obviously the jury could take into account it's a relatively it's not a very large house. They could also take into account the evidence from Garda Bolger and the photographs, the yellow booklet of photographs and there is photograph No. 5 in that booklet. Garda O'Brien went to the scene. She also took photographs. She said she could see through part of the wall, one of the walls that was damaged, it was that badly damaged and that the children couldn't come out one of the windows. Now, Garda Sheehan gave evidence also in relation to attending the scene and Garda Sheehan had said that the front door was badly damaged. The wall was almost completely knocked. The right hand corner of the block work was knocked. To the left of the door there were visible marks to the wall. Now, when one looks at photograph 5, again taking the prosecution case at its highest point, and photograph No. 6, one sees marks on the walls and one sees that there is debris which has fallen down there which a jury could find is consistent with the car crashing into that side of the house at speed. So there is evidence, subject to the jury, but there is evidence, taking at its highest point, that the car crashed into the house in two separate areas.

Mr Guildea, the structural engineer, gave evidence in relation to the damage to the property and he said it was outer block with an air gap and an inner block. There was considerable damage to the front wall of the new part and the structure of the new part, the front wall was completely compromised. There was extensive structural damage to the wall and remedial works would be necessary. He said there was a crack to the wall of the new building, to the gable of the wall of the new building to be investigated.

Now, I am satisfied that the prosecution evidence, taken at its highest point, indicates that the car in question was driven at speed into the house and, at its highest point, into two areas of the house causing extensive damage to both parts of the house and on that basis I am satisfied there is a case to go to the jury. I am also satisfied that the M decision means that the primacy of the jury has to be considered and that under the M case this is an appropriate case to go to the jury."

34. Counsel for the appellant relies on the principles enunciated in *R v Galbraith* [1981] 2 All E.R. 1060, as approved in this jurisdiction. They rely upon the proposition that there was no evidence probative of all elements of the crime of endangerment or alternatively, that the evidence before the jury, even if it fulfilled that criterion, taken at its height was of such a tenuous nature and so inconsistent with other evidence that any jury properly directed could not properly convict on it. We need not, we think, set out the principles first elaborated in *Galbraith* since they are so well-established.
35. Counsel for the respondent submits that there was ample evidence, far in excess of the requirements of *Galbraith*, of substantial risk of serious harm and/or death. There was evidence that a car was driven repeatedly into a dwelling home. Ms Harty had described, in her initial disputed statement, that she was scared and called upon the emergency services who helped evacuate the young family from their home. There was evidence from a structural engineer who stated that the structure of the house had been completely compromised. It was submitted that it stands to reason that repeatedly driving a car at a building, with significant velocity and force, would create a substantial risk of serious harm to the occupants of the home.
36. Again, here, we think that the judge was right. It seems to us that whether the application is to be considered on the basis that no evidence in proof of some element of the charge was given or, even if that was the case, it was tenuous or inconsistent with other evidence (and it was neither of those things) a direction was not justified. As appears from the terms of his comprehensive ruling, the judge had regard to all relevant aspects of fact and law and properly reached his conclusion that the application should be refused. We might add that, again, he rightly stressed the primacy of the jury.

Conclusion

37. We think it right to refer to the fact that in a letter referred to in counsel's plea in mitigation of sentence, the appellant expressed his sorrow in reference to both the present offences and to another, which was unrelated, but dealt with at the same time. He said, as paraphrased by counsel in her submissions, that: -

"He says he feels remorse and sorrow for all the people he hurt now and in the past. He knows he was selfish and that's why it hurts him so much that the people he cares and loves about want him to be a better person and he really wants a chance to do that. He apologises to everybody involved and he again explains that the letter isn't to condone his behaviour, just to help people understand the way his life has gone and where he feels it's going and he thanks the Court for taking the time to read the letter."

And counsel also submitted in the course of the sentencing hearing that: -

"In relation to the sentencing principles, first of all I'd ask the Court to take into account the remorse which my client is now showing in relation to the first set of offences [those before us]. In relation to the second set of offences, this is a guilty plea."

38. We therefore reject all of the grounds of appeal and dismiss this appeal as to conviction.