

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

The People at the Suit of the Director of Public Prosecutions	V	Marta Herda
High Court Record Nr	CCDP0101/14	Court of Appeal Record Nr 226/16
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Marta Herda	
Solicitors for Applicant(s)/Appellant(s)	Thomas E Honan	
Thomas E. Honan & Co. Solicitors, Ferrybank, Arklow, County Wicklow		
Name of Respondent(s)	The People at the Suit of the Director of Public Prosecutions	
Respondent's solicitors	Chief Prosecution Solicitor	
Infirmarary Road, Dublin 7		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham J., Mahon J., Whelan J
Date of order/ Judgment	Date of judgment: 12/10/2017 Perfected on the 06/11/2017

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Marta Herda
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

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If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	The Director of Public Prosecutions
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent	
	<input checked="" type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>		
Yes		<input checked="" type="checkbox"/>	No		<input type="checkbox"/>

Solicitor			
Name of firm	Chief Prosecution Solicitor		
Email			
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Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

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Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

The Appellant seeks to appeal from the entire decision of the Court of Appeal refusing to quash the murder conviction.

(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

Statement of the facts taken from the judgment of the Court of Appeal:-

1. The appellant was convicted on the 28th July [2016] of murdering Csaba Orsas, a Hungarian national on the 26th March 2013 by a jury at the Central Criminal Court and was sentenced to life imprisonment. She has appealed against her conviction.
2. The appellant is a Polish national born in 1987. She came to live in Ireland at the age of nineteen, and at the time of the offence was working in a hotel in Arklow where the deceased was also employed. They had known each other for approximately two years. Both lived in Arklow, but in different parts of the town, with the deceased residing in a part closer to the harbour area. It was alleged by the appellant that the deceased had been, for some period of time, infatuated with her, regularly followed her and attempted to contact her, and in general terms, harassed her to the point of annoyance and concern on her part.
3. Early on the morning of the [26th of March,] 2013 the appellant drove her Volkswagon Passat car, with the deceased in the front passenger seat, through a barrier and railing at Arklow harbour and into deep water. The appellant succeeded in exiting the car and swam to safety. The deceased's body was later found washed up on the nearby shore, having died from drowning. Immediately following the incident, the appellant was found by local people in a saturated state close to the harbour area and was taken by ambulance to hospital. At the

trial, evidence was heard from people who came to her assistance, ambulance personnel and from two nurses who tended to her in hospital. The appellant did not sustain any physical injury.

4. At the time of the incident the appellant had been living and working in Ireland for approximately seven years and had a reasonably good, although not perfect, command of the English language. She advised D/Sgt. O'Brien at the commencement of her second garda interview on the 2nd August 2013 that she had a good understanding of English but might need help with some words.

5. The prosecution case against the appellant was that she had deliberately and intentionally driven her car at speed into the water with the intention of killing the deceased or causing him serious harm. Although the appellant did not give evidence at the trial, and no evidence was called on her behalf, it was nonetheless clear from the cross examination of witnesses in the course of the trial by her counsel and from what he said in the course of his closing speech to the jury that the appellant vehemently challenged the allegation that she deliberately drove her car into the water or that she intended to kill or seriously harm the deceased. It was contended on her behalf that she did not have a full recollection of events immediately prior to the incident, and that aspects of statements made by the appellant immediately following the incident, and another some three to four months later*[sic] did not convey information which the prosecution claimed they did. A similar position was taken in relation to a video taped interview of the appellant by the gardaí. Furthermore, some of the evidence given by the witnesses who came to the appellant's assistance after she emerged from the water on the morning of the incident and the evidence of the two nurses who tended her in hospital were robustly challenged by the appellant. In general, the appellant claimed to have little or no recollection of the events in the period leading up to driving into the water, including, in particular, the circumstances in which the deceased came to be in her car.

6. In particular, the appellant challenged the suggestion that she had said in statements or in her recorded interview that the deceased had suddenly appeared at her car outside her residence shortly after 5 a.m. on the morning of the incident while she sat in the car alone having been driven home by a work colleague, and that he got into the car and ordered her to drive. CCTV evidence established that shortly after that time the appellant was seen driving her car alone through the town of Arklow, and in the general direction of the deceased's address, and the harbour area generally. Telephone evidence also established that in or around this time the appellant had made three calls on her mobile phone to the deceased, and

CCTV evidence showed her on a mobile phone making one of these calls as she drove through the town. There was also evidence from a witness that the appellant was on her mobile phone in her car and appeared to be engaged in very agitated conversation. There was also evidence that the appellant had driven her car at speed in the harbour area and through the barrier and hand rail into the water, and that the handbrake, (and not the footbrake), had been applied immediately before the car plunged into the water. There was also the suggestion that the appellant may have fully opened her electrically operated driver's window immediately prior to the car entering the water, although there was evidence that an electronically operated window could have been opened within one minute of a car entering water, and that a car may float briefly. The appellant was aware that the deceased was unable to swim and had a fear of water, while she was able to swim.

The Applicant sets out the following further important matters of fact:

7. The prosecution case was that the Applicant conveyed the following information to triage nurses in particular Nurse Best, and, later the same day*, to gardaí in a statement which was not video recorded: that the Deceased had entered her car unexpectedly outside her home while she was in her car; that she was being harassed by the Deceased in her car and that she deliberately drove into the water in order to stop the harassment by the Deceased. An interpreter was not present for either the conversations with the nurses or the taking of the said statement. (A friend of the Applicant was present but there was no suggestion that his English was any better than the Applicant's English.) Nurse Best continued speaking with the Applicant after she had sought a garda to be present because of what she believed the Applicant was saying.

8. It appeared, incorrectly, from a reading of certain points in the memos of interview written during interviews which were video recorded a number of months later while the Applicant was detained, that the Applicant appeared to concede or to fail to deny at least some of the incriminating propositions set out at (7) above. At other points she is recorded in the memos as having denied the incriminating proposition. However, on a consideration of the videos of those interviews, it was clear that the memos were incorrect at those points where it appeared that the Applicant had made incriminating concessions or failed to deny the said incriminating propositions; and did not reflect accurately what had been said by the Applicant. An interpreter was present only for the interviews which were video recorded.

9. It was demonstrated by a consideration of what was actually said in the video recorded

interviews, by showing excerpts of the videos and by providing transcripts of the relevant parts of the interviews and contrasting them to the garda memos of interviews: a) that the Applicant had consistently asserted that she had not known she was driving into water and had not intended to do so; b) that she had never said that she drove into the water in order to stop the harassment; c) that she had honestly conveyed that at the time she drove the car into the water she was being harassed by the Deceased and wanted the harassment to stop; d) but that she did not drive into the water deliberately for the purpose of stopping the harassment; e) that she had never said that she had driven into the water deliberately; and f) that she could not remember how or under what circumstances the Deceased got into her car and had never said that he got into her car at her home.

10. As a matter of common sense, it was an obvious fact that the Appellant's vehicle must have been travelling at some speed in order to crash through barriers into the water. There was no evidence as to the amount of speed. The defence had accepted that it appeared that the handbrake and not the foot brake had been applied about a half a second before impact with the barriers. It was contended by the defence that this was consistent with the scenario put forward by the Appellant: that she did not know that the vehicle was going to go through the barriers and the deceased may have applied the handbrake in the last second before impact.

11. The defence contended that the prosecution had put forward a theory from the outset of the trial that the Appellant had premeditated and planned the murder and had later lied about these plans to Nurse Ging and in the statement to Garda Crehan when an interpreter was not present. This theory involved alleging that the Appellant had lured the Deceased from his home; put her window down, crashed through barriers at substantial speed deliberately driving into the water, knowing he could not swim and expecting that she would swim out the window and escape; then falsely claimed she had been raped while shouting for help on the street; although denying any sexual assault when asked by paramedics, nurses, doctors and gardaí.

12. But in his closing speech, counsel for the prosecution appeared to acknowledge that the premeditated murder plan might be fanciful and far-fetched and suggested that the Appellant may have been intent on committing suicide and murdering the Deceased at the same time.

13. But the first "premeditation theory" was not abandoned; and despite the fact that the premeditation theory involved an allegation that the Appellant told lies to conceal the murder plan (allegedly claiming the Deceased jumped into her car at her home), a concurrent,

inconsistent theory was also put forward: that the Appellant had become angry and frustrated with harassment from the Deceased and drove into the water in anger to end the harassment; and that she confessed as much to Nurse Best; and subsequently in a formal interview, to Garda Crehan (without an interpreter).

14. The Appellant contended that both of these inconsistent prosecution theories were put forward in the context of prejudicial evidence and submissions to the effect that the Appellant had behaved reprehensively by leading on and sending mixed messages to the Deceased who she knew had been in love with her.

The relevant orders and findings made in the High Court and/or in the Court of Appeal
The Court of Appeal rejected the various grounds of appeal and dismissed the appeal.

Findings of the Court were as follows, in summary:

1. It was not necessary for the trial judge to direct the jury that in deciding the first question to be determined by the jury, whether the act of driving into the water was a deliberate or intentional act, the statutory presumption that the accused intended the natural and probable consequences of her action did not apply.
2. If the jury found that the act of deliberately driving off a harbour pier into deep water at speed was deliberate, it would be fanciful to suggest that the Applicant might not have intended to cause serious harm or death; therefore it was not necessary to direct the jury that if they found that the Applicant deliberately drove into the water, but also found that there was a reasonable possibility that she did not intend to kill or cause serious harm, then the appropriate verdict was manslaughter.
3. It was not necessary to direct the jury that if there was a reasonable possibility that the Applicant did not intend to kill or cause serious injury, but the Applicant had adverted to the real risk of death or serious injury, then manslaughter was the appropriate verdict.
4. The obligation of the trial judge to put the defence case was fulfilled in this case by generous reference to the cross-examination by the defence of various witnesses.
5. There was no requirement for the trial judge to give any direction to the jury arising from the suggestion first made in the prosecution closing speech, that the Applicant may have intended to commit suicide.
6. The trial judge did not err in refusing to direct the jury that the circumstantial

evidence in this case was not sufficient to ground a conviction for murder.

7. The evidence of the nurses was properly admitted in evidence. There was no requirement for a warning under s.10 of the Criminal Procedure Act, 1993, because that provision only applies to confessions which are not corroborated and in this case the confessions were corroborated on the basis that the confessions to Nurse Best and to Garda Crehan (the statement which was not video recorded and for which an interpreter was not present) “were capable of corroborating each other”; and “additional evidence of corroboration can be found in the evidence relating to the speed of the vehicle... and possibly the use of a hand brake to brake the vehicle, instead of the foot pedal”.
8. The trial judge did not err in directing the jury as to reasonable doubt in saying that “It is the sort of doubt a reasonable person would entertain on a matter of the (most) importance which would cause them to turn away from the proposal or idea or course of action which one was contemplating”
9. The trial judge did not err in refusing to direct the jury that while it was the duty of the members of the jury as a collective unit to make all proper efforts to reach a verdict, the individual members of the jury were bound by their oath not to subscribe to a verdict with which they did not truly agree in the exercise of their independent judgment, having previously directed the jury that a unanimous verdict was required.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

Summary

1. It is respectfully submitted that the following aspects of the decision of the Court of Appeal involve legal matters of general public importance; and that those matters arose from legal directions which were given to the jury or which the trial judge refused to give to the jury; and that there are therefore objective grounds for concern that the Applicant was wrongly convicted of murder and that a miscarriage of justice has occurred in this case, and that in all the circumstances, it is in the interests of justice that there be an appeal to the Supreme Court.
2. The Learned Trial Judge refused to exclude the purported admissions alleged to have been made by the Applicant to a triage nurse and subsequently refused to give any warning or direction to the jury as to the reliability of the alleged admissions to the nurses or Garda Crehan. The prosecution contended that they amounted to an admission to intentionally driving into the water knowing the Deceased would die. The Applicant denied ever saying that she knew she was driving into the water. The Court of Appeal held that the nurses' evidence was properly admitted and that no warning or directions were necessary. These decisions give rise to questions of fundamental and general importance as to the State's legal obligations and the duty of trial judges under the constitution and under European law, as to the fair treatment of foreign nationals who are alleged to have made admissions without an interpreter present.
3. As to the legal issues relating to murder, in summary it is submitted that the following matters arise in the Applicant's case and are of general importance in all murder cases in which accident/misadventure/involuntary action arises on the evidence (a) below; and in murder cases generally – (b) and (c): in that:
 - a) a trial judge must direct the jury that the statutory presumption that the accused intended the probable consequences of her conduct does not apply to the question of whether the action causing death was deliberate;
 - b) if the action was deliberate but the Applicant might not have intended to kill or cause serious injury, the Applicant was not guilty of murder;
 - c) but in that case, the Applicant was guilty of manslaughter if she was reckless,

that is if she adverted to the real risk of death or serious injury but proceeded in those highly culpable circumstances.

4. The other issues of general importance may be summarised as follows:

d) what is the extent of the duty of trial judges to summarise the defence case in a trial in which the prosecution relies on two inconsistent or alternative theories?;

e) should the alleged admissions to the nurses have been admitted in evidence at all; and if so, what directions must a trial judge give to a jury where evidence of a confession (made by a person whose English is limited) is given in particular where an interpreter is not present; and does s.10 of the Criminal Procedure Act, 1993 require a direction in all cases involving a confession, even if there is evidence which the jury could regard as corroboration?;

f) is a direction on reasonable doubt defective if it conveys to the jury that such a doubt should be of sufficient weight as to cause a jury member to decide on a matter of importance in the affairs of a member of the jury, as opposed to causing postponement of such a decision?;

g) is it permissible for a trial judge to convey that the jury is under a duty to agree a verdict, but to refuse to direct that the individual jurors are under a duty not to subscribe to a verdict with which they did not truly agree in the exercise of their independent judgment?

A: Legal Question of general importance: Accident and the Statutory presumption

5. Whether it is necessary in all murder trials in which the possibility of accident or misadventure arises on the evidence, for the trial judge to direct the jury that the statutory presumption that the accused intended the natural and probable consequences of her conduct applied only in respect of the intention as to consequences of actions which were proven to be voluntary or non-accidental actions.

6. There is a strong case for the proposition that such a direction is necessary as a matter of law and logic: cf *Woolmington v D.P.P.* [1935] A.C. 462 at p. 481 "...there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused

and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.) intentional and (ii.) unprovoked.”

7. However, it appears that there is no clear Irish authority on this matter, although the existence of such a requirement is implied in the Supreme Court decision of *P(DPP) v Cronin (No.2)* [2006] 4 IR 329 per Kearns J at p.347 “In the case of murder this means that the accused must have ‘intended to kill or cause serious injury’. That necessarily means that it must be sufficiently conveyed to the jury that the accused committed the specific act, in this case the firing of the gun, intentionally.”
8. There is a real danger in the Applicant’s case and in other cases in which accident arises as a possibility, that the jury might take the statutory presumption as to intended consequences and incorrectly apply it to the prior question of whether the action was voluntary/intentional/deliberate, as follows: “In deciding whether the accused drove into the water deliberately, we are assisted by the presumption: she is presumed to have intended the natural and probable consequences of her actions; her actions were to drive into the water; the natural and probable consequence was death or serious injury; therefore she is presumed to have intended death or serious injury; and therefore she intended to drive into the water.”

B: Legal matter of general importance: Intent

9. **In all murder trials in which the defence requests that a direction be given to the jury on the legal consequences of a finding that although the act causing death was deliberate, there was a reasonable possibility that the accused did not intend to kill or cause serious injury, is the trial judge required to give such a direction, despite the fact that the trial judge and the Court of Appeal might regard such a possibility as fanciful?**
10. It is respectfully submitted that the decision of the Court of Appeal in this respect amounts to a highly significant deviation from a fundamental principle of the criminal process: the jury, not the judge, decides the matters of fact, in this case whether the Applicant could have deliberately driven into the water and yet not have intended to cause serious injury or death.
11. The refusal by the Learned Trial Judge to give the requested direction amounted in effect to a conditional direction to find the Appellant guilty of murder if the jury found that the action of driving into the water was deliberate cf *P(DPP) v Davis* [1993] 2 IR 1; *P(DPP) v McNally* [2007] 4 IR 145

12. In the Appellant's case, the prosecution had specifically submitted to the trial judge that a finding by the jury that the Applicant deliberately drove into the water was a necessary precondition even for a manslaughter conviction. The Appellant had specifically requested that the trial judge direct the jury as to the legal consequences of a finding by the jury that driving into the water was deliberate.

13. These circumstances give rise to questions of general importance in all murder cases in which intent is in issue as to the duty on a trial judge having regard to the submissions of both the defence and the prosecution.

C: Legal matter of general importance: Recklessness

14. **In all murder trials in which the question of intent or recklessness is in issue, is the trial judge required to direct the jury that if the accused might not have intended to kill or cause serious harm, then the appropriate verdict is manslaughter if she was reckless, that is if she adverted to the real risk of death or serious injury but proceeded in those highly culpable circumstances.**

15. The definition of recklessness in this jurisdiction is settled: *P(DPP) v Cagney* [2008] 2 IR 111

16. In the Applicant's case the trial judge repeatedly stated in response to submissions prior to closing speeches that he would direct the jury that manslaughter was the appropriate verdict if the jury found that the death resulted from the recklessness of the Applicant. The defence made a closing speech in accordance with that expected direction. The Learned Trial Judge subsequently refused to give such a direction to the jury.

17. These circumstances give rise to questions of general importance in all murder cases in which intent and recklessness are in issue as to the duty on a trial judge having regard to the submissions of both the defence and the prosecution; and further in regard to all criminal trials in which, on a matter of settled law, the prosecution, defence and trial judge all appear to be agreed that a crucial legal direction should and would be given to the jury; the defence makes a closing speech on that understanding; and the trial judge then refuses to give that direction.

D: Legal Matter of general importance: the requirement to put the defence case

18. **What is the extent of the duty of a trial judge in putting the defence case in a complex criminal trial? In particular, where the prosecution has put forward**

inconsistent or alternative theories or bases for a conviction; can the requirement to put the defence case be satisfied merely by reciting extensively from cross-examination by defence counsel? Or is the trial judge required to summarise the key points of conflict as between the parties?

19. In the Applicant's case the prosecution put forward two theories: a) that the Applicant premeditated and planned the murder operation (from which she intended to escape) by luring him into her car and lied about how she did so; and b) that the Applicant impulsively killed the Deceased while intending to kill herself as well, and admitted it to a nurse and in a garda statement afterwards.
20. In the circumstances it was necessary for the trial judge to give a clear direction as to the issues in contention in the case and relate the relevant legal principles to those issues.
21. Many trial judges in this jurisdiction habitually include a summary of the key propositions relied on by the prosecution and defence as part of the judge's charge. Other judges as a matter of policy decline to do so, as occurred in the Appellant's case.
22. The Court of Appeal's judgment in this case referred to authority to the effect that such a summary of the defence case was necessary: *P(DPP) v Bishop* [2005] IECCA 2; but held that the obligation to put the defence case was met by generous references to cross-examination.
23. The practice and requirement for a summary of the defence case was well established long before modern developments in understanding factors affecting decision making. However it is clear from this case that a decision of the Supreme Court is necessary as to whether trial judges must summarise the respective positions of the parties at the close of a complex criminal trial, and that this is a matter of exceptional general importance.

E: Legal matter of general importance: confession warnings

24. **Where a confession is put in evidence in a criminal trial, is the trial judge required to give a direction under s.10 of the Criminal Procedure Act, 1993, even though there is evidence which if accepted by the jury, is capable of being regarded as corroboration?**
25. **Does s.10 refer to corroboration of the evidence of the confession (that is independent evidence supporting the reliability of the making of the confession)**

or to corroboration in the sense of independent evidence implicating the accused in the offence in a material particular?

26. Where a suspect's first language is not English and where her capacity to speak and understand English is below the normal standard of persons for whom it is their first language, and where an interpreter is not present is a trial judge required to give any direction to the jury as to alleged confessions made by such a suspect in circumstances where the words used and the meaning of words used is challenged and the relevant exchanges were not audio or video recorded?

27. What are the criteria which a trial judge should apply to the decision as to whether to exclude admissions alleged to have been made in such circumstances as set out above including in particular the absence of an interpreter, and in addition where the admissions are alleged to have been made to a triage nurse by a patient shortly after a traumatic incident, in circumstances where the triage nurse appears to continue questioning after seeking the presence of a garda.

28. There is a conflict on the Court of Criminal Appeal judgments: *P(DPP) v Connolly* [2003] 2 IR 1 at p.15 per Hardiman J: "...in many cases there is evidence which could amount to corroboration if the jury accepted it. Because the judge cannot know in advance whether they will accept it or not, it will be necessary in such cases, even apart from s. 10, to explain the meaning of corroboration in law." Other judgments referred to by the Court of Appeal *P(DPP) v Brazil* Unrep CCA 2/3/2002; *P(DPP) v Murphy* [2005] 2 IR 125 appear to hold that if the trial judge or the appellate court determines that there was corroboration in the sense of independent evidence implicating the accused in the offence, the s.10 direction is not required. Neither of those judgements was referred to in argument or written submissions in the Court of Appeal; and neither judgment makes reference to the *dicta* of Hardiman J in *Connolly* which was relied on by the Applicant in the Court of Appeal.

29. Having regard to the circumstances in which s.10 was made law (concern as to wrongful convictions despite evidence of confessions), it is submitted that the interpretation applied by the Court of Appeal defeats the purpose of the provision: the jury may take a different view of the evidence to that of the trial judge or appellate judges: evidence may be capable of amounting to corroboration but such evidence may be rejected by the jury as unreliable or not independent; or regarded as not implicating the accused in the offence. The statutory provision is mandatory and does not use the phrase "evidence capable of amounting to corroboration", but refers to (actual) corroboration.

30. In the Applicant's case, the trial judge did not address the question of whether there was corroboration of the making of the confessions or what independent evidence actually implicated the Applicant in the offence of murder. But the Court of Appeal held that two disputed alleged confessions "were capable of corroborating each other". And further held that the speed of the vehicle (a matter which was not ascertained but not disputed); or the use of the handbrake and not the foot pedal, could corroborate the murder allegation despite the fact that there is no apparent rational justification for the former; and the use of the handbrake as opposed to the foot pedal was consistent with the proposition that the Applicant did not know she was driving into the water.
31. It is submitted that the literal wording of s.10 means that the warning is required if the evidence of the confession is not corroborated: s.10(1) provides "*Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.*"
32. Such corroboration might be in the form of video or audio recording; or at least by the taking of contemporaneous, demonstrably reliable notes.
33. But the Court of Criminal Appeal authorities appear to agree that the proper interpretation of s.10 is that the direction is intended to deal with circumstances where there is no corroboration in the sense of independent evidence implicating the accused in the offence.
34. Apart from s.10, the Court of Appeal appears to have held by implication that there was no need for a careful direction to the jury as to how to approach the contest on whether the alleged confession had been made to Nurse Best and Garda Crehan – that is whether particular words were used and meant what the prosecution contended.
35. Although not relied on in argument in the Court of Appeal, the Supreme Court has clearly stated that quite apart from s.10, there may be circumstances where a particular direction is "absolutely essential" in confession cases: *P(DPP) v Quilligan (N.3)* [1993] 2 IR 305 at 332; and a conviction may be quashed if necessary directions are not given *P(DPP) v Lynch* [1982] IR 64 at 82
36. It is submitted that given the increased number of persons in the jurisdiction whose English is limited, the questions as to whether the interview with Garda Crehan should have been conducted without an interpreter (including in the light of Directive 2010/64/EU on the rights of suspects to have interpreters during the investigative process, which was not relied on in the Court of Appeal or the trial court) and whether

a particular direction to the jury was necessary regarding that alleged confession and the alleged confession to Nurse Best, are matters of particular general importance.

37. As to the question of admissibility of the evidence of the nurses, it is submitted that the matter is of general importance for the reasons indicated above, but also because there are additional reliability and public policy issues arising from the post traumatic circumstances and the expected relationship between a patient and hospital personnel. It is submitted that the need for guidance from the Supreme Court on the criteria to be applied in deciding whether such apparently incriminating comments should be admitted in evidence is a matter of public importance. It is also respectfully submitted that it is necessary in the interests of justice that the decision to admit the nurses' evidence and the decision of the Court of Appeal to uphold same, be the subject of an appeal to the Supreme Court.

F: Legal matter of general importance: Reasonable doubt

38. Is a direction as to reasonable doubt satisfactory that “It is the sort of doubt a reasonable person would entertain on a matter of the (most) importance which would cause them to turn away from the proposal or idea or course of action which one was contemplating” in circumstances where such a direction suggests that such a doubt would be sufficient to be decisive on a matter of importance in the affairs of a member of a jury, as opposed to being of sufficient weight so as to cause a delay in making a decision on such a matter on the available evidence.

39. It is respectfully submitted that the general importance of this question is clear. Many trial judges in this jurisdiction give a direction consistent with the Applicant's requisition; many trial judges give directions consistent with the direction of the trial judge in this case. Apart from the fact that the direction sought by the Applicant is habitually used by some judges in this jurisdiction and rejected by others, the substance of the argument relied on by the Applicant is demonstrated by the fact that the U.S. Supreme Court has indicated that the formulation put forward by the Applicant is correct; and the Supreme Court of Canada has indicated that the type of formulation put forward by the learned trial judge is incorrect.

40. *Victor v Nebraska* 511 US 1(1994) p.20/21:

“In any event, the instruction provided an alternative definition of reasonable

doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, *Holland v. United States*, 348 U. S., at 140; cf. *Hopt v. Utah*, 120 U. S., at 439-441, and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a commonsense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one."

41. *R. v. Lifchus*, [1997] 3 S.C.R. 320: even an unqualified direction to the jury that they must be certain is not sufficient unless certainty is expressly explained by reference to the reasonable doubt test. Delivering the unanimous decision of the Court, Cory J held at paragraphs 24/25:

"Ordinarily even the most important decision of a lifetime are based upon carefully calculated risks. They are made on the assumption that certain events will in all likelihood take place or that certain facts are in all probability true. Yet to invite jurors to apply to a criminal trial the standard of proof used for even the important decisions in life runs the risk of significantly reducing the standard to which the prosecution must be held."

G: Legal matter of general importance: Jury verdict direction

42. Is there a general requirement on judges to charge the jury in a criminal trial that while it is the duty of the members of the jury as a collective unit to make all proper efforts to reach a verdict, the individual members of the jury are bound by their oath not to subscribe to a verdict with which they do not truly agree in the exercise of their independent judgement? Are there circumstances in which such a direction is necessary?

43. The question as to whether anything should be said to a jury in a criminal trial as to the duty in regard to verdicts is a matter of the greatest general importance. As matters stand, the common understanding is that judges are expected to convey to a jury in the charge, as occurred in this case: "Your duty is to return a unanimous verdict."; and after the appropriate period of deliberation: "Your duty is to return a verdict of at least 10".

44. There is no authority in this jurisdiction which guides trial judges as to what should

be said to a jury about failing to reach a verdict. The common practice appears to be that at some point of the judge's choosing, or after the jury says they cannot agree, the jury will be asked: "Is there any prospect of agreement if given extra time?"

45. It is respectfully submitted that the current practice is wrong in principle because it involves conveying the blunt but utilitarian message that their duty is to return a verdict; instead of the correct, nuanced but inconvenient message which is encapsulated in the direction which was sought in the Appellant's case (in which the jury convicted of murder by a majority verdict of 11-1 after over 8 hours deliberation over 4 days).

46. It will be noted that in *P(DPP) v Cahill* [2001] 3 IR 494 and *P(DPP) v Byrne* Unrep CCA 24.2.'03 the Court of Criminal Appeal held that it was not appropriate to tell the jury of a "right to disagree", but in circumstances where the jury was clearly aware of the fact that a disagreement was an option.

47. It is respectfully submitted that the direction sought is in accordance with principle, with the proper interpretation of the juror's oath and with a criminal justice system that places its trust in jurors to act responsibly in accordance with proper directions from the trial judge; and that a charge that conveys to the jury that a verdict must be achieved should be considered a misdirection since it is not factually or legally correct; and while the proper achievement of a verdict is most desirable, a verdict achieved through compulsion, or the risk of compulsion, is not.

48. As to the discretion and where appropriate, duty of trial judges to give such a direction in the UK cf *R. v Watson* [1988] Q.B. 690

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Ground of Appeal/error of law Relevant legal principle as applied to the facts

A: Accident and the statutory presumption

- 1. The Court of Appeal erred in failing to find that the learned trial judge was required in the circumstances to direct the jury that the statutory presumption that the accused intended the natural and probable consequences of her conduct does not apply to the question of whether the action causing death was deliberate or intentional.**
2. The Appellant refers to Section 5 Part A paragraph 5 above as to the fundamental legal principle that before any inference as to intended consequences can be drawn from conduct or actions, where accident arises as a possible cause of the action, the prosecution must first prove that the conduct was voluntary and not accidental: cf *Woolmington v D.P.P.* [1935] A.C. 462 at p. 481; *P(DPP) v Cronin (No.2)* [2006] 4 IR 329 per Kearns J at p.347.
3. In this case there is a danger that the jury incorrectly applied the presumption to the effect that the Appellant must have intended to drive into the water because that was the probable consequence of her conduct.
4. The Court of Appeal held at p.16 of the judgment that the learned trial judge was correct not to accede to a requisition to give such a direction; and that the trial judge made clear to the jury the need for the prosecution to prove that the action of driving into the water was deliberate.
5. The latter proposition is not in issue: rather the question is whether it was necessary to tell the jury in deciding whether the driving into the water was deliberate, that the statutory presumption did not apply.

B: Intent

- 6. The Court of Appeal erred in finding that the learned trial judge was not required to give to the jury a direction on the legal consequences of a finding that although the act causing death was deliberate, there was a reasonable possibility that the accused did not intend to kill or cause serious injury; and that in that event, a verdict of not guilty of murder must be returned; and in that event, that a verdict of guilty of manslaughter would be appropriate on various other bases.**
7. The Appellant refers above to Section 5 Part B paragraphs 9 and 10 as to the fundamental legal principle that the jury, not the judge, must decide whether the accused

in a murder case had the necessary intent.

8. The Court of Appeal held at p.12 that if the driving into the water was deliberate, then the Appellant must have intended to cause death or serious harm; and to suggest otherwise was fanciful.
9. However, it is clear that at a minimum, a reasonable jury could find that the Appellant did not intend to or want to kill the Deceased or herself, but was angry and reckless in that she knew she was putting her life and his at severe risk but drove on, in those culpable circumstances.

C: Recklessness

10. The Court of Appeal erred in finding that the learned trial judge was not required to direct the jury that if the accused might not have intended to kill or cause serious harm, then the appropriate verdict was manslaughter if she was reckless, that is if she adverted to the real risk of death or serious injury but proceeded in those highly culpable circumstances.

11. The Appellant refers above to Section 5 Part C paragraphs 13-16 as to the fundamental legal principle that when recklessness arises as a real possibility on the evidence and the judge indicates that the jury shall be charged as to the settled law on recklessness, the jury must be charged accordingly.

12. The Court of Appeal appears to have found at p.19 that gross negligence was the only basis on which a manslaughter verdict could be returned; the implication being that the jury could not have concluded that the Appellant was reckless or, theoretically, that if the Appellant was reckless, she was guilty of murder. It is respectfully submitted that such findings cannot be justified as a matter of law, logic or fairness.

13. A real risk in this case is that the jury having heard the defence closing speech as to recklessness, concluded by inference from the judge's charge, that if the Appellant was reckless, then murder was the appropriate verdict.

14. The Court of Appeal did not explicitly address the fact that the learned trial judge had said prior to the closing speeches that the jury would be directed as to recklessness. It is respectfully submitted that in such circumstances, a murder verdict cannot be regarded as safe or the trial as fair.

D: The duty to summarise the defence

15. The Court of Appeal erred in finding that the learned trial judge was not required to put the defence case by summarising the defence case and in finding that the requirement to put the defence case was satisfied merely by reciting extensively from cross-examination by defence counsel; and in failing to find that in a complex trial in which the prosecution had put forward inconsistent or alternative theories or bases for a conviction, a particular requirement arose to identify the key points of conflict between the parties.

16. The Appellant refers above to Section 5 Part D paragraphs 17-23 as to the general requirement that the defence be put and the particular need in the Appellant's case to summarise the key points of conflict.

17. The Court of Appeal held at p.23 that because the trial judge recited large parts of the defence cross-examination of every prosecution witness, that a complaint that the defence case was not put could not be sustained.

18. It is respectfully submitted that the Court of Appeal did not engage with the key issue of substance: a summary of the key contested issues was necessary and it was not adequate for the trial judge to recite hundreds of questions and answers relating to a multiplicity of issues covering two mutually inconsistent or alternative prosecution theories (as summarised above in Section 4 at paras 11-14) – one alleging premeditated pre-planned murder with lies to conceal same; the other an angry spontaneous murder (with possible suicidal intent) followed by confessions; both presented in the context of prejudicial evidence and submissions to the effect that the Applicant was a bad manipulative woman who mistreated the Deceased who had been in love with her.

19. The defence made specific requests for the defence position to be articulated to the jury on key issues with appropriate legal directions relevant to each issue eg that the circumstantial evidence in combination could not ground a conviction for murder; the evidence of the alleged confessions was not reliable; the circumstantial evidence which the prosecution put forward to support the premeditation theory did not support the confession theory.

E: Confessions

20. The Court of Appeal erred:

- a) **in holding that a direction under s.10 of the Criminal Procedure Act, 1993 is not necessary where there is evidence capable of amounting to corroboration**

in the sense of being evidence that on one view was independent evidence implicating the accused in the offence;

- b) in failing to hold that a material consideration is whether there is corroboration of the making of the alleged confession including the presence or absence of a reliable contemporaneous note or video or audio recording or an interpreter; and**
- c) in failing to hold that the direction is required where the question of whether the relevant evidence does in fact amount to corroboration is a matter for the jury to determine.**

21. The Court of Appeal erred in failing to find that arising from the law other than the said statutory provision:

- a) the learned trial judge erred in failing to give a specific direction to the jury as to how to approach the contested issues as to whether particular words, put forward by the prosecution as amounting to confessions, were said; or the proper meaning to be attached to them; and**
- b) having regard to the particular circumstances, it was essential that certain matters relevant to the reliability of the alleged confessions be identified in the context of a specific direction, including:**
 - i) the limited capacity of the Appellant to speak and understand English;**
 - ii) the fact that no interpreter was present during the alleged admissions;**
 - iii) the demonstrated risks of misinterpretation or misrepresentation of her words and the meaning to be attached to them;**
 - iv) the concession by Nurse Best that there might have been misunderstanding or miscommunication in regard to the crucial alleged admissions;**
 - v) the concessions by the gardaí as to the fact that a reasonable interpretation of the statement made to Garda Crehan was that it did not amount to a confession.**

22. The Court of Appeal erred in holding that the trial judge correctly admitted the evidence of Nurse Best and Nurse Ging having regard to all the circumstances including the absence of an interpreter or contemporaneous note taking or other

recording, and the post traumatic circumstances.

23. The Applicant refers to the summary of relevant evidence relevant to the alleged confessions in Section 4 paragraphs 7-9; and to the summary of legal issues of general importance Section 5 Part E paragraphs 2 and 24-37. The Applicant respectfully reiterates that an appropriate direction was “absolutely essential” in the circumstances of this case: *P(DPP) v Quilligan (N.3)* [1993] 2 IR 305 at 332.
24. In addition to refusing to give any direction to the jury as to how the alleged confession evidence should be approached, the learned trial judge refused to draw the attention of the jury to the concessions of Nurse Best and in relation to the statement made to Garda Crehan referred to at 2 (b) (iii) and (iv) above. The Court of Appeal held at p.25 that the trial judge was correct to admit the nurses’ evidence; and at p.29 held that no warning under s.10 was required on the grounds that there was evidence capable of being corroboration.

F: Reasonable Doubt

- 25. The Court of Appeal erred in refusing to hold that the learned trial judge erred in law in directing the jury as to the burden of proof including in particular by conveying to the jury that a reasonable doubt should be of sufficient weight as to be decisive on a matter of importance in the affairs of a member of a jury, as opposed to being of sufficient weight so as to cause a delay in making a decision on such a matter on the available evidence.**
26. The Applicant refers above to Section 5 Part F paragraphs 38-41 as to the fundamental principle at stake and the substantial practical consequences for all criminal trials as to which formulation is correct – that articulated by the learned trial judge and many other judges in this jurisdiction; or that employed by many other judges in this jurisdiction consistent with the *dicta* of the US and Canadian Supreme Courts in *Victor v Nebraska* 511 US 1(1994) p.20/21. *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 24
27. The Court of Appeal held at p.38 that there was no basis for criticising the charge on this point; but the judgement does not engage with the substantive point.

G: The juror’s duty

- 28. Having regard to all the circumstances, the Court of Appeal erred in refusing to hold that the learned trial judge erred in refusing to charge the jury that while it was the duty of the members of the jury as a collective unit to make all proper**

efforts to reach a verdict, the individual members of the jury were bound by their oath not to subscribe to a verdict with which they did not truly agree in the exercise of their independent judgement.

29. The Applicant refers above to Section 5 Part G paragraphs 42-48 as to the fundamental principle at stake and the substantial practical consequences for all criminal trials as to what should be said to juries as to their duty to make proper efforts to reach a verdict.

30. It is respectfully submitted that the Court of Appeal judgment at p.39 is in error in attributing to the Applicant an argument that was not made. It was never argued that the charge of the jury suggested that individual members of the jury ought not exercise their independent judgment. The point made and maintained now, is that the charge on its terms communicated that the jurors were required to return a verdict. It is submitted that this is incorrect as a matter of law. The duty of the juror is to make all appropriate efforts to return a verdict; and it is respectfully submitted that in communicating that to the jury, all trial judges in all cases should explain how that duty may be fulfilled and must explain how it may not be fulfilled: by directing the jury as respectfully requested. In this regard, the Applicant refers to the discussion in *R v Watson* [1988] QB 690.

31. In the Applicant's case, the jury deliberated for over 8 hours over a period of 4 days and eventually returned a majority verdict which, it is respectfully contended, involved a miscarriage of justice. In all the circumstances it is submitted that this is an appropriate case in which to consider this important issue.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Giollaíosa Ó Lideadha SC; Niamh Foley BL

7. Other relevant information

Neutral citation of the judgment appealed against

Court of Appeal [2017] IECA 260

References to Law Report in which any relevant judgment is reported

1. *Woolmington v D.P.P.* [1935] A.C. 462
2. *P(DPP) v Cronin (No.2)* [2006] 4 IR 329
3. *P(DPP) v Davis* [1993] 2 IR 1
4. *P(DPP) v McNally* [2007] 4 IR 145
5. *P(DPP) v Cagney* [2008] 2 IR 111
6. *P(DPP) v Bishop* [2005] IECCA 2
7. *P(DPP) v Connolly* [2003] 2 IR 1
8. *P(DPP) v Brazil* Unrep CCA 2/3/2002
9. *P(DPP) v Murphy* [2005] 2 IR 125
10. *P(DPP) v Quilligan (N.3)* [1993] 2 IR 305
11. *P(DPP) v Lynch* [1982] IR 64 at 82
12. *Victor v Nebraska* 511 US 1(1994)
13. *R. v. Lifchus*, [1997] 3 S.C.R. 320
14. *P(DPP) v Cahill* [2001] 3 IR 494
15. *P(DPP) v Byrne* Unrep CCA 24.2.'03
16. *R. v Watson* [1988] Q.B. 690

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An Order quashing the conviction of the Applicant for murder

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: _____

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court

The Four Courts

Inns Quay

Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.