



THE COURT OF APPEAL

Record No: 25/2019

**Birmingham P
Edwards J.
McCarthy J.**

Between/

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

RESPONDENT

V

KEITH CONNORTON

APPELLANT

JUDGMENT of the Court delivered on the 21st day of October, 2021 by Mr Justice Edwards.

Introduction

1. On the 21st December 2018 the appellant was convicted by a 10/2 majority verdict of a jury in the Central Criminal Court of the murder of Graham McKeever on the 18th of February 2017 at 53 Deerpark Avenue, Tallaght, Co Dublin, contrary to common law and as provided for in s. 4 of the Criminal Justice Act, 1964, following a 10 day trial. He was sentenced to the mandatory term of imprisonment for life on the 28th of January 2019.
2. The appellant now appeals against his conviction.

Background to the case and key evidence at voir dire and before the jury

3. The case was presented by the prosecution on the basis that it was a so-called "love triangle" case. Prior to the date of the alleged offence, the appellant had been in a relationship with a Ms Claire McGrath for approximately three years. They had a son together and lived in an apartment located at 53 Deerpark Avenue, Tallaght. In her sworn evidence to the jury Ms McGrath stated that they had been going through "*a very very rocky patch*" in their relationship for about a year, but they were "*never not together*". However, she had previously said in a statement to gardaí that the relationship had been "*on and off*" for the past 6 months and that, as far as she was concerned, they were finished. She told the jury that they would row frequently, usually about his drug abuse, and the appellant typically would leave the apartment rather than continue the fight, only to return later. A number of weeks prior to the alleged offence, Ms. McGrath began a relationship with another man, Graham McKeever, without the appellant's knowledge. The appellant, Ms McGrath and Mr McKeever all had addiction issues.

4. Ms McGrath's evidence was that three days before the incident she and the appellant had had a row, and he had left the apartment. Ms McGrath told the jury that the appellant was in the habit of returning to the house even when their relationship was not going well, and that he would stay there most nights, sleeping on the couch when they did not sleep in the same bed together, because it was his house, i.e., his clothes and medication were there, his name was on the lease and the rent was funded by his HAP (the acronym stands for Housing Assistance Payment) payment.
5. She further explained that she and the appellant usually used a patio door as their main means of ingress to and egress from the apartment, in preference to the front door which they kept permanently locked by means of a bolt on the inside. On occasions when they had rowed, and the appellant had left the apartment as he had done on this occasion, Ms McGrath would sometimes leave a key in the lock on the inside of the patio door to prevent the appellant from re-entering and would leave it there until she was prepared to have him back.
6. In very broad-brush outline, the circumstances giving rise to the charge of murder were that in the early hours of the 18th of February 2017, Ms McGrath and Mr McKeever were in bed together in the flat and engaged in some intimacy when they heard a noise. Ms McGrath left the bedroom on her own to investigate and discovered the appellant in the kitchen/sitting room. The appellant had seemingly been able to enter because Mr McGrath had earlier, for some reason or other, removed the key from the inside of the patio door and neglected to replace it. There was then some conversation between the appellant and Ms McGrath, followed by some physical interaction between them (there are conflicting accounts of the circumstances), leading Ms McGrath to emit some form of exclamation. Mr McKeever then entered the kitchen/sitting room and became embroiled in a physical altercation with the appellant. In the course of that altercation Mr McKeever was stabbed with a knife in the chest (it was the prosecution's case that he was stabbed by the appellant), and sustained injuries from which he rapidly died.
7. It will be clear from this very brief overview that, in circumstances where the only persons present during the incident were the appellant, the deceased and Ms McGrath, that Ms McGrath's evidence was going to be of critical importance and significance in the trial. In the course of the subsequent Garda investigation into the death of Mr McKeever, Ms McGrath made statements on two separate occasions. These were included in the Book of Evidence and she was to be the principal witness for the prosecution.
8. In the course of testifying before the jury concerning what had occurred during the incident leading to the deceased being stabbed Ms McGrath deviated, the prosecution maintain significantly, from what she had said in her earlier statements to gardaí. In those circumstances counsel for the prosecution applied to the trial judge, successfully, for leave to treat her as a hostile witness and to cross examine her on her statements, and also for leave to invoke s.16 of the Criminal Justice Act 2006, and to place her statements to gardaí in evidence before the jury. An issue to be addressed on this appeal is whether the trial judge was correct in admitting those statements under s.16. However,

before considering that, it is necessary to now outline in more detail what Ms McGrath said in evidence before the jury, and what she had previously said to gardaí.

Ms McGrath's account of the incident in her testimony before the jury

9. Ms McGrath told the jury that prior to the 17th of February 2017 Mr McKeever had never been to the apartment. On that date, Ms McGrath having invited him to Tallaght, in circumstances where it was understood that he would spend the night with her at the apartment, he had taken the LUAS from town (i.e., Dublin city centre) to Tallaght, and she had met him at 'The Square'.
10. Earlier in the day Ms McGrath, accompanied by her son, had met up with her mother at 'The Square', and her mother had loaned her some money. Her mother then went about her own business. After Ms McGrath met up with Mr McKeever they purchased alcohol using the money loaned by Ms McGrath's mother, and she, her son, and Mr McKeever then walked back to the apartment. She estimated their time of arrival at the apartment to be between 5pm and 7pm.
11. Ms McGrath told the jury that she had seen the appellant earlier that day, sometime between 1pm and 3pm when he had called to the apartment, but that he wasn't in his right mind. He was intoxicated with drugs. He had been unable to get in through the patio door at that stage because the key was in the lock on the inside. They had had an argument. She told him to leave and come back to her when he was sober. However, she admitted that in doing so she had had a different agenda. She had not wanted the appellant there in circumstances where Mr McKeever would be coming to the apartment later.
12. Ms McGrath was asked if there was any question of Keith Connorton coming back that night, and she replied, "*That's where I confused myself, I don't know what possessed me to think that he wouldn't, I don't know why I thought he wouldn't come back, he always does. I just had a bad lapse of judgment.*" Pressed as to why she had subsequently removed the key from the back of the patio door she said, "*I don't know what possessed me to take it out of the door and bring it into the bedroom with me, but I did.*"
13. Ms McGrath told the jury that following their arrival at the apartment they had had a drink, watched television, played with her son, had dinner and had chatted. The child had been put to bed and was asleep by 9.30 following which they had stayed up for some further hours, during which they had kissed and did "*the usual romantic things*" before retiring to bed together at sometime between 3.30am and 4.30 am. She then stated that "*we had literally gotten into the bed and started to kiss and undress*", and "*we were planning to have sex and I heard a noise.*" She thought initially it was the noise of a toilet seat, but it turned out to be the noise of a kitchen press door being opened. On hearing the noise, she said to Mr McKeever, "*That's Keith. Wait here*", and she got out of bed and proceeded into the kitchen/sitting room to investigate. Mr McKeever remained in the bedroom. She said that she was wearing a dressing gown, underwear and a bra.

14. Ms McGrath told the jury that on entering the kitchen/sitting room she saw Keith (i.e., the appellant) standing at the counter and he was cutting a piece of cannabis with a kitchen knife. She said *"I think to be honest, I don't know, I think his intention was to go back out."* She said that as he was cutting the cannabis she walked into the room and told him to get out. It was her piece of cannabis. Keith had seemed to her to be tired and cold and disinclined to leave. She testified that she said to him *"What are you doing here? We're not together anymore, we broke up two days ago, get out."* He had the key to the patio door in his hand and the door was open. On noting this she went over and pulled at the door.
15. Ms McGrath stated that the appellant then realised what she was wearing, which was not what she normally wore when going to bed on her own, and said to her *"Is there somebody there?"* She said to the jury, *"that's when I said, 'We're not together anymore', and tried to cover my own ass."*
16. Ms McGrath stated that the appellant, realising that she had been cheating on him, then started to cry. He still had the knife with which he had been cutting the cannabis in his hand and walked towards her and as he did so she moved backwards away from him. She said they were arguing face to face, with the appellant saying *"My Mam bought us rings, I was going to propose to you Claire, how could you do this to me"*, and that he was getting angry and upset and she was getting upset. Then, being unconscious of the position of a couch behind her as she moved backwards, she fell backwards over the couch and emitted an exclamation, which she described as *"kind of like 'Aargh', you know"*, and which she was not prepared to characterise as a scream, but rather *"more of a shout"*.
17. Ms McGrath told the jury that the next thing that happened was that *"Graham came through the door."* She suggested that it was not in response to her exclamation because *"[h]e got there fairly fast, so he had to have been out of the bedroom before I shouted."* She said that he *"barged"* Keith across the other side of the room, later characterising Mr McKeever's action as *"using a gore movement"*, i.e., that he *"charged at him like a bull"*, and said to Keith, *"She's mine now"*. She said that she was scared by Keith's body language, but it wasn't directed at her. It was the situation itself. He (Keith) was absolutely disgusted with her. After Mr McKeever had charged at him, Keith had ended up *"folded up like a deck chair"* on top of a little *"Mickey Mouse"* child's chair. When asked to clarify this aspect of what had occurred she stated, *"when Graham ... when he pushed him away, Keith kind of staggered over that way and he ended up with his bum in that chair"*, adding, *"[b]ut Graham has some punch on him and I'll say that, so he bet the crap out of Keith."*
18. Ms McGrath was asked at one point during her testimony to clarify what Keith had been doing with the knife when he realised that there was someone else in the house. She stated that after pulling at the patio door she had returned to the kitchen counter. At that stage he had let go of the piece of cannabis that he had been cutting and she picked it up and put it in her dressing gown pocket, telling him, *"You're not taking my hash."* He still

had the piece he had cut off earlier and he said to her, "You're not taking the rest of it." Her evidence was that at this point he was still holding the knife limply in his hand, and she said that it was then that he had asked, "Is there somebody else there?."

19. Referring to a scene of crime photograph that had been shown to her, Ms McGrath stated "I see a serrated knife here", but stated "I didn't see a second knife." She added, "I never saw that knife in Mr McKeever's hand and I never saw it in Keith's hand. So I didn't see a second knife, I only saw the knife that Keith had been cutting the hash with", and that "obviously its evident that it was there, but I didn't see it. But again I wasn't refereeing the fight, I was trying to stop it."

20. Continuing her narrative, she stated:

"A. So Keith was in the corner trying to fight back, it looked like. Actually, before they even ended up on the chair, when Keith first got pushed, it's hard it's only kind in hindsight that I can see it this way.

Q. Yes?

A. It was like as if Keith was letting him punch him in the face, that's that's what I could see, he had like he had a knife, but he wasn't using it.

Q. I see?

A. So he's standing there taking these punches and I'm screaming at the two of them, "Just stop, stop fighting, fight".

.....

Q. Okay?

A. So Graham is saying to him, "She's mine now", and Keith is screaming at him, "Get out of my house, get out of my house, get out of my house." And I'm screaming at the two of them, "Stop, stop." And then Keith, it was like as if, as I said, Graham had his back to me, so I could only see Keith's face, and I could just see him taking digs and digs and digs into the face. But he wasn't fighting back and I couldn't understand why and now I know that it was because he had a knife in his hand and if he had of fought back, he'd have stabbed him. So as I said, I didn't see a second knife, but now I know that Keith was holding that knife and taking these punches

Q. Keith was which?

A. Holding on to this knife that Graham had in his hand because Keith didn't have a second knife, so where else did it come from and he didn't get it from the kitchen. So he had to have had it in the bedroom when I was there with him, that's not one of my knives.

Q. Which, which knife, what are you talking about?

A. *This knife here, that knife there.*

Q. *Yes?*

A. *That's not a knife I recognise.*

Q. *Would you call that a bread knife, that's in ?*

A. *No, it's serrated.*

Q. *Right. Just for identification purposes, that's photograph No. 13?*

A. *No. 13.*

Q. *Yes?*

A. *I had never seen that knife before, my knives as you can see in one of the pictures there's a block of knives, that's not one of the knives from that block. So I don't know where that knife came from and I didn't see it previously to today.*

Q. *Today?*

A. *I never saw it, no, I never saw that knife. I know it sounds ridiculous, but I never saw a second knife and I told the guards that in my statement.*

Q. *Go on?*

A. *So as I said it's only in hindsight that I can see Keith standing there taking these punches. But they it was like you know, you nearly do a waltz, they spun around and Keith ended up with his bum in the Mickey Mouse chair and Graham kept at him, kept at him and I'm trying to stop them. Now, Keith still had the knife in his hand and I remember seeing Keith's hand come up over, over Graham and I took the knife from Keith."*

21. There were then the following further exchanges:

"Q. *You have taken the knife off him yourself?*

A. *But but this was after Graham had been stabbed, but I never saw, like, that's what I mean, it was it was during the fight, the altercation that it happened. Like Keith didn't run at him and do this or this. It was more of a like I can't, I don't know and Graham turned to me and said, "He got me, give me a knife" and I was*

Q. *"Give me a knife", Graham asked you to give him a knife?*

A. *And I said, "No", and then he went for Keith again and into the chair and I think that's when I took the knife from Keith and then it was like as if he exerted so much energy and power punching him and punched so much blood that he just turned and fell and collapsed, and we didn't realise how serious it was that he was*

dying and we thought Keith thought he was still a threat, you know. And then I realised how serious he was, he wasn't moving and Keith was just trying to get him out of the house, that's all he was saying, "Get out of my house, get out of my house." So he pulled him by the feet towards the door and that's where the drag marks are, to try and get him out and then I knelt beside him

Q. Yes?

A. --and he died."

22. Ms McGrath told the jury that Keith had been very angry with her when she told him that Graham was dead and he "loafed" (i.e., headbutted) her in the face, saying "*How could you do this to me, this is your fault.*" She then stated, "*and it is my fault, if I had never brought him to my house he would still be alive, I'm so sorry.*" She said that she had attempted to resuscitate the deceased while Keith made a 112 call. She said that Keith then went in to say goodbye to his son because he knew he had to leave at this stage. She then made another call to 999 just to make sure that someone was coming.

Ms McGrath's first statement to gardaí

23. This statement was taken from Claire McGrath by Garda Dara Kelly on the 18th of February 2017. Garda Kelly was one of several gardaí who attended at the scene in the early aftermath of the incident. He initially spoke to Claire McGrath, who had her young son in her arms, on the porch of the apartment building, and he brought them to a patrol car so that they could get in out of the cold and away from the gathering crowd. He then commenced taking a statement from her in the patrol car. The taking of the statement was interrupted by the arrival of Ms McGrath's mother, and Ms McGrath passed her son over to her mother. Garda Kelly had in the meantime received an instruction that Ms McGrath was to be brought to a Garda station, and Ms McGrath accompanied the gardaí in the patrol car to Tallaght Garda station where the taking of her statement was resumed by Garda Kelly, accompanied by Garda Dolores Walsh. After the statement had been completed it was read over to Claire McGrath by Garda Kelly and the reading over process was recorded on video. She was invited to make any alterations or additions and declined to do so. She signed the statement and initialled each page, and also initialled alterations or corrections that had been made by Garda Kelly as he was taking the statement.
24. The video of the reading over process was played to the jury on day 5 of the trial. The text of the statement is as follows:

"My name is Claire Mc Grath of the address above. I live there with my son [X] [DoB supplied], I used to live there with [X]'s father Keith Connorton 2/11/78 but we broke up about 6 months ago because he can't kick the habit. We have been on and off 6 months or so. About a month ago I started to see Grahah Mc Keever. I know Graham since I was very young. We are both from the one school. Tonight the 17/2/17 was the 1st night Graham stayed over. Graham knew me and Keith were having trouble but this was the first night to stay over. Graham came over at

about 7pm, I met him at Tallaght Luas Stop and we walked up. We played with [X] and watching telly Jeremy Kyle, we kissed and were having a nice time. I put [X] to bed at 12:30 because he would not settle, we went to bed later. We went not in bed long when I heard a noise. I thought it was the toilet seat falling down but then I heard a second noise, I knew inside it was Keith that he had gotten in to the house. I got up and went into the sitting room and I saw Keith, he was standing at the counter making a cigarette he was goofed off stoned and dopey. I asked him what was he doing here and how he got in, he said what do I mean I said we are not together he said we are still together. I said I have moved on, he got mad and said is there someone else there?, he leaned up and grabbed me and threw me onto the couch. I saw the little knife with the curve blade and black handle in his hand. I screamed and that's when Graham came running, Keith had me cornered on the couch leaning over me. Graham pushed Keith off me and the two of them turned to face each other. They started fighting it was bad. Graham kept fighting but Keith had the knife in his hand. Graham tried to block Keith's punches but they got through. I tried to stop Keith. I was shouting "stop you are going to kill him, your son is in the other room". Keith was trying to stab Graham but he did miss a lot of times but Keith stabbed Graham in the chest, Graham shouted he stabbed me and was in shock he clutched his chest and shouted at me to give him a knife. I said no, I grabbed the knife from Keith that's how I cut my hand, Graham collapsed and Keith grabbed the serrated knife just as Graham collapsed, Keith grabbed me and head butted me, I screamed looking for a phone and Keith gave me his phone. I told him we had to get help. I dialled 112 from Keith's phone his number is 085 [xxxxx]94, the call centre answered. I started screaming someone has been stabbed he is in my front room, as I was doing this Keith dragged Graham across the floor to the sliding door. I heard [X] crying and I ran upstairs to get help from Lauren my neighbour but she didn't answer her door. I ran back downstairs and Keith was in with [X] covered in blood, Keith told me he was going to say Graham broke in to the house. I shouted I am not lying help him he is going to die, I got down to [X]'s room and picked him up for a second, but I could not bring him out to see that so I put on some clothes and shoes and ran back into the living room, when Keith dragged Graham across the floor he kicked him twice in the face so hard, I screamed to stop that's when I went into [X]'s rooms and when I came out Keith was gone. I got down beside Graham them. He died while I was waiting for the ambulance and guards. I went a[nd] got [X] and ran out into the hall the place was full of blood so I could not say in there. 2 marked Guards arrived and I met them in the hall. I told him what had happened then the ambulance and then you arrived. Just before any of ye arrived I was at the door and I saw Keith across the yard knocking on Paddy's door. I shouted at him and he just looked at me, I was scared so I ran back into the hall with [X] that's when I saw the police cars coming. Because I gave Keith the phone as I was talking to 112 I was not sure what Keith had said to them, so I rang them again from Grahams phone his number is 085 [xxxxx]28 I think. I want to add that Keith d called over earlier when Graham was there but he did not see Graham, I went out to him at the door, I asked him what

are you doing here, he said what do you mean. I said your stoned we are not together just go. I just remembered during the fight when Keith dragged Graham out to the door had him kind of out the door, I pushed Keith out the sliding door dragged Graham back in and locked the door. I ran upstairs to try get Lauren again and when I came back down Keith was back in the house, thats when I went in to get [X] and it was then when I came out with [X] that Keith was gone. When I went in to [X]'s room the time Keith was in there I asked him what he was doing, he was changing his clothes they are probably still in [X]'s room, this is completely out of character for Keith, he is the quietest but he just could not kick the habit, maybe I should have given it more time. I am just so sorry.

Q. *Gda Walsh: do you remember what Keith was wearing. A*

A. *No I think grey bottoms white nike air max and blue jacket with fur on it.*

SIGNED: Claire Mc Grath.

Witnessed: Dara Kelly, Gda, 34827K. ..."

(Redactions in square brackets by the Court)

25. During a *voir dire* the witness was, for the most part, willing to accept that she had said the things that were recorded in the statement (although she maintained that not everything she had said was accurate or true, and indeed said that she had lied at times for self-preservation and to paint herself in a better light) but contended that it was also the case that certain matters were taken down wrongly. In that latter regard, she maintained that in Garda Kelly's record of her description of the crucial struggle between Keith Connorton and Graham McKeever, the protagonist's roles were mixed up, so that actions she was attributing to Graham were wrongly recorded as being attributed to Keith and vice versa. In terms of attributing responsibility for this, she stated before the jury at one point, "*So I don't know is the name wrong there or did I say it wrong.*"
26. Garda Kelly's evidence on the *voir dire* and later to the jury was that while he recognised Ms McGrath as somebody who had had drug abuse difficulties, she had told him that she was clean for six months and he had accepted that. Although she was very upset during his encounter with her, she did not appear to him to be intoxicated. He said she was articulate enough and in good enough condition to make the statement. He said that he took down the statement as it was narrated by her.

Ms McGrath's second statement to gardai

27. The second statement was taken from Ms McGrath at her mother's home on the afternoon of the 18th of February 2017, by Sergeant Caiman Ryan, accompanied by Detective Garda Jennifer Brogan. Sergeant Ryan testified that when spoken to, Ms McGrath had expressed a willingness to co-operate and to make a statement. He did not observe Ms McGrath as being under the influence of tablets, which she had suggested she was during her testimony. He was aware that she had visited a doctor earlier in the day but his

understanding was that it was for a suspected broken nose. Ms McGrath and her mother had told him that she had been prescribed some sort of tablets to relax or to calm her down.

28. Sergeant Ryan testified that Ms McGrath was asked if she was ok to go ahead, and that they had offered to call back later if she would prefer but that she said "No", that she wanted to do it there and then. She stated that she couldn't sleep anyway. He took down her statement. It was read back over to her. She was offered the chance, but didn't want to make clarifications or amendments, and she had signed every page of the (7 page) statement. He did not recall anybody objecting to the taking of the statement, or expressing a view as to Ms McGrath's fitness to be interviewed. It had been a friendly visit, during which the gardaí were offered tea and coffee, and during which Mrs McGrath's mother had made her a number of cups of tea. Detective Garda Brogan, who gave similar evidence, characterised Ms McGrath as having been "very chatty".
29. Ms McGrath herself said that she didn't remember the second statement being taken, stating that she had been "*absolutely out of my head on Valium, up John and Zimovane*" that had been prescribed to her by her doctor. She confirmed that her mother had not been present during the taking of her second statement. She accepted that the signatures on the statement were hers but reiterated that "*I was absolutely out of my head on drugs I –I could have said anything.*" When it was put to her that she had given a pages long account of the events, she interjected saying:

"Which are completely different to the first account I gave, I know that this account, I don't want to say I was lying. But I will say that I could not accept that this was my fault. I didn't want to accept that I had caused a young man to die for my selfishness."

30. Towards the end of her cross-examination by prosecuting counsel she was asked whether there was any other explanation that she had as to why she couldn't remember the second statement, to which she replied:

"Just that I had been obviously using intravenously, that is my doctor gave me an intravenous shot of Valium, benzodiazepine for shock and he gave me a months' supply of my usual tablets but I had abused them. So you're talking 60, over 60 tablets in the space of two days. So I wouldn't have known my arse from my elbow."

31. Evidence was also adduced from the witness's G.P., Dr Clarke, who told the court that Claire McGrath had been his patient for 20 years, and that she had had drug issues that she had tried to resolve. On several occasions she had engaged in methadone withdrawal and treatment programs. On the 18th of February, 2017 he had been in his surgery when somebody had come running up the stairs to say that a woman was very distressed in a car downstairs. He had proceeded downstairs and discovered that the distressed woman was Ms McGrath. She was in a state of shock, crying and hysterical. She told him that she had been a witness to a murder at 3.30 that morning and that a man had broken into her

apartment. She told him she had suffered injuries to her nose and the tip of the middle finger of her right hand. He had noted that, "*She was with her mother and child in the car. The murder she had witnessed took the form of her attacker stabbing her boyfriend in the ribs and he bled to death in front of her.*" He said that he gave her a shot of Valium. She had been on Xanax prior to this, and he doubled up the dosage, and arranged to see her on Monday. While the doctor said he didn't ask her if she had already taken Xanax that morning, she didn't present as somebody who had done so, because of her distraught state.

32. Ms McGrath's mother, Mrs Catherine McGrath was called as a witness for the defence. She testified as to her daughter's drug addiction, as to how her daughter had been in a relationship with Keith Connorton, how he owned an apartment and how Keith and Claire had lived for a number of years in that apartment, the lease being in Keith's name.
33. She described getting a call to go down to the apartment in the early hours of the 18th of February 2017 because something bad had happened. When she encountered her daughter she was distraught, shaking, crying and wailing. The gardaí were there. She took the child away. Later the gardaí dropped Claire home. Claire was still very upset and the witness said she rang the doctor's surgery and was told by the receptionist that they should come straight down, which they did. The doctor came down to the car. He gave Claire an injection of Valium and prescribed tablets, Zimovane and Xanax. Zimovane was a sleeping tablet and Xanax was an antidepressant. They got the prescription filled by a local Chemist and returned home.
34. The witness said that Claire went to her bedroom. Sometime later two members of the gardaí arrived. She answered the door to them and they said they wanted to take a further statement from Claire. She testified that she said to them, "*Well, Claire has already given a statement this morning*", in response to which they said, "*We just want to touch up on a couple of points that are in it.*" Mrs McGrath testified that she then said, "*Well, Claire is in no fit state to give a statement*", and informed the two gardaí that she had been down to see the doctor, and that he had given her an injection and a letter for Tallaght Hospital in relation to her nose injury, which she had omitted to mention earlier in her testimony. Mrs McGrath was adamant that she had asserted that her daughter was not fit to be interviewed, notwithstanding having listened earlier to denials from both gardaí that she had done so. She accepted under cross-examination that when she had made a statement during the garda investigation to the same two gardaí who had earlier taken the statement from Claire, she had made no mention of having had any concern about the statement they had taken from Claire. She accepted that while the statement was being taken, she was in the kitchen-part of her open plan home with her grandson who was running around. She had made tea. She did not realise that the gardaí were there two and a half hours until she heard it in court. She said "*Claire had just talked, talked, talked, talked.*" It was put to her in response, "*Yes, and the Gardaí wrote, wrote, wrote down what Claire was saying.*" She then said, "*That's right. But I didn't sit there and listen and sit and look at the three of them.*" She accepted that while Claire was speaking and her words were being written down, there had been no intervention or

interruption by her to suggest that something was taking place that shouldn't be taking place.

35. The witness also offered the view that when her daughter was taking drugs that no faith could be put in anything that she said.
36. The controversial second statement was in the following terms:

"In addition to my earlier statement I would like to add the following. I have had the declaration read over to me by Detective Garda Ryan and I understand it. Myself and Keith have been on and off for the past six months. The last time he stayed in my house was about one week ago. He slept on the couch with [X] and I slept in my room. Keith would call up nearly, daily. and I would let him in to see [X], but as far as I was concerned we were finished. I told him numerous times that we were finished but Keith never seemed to accept it. Just on Thursday gone he arrived at my house, out of it and I. told him I didn't want him around my son like that. As far as I was concerned he had taken heroin and "bluey" tablets. He emptied his pocket and had half a garden of heroin, which is about 12 or 13 deals. I told him to leave and I didn't want to be with him. He grabbed me around the neck and pushed me back up against the washing machine. He said "you're not going to take my son away from me". That was very unlike Keith. He isn't normally violent. The only other time he got violent with me was when I was pregnant and he took a knife to me at my house in Deerpark. My mam was there when that happened. Yesterday, I told Keith over the phone that I was having a girly night and my friend Megan was coming over and that my mam was taking [X] for the night. I was trying to ensure that Keith wouldn't call up. The next contact was about 10pm or 10.30pm when Keith knocked on the door. I went out to him and told him he wasn't welcome because he's on drugs and was out of it. He didn't ask if anyone was with me. I got Graham to stay quiet on the couch while Keith was at the door. It took a while to settle [X] after and I'd say he went asleep about 12 midnight or 12.30am. Graham had 3 or 4 cans of cider during the night. After [X] went to bed we watched Jeremy Kyle on T.V. I'd say we went to bed about 2.45 am. We were literally in bed about half an hour when I heard a noise. I thought it was the toilet seat dropping at first. Myself and Graham were having sex when I heard the noise outside in the kitchen. I said to Graham, stay here, there is somebody in the house, it's Keith. I went out to the sitting room. Keith was at the kitchen counter making a roll up. The patio door was wide open. Keith was goofing off and I told him to leave. I told him it's not his house anymore and to leave. He kinda perked his ears up and looked at me and said "Is there someone else here, Claire?". I said yes there is. He grabbed the knife from the stack beside microwave in a wooden block. He called me a dirty tramp and pushed me onto the couch and threatened me with the knife. He said "I'll kill you". I was terrified cause I had no way out cause I was under him, and I didnt want to call Graham out, but I just screamed. Although he said he would kill me I didn't think he would have. He wanted to frighten me more. I was wearing my dressing gown with nothing underneath. Graham ran out to the sitting room when I

screamed. He was wearing blue check boxers. Graham pushed Keith off me. Graham then stood up to fight with his fists up. He was dodging punches from Keith. He was kinda ducking left and right. Keith kinda had his hand with the knife hidden. It was in his right hand. Keith stabbed Graham with his first swipe. Graham didn't know Keith had a knife. Keith stabbed him in the chest and swiped at his face too. Then Graham stood back and held his chest and said he's stabbed me. He was in shock. This is when he had pushed Keith back down into a kids Mickey Mouse arm chair. Graham was running out of breath at this stage. He said to me, give me a knife. Keith swiped at Graham again and I grabbed the knife off Keith. I'd say Keith stabbed Graham about three times and they were standing for all them. I think I placed the knife on the counter where the kettle is. Keith grabbed a second knife from the block. That's when Graham hit the ground hard after he collapsed. He lost loads of blood. I don't think Keith used the second knife. I'm not sure where that knife is now. He collapsed beside a single armchair. The one near the kitchen. I knew he was in trouble the way he fell. I was saying "He's dead, He's dead". Keith grabbed Graham by the feet and dragged him towards the patio door. Keith had Graham half out the patio door. His legs were out, up to his boxer shorts. I went over and Keith was kinda bent over at the sliding door and I kicked him up the hole and he stumbled outside. I lifted Graham under his arms and pulled him back into the sitting room and locked the patio door again. I pulled the curtain across the patio door cause I didn't want anyone looking in. People were probably still coming home from the pub. Graham was still alive. His eyes were moving in his head. He wasn't talking. He was trying to catch his breath. It was like he was drowning. I was down encouraging him and telling him to hold on. Then his teeth just slipped. He had no suction in his mouth. His tongue kinda rolled. I knew he was dead. Actually it was two or three minutes after he collapsed that Keith moved him. At that time I got Keith's phone and rang 112. I said there was someone dead in my sitting and I needed help. I gave my details and handed the phone to Keith. I went up to get Lauren McGarry to ring my mam and to come and get [X]. I didn't get any answer. I went back downstairs and Keith was moving Graham towards the patio door. I said "what are you doing?". He said "Claire, this is my house. He broke into my house". I said get him help, he is dying. Keith was saying "This is the story Claire" and I said no it's not. When Keith was dragging Graham or just before, he head butted me. I said what are you doing. He broke my nose and blood went everywhere. I got up and kicked him up the hole and out the patio door. Keith was gone with his phone so I went up to Lauren's again but she didn't answer. When I came down. Keith was in the sitting room again. He had moved Graham towards the patio door again. The patio was open and the curtains and everything was wide open. Keith wasn't actually in the sitting room, he was down in [X]'s room. He changed his clothes. I was saying what are you doing., This your son's room. He was saying he loved me. I said how can you do this, you're after murdering a fella. I was saying "He's going to die, we need to get him help". He said "let him die". Keith walked towards the toilet and out the door. I was thinking how am I going to get a phone then I remembered Graham's phone. It was on the bedside locker on

the left. I rang 112 and told them what had happened and they told me someone was on the way. I knew the ambulance was coming so I put on some clothes. I put on pyjama bottoms (Leopard Print) and Leopard Print slippers, bra and deep purple dressing gown. I picked [X] up and went out to the hallway and the Guards arrived soon after. A girl from down the road Mairead and another girl were at my front door and I told them to go and mind their business. Donna from across the road was also outside on her balcony. The girls were still there when the Guards arrived. They were just been nosey and were moved on. When I was trying to get a phone at the start to ring 112, Keith was slow to hand it over and slow with his pin code. I don't know if he was just not thinking straight or delaying things. I'd say it was 6 or 7 minutes before I made the first phone call.

I have had this statement read back over to me by D/Garda Ryan and it is correct. I have been invited to make any alterations or corrections I deem necessary but do not wish to make any.

SIGNED: Claire Mc Grath.

WITNESSED: Camon Ryan, D/Garda.

WITNESSED: Jennifer Brogan, 29659G, Gda.

(Redactions in square brackets by the Court).

The 112 call and the 999 call

37. Evidence in relation to the 112 call was given by Mr David Hurley, a control service officer with Dublin Fire Brigade, and evidence in relation to the 999 call was given by Mr Kevin Casey, a garda emergency line operator. Recordings of the calls were produced. Their admissibility before the jury was challenged on the basis that they were hearsay and it was variously argued by the prosecution that they were admissible as real evidence, as part of the *res gestae*, and (at least in the case of the call made by Mr Connorton) as a declaration against interest. The trial judge ultimately ruled that the recordings were admissible, and the correctness (or otherwise) of his decision in regard to the 999 call made by Ms McGrath is a controversy in this appeal that will be addressed later in this judgment.
38. The audio recording of the 112 call was played in court and indicated that it was received from a male, who was requesting assistance following a stabbing incident. The pertinent exchanges between the caller and the operator, i.e., Mr Hurley, had included the following:

Caller: "So I had an argument, he took a blade out and I stuck it in him. He just had a knife he had."

Operator: "Okay, was anyone hurt with that knife?"

Caller: "Just that chap."

Operator: "Okay, you got hurt with that knife, is there any serious bleeding?"

Caller: "Yeah."

Operator: "Is he completely alert?"

Caller: "Yes."

Operator: "What part of the body injured?"

Caller: "His stomach."

[Operator then indicates that he is organising help and gives caller a list of instructions]

Caller: "The phone is going dead."

39. Mr Casey produced the recording of the 999 call received from the witness Claire McGrath. The audio was played in court and the transcript was entered as exhibit 12A. In the course of exchanges between the caller and the operator the caller is asked what her connection to Mr McKeever is, and Ms McGrath says that he is her new partner. She is then recorded as saying:

"My ex-partner came into the house and picked up a knife and went for him with it and stabbed him with it and he is gone now. He broke my nose."

40. Ms McGrath was cross-examined on what she had said during the 999 call, and the following exchanges are recorded in the transcript:

"A. *What I am trying to say is my – my description to the 911 operator is not accurate, it is what I said though.*

Q. *But it is what you said?*

A. *Yes, it is. Yes.*

Q. *But it's not accurate?*

A. *No.*

Q. *So when you say "he is a new partner", that is accurate?*

A. *For the purpose of explaining who each person was?*

Q. *Yes, he was a "new partner I was seeing"?*

A. *Yes sir.*

Q. *That's accurate.*

A. *Yes sir.*

Q. *"My ex-partner came into the house". That's accurate?*

A. *Yes sir.*

Q. *"And picked up a knife?", that's accurate?*

A. *Well yes to cut the hash he had to pick it up, so, yes.*

Q. *"And went for him with it"?*

A. *Well he did stab him with it, so yes.*

Q. *"And stabbed him with it"?*

A. *Yes sir.*

Q. *"And now he's gone"?*

A. *He had left at that point as far as I am aware, yes.*

Q. *Was this on Graham's phone. Yes?*

A. *Yes. Mr Connorton had left the premises.*

Q. *"He broke my nose"?*

A. *Well I thought it was broken at the time, yes.*

Q. *So everything you said now you accept is in fact true?*

A. *That I said it, yes."*

Interaction with Garda Ferris

41. Evidence was also given of an interaction between the witness Claire McGrath, who was accompanied at the time by Mr Connorton, and a Garda Ferris attached to Blanchardstown Garda Station, on the day following the stabbing, i.e., the 19th of February 2017. Garda Ferris told the jury that on that date while on patrol in a patrol car he saw a male and female walking in his direction on the footpath to his left hand side. The male was wearing a blue jacket with a hood up partially covering his face. He was passed a white bottle by the female containing a dark green liquid, which Garda Ferris perceived (seemingly correctly) to be methadone. There was other evidence in the case that earlier that day, the appellant had contacted Ms McGrath and had requested that she meet up with him and bring him his medication. Garda Ferris on seeing the bottle being passed had formed the view that a possible drugs transaction was taking place, and he

intercepted the couple and sought to search the appellant under s.23 of the Misuse of Drugs Act, 1977.

42. In the course of their subsequent interaction the appellant identified himself as Keith Connorton and then said to Garda Ferris, who knew nothing about the stabbing, "Yeah, sorry I am, I knew this would happen." Garda Ferris responded: "You knew what would happen?" The appellant replied: "Me getting arrested for what happened." The appellant was then taken to Blanchardstown Garda Station in the patrol car for the purpose of being searched. Garda Ferris testified that as the appellant was being placed in the patrol car Ms McGrath shouted at him "I told the truth, the actual truth, do you remember? Say nothing, keep your mouth shut."
43. The jury also heard that while at Blanchardstown Garda Station the appellant made some verbal remarks which were noted by Garda Ferris. He had said:

"All's good other than a fella in my house who pulled a knife on me and I took it off him and stabbed him. I'm even paying rent, he was an intruder. I took the knife off him, look at my hand, finger, it's cut, you can see the bone. I grabbed the blade, he was going to kill me and I stuck it in him after he tried to get me. I had arranged to hand myself in with my solicitor tomorrow at two. I've nothing to hide other than the false name."

44. Garda Ferris's evidence was that he did not know at the time what the appellant was talking about, but subsequently became aware of the reported stabbing. The appellant showed Garda Ferris some injuries on his body that he claimed were defensive wounds, stating that he had received those injuries when Mr McKeever had initially attacked him with a knife. Garda Ferris later provided his notebook entries to the Tallaght gardaí who were investigating the stabbing incident.

Other evidence

45. Other evidence was adduced at trial, which (save to the extent already alluded to) does not bear directly on the issues arising on this appeal. It is sufficient to record that there was prosecution evidence, *inter alia*, as to the cause of death, as to the course of the investigation, and as to interviews with the appellant following his arrest and detention. In the course of his interviews he had contended, *inter alia*, that Mr McKeever had come at him with a knife and that he had acted in self-defence.
46. The defence went in to evidence (although the appellant did not give evidence himself, as was his entitlement), and adduced testimony from the appellant's doctor concerning his drug addiction and methadone maintenance regime, and from Ms McGrath's mother concerning, *inter alia*, her views as to her daughter's fitness to be interviewed by gardaí in the aftermath of the incident. Her testimony was described earlier in this judgment.

The defence case to the jury

47. In the closing speech for the defence the jury were invited to find that it was not a case of murder, but rather that the appellant had acted in self-defence. The primary case made was one of reasonable self-defence, with an alternative scenario (if the jury were not prepared to accept reasonable self-defence) that the appellant had acted in excessive self-defence. Further, with the leave of the trial judge, the jury were invited to consider as a further possibility (if they were disposed to reject self-defence on either basis) that the appellant may have stabbed and killed the appellant in circumstances where he had been so provoked as to have totally lost his self-control. The jury rejected all three possible defences and found the appellant guilty of murder.

The Grounds of Appeal

48. The appellant's Notice of Appeal advances three grounds of appeal, which are:

1. The trial judge erred in law in his interpretation and application of s. 16 of the Criminal Justice Act 2006;
2. The trial judge erred in law and in fact in admitting as evidence the statements of Claire McGrath pursuant to s. 16 of the Criminal Justice Act 2006 in circumstances where there was insufficient evidence before the court as to the reliability of statements, including the manner in which they had been recorded;
3. The trial judge erred in law and in fact in allowing the prosecution to play a '999' call made by Claire McGrath to the jury, in circumstances where the legal basis pursuant to which the trial judge was requested to admit the evidence was uncertain, unclear and/or confused.

Grounds of Appeal 1 & 2.

The relevant statutory provision

49. Section 16 of the Criminal Justice Act 2006 ("the Act of 2006") provides:

- 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.

The Ruling on the s.16 application

50. The trial gave an initial short form ruling on day 5 on the conjoined applications to treat the witness as hostile and to admit her pre-trial statements into evidence pursuant to s.16, promising to give more detailed reasons later during the trial. The initial ruling was in these terms:

" ... I'm permitting the old style cross examination based on the witness being hostile and Mr Grehan, you've heard what Mr O'Higgins has said in terms of cross examination. I'm not laying down any lines, but you know we do have to be mindful of fairness obviously. The second thing is, but it's subject to where we stand at the completion of the procedure just mention that in principle, I'm satisfied for reasons that I will explain briefly, but in more detail as soon as I have a chance to put pen to paper which would be sometime next week that in principle, both of the statements are admissible for the purposes of section 16. But it did strike me that the entirety of the first statement, I think is in principle admissible.

The portion of the second statement that runs from, "We were literally in bed", on page as it appears at page 6 of the book of evidence, down to, "Deep purple dressing gown" at the bottom of page 7, that would be material which relates to the res gestae, if you like, the transaction in issue. And therefore is in my view, in principle admissible. But it did strike me, two things struck me on considering it, we've had a dry run, so to speak, in the absence of the jury. And it may well be that if the cross examination in front of the jury proceeds in broadly the same manner, that the facts in issue may be somewhat confined, and it may not be necessary to admit for section 16 purposes, and of course the distinction will have to be drawn for the jury between the categories of statement subsequently. But it did strike me that the necessity of admitting parts of the statement for the purpose of consideration under section 16 would be limited strictly to facts that are in issue and necessary."

51. The trial judge then gave detailed reasons for his ruling on day 10. As the statement of reasons is lengthy and runs to 9 pages of transcript it is not proposed to reproduce it verbatim, but rather we will adopt, with some minor additions, the summary of the main points made therein which is contained in the written submissions filed by the respondent, which seems to us to represent an accurate and succinct distillation of the statement of reasons provided by the trial judge:
- a) The first statement was voluntary in the sense in which that term is defined in relation to this section by the Court of Criminal Appeal in *People (DPP) v. Murphy* [2013] IECCA 1 (where it was held that the voluntariness test laid down in the context of the admissibility of confessions should be applied and the Supreme Court agreed with this conclusion in *People (DPP) v. Gruchacz* [2020] 1 IRLM 191 at p 199).
 - b) On the basis of the evidence of Garda Dara Kelly, who the trial judge found to be a particularly truthful witness, he was satisfied that what was said was volunteered, was information given in relation to the events by the witness. The trial judge found that Garda Kelly did his best using the statement paper in his vehicle to reduce that statement to writing as he had a talkative witness and, as a policeman, he was entitled to pursue his talkative witness. He was satisfied that Ms McGrath spoke to Garda Kelly voluntarily, and in a spirit of cooperation. Of course, she was shocked

and traumatised, but that in itself did not mean that a witness was incapable of giving a statement.

- c) The statement was properly made and properly recorded. The "read over" was not some kind of empty formula. The read over is a chance for a person who has made a statement to indicate or to make corrections or to say "*No, that's not what I said.*" Ms McGrath was calm and obviously cooperative. She was volunteering information and promised that, if she remembered something else, she would come back to the gardai about it.
- d) She was obviously shocked and traumatised, but the trial judge was of the view that there was no dissembling at that stage. The dissembling all started, in his view, much later on when she came back into the amity of Mr Connorton. The trial judge was convinced that in fact it was the force of the shock and trauma that, in his view, caused her to give a voluntary and accurate account of what happened. She was obviously partial to Mr McKeever. She had done her best to encourage him up to the house for whatever was to go on, on the evening in question.
- e) The trial judge had found no evidence that the witness was angry at Mr Connorton as she had claimed in her testimony. On the contrary, the witness had said in her statement to Garda Kelly "*This is completely out of character for Keith.*" The trial judge observed that if she was angry she had it well concealed, and he noted that "*in fairness to her, she said she was surprised she actually gave him something of a compliment.*" In the trial judge's view that, i.e., "*that she probably was surprised and maybe everybody is surprised and Mr Connorton himself is surprised by his behaviour on that occasion*", was probably the truth of the matter. He was satisfied that "*all the indications given in relation to this statement is that it was given voluntarily.*"
- f) The trial judge was also satisfied that the second statement was voluntary. There was nothing in the case to suggest that there was some kind of emergency or some kind of extreme overdose. Anything but. She was resting peacefully. Even allowing that there was some concern raised by Mrs McGrath (the witness's mother) gardaí themselves were entitled to try and find out what the situation was and make their own assessment. The trial judge was entirely satisfied that their assessment was a correct one. They were there for 3 hours, there was tea, the witness's son was running around, Mrs McGrath was in and out, there was 'talk, talk, talk,' there was 'write, write, write'. There is a very coherent, consistent and logical narrative offered. It was signed. It was corrected in one instance. The question is not whether someone has taken drugs, the question is would that render them unfit to make a statement. The fact that Ms McGrath was fit to give a statement is shown by the contents of the statement itself, which is rational, coherent and consistent with everything else that had been said previously. There is further support for all of this, the 999 call, the account to the doctor the next morning, and the remark to Garda Ferris of Blanchardstown Garda Station, who

knew nothing about any of this. What he saw was a suspected drugs transaction on the side of the road and he intervened, not knowing about stabbings or drug overdoses or any of the rest of it. Ms McGrath volunteered the statement "*I told the truth, the actual truth..... Keep your mouth shut.*" The learned trial Judge found that that was "*as clear an acknowledgement that she knew perfectly well that she had made statements and indeed that she had made truthful statements on a previous occasion and was therefore cautioning Mr Connorton that, if he said anything, to be very careful about what they (sic) said.*" The trial judge inferred from that that there hadn't been any great putting together of heads at that stage, she just having delivered the methadone to him. It was a spontaneous and indeed truthful assertion in his view which supported the voluntariness of the second statement.

- g) With regard to the interests of justice and fairness to the accused, as raised by his counsel, the trial judge found that unfairness doesn't arise simply because something is prejudicial or awkward or inconvenient. The prosecution were no doubt seeking to introduce the material in controversy because it was all of those things. That did not mean that something was unfair. Defence counsel had spoken about the difficulty about them (i.e., Ms McGrath and the appellant) being perceived to be mates and how one might be helping out the other. In the trial judge's view that was not a difficulty, that was the fact. The fact of the matter was that they were very good mates, they were the parents of a child, and they had reunited very quickly after these very tragic events.

The trial judge said that he did not buy the unfairness argument "*in the sense that, oh this is unfair because you know in fact it's inconsistent with Mr Connorton's account. Well, so be it, because it puts a knife in his hands, well that's it, they're the facts, it's a matter for the jury to decide. But in fact it's another good example I think of Ms McGrath being well able to call the odds in this case by putting the knife in Mr Connorton's hands in a very benign sort of way as opposed to the way she initially described ...*"

The trial judge observed, "*What Ms Grath said was logical, consistent and coherent. Mr McKeever came from the bedroom having been told to stay quiet. When the row started, he found someone, he began to punch them, he didn't realise there was a knife. Mr Connorton struck out with the knife, this is what happened.*"

- h) The trial Judge stated that he was "*obviously*" not going to repeat his observations on the evidence to the jury. Nevertheless, they were his factual conclusions in relation to the matter. That being so, he concluded, "*the interests of justice absolutely demand that these statements be considered by the Jury.*"

Submissions on behalf of the appellant

52. Counsel for the appellant has submitted that the section typically poses two related difficulties for the defence. Firstly, there is the risk that the jury will simply disregard

everything said by the witness in court and rely on the account in the written pretrial statement instead. Secondly, the defence's ability to disrupt reliance on that statement is greatly compromised because the effectiveness of cross-examination is blunted in a s. 16 context. Ordinarily, witnesses under cross-examination by the defence will hold the line. That general stance of resistance will confer weight on any concessions which happen to be extracted. In a s. 16 situation, however, the witness will usually agree with many or indeed every proposition put forward by the defence, in a manner that is likely to appear unreal and of limited persuasive value to a jury. Indeed, the jury might conclude that the witness is agreeing simply out of fear of or friendship with the accused, rather than the concessions being genuine in nature.

53. Ms. McGrath's two pretrial statements were admitted under s. 16 of the 2006 Act. That left the appellant facing the two interlinked difficulties just described. He needed to persuade the jury not to rely on those pretrial statements, in circumstances where the effectiveness of cross-examination was heavily curtailed. It was submitted that these circumstances underline the importance of a trial judge ensuring that the requirements for admission of a statement or statements under s. 16 are strictly met.
54. The appellant accepts that a judge has some amount of discretion in determining whether or not the requirements for admission under s. 16 are satisfied in a particular case. However, it has been submitted on his behalf that the trial judge erred in the exercise of his discretion in this case.
55. Counsel for the appellant submitted that the most fundamental issue was the failure by the trial judge to give adequate weight to the evidence when assessing whether the requirements for admission under s. 16 were met. In particular, it was submitted that the trial judge failed to give proper weight to the following features of the evidence he had heard when assessing the voluntariness and reliability of the statements made by Ms. McGrath, as well as her understanding of the requirement to tell the truth:-
 - i. Her admission that she had lied when making the statements out of a sense of self-preservation, because of an inability to fully accept her role in the events that unfolded;
 - ii. The fact that the actual making of the first statement (as opposed to reading it back to the witness) was not video-recorded, even though a significant portion of same could have been recorded, meaning that there was no opportunity to assess how Ms. McGrath had presented when her statement was being compiled. The recording of the readback was of limited value in helping with this assessment, as the statement had already been compiled.
 - iii. The fact that the evidence clearly established a possibility – at the very least – that Ms. McGrath had taken a significant quantity of controlled drugs before making the second statement and was in an unfit state where, according to her own mother, she could not be trusted to tell the truth.

56. It was submitted that proper consideration of these matters should have led to a refusal of the s. 16 application by the prosecution. This was particularly so given that the concept of reliability within s. 16 must be understood as involving some qualitative assessment of the witness and his or her willingness and ability to tell the truth, and it could not be appropriately concluded that the statements were reliable beyond all reasonable doubt given the factors set out above. However, it was submitted, these factors were improperly discounted by the trial judge.
57. Further or in the alternative, it was submitted that the trial judge erred in failing to refuse to admit the statements pursuant to s. 16(4)(a) of the 2006 Act, on the basis that admission would be unfair and was not in the interests of justice in circumstances where the partial recording of the first statement meant that the appellant could not properly engage with or tackle the veracity of same. The recording of the readback presented the court with a snapshot of the statement after all issues in terms of the statement had been ironed out, and ran the real risk of creating an impression that the statement was more orderly and reliable than in fact it could be considered to be.
58. In addition, it was submitted that even in the event that the trial judge was justified in principle in admitting the statements under s. 16 of the 2006 Act, he had erred in admitting both the first statement and a portion of the second statement. It is submitted that the interests of justice and fairness to the defence required the trial judge to admit one statement or the other, rather than both. Admitting both statements failed to strike a proper balance which achieved fairness for the defence, given the difficulties of challenging s. 16 statements.

Submissions on behalf of the respondent

59. The respondent submitted that there was no error on the part of the trial judge. As is well known, in order for a statement to be admitted pursuant to s.16, a number of requirements have to be satisfied:
- a. The witness is available for cross examination;
 - b. The witness refused to give evidence, denied making the statement or gives evidence which is materially inconsistent with it;
 - c. The witness confirmed it was proved that she made it;
 - d. Direct oral evidence of the fact concerned would be admissible;
 - e. The witness understood the requirement to tell the truth;
 - f. The statement was made voluntarily;
 - g. The witness is reliable.

60. Extensive enquiries were carried out under each of the aforementioned headings which enabled the trial judge to conclude that the s.16 statements should go in.
61. There was no error on the part of the trial judge in admitting the statements. In *People (DPP) v. Mindadze* [2018] IECA 56, it was held that the trial judge had correctly admitted a statement where, on the evidence, the irresistible conclusion was that the witness had simply decided to change her evidence so as not to implicate the accused. The trial judge having conducted an analysis similar to that conducted by the trial judge in this case, the Court of Appeal had observed [at para 20] that:

"The circumstances in which the statement was made, the fact that the original statement was video recorded and made on the afternoon after the incident and that the principal statement and the three statements combined provide an extremely detailed account are all strongly suggestive of reliability."

The respondent contends that remarks similar to these would be apposite in the circumstances of the present case.

62. It was submitted that the argument that admission of the statements was unfair and not in the interests of justice (in circumstances where only the reading back of the first statement was video recorded; leading, it was suggested, to an inability to properly engage with or tackle the veracity of same) was not substantiated by the evidence.
63. This, says the respondent, is borne out by the contents of the 112 call made to the emergency services by the witness, Claire McGrath; by the positive engagement of the witness which was manifest at the end of the read over; and, by her account to her GP, Dr Clarke, a short time after making the first statement.
64. As was pointed out by prosecuting counsel, the evidence contained in both statements was topped and tailed by separate, independent evidence, namely the 112 call and, thereafter, the comments made by Ms McGrath to Mr Connorton as he was being placed in the patrol car.
65. It was further submitted that while Ms McGrath conceded during cross examination that she lied out of self-preservation, she had also accepted on a number of occasions that much of the content of her statements was true, during the extensive "true and accurate" exercise engaged upon by the prosecution and followed up by the defence. Ms McGrath had accepted and remembered making the first statement and, while she stated that she had no recollection of making the second statement, and a case was advanced that it could not be safely relied upon due to possible drug intoxication by the witness at the time it was made, there was circumstantial evidence strongly suggestive that it had been made consciously and voluntarily, and was reliable. The trial judge had reasonably so concluded, stating:

"I don't as I say, I don't buy anger or partiality or shock or trauma in relation to the first statement. I don't buy a kind of forgetfulness or anything of that kind. I don't'

buy intoxication or anything of that kind in relation to the second statement. I am satisfied that there is a real explanation for inconsistency which is more to do with the reunion which took place very shortly after these sad events and has continued apace since."

66. The trial judge had referenced Ms McGrath's remark to Garda Ferris, who knew nothing about any of this. This was indicative that Ms McGrath knew perfectly well that she had made statements and indeed made truthful statements on a previous occasion and was therefore cautioning Mr Connorton, the following day, that if he said anything, to be very careful in what he said.
67. The respondent rejected the submission that there was an error on the part of the trial judge in admitting both the first statement and a portion of the second statement as, in itself, amounting to an unfairness to the defence. It was submitted that there is no obligation on any trial judge to effectively strike a balance or compromise in terms of what should go to the jury in reliance on s.16 when, in circumstances such as those in this case, after an extensive inquiry into the circumstances in which a number of earlier statements had been made by a recalcitrant witness which were inconsistent with the testimony given by the witness in court, he had concluded that the witness had given a very coherent, consistent and logical narrative in her statements. There was nothing manifestly unfair in allowing the entirety of Ms McGrath's first statement and a portion of her second statement to go to the jury.

Decision on the s.16 issues

68. Although Ground of Appeal No 1 alleges an error of law on the trial judge's part in his interpretation and application of s.16, this claim was made without specificity either in the complaint as pleaded or in the appellant's written and oral submissions. We find nothing to suggest any error of law by the trial judge in terms of his interpretation of, or approach to applying, s.16.
69. The gravamen of the appellant's substantive complaint seems to be better captured by Ground of Appeal No 2, namely the contention that there was insufficient evidence before the Court as to the reliability of the statements including the manner in which they had been recorded. However, we reject this complaint. The trial judge conducted a comprehensive *voir dire* and was best placed to form an impression and, indeed overview, of the evidence relevant to whether the statutory criteria for the admission of the material in controversy pursuant to s.16 had been satisfied. The transcript reveals that the trial judge's enquiry was detailed and rigorous. He addressed his mind to all of the statutory criteria, and in so far as he reached conclusions as to factual issues, there was evidence to support those conclusions.
70. While it is asserted that there was insufficient evidence before the Court as to the reliability of the statements, including the manner in which they had been recorded, the trial judge took a different view. He regarded Garda Kelly as being a particularly truthful witness. He regarded the fact of the recording of the reading over of the first statement to

be important. It was not an empty formula. The witness Ms McGrath had been offered the opportunity to make alterations or additions and had not done so. She had been calm and co-operative and had manifested a willingness to engage. He rejected suggestions of forgetfulness. While she claimed to have no recollection of making the second statement, and her mother had claimed she was unfit to be interviewed, he rejected any suggestion that intoxication with drugs had influenced the making of that statement, or that the statement's reliability should be regarded as questionable on that account. He was impressed with the logic, consistency and coherency of the accounts in the pre-trial statements. He discerned, from his overview of the evidence, a ready explanation for the inconsistencies between what the witness had said in court, and what she had said in her pre-trial statements, namely what he characterised as the "amity" between the witness and Mr Connorton and "*the reunion which took place very shortly after these sad events and has continued apace since.*" This was, notwithstanding her admissions to telling lies for self-preservation and to paint herself in a better light, and her other explanations, such as they were, for the inconsistencies between what was in her pre-trial statements and what she had said in court. He was entitled to reject the witness's explanations, providing he gave due consideration to them which it is clear to us he did. He found further support for his conclusions in the contents of the 112 call (or 999 call as it was also sometimes referred to), and in what Ms McGrath had said to Mr Connorton during the interaction with Garda Ferris. In our judgment there was a clear basis in the evidence for the conclusions arrived at by the trial judge. The appellant and his counsel may disagree with his analysis, but the conclusions he arrived at were open to him on the evidence. We therefore find no error on the part of the trial judge.

71. We are satisfied that the trial judge was correct to admit Ms McGrath's first statement and the relevant portion of her second statement into evidence pursuant to s. 16 of the Act of 2003. In the circumstances we reject Grounds of Appeal No's 1 & 2.

Ground of Appeal No 3

72. In Ground of Appeal No 3 the appellant complains that the trial judge erred "*in allowing the prosecution to play a '999' call made by Claire McGrath to the jury in circumstances where the legal basis pursuant to which the trial judge was requested to admit the evidence was uncertain, unclear and/or confused.*"
73. In the way in which the ground of appeal is framed and cast, it suggests that the focus of the complaint should be on the basis on which the trial judge was asked to rule, and the criticism seems to be that he should not have ruled in the prosecution's favour (or, implicitly, made any ruling at all) where the legal basis of the request was, in the appellant's view, "*uncertain, unclear and/or confused*". As it is put in the appellant's submissions, "*the approach of the prosecution to the issue of admissibility was flawed and formed an unsatisfactory foundation for the consideration of that issue at trial.*"
74. In truth, however, it seems to us that the real complaint with which we are being confronted is that the actual legal basis on foot of which the trial judge ruled in the prosecution's favour was unsound in law, and that consequently his ruling was erroneous and resulted in evidence being admitted which ought not to have been admitted.

75. We say this because it can hardly be a good ground of appeal that a trial judge ruled in a manner adverse to the interests of one party merely because that party subjectively viewed the application as “uncertain, unclear and/or confused”. What matters is not how the party, ultimately adversely affected, thought of how the other side presented their application. Rather, it is what the trial judge thought of the application. Providing that the transcript provides a *prima facie* basis for believing that the trial judge was clear in his/her own mind as to what it was that he/she was being asked to rule upon, and as to the basis on which he was being asked to do so, the fact that a ruling was made (even if incorrect in law) could not be the subject of legitimate criticism, even if the aggrieved party believed the application leading to the ruling to have been “uncertain, unclear and/or confused”. Rather, any criticism should instead be addressed to the soundness and legal propriety of the actual ruling, and we will approach assessment of the appellant’s complaints on the basis that he regards the ruling made as having been unsound and erroneous.
76. Having read the material portion of the transcript, there is no doubt in our minds that the trial judge understood that he was being asked by the prosecution to allow them to play the recording of the 999 call made by Claire McGrath before the jury, and that equally that the defence were objecting to that. As to the basis on which he was being asked to do so, the appellant’s own submissions accept that ultimately three potential bases were relied upon:
- (i) The recording would be relied on as real evidence and in those circumstances the rule against hearsay would not apply to it;
 - (ii) Should the rule against hearsay apply to it, it was nevertheless admissible under an exception to the rule against the admission of hearsay evidence, namely the *res gestae* exception;
 - (iii) That in any case, technology had moved on, and any idea that because of some rule of evidence rooted back at a time when the technology they were now concerned with did not exist, or perhaps wasn't perceived to be available, didn't deserve very much consideration at all. It was said that it would offend against any progressive view of the law or ordinary common sense not to admit the evidence.
77. It is equally clear that the trial judge understood the basis on which the admissibility of the recording was being objected to by the defence, namely that it was hearsay and not admissible under any exception to the hearsay rule.

The trial judge’s ruling

78. In response to the application the trial judge ruled as follows:

“JUDGE: All right. Well, the matter has been retailed extensively both now and yesterday and Mr Grehan and Mr Staines made very learned submissions based on the law. The general principle of O’Mahoney [i.e., The People (DPP) v O’Mahoney

and Daly [2016] IECA 111] is that I believe that such an item can be admitted in evidence subject to the ordinary rules of evidence, including the rule against hearsay. And if one wants to apply the rule against hearsay to this, the res gestae is a well established exception to it. It's a hearsay statement in the sense that it's an out of court statement, and that feature of it is not changed by the fact that the witness is in court and has made other in court statements and matters of that kind. It's still a hearsay statement, so therefore it must be brought within one of the exceptions.

Well, I suppose one can regard the res gestae as something of a catchall category. But in fact it's very clearly set out in the Ratten case [i.e., Ratten v R [1972] AC 378], which is from getting on for 50 years ago. But the circumstances in fact aren't all that different, except that technology of course has addressed some of the potential objections that might arise the terms of the recording of a statement such as this. It's clearly part of the facts in issue in this case. As Mr Grehan points out, the opening part of it indicates that Mr Connorton is still somewhere around. So the transaction or incident in issue is in fact ongoing at the time, that as a matter of fact the emergency services are called and as a matter of fact nowadays an emergency call is captured by a recording system.

As Mr Grehan says, that's the world we live in and I mean there is a statement of Barron J. from sometime which one should be careful I suppose of overusing. But it remains the fact that the rules of evidence should not offend against common sense. And I mean here we have a situation whereby text messages are in without objection. The first emergency call is in. And then the jury would be left with a situation of a second call three minutes later not being played to them, obviously will be available because they'll know that because they'll have heard the first call being recorded three minutes earlier. And then they will have a reading from a bit of paper as to what was said the second time around.

If I was on the jury confronted with that, I would go in and I would say to myself, what's all that about? So it clearly offends against common sense. But that's not really the touch stone. Does it have a purpose? Is it probative of something? Well, of course it is, because this as Mr Grehan points out, as I've pointed out repeatedly, all of this comes down to what view or conclusion can be formed about the events of a number of seconds, a minute or something of that kind in this apartment on this night. The only person who saw that is Ms McGrath. She herself has been at pains to tell the jury that she wouldn't regard herself as a reliable witness. They're going to have to make decisions all about that.

We have here a real fact which is something that the jury can pray in aid in making the difficult decisions they have that make in this case. I'm satisfied to hang my hat on it being admissible as part of the res gestae and therefore an exception to the an admissible exception to the hearsay rule. But in fact, if I had to go so far, I would happily say that this is a situation whereby things have moved on and this

is simply a real fact of life that is part of what happened in the essential transaction in issue in this case. And as I've pointed out, I'm not presiding over a scenario whereby the jury get the bits that suits some people, and don't suit others. They get everything that's relevant, admissible and admissible, and for the reasons put forward by Mr Grehan, this is both relevant and admissible, and it goes in."

[The full case citations in square brackets were added by this Court]

The basis put forward for the contention that the ruling is unsound

79. It was submitted that while at first blush the recording might "feel" admissible, a closer analysis indicates that there was no legal basis for its admission at the appellant's trial. The recording was used for testimonial purposes meaning that it was not admissible as real evidence. The appellant contended that none of the exceptions to the hearsay rule applied. The "common sense" basis for admission relied upon by the prosecution and trial judge had no proper foundation in law.
80. The appellant contended that the trial judge was led into the alleged errors just identified by the approach of the prosecution which, it was complained, was unsatisfactory in that:
 - i. There was a failure to clearly identify or specify the evidential purpose underlying admission of the recording.
 - ii. The proposed grounds for admission were inconsistent. For instance, the prosecution claimed the evidence was admissible as real evidence, but also under the res gestae exception (which supposes that the evidence is testimonial).
 - iii. There was no detailed analysis of the exceptions relied on. For instance, there was no analysis of the requirements of the res gestae exception. No authority was opened to the court to establish a legal basis upon which evidence could be admitted so as to accord with "common sense".
81. We immediately have an issue with one aspect of the case being made, inasmuch as there is an ostensible assumption that evidence can only be used either as testimonial evidence, or as real evidence, and that these purposes are mutually exclusive. Evidence of an out of court statement can in fact be adduced for one or more of three purposes and they are not mutually exclusive. A party wanting to introduce a recording of an out of court statement is perfectly entitled to seek to use it for more than one purpose, but must of course satisfy any requirements for admissibility relevant to each such purpose.
82. A record of a voice recording of an out of court statement can be adduced as real evidence to demonstrate the discernible characteristics it exhibits. So in the case of a voice recording, it can be relied on as real evidence to demonstrate the quality of the record, the speed at which the speaker spoke, the cadence, tone and timbre of the voice on the recording, the clarity of his/her diction, the existence or non-existence of an accent, or of a speech impediment, the demeanour of the speaker, the ostensible

emotional state of the speaker, background noises and matters of that sort. Use of a recording as real evidence does not of itself engage the rule against hearsay.

83. Such a recording can also be introduced as original evidence, i.e., where it is intended to rely on the contents of what was said but not necessarily the truth of what was said. The classical example of this occurs in the context of defamation litigation, where the plaintiff leads the evidence to establish what was said, but not to establish that it was true. On the contrary, the plaintiff's whole case in a defamation action is that the statement is false and misleading. In the criminal context it is well established that it is permissible to use out of court statements as original evidence to prove merely that something was said, but not necessarily that what was said is true. For examples, see in this jurisdiction *People (DPP) v. O'Reilly* [2009] IECCA 18, and the English case often put forward as being the classic illustration of the proposition, i.e., *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965. As in the case of using a recording of an out of court statement as real evidence, using a recording of an out of court statement as original evidence does not engage the rule against hearsay.
84. On yet other occasions, the party introducing the evidence will seek to rely on the truth of the contents of the recorded statement, in which case it is being adduced for testimonial purposes. Where it is intended to use a recording of an out of court statement for testimonial purposes that does engage the rule against hearsay, and before it can be admitted for that purpose it must be shown to come within some recognised exception to the rule against hearsay.
85. Accordingly, to properly assess the application the trial judge needed to know for what purpose or purposes the prosecution were seeking to introduce the recording in question. The transcript reveals the following exchanges between prosecuting counsel, Mr Grehan SC and the trial judge on this question:

"MR GREHAN: So ... , we have actually a piece of what Ms McGrath did actually say, acknowledged by Ms McGrath as what she did say, by way of a recording made within terms which would see it admitted under the ordinary res gestae rule. But in my submission, there's actually a far greater reason, it's in terms of fairness to the prosecution presentation of the case. But also the jury, we have this evidence, it is available, there is nothing that anybody can point to that taints it, because Ms McGrath says, I said that, she has accepted she said that. So it's there, so what do they get in addition from the recording that they don't get from the transcript? They get to, I suppose, hear her voice, they get to hear her tone, they get to hear some impression of her emotional state during the course of that. And they get to know that this is in effect as near contemporaneous with events as it possibly could be. The call starts off with Ms McGrath saying, "Keith", and it suggests that Keith is still in fact either in or leaving the apartment.

JUDGE: Somewhere around?

MR GREHAN: Somewhere, somewhere around. So the idea that that evidence should be excluded from the jury, in my submission, is offensive to any view of common sense, or any view of the law that we're here, where the prosecution have gathered evidence to allow that evidence to be presented in front of the jury. And in my submission, there is in fact no principled objection for it. And if it's necessary to actually put it in terms of modern day jurisprudence, this is now evidence that becomes available because of modern technology, because unlike in Ratten where you had to rely on the operator

JUDGE: Well, the operator scribbled something down.

MR GREHAN: Yes, and the operator saying what they thought when it comes to trial many months or many years afterwards, that because of because of technology, because these calls are recorded in the same way that because of CCTV that matters are recorded, or indeed in the same way that because of text messages, that the actual text is there for the benefit of everyone. These are all matters of they're real evidence in the sense of they are a real piece of tangible material which both sides have the ability to make use of. But the jury should not be denied the benefit of evidence of that quality based on some kind of a suggestion that it offends a rule that was brought in in the first place, if one takes the best evidence rule, as a way of ensuring that the jury only received the best possible evidence. And one of the objections that used to be made to hearsay evidence was that the witness wasn't able to be cross examined, didn't give evidence on oath, that it was an out of court statement. This is an out of court statement, that is certainly true. But the witness has acknowledged that she said it in the witness box.

JUDGE: But that can't be a principled objection, because as you've pointed out, out of court statements in the form of text messages have been freely brought into the case.

MR GREHAN: Yes, and that's because technology and the way our world has evolved has moved on since. So any idea that because of some rule rooted back at a time when such technology did not exist or perhaps wasn't even perceived to be available, in my submission, doesn't deserve very much consideration at all. And certainly from my point of view, as I say I think it would offend against any progressive view of the law or ordinary common sense not to permit the jury to have the actual words spoken by the witness."

86. It is abundantly clear from this extract that prosecuting counsel had flagged an intention to use the recording as real evidence in the traditionally understood sense, i.e., as an observable thing exhibiting qualitative or quantitative characteristics discernible to the senses that a jury could scrutinise or examine for themselves. He specifically identified that the jury "get to, I suppose, hear her voice, they get to hear her tone, they get to hear some impression of her emotional state during the course of that." These are characteristics discernible from the recording, irrespective of its substantive content. If

that had been the only basis on which prosecuting counsel had sought to have the recording admitted, there could have been no objection to the trial judge admitting it for that limited purpose, providing that it was made clear to the jury that it was only being admitted for that purpose and that they were not to pay any regard to the substantive content of the record.

87. However, in our view prosecuting counsel was going further and was, in truth, indicating in substance, if not in explicit terms, that he intended to use the recording, or at least aspects of it, as testimonial evidence. For example, in the quotation in paragraph 84 from prosecuting counsel's submission, the following is said:

"And they get to know that this is in effect as near contemporaneous with events as it possibly could be. The call starts off with Ms McGrath saying, "Keith", and it suggests that Keith is still in fact either in or leaving the apartment."

It is clear, therefore, that prosecuting counsel wanted the jury to have regard to what Ms McGrath had said about Keith in the recording (which is substantive content), and the time at which it was said (they would have had the assistance of the testimony of the operator in regard to the time of the call), but also to accept as true the suggestion that Keith was either still in, or was in the process of leaving, the apartment at that point.

88. In seeking to adduce the recording both as real evidence and as testimonial evidence, prosecuting counsel argued (in substance) that he should be allowed to do so without constraint on the basis that the rule against hearsay was not in fact engaged in the circumstances of the case (even though he intended to use the material in part as testimonial evidence), but that if it was engaged, the material came within the *res gestae* exception.
89. The argument that the rule against hearsay was not in fact engaged in this instance (even if the material was to be used in part for testimonial purposes) was put forward by prosecuting counsel essentially as a novel proposition because the court was referred to no case law or authority directly in point. It was argued that there could be no principled objection to its admission. The rule against hearsay was intended to guard against the mischief of possible concoction or distortion in circumstances where the maker of an out of court statement might not be available for cross-examination. It was said there was no such risk here. The witness herself had accepted that she had made the call. A recording of the actual call capturing the caller's voice as well as the substance of what was said was the very best evidence available. Moreover, in modern life it is ubiquitous to summon a first response in an emergency by having recourse to the emergency phone numbers 112 or 999, and nowadays such calls are invariably audio recorded. However, when the rule against hearsay was conceived the technology to summon help in that way, and for an audio record to be kept of it, simply did not exist. Counsel contended that the law had to adapt to reflect current reality. Accordingly, in his submission, *"any idea that because of some rule rooted back at a time when such technology did not exist or perhaps wasn't even perceived to be available ... doesn't deserve very much consideration at all"*, and he

suggested, "it would offend against any progressive view of the law or ordinary common sense not to permit the jury to have the actual words spoken by the witness"."

90. It is manifest that the trial judge was also of the view that it was intended to use the recording, at least in some respects, as testimonial evidence. It is clear that he considered that the rule against hearsay was engaged on his understanding of that rule as it is usually applied, and he was correct in that assessment in our view, so that the material was *prima facie* inadmissible unless it could be shown to come within one of the recognised exceptions to the hearsay rule. In that regard, he said that, "*I'm satisfied to hang my hat on it being admissible as part of the res gestae and therefore an exception to the – an admissible exception to the hearsay rule.*" That was his ruling, and we are satisfied (notwithstanding arguments addressed by the respondent as to why the material should not be regarded as coming within the exception, a matter we will return to) that it was a correct ruling.
91. In so far as he addressed the novel argument that the rule against hearsay could be treated as not having been engaged in the circumstances of the case, he expressed sympathy with the argument but did so only as an *obiter dictum*. Having ruled that the material was covered by the *res gestae* exception he said, "*if I had to go so far, I would happily say that this is a situation whereby things have moved on and this is simply a real fact of life that is part of what happened in the essential transaction in issue in this case.*"
92. In our view the trial judge's approach to the dual arguments being presented by the prosecution was the correct one. Faced with an argument, being advanced as a novel proposition, that a long-established rule of law, namely the rule against hearsay, should be disregarded on a common sense basis in the circumstances of the case, so as to allow the controversial recording to be admitted; and an alternative argument that admission of the controversial recording could in any event be safely accommodated under our existing law, as coming within the *res gestae* exception; the trial judge was right to consider the alternative argument based on the existing law first. Quite apart from any argument, such as that made by the appellant, that if the law regarding the scope of application of the rule against hearsay is to be changed, it is a matter for the legislature to address by the enactment of suitable legislation, judicial activism involving changes or modifications to existing law should be engaged in sparingly. If the relief being sought by the applicant was capable of being possibly granted under existing legal rules then it was proper, and preferable, that the court should rule on the basis of the existing and well-established legal rules. That is what the trial judge did.
93. Having thus ruled in the applicant's favour on the basis of the existing law, the trial judge was perfectly entitled to offer a view on the novel proposition that had also been put forward, and to express sympathy with it, as an *obiter dictum*. However, in circumstances where we are satisfied that he ruled correctly on the basis of the existing law it is unnecessary for this court to engage with the novel proposition.
94. It remains for us to explain why we are satisfied that the trial judge was correct in concluding that the recording came within the *res gestae* exception. In doing so, we must

make clear that while we are satisfied that the trial judge's ruling was ultimately correct, there are aspects of his reasoning with which we do not agree. In particular, we do not agree that the fact that the substantive content of the appellant's 112 call was accepted as being admissible was relevant to whether the substantive content of Ms McGrath's 999 call should also be admitted.

95. It will be recalled that the trial judge observed:

"I mean there is a statement of Barron J. from sometime which one should be careful I suppose of overusing. But it remains the fact that the rules of evidence should not offend against common sense. And I mean here we have a situation whereby text messages are in without objection. The first emergency call is in. And then the jury would be left with a situation of a second call three minutes later not being played to them, obviously will be available because they'll know that because they'll have heard the first call being recorded three minutes earlier. And then they will have a reading from a bit of paper as to what was said the second time around."

96. These observations disregard the fact that it was sought to admit the two recordings under entirely different exceptions to the rule against hearsay. It therefore could not be said to be illogical or contrary to common sense to have treated them differently, had it been necessary to do so. The substance of the appellant's 112 call (whether that was given as oral evidence by the operator who received it, or as a transcript produced by him, or as an audio recording played by him is not relevant), was accepted as being admissible because it qualified as a declaration against the appellant's interest. A declaration against interest represents an exception to the rule against hearsay which is quite separate to the *res gestae* exception which was invoked in the case of Ms McGrath's 999 call. If, hypothetically, it had been necessary to regard one as admissible and the other as inadmissible the trial judge could have provided an explanation to the jury (who would have known of the existence of both calls from evidence already adduced before them, if not their exact substance) that the legal rules applying to each of them were different and that it was for that reason they were being allowed to hear one but not the other. It didn't arise, however, because they were both admitted, albeit under different exceptions to the hearsay rule.

97. We accept the appellant's submission that the correct approach to whether or not evidence comes within the *res gestae* exception is that commended in *The People (DPP) v. Lonergan* [2009] 4 I.R. 175, namely that due weight should be given to both the requirement of contemporaneity and the possibility of concoction or fabrication. In *Lonergan* the Court of Criminal Appeal referred to the test for admissibility formulated by Lord Wilberforce in *Ratten v. R*, [1972] A.C. 378, a decision of the Privy Council, which was later endorsed by the House of Lords in *R v Andrews* [1987] A.C. 281. Giving judgment for the Court of Criminal Appeal in the *Lonergan* case, Kearns J. [at para 15 on pp180/181 of the report] quoted from the judgment of Lord Ackner in the *Andrews* case,

succinctly setting out the *Ratten/Andrews* approach, which the Court of Criminal Appeal was prepared to approve and adopt, in five points:

- "1. *The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?*
2. *To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.*
3. *In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event ...*
4. *Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely ... malice ...*
5. *As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error ... In such circumstances the trial judge must consider whether he can exclude the possibility of error."*

98. Prior to the *Lonergan* case the leading authority on the res gestae exception in this jurisdiction was the earlier decision of the Court of Criminal Appeal in *The People (Attorney General) v. Crosbie* [1966] I.R. 490. In *Lonergan* the court, per Kearns J., did not see the decision in *Crosbie* as being in conflict either with the decision of the Privy Council in *Ratten* or with that of the House of Lords in *Andrews*, albeit that those decisions carried the reasoning in the *Crosbie* case somewhat further. Kearns J. observed:

"The court is satisfied that the more evolved formulation of principle set out by Lord Ackner does no more than elaborate the rationale for the views expressed in The People (Attorney General) v. Crosbie. The composite approach adopted by the trial judge, which gave due weight to both the requirement of contemporaneity and the possibility of concoction or fabrication, appear to this court to represent the correct approach to this issue. It would be quite wrong to hold that admissibility should be determined by reference solely to a given time period as to do so would lead to arbitrary and unfair results. Time in this context is an important factor but not a

determinant. The true importance of the requirement of contemporaneity is to eliminate the possibility of concoction. Where it is clear that no such opportunity existed on the facts of a given case it would be quite wrong to exclude statements on some arbitrary time basis. It is more a matter of factoring in both components when deciding whether or not to admit such statements as part of the res gestae. In every case the trial judge will have to exercise his discretion having regard to the particular circumstances of the case."

99. We find the following passage from the judgment of Lord Wilberforce in the *Ratten* case to be of particular assistance to us in considering the approach of the trial judge in the present case. His Lordship stated [at p.388, para F to p390, para A]:

"The expression "res gestae", like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:

1. *When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in O'Leary v. The King (1946) 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J. said at p. 577:*

"Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behavior of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

2. *The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or part of them.*
3. *A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. A classical instance of this is the much debated case of Reg. v. Bedingfield (1879) 14 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through*

the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. and the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression "res gestae" may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

100. In our view the evidence in the present case clearly established close proximity in time between the 999-call made by Ms McGrath and the stabbing of Mr McKeever. It was made while he was *in extremis* in the immediate aftermath of being stabbed. We are satisfied that the requirement of contemporaneity was clearly established.
101. On the issue of possible concoction or fabrication (we can discern no substantive difference between the two terms), or deliberate distortion, of the account, the appellant has suggested there were a number of factors which pointed towards the possibility of concoction or distortion. It was submitted on his behalf that, firstly, the appellant had minutes earlier engaged in a physical confrontation with Ms. McGrath's new lover, as result of which he lay dying on the ground. At that moment the appellant, her long term partner (or former partner), with whom she had been recently fighting was unlikely to be

a person that she held in high regard. It appeared that the appellant had assaulted her. It was suggested that any possibility of Ms McGrath being in a position to give a dispassionate, objective and undistorted view of what had taken place was compromised. Secondly, in Ms. McGrath's own evidence regarding the accuracy of what she said on the emergency call: under cross-examination, she stated that "*my description to the 911 operator is not accurate.*" Other factors, relied on by the appellant as being relevant, included findings that might have been made regarding Ms. McGrath's overall credibility as a witness in circumstances where she had been deClaired hostile and s. 16 had been successfully invoked based on the viva voce evidence she had given in court. Finally, there was evidence that Ms. McGrath was an active drug user at the time, who by her own admission would lie for self-preservation, and Ms. McGrath's mother had given evidence (in the absence of the jury) that when Ms. McGrath was taking drugs that no faith could be put in anything that she said.

102. We note the points made by the appellant. However, we regard it as being of significance that while Ms McGrath was extensively cross-examined, both during *voir dire* and before the jury, there was no cross-examination concerning her 999 call suggestive of concoction or distortion. She readily accepted that the voice on the recording was hers and that she had said what she had said, albeit while maintaining that "*my description to the 911 (sic) operator is not accurate.*" However, even in the circumstances where she had volunteered this, the possibility was never suggested to her that her account to the operator had been deliberately concocted or distorted.
103. Indeed, the possibility of concoction or distortion in the context of the 999 call was not raised as a potentially relevant issue by either the prosecution or the defence. The argument now being made by the appellant in this appeal, based on the circumstances pointed to (which we have set out at paragraph 101 above), was not one made in the court below. Other arguments were advanced, but the case was not made that the evidence should not have been admitted because there was a risk of concoction/fabrication or deliberate distortion that could not be discounted. Therefore, we find it unsurprising that the ruling of the trial judge did not address that issue in terms. That having been said, we are in no doubt that the trial judge was nevertheless fully alive to the approach commended in the *Ratten/Andrews* jurisprudence and its nuances.
104. We are satisfied that the trial judge was aware of and must be taken as having applied in his own mind, the *Ratten/Andrews* test both because he was expressly referred by prosecuting counsel to the *Lonergan* case (transcript, day 6, line 2) and because of his response to it (transcript, day 6, line 5). In that regard, he was referred to the *Lonergan* decision in the context of a submission by prosecuting counsel to the effect that the courts (both here and in England and Wales) had moved away from contemporaneity as being the determinative consideration. While this proposition was being advanced, the trial judge had interjected to say, "*It was Bedingfield what did it*", thereby indicating his awareness of the *Bedingfield* case which had featured so centrally in the passage we have quoted from in the judgment of Lord Wilberforce in *Ratten v. R.*, at paragraph 99 above.

105. Moreover, in his ruling, the trial judge alluded expressly to the fact that the law on the res gestae exception to the hearsay rule was *"very clearly set out in the Ratten case, which is from getting on for 50 years ago."*

106. While it might have been better if the trial judge had expressly discounted concoction/fabrication and/or deliberate distortion in his ruling, we do not regard his failure to do so as having been fatal in the overall circumstances of the case, and particularly where neither party was seeking at that point to suggest that it was an issue in the case. Importantly he did consider the issues of potential relevance and reliability, stating:

"Does it have a purpose? Is it probative of something? Well, of course it is, because this as Mr Grehan points out, as I've pointed out repeatedly, all of this comes down to what view or conclusion can be formed about the events of a number of seconds, a minute or something of that kind in this apartment on this night. The only person who saw that is Ms McGrath. She herself has been at pains to tell the jury that she wouldn't regard herself as a reliable witness. They're going to have to make decisions all about that."

107. It is clear to us that the trial judge was of the view that any questions arising as to the reliability of the record itself, and its substantive contents, were well capable of being addressed by the jury, and that there was no ostensible basis for not admitting the evidence in controversy before them. He had a clear appreciation that the emphasis in the *Lonergan/Rattan/Andrews* jurisprudence had been on whether the evidence could be *"safely admitted"*.

108. In *Ratten*, which was a murder trial in which a man was accused of murdering his wife, the court had concluded that the evidence in controversy, which involved testimony from a telephone operator of having received a call from the address where the deceased lived with her husband from a distressed female saying *"Get me the police"*, but who had hung up before she could be connected, could be safely admitted. The court based its conclusion on the close and intimate connection between the statement ascribed to the deceased and the shooting. They were closely associated in both time and place. Moreover, the way in which the statement at issue came to be made, and the tone of voice used, showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of a contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the accused with his gun. Even on the assumption that there was an element of hearsay in the words used, they were safely admitted.

109. We are satisfied that similar considerations would have arisen in the present case. Moreover, unlike in *Ratten*, in the present case the maker of the out of court statement was available to be cross-examined, thereby enhancing the prospect that the evidence could be safely admitted. In this context, we point yet again to the fact that although there was an opportunity to probe the possibility of concoction/fabrication or distortion with Ms McGrath it was not availed of. In our view while the trial judge in the present

case did not display the type of rigorous analysis that was provided in the judgment in the *Ratten* case when giving reasons for his ruling on this particular issue, it is clear from the later detailed ruling that he gave on the s.16 issue, which covered and extensively analysed a great deal of evidence that was also relevant to the *res gestae* issue, that he was closely following the evidence throughout the trial and subjecting it to rigorous, ongoing analysis. While clearer and better reasons, more clearly anchored in this ongoing analysis, might have been provided by him for his decision to admit the evidence, we are satisfied that he was ultimately correct to do so. We are in no doubt but that when he gave his ruling he had a full appreciation of the evidence before him and understood, and may be taken to have applied the test in law for admitting hearsay evidence pursuant to the *res gestae* exception.

110. We are therefore satisfied that it was safe to admit the recording of Ms McGrath's 999 call, and that the trial judge was correct to do so. Accordingly, we reject ground of appeal No. 3.

Conclusion.

111. The appeal against the appellant's conviction for murder must be dismissed.