

SUPREME COURT
Respondent's Notice



Supreme Court record number	2017/156
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[Title and record number as per the High Court proceedings]

Director of Public Prosecutions	V	Marta Herda Court of Appeal No. 226/16
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Date of filing	15 th December 2017
Name of respondent	Director of Public Prosecutions
Respondent's solicitors	Chief Prosecution Solicitor c/o Jane McKeivitt, Prosecutor
Name of appellant	Marta Herda
Appellant's solicitors	Thomas E Honan & Co, Co Wicklow

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	N/A
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The respondent was served with the application for leave to appeal and notice of appeal on date	1 st December 2017
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The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
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<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
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<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
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<input type="checkbox"/>	not to oppose the application for leave to appeal
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<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
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<input type="checkbox"/>	Other (please specify)
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If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm	Office of the Chief Prosecution Solicitor		
Email	cca.mailbox@dppireland.ie; jane.mckevitt@dppireland.ie		
Address	Infirmery Road Dublin 7	Telephone no.	858-8500
		Document Exchange no.	DX 34
Postcode		Ref.	2013/10993
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)

Counsel			
Name	Brendan Grehan SC		
Email	brendan.grehan@lawlibrary.ie		
Address	Law Library Criminal Courts of Justice Parkgate Street	Telephone no.	087 260 5911
		Document Exchange no.	DX 301023
Postcode	Dublin 8		

Counsel			
Name	Paul Murray SC		
Email	pmurray@lawlibrary.ie		
Address	5 Briarwood Vevay Road Bray	Telephone no.	086 607 1030
		Document Exchange no.	DX813040
Postcode	Co Wicklow		

If the Respondent is not legally represented please complete the following

Current postal address N/A
Telephone no.
e-mail address

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

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

Preliminary Point

The applicant's application in this case is unduly prolix, unfocussed and unclear in terms of identifying any issue of law much less one of general public importance. The Director of Public Prosecution's invited the applicant's solicitors to file an amended application in conformity with the guidelines and jurisprudence of the Supreme Court which had already been brought to their attention. In circumstances where this invitation was not taken up, the response herein is necessarily longer than it normally would be.

Information about the decision that it is sought to appeal.

1. Paragraphs 1-6 of the Applicant's Notice correspond to paragraphs 1 -6 of the Judgement of the Court of Appeal in this case, setting out the background facts. Same was (and was never intended to be other than) a general summary of the background facts. Not every fact which was pertinent from the prosecution's point of view was set out (and the Applicant may well say likewise). For example, from the prosecution's point of view, it was not irrelevant that it transpired that the Applicant who was allegedly being harassed by the deceased had a second phone on which she had phoned the deceased on the night in question (against a background where she had initially given permission to the Gardai to access the phone records relating to a different irrelevant phone number). Such evidence clearly went to the credibility of the Applicant which had to be considered by the jury.
2. At paragraphs 7-9 of the Applicant's Notice, reference is made, inter alia, to the level of English understood of the Applicant, to the memoranda of interview being allegedly incorrect in certain respects and that it had been "demonstrated" that the Applicant had not said certain things. Clearly, the Applicant is attempting to re-visit once more what happened during the course of the trial itself and also before the Court of Appeal. By way of brief response, the Respondent says the following:
 - i. the Applicant did indeed have a good understanding of English;
 - ii. portions of the video recorded interviews with the Applicant were played both

by the prosecution and the defence at her trial, which clearly enabled the jury to ascertain what level of English she had and what she said / did not say;

iii. the difficulty was not with her language proficiency but rather that the Applicant said different things at different times to different people, told lies. For example, about the circumstances in which the deceased came to be in her vehicle on the night i.e. whether he got into the vehicle at her house or at his house, and whether she was raped, etc.

3. At paragraphs 11-14, it is contended that the prosecution put forward two (inconsistent) theories at the trial. This was manifestly not so, and such contention is based upon a complete mis-reading of what Counsel for the prosecution actually said in closing the case. The essence of what he said was that even if the jury considered that there was a possibility that the Applicant had intended to commit suicide, this was entirely irrelevant in the context of the prosecution case that she had committed the offence of murder. At no stage did the prosecution depart from its central proposition that the offence of murder had been committed in this case, in that the Applicant had intended to kill or cause serious harm to the deceased (see Part H(3) of the written Submissions on behalf of the DPP to the Court of Appeal and also paragraphs 69-71 of the Judgement of the Court of Appeal).

4. Subsequent to paragraph 14, a summary is set out of various findings of the Court of Appeal. Some of what is set out in this regard also constitutes a misreading of what the Court of Appeal actually said e.g. there was no specific finding made by the Court of Appeal (as suggested at paragraph 1 of the Summary) that it was not necessary for the trial Judge to direct the jury that in deciding 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. The Court of Appeal in fact addressed the Judge's charge in this context in a global manner (as set out below), rather than with the specificity suggested by the Applicant.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

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)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

1. It would appear that the Applicant is relying upon seven matters in her Notice of Application for Leave to Appeal, namely:
 - A. accident and the statutory presumption (paragraphs 5-8).
 - B. Intent (paragraphs 9-13).
 - C. Recklessness (paragraphs 14-17)
 - D. Duty to summarise defence (paragraphs 18-23).
 - E. Confession (paragraphs 24-37).
 - F. Reasonable doubt (paragraphs 38-41)
 - G. Jury verdict (paragraphs 42-48).
2. Essentially, the Applicant is seeking to re-visit exactly the same issues which were canvassed at length (both in the form of written submissions and oral submissions) before a lengthy hearing in the Court of Appeal.
3. The first three matters A, B and C above, can be dealt with together by looking at what the Court of Appeal actually said. After setting out the prosecution's case (at paragraph 17), and how the Applicant contended that the learned trial Judge had erred (at paragraph 18), the Court of Appeal went on to set out at paragraph 19 onwards what the learned trial Judge had said.

In this regard, at paragraph 21, the Court of Appeal stated that:

"The jury could not but have been clear that a conviction of murder could only arise if they were satisfied, beyond all reasonable doubt, that the Appellant deliberately drove her car into the water in order to kill or seriously harm the deceased. Any suggestion that the act of driving a car off a harbour pier into deep water at speed was deliberate but at the same time was not intended to kill or cause serious injury to the victim is fanciful. It is difficult to see how much more clearer the charge might have been in that context".

Subsequently, at paragraph 22 onwards, the Court of Appeal set out how the learned trial Judge had approached the circumstances in which a verdict of manslaughter might be reached. At paragraph 31, the Court of Appeal stated that:

"The foregoing extracts from the charge to the jury illustrate the extent to which the learned trial Judge carefully distinguished the concepts of murder, manslaughter, and the act of driving into the water in a non-criminal manner"

At paragraph 35, the Court of Appeal stated that the task of a trial judge was to advise the jury as to the relevant legal principles *"in ordinary language and in as comprehensible a manner as possible... What is important is that the directions to the jury are reasonably clear and that complex legal terminology and principles are explained in ordinary language to the greatest possible extent"*. Ultimately, after further recitation of what the trial Judge had said, the Court of Appeal stated at paragraph 42 as follows:

"In the Court's view, the jury were left in no doubt as to the difference between the ingredients required to convict for murder on the one hand, and manslaughter (to the extent that it could arise in this particular case on the other hand), and the circumstances in which they might consider that guilt under either heading did not arise. It is difficult to conclude how the issue of murder versus manslaughter might have been better explained to the jury, a comparison which is often found difficult and complex by lay people. What is important is that the learned trial Judge's charge left the jury with a sufficient understanding of the concepts involved. Even if it is arguable that the charge might have provided greater clarity in relation thereto, it could not reasonably be considered to have left the jury in any doubt but that the core issue for decision by them was whether the driving of the car into the water was or was not a deliberate act, and if it was not, was it grossly negligent or accidental..."

In short, what the trial Judge had actually told the jury was clear and comprehensive and did not give cause for any criticism by the Court of Appeal.

4. In relation to D above (namely, the duty to summarise the defence case) this issue was dealt with at paragraphs 43-48 of the Court of Appeal Judgement. The Court of Appeal stated that it was *"difficult to identify a single aspect of the defence case which was not referred to by the learned trial Judge in the course of his lengthy charge"* (see paragraph 48).
5. In relation to E above (Confession), it is effectively contended on behalf of the Applicant that the trial Judge was required to give a direction under Section 10 of the Criminal Procedure Act, 1993.

Before dealing with this particular point, it is important to note that the Court of Appeal found that the decision of the learned trial Judge to admit the evidence of the two nurses was correct, being *"evidence of words spoken by the Appellant in the immediate aftermath of the incident in circumstances which were in no way contrived or part of any investigation. To have ruled against the admission of this evidence could only have been on the basis that anything said by the Appellant in the immediate aftermath of the incident to any third party was inadmissible, which of course is not the case, save in particular circumstances, such as a statement made to a Garda Officer in circumstances which involved a breach of constitutional rights. The two nurses were disinterested witnesses who were persons of integrity and whose demeanour was open to assessment to the learned trial Judge"* (see paragraph 56).

In the context of what was said to the nurses, and also to Garda Crehan in one of the initial statements made by the Applicant, the Applicant is essentially saying that Section 10 required a warning to be given about the absence of corroboration. The learned trial Judge was clearly of the view that that section only applied if the "confession" was the sole ground or main ground upon which the prosecution was based and clearly (against a background where he did not give a corroboration warning) he was not satisfied that this situation obtained. His view in this regard was affirmed by the Court of Appeal (at paragraph 67).

6. In relation to F above (Reasonable Doubt) what essentially is being placed in issue is whether the jury should be told that a reasonable doubt must be one "*which would cause them to turn away from the proposal or idea or cause of action which one was contemplating*" or whether they should be told that the reasonable doubt was such as to "*cause a delay in making a decision on such a matter*".

The Court of Appeal dealt with this issue in paragraphs 76 onwards, with the Court again finding (at paragraph 85) that there was no basis for criticising the learned trial Judge in relation to his direction to the jury of how the concept of reasonable doubt was to be considered and applied to the evidence in the case.

7. In relation to G above (Jury Verdict Direction), it is essentially being contended that a jury should not be given the message that their duty was to return a verdict but that instead they should be left in no doubt as to the option of disagreement. The Court of Appeal dealt with this particular point at paragraph 86 onwards with it being found (at paragraph 88) that the jury was simply advised (when the majority direction was being given) "*that at least 10 jurors were required to agree on a verdict if a verdict was to be recorded*" and that there had in no way been a suggestion (nor was it likely to have been interpreted by the jury as such) "*that individual jury members ought not to exercise their independent judgement on deciding on the appropriate verdict*".
8. The Applicant in her Submissions on the foregoing matters A-G inclusive has not established that the decision or any rulings made by the Court of Appeal on these particular points involve a matter of general public importance or that it is otherwise in the interests of justice necessary that there be an appeal to the Supreme Court. What essentially has happened is as follows:

- i. the Applicant was prosecuted for murder;
- ii. during the course of her trial, various rulings were made (in the normal way) by the learned trial Judge;
- iii. she was convicted of murder;
- iv. her appeal to the Court of Appeal was unsuccessful, with that Court not finding any fault with the various rulings and issues which had been made by the learned trial Judge.

The course of events in the present case is similar to many cases in which convictions are upheld by the Court of Appeal, and the present case is not in any way an exceptional one. To suggest that seven points of public importance arises is quite simply unstateable when in reality the case revolved on proven factual matters.

9. While it is appreciated that each application for leave to appeal must be considered according to its own merits, the following passage by the Supreme Court in its judgment in relation to the Application for leave to appeal in the case of DPP -v- C [2017] IESCDT 44 is on point:

“As is clear from a range of determinations made by this Court since the Thirty Third amendment of the Constitution came into force, the constitutional function of this Court is no longer that of an appeal Court designed to correct alleged errors by the trial Court. Where it is said that the High Court, or another court from which the Court of Appeal has appellate jurisdiction prescribed by law, has simply been in error in some material respect, the constitutional regime now in place confers jurisdiction to correct any such error as may be established on the Court of Appeal. Rather the text of the Constitution now in place makes it clear that an appeal to this Court whether directly from the High Court under Article 34.5.4° or from the Court under Appeal under Article 34.5.3° requires that it be established that the decision sought to be appealed against involves a matter of general public importance or that it otherwise is in the interest of justice necessary to allow an appeal to this Court. It would rarely be necessary in the interests of justice to permit an appeal to this Court simply because it is said that the lower Court was in error. An appeal to the Court of Appeal, provides the appropriate remedy for any error made by the High Court. Likewise, a party which has had the opportunity to have the decision of the High Court reviewed by the Court of Appeal would have had the benefit of having been able to put its case both at trial and on appeal. Without more, the interests of justice will not require a further review on appeal to this Court (see paragraph 6.1).”

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. Essentially, what is set out in paragraphs 1-31 of the Applicant's lengthy submissions are the proposed Grounds of Appeal referable to the matters identified at A – G previously which the Respondent has already addressed and does not propose to repeat.
2. It suffices to say that it is not accepted that the learned trial Judge made any errors in law, nor is it accepted that the Court of Appeal was in error in any way in upholding the rulings of the learned trial Judge and ultimately dismissing the Appeal.
3. However, two additional points need to be made, namely:
 - (a) The proposed grounds of appeal in places again comprise a misreading of what actually happened at the trial itself. For example, in the context of the ground of appeal set out at paragraph 15, it is noted that reference is again made to the prosecution having put forward inconsistent or alternative theories as a basis for conviction, which is manifestly not so and a proper construction of the Closing address.
 - (b) Moreover, it is submitted that a Ground of Appeal should relate to a legal matter rather than a factual matter which was fully canvassed before the jury. For example, in paragraph 21, reference is made to the alleged limited capacity of the Applicant to speak and understand English, the fact that no interpreter was present

during the alleged admissions, and to the concession by Nurse Best that there might have been a misunderstanding or miscommunication in relation to what was said to her. However, it is abundantly clear that the jury was e.g. fully aware of the capacity of the Applicant to speak and understand English etc., and was in a position to determine what to make of statements which the Applicant made to persons such as Nurse Best.

(c) Rather than turning on any elaborate or novel or important legal issues, this case turned very much on its own facts and the numerous direct and indirect pieces of evidence which pointed to the Applicant having deliberately driven the deceased to his death.

4. If leave to appeal is granted on all or any of the proposed Grounds of Appeal, the Respondent will stand over the correctness of such relevant rulings as were made by the learned trial Judge as upheld by the Court of Appeal. In so doing, the Respondent will again rely on what was said in this regard in both the written and oral submissions to the Court of Appeal.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Paul Murray SC
Brendan Grehan SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

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?	<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No
If Yes, please give reasons below:				

Signed: *Helena Kiely*
Chief Prosecution Solicitor
Solicitor for the respondent

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.