10TH ANNUAL NATIONAL PROSECUTORS' CONFERENCE

Saturday, 23 May 2009
Dublin Castle Conference Centre

Genevieve Coonan BL

Law Library

~

Section 16 Statements & the Judge's Charge

SECTION 16 STATEMENTS AND THE JUDGE'S CHARGE

GENEVIEVE COONAN BL

Introduction

Both prosecution and defence counsel should endeavour to discuss with the trial judge difficult or controversial issues prior to the summing-up in order to avoid error and unmeritorious appeals.[1] They also have a duty to draw the trial judge's attention to any deficiencies which they consider to exist in relation to the charge to the jury.[2] As O'Flaherty J. said on behalf of the Court of Criminal Appeal in *People (DPP) v Moloney*[3]:

> "We would wish to reiterate the jurisprudence of the Court which has been in place for many years that there is an obligation on counsel on both sides, the prosecution and the defence, to bring to the attention of the trial judge any inadequacies they perceive in his directions to the jury. If an appeal is brought before this Court on a point that has not been canvassed at trial this Court will regard any person making such a new point as having an obligation to explain why it is sought to be made on appeal when not made at the trial. That is not to

[1] See, e,g, the comments made by the Court of Criminal Appeal in *People (DPP) v M.K.* [2005] 3 I.R. 423 and the decisions in *R. v Ensor* [1989] 1 W.L.R. 497; *R. v Franklin* [1989] Crim. L.R. 499; *R. v Nagy* [1990] Crim. L.R. 187; *R. v Gold* [1991] Crim. L.R. 447; *R. v Burge and Pegg* (1996) 1 Cr. App. R. 163 and *R. v Taylor* [2003] E.W.C.A. Crim. 2447. The *JSB Specimen Directions* also recommend that the trial judge and counsel discussed the content of directions on the following matters before summing-up – the doctrine of joint enterprise, the *mens rea* requirement for gross negligence manslaughter, the accused's good character, lies of the accused, inferences to be drawn under s.34 of the Criminal Justice and Public Order Act, 1994, provocation and direction as to unanimity.

[2] See *People (DPP) v Boyce* [2005] I.E.C.C.A. 143; *DPP v Sweetman* (Unreported, Court of Criminal Appeal, *ex tempore*, 23rd October, 2000).

[3] Unreported, Court of Criminal Appeal, *ex tempore*, 2nd March, 1992.

say but that if the essential justice of the case calls for intervention we have an obligation so to intervene."[4]

Since the decision of the Supreme Court in *People (DPP) v Cronin*[5] a failure to draw the trial judge's attention to a misdirection or non-direction during the requisition stage will constitute an almost insurmountable obstacle to raising the same argument on appeal. The Supreme Court has reiterated this approach as recently as November of last year in its decision in *People (DPP) v Boyce*.[6] It must be acknowledged, however, that in most cases the *Cronin* jurisprudence is unlikely to have much practical effect on prosecution counsel. This is due to the fact that the prosecution has no right to appeal an acquittal in such circumstances and will be highly unlikely to seek to appeal a conviction.

Nevertheless, it is important to note that prosecution counsel is aware of the manner in which the trial judge should instruct the jury on s.16 statements. Their duty to see justice done in every case goes hand in hand with their obligation to bring errors in the summing-up to the trial judge's attention. Furthermore, there is a distinct possibility that the appellate courts will feel themselves pressed to deal with appeals on the grounds of misdirection or non-direction in this area, even where defence counsel fails to raise requisitions. This is due to the fact that s.16 radically reforms the law on the admissibility of out-of-court statements, in circumstances where most statements admitted thereunder will contradict the witness's testimony directly and will cause significant prejudice to the defence case.

Preliminary matters

Where a s.16 statement is admitted, it seems prudent to first instruct the jury as to the reason why it has been admitted (i.e. that the witness has refused to give evidence, has denied making the statement or has given evidence which is materially inconsistent with it)[7] and that it is up to it alone to decide what weight, if any, should attach to the statement, "taking into account all of the circumstances".[8]

Section 16(1) also dictates that the statement will be admitted "as evidence of any fact mentioned in it." There are two approaches open to a trial judge when instructing the jury as to the purpose for which a s.16 statement is admitted. In the first instance, it may be argued that the trial judge should instruct the jury in direct terms that the statement may be considered as evidence, just as the witness's testimony constitutes

---

[4] *Ibid.*, at p. 3.
[5] [2006] 4 I.R. 329.
[6] [2008] I.E.S.C. 62; Unreported, Supreme Court, 18th November, 2008.
[7] Section 16(1) states that a statement will be admitted thereunder where a witness, although available for cross-examination, either:

"(a) refuses to give evidence,
(b) denies making the statement, or
(c) gives evidence which is materially inconsistent with it."

An instruction as to the reason why the out-of-court statement was admitted was given by the trial judge in *R. v Hulme* [2006] E.W.C.A. Crim. 2899.
[8] See s.16(5). See also *R. v B.* [1993] 1 S.C.R. 740, at pp.803-804 (per Lamer J.); *R. v Hulme* [2006] E.W.C.A. Crim. 2899.

evidence.[9] Alternatively, the trial judge may decide not to instruct the jury on this issue directly, but rather to simply direct it that it is free to consider both accounts and to rely on whichever account it considers to be true. It must be conceded that the distinction between these two approaches is a subtle one and may be lost on most jurors. Even so, the first approach may be seen as more advantageous to the party seeking to admit the statement, as it involves the placing of some emphasis on the fact that the out-of-court statement constitutes evidence.

Whatever approach the Irish courts chose to adopt, it should be noted that this issue was addressed in England recently in *R. v Billingham*.[10] In that case a key prosecution witness was the appellants' alleged accomplice, a man by the name of Walden, who had pleaded guilty to the murder of his mother's boyfriend. Walden had on a number of previous occasions denied that the appellants had been involved in the murder but testified at trial that they had. He accepted that he had given various previous accounts to police, solicitors, prison visitors and a psychiatrist in which he had failed to mention the involvement of the appellants, but said that he had lied in his earlier accounts in order to cover-up for the appellants. Another prosecution witness, a woman by the name of Blanchard, who was also the appellants' neighbour, had also made a number of statements that were exculpatory of the appellants. The appellants were successful in having the previous statements admitted as evidence under s.119 of the Criminal Justice Act, 2003[11] and argued on appeal that the trial judge had failed to direct the jury properly on the effect of that provision. In particular, they argued that he should have instructed the jury that the statement was just as much evidence as was the testimony in the witness box.

On appeal, Stanley Burton L.J., delivering judgment for the Court of Appeal, accepted that the trial judge "did not clearly direct the jury that all of the previous statements of Walden and Blanchard are evidence."[12] However, the Court went on to state:

> "…it is by no means easy to direct a jury on the effect of section 119 without causing confusion. A jury is entitled to reject a statement in evidence, and to accord it no weight at all, because they do not consider it to be true. That may be because of its inconsistency with previous statements or because of inconsistency with other evidence or simply its improbability or the manner in which it has been given. For a jury to be directed, as [counsel for the appellant] suggested to the Judge, and is suggested by Justin Billingham's grounds of appeal, that a previous statement is just as much evidence as the witness's testimony in court is liable to confuse them: the jury may take the

[9] See, e.g., the comments of Lamer C.J. in the *K.B.G.* case [1993] 1 S.C.R. 740, at p. 803. See also *Queensland Specimen Direction No.44*.

[10] [2009] E.W.C.A. Crim. 19.

[11] Section 119 of the Criminal Justice Act, 2003 states:

> "(1) If in criminal proceedings a person gives oral evidence and—
> (a) he admits making a previous inconsistent statement, or
> (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),
> the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.
> (2) If in criminal proceedings evidence of an inconsistent statement by any person is given under section 124(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible."

[12] *Ibid.*, at para. 62.

> direction to mean that they are obliged to give the previous statement the same evidential weight as the testimony (and *vice versa*).
> In order to convict the Appellants, the jury had to be sure that the testimony of Walden and Blanchard was true. If they were, it followed that they rejected the truth of their previous inconsistent statements. The fact that, as a matter of the law of evidence, those previous statements were evidence became immaterial at that point. Hence the Judge's direction modelled, as we think, on the standard JSB direction, 'if having looked at the witness's evidence you are sure that one of the two accounts is true, then that's evidence that you can take into account when considering your verdict in the case' was to that extent appropriate.
> …
> It is for these reasons that we consider that the omission of a direction as to the effect of section 119 was inconsequential. In fact, the judge dealt at some length with the fact that Walden and Blanchard had made inconsistent statements which were not incriminatory of the Appellants, as the above passages demonstrate."[13]

This decision makes some sense in that there is no general obligation on the trial judge to instruct the jury as to the fact that certain items of evidence may be taken as "evidence." However, one could argue that the instruction should be given in cases where a s.119 statement is admitted having regard to the fact that that statement will be admitted in circumstances where the witness's testimony, and not merely another statement, is contrary to its contents.

Furthermore, the decision may be criticised on the ground that the Court was clearly concerned with the possibility that the evidence instruction may be confusing to the jury in that it may take it to mean the jury is obliged to give the previous statement the same evidential weight as the testimony. As is clear from *Queensland Specimen Direction No. 44* this danger can be mitigated in the summing-up. That direction recommends that the jury be told:

> "The previous statement made by the witness is evidence of any fact stated in it. It is a question for you whether you accept the evidence and, if so, what weight you attach to it."

It is also interesting to note that the Court in *Billingham* dismissed the argument that the evidence direction should have been given in circumstances where it was the defence who sought to adduce the out-of-court statements as evidence. As is discussed in further detail elsewhere in this paper, the Canadian courts have suggested, in light of an accused person's Charter rights (in particular, an accused's right to put forward a full defence), that the reliability requirement may be applied more loosely where the defence seek to adduce an out-of-court statement. The same argument may also be made in Ireland. Indeed, one may go one step further and argue that where the defence seek to rely on a s.16 statement, the trial judge should not follow the decision in *Billingham* and instead instruct the jury that the previous statements constitute "evidence" just as much as the witness's testimony does. In so doing, the trial judge

[13] [2009] E.W.C.A. Crim. 19, at paras. 62-63.

places some emphasis on the fact that the statements constitute evidence and, in turn, rebalances the scales to some small degree in favour of the defence.

Scope of Instruction as to Weight

Section 16(5) of the 2006 Act states that:

> "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."

It is the jury's task alone to determine what weight, if any, should be attached to the statement.[14] The effect of s.16(5) is that the jury must have regard to "all the circumstances" affecting the statement's accuracy. The trial judge should, therefore, ensure that the jury is made aware of all relevant "circumstances." The trial judge, it is assumed, will already be familiar with those circumstances having regard to the fact that he must be satisfied that the statement is reliable in order for it to be deemed admissible.[15]

The issue of how detailed the instruction as to weight should be has been discussed in a number of other jurisdictions. In Australia it has been held that the trial judge should first tell the jury that it may take into account "all the circumstances from which any inference can reasonably be drawn as to its [i.e. the statements] accuracy or otherwise."[16] He should then proceed to particularise the warning by referring the jury to those specific factors that affect the statement's reliability and accuracy. The Australian courts have held that merely instructing the jury to have regard to "all of the circumstances" from which an inference may be drawn as to the statement's accuracy will constitute an inadequate direction. In *Morris v R.*[17] it was held that in estimating the weight to be attributed to a previous inconsistent statement admitted under s.101 of the Evidence Act, 1977,[18] it is insufficient to merely tell the jury that:

> "regard is to be had to the circumstances from which an inference can reasonably be drawn as to its accuracy, including the contemporaneity of the statement with the occurrence of facts to which it relates and any incentive the maker might have had to conceal or misrepresent the facts."[19]

As Mason C.J. said:

---

[14] *R. v B.* [1993] 1 S.C.R. 740; *R. v Hulme* [2006] E.W.C.A. Crim. 2899.
[15] See s.16(2).
[16] *R. v Perera* [1986] 2 Qd. R. 431.
[17] [1987] 74 A.L.R. 161.
[18] Section 101(1) states:
> "(1) Where in any proceeding–
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
> (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated;
> that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible."
[19] *Morris v R.* [1987] 74 A.L.R. 161.

> "If…such a statement is admitted, it will usually be necessary for the trial judge to give very careful and very precise instructions to a jury as to the weight the evidence should be given. The nature of the instructions will necessarily depend on the particular case. *It is difficult to conceive that in a case where the prior inconsistent statement is more damaging to the accused person than the evidence given by the witness, a mere invitation to the jury to consider the matters referred to in s 102*[20] *of the Evidence Act would be a sufficient instruction. In many cases such an invitation may be to the disadvantage of the defence case.*" (emphasis added)

The importance of charging the jury as to the weight of a s.16 statement in a detailed way is also reflected in the wording of *Queensland Specimen Direction No. 44*:

> "The prosecution relies on a statement by [A] to the police on [the event] that [describe contents of statement]. The witness gave evidence on oath before you that the statement was made but was not true, and [summarise evidence].
> *The previous statement made by the witness is evidence of any fact stated in it.* It is a question for you whether you accept the evidence and, if so, what weight you attach to it.
> In estimating the weight that can be attached to the statement, [you should] have regard to all the circumstances from which an inference can reasonably be drawn as to its accuracy or otherwise.
> You should consider whether the statement was made around about the same time as the occurrence of the facts to which it relates.
> Bear in mind both that the statement was not given on oath [if applicable] and that you did not have the advantage of seeing and hearing the witness make the statement, as you do have when witnesses give their evidence before you.
> In dealing with a statement such as this – made out of court and more damaging to the defendant than the evidence the witness gave here in court – greater care is needed. The statement is not in the same category as sworn evidence before you.
> Consider also whether [A] had any incentive to conceal or misrepresent the facts.
> Consider also any specific factors that may call the reliability of the prior statement into question.
> You should take into account the reasons [A] gave for giving the statement in the first place and then for changing his version of events.
> If you find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this Court, and you find that no acceptable explanation has been provided for the inconsistency, it may cause you to be hesitant about the witness's accuracy, honesty, reliability and credibility generally."

---

[20] Section 102 states:

> "In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

Similarly, in *R. v B.*[21] (commonly referred to as the *K.G.B.* case in Canada) case the Canadian Supreme Court offered some guidance on how to instruct the jury in this area. This case is of particular assistance to an Irish court having regard to the fact that s.16 is modeled closely on the manner in which the "principled exception" to the hearsay rule was applied in that case.[22]

In that case, Lamer C.J. said that where a statement is admitted as evidence of its contents:

> "…the trial judge need not issue the standard limiting instruction to the jury, but may instead tell the jury that they may take the statement as substantive evidence of its content, or, if he is sitting alone, make substantive use of the statement, giving the evidence the appropriate weight after taking into account all of the circumstances. In either case, the judge must direct the trier of fact to consider carefully these circumstances in assessing the credibility of the prior inconsistent statement relative to the witness's testimony at trial. For example, where appropriate the trial judge might make specific reference to the significance of the demeanour of the witness at all relevant times (which could include when making the statement, when recanting at trial, and/or when presenting conflicting testimony at trial), the reasons offered by the witness for his or her recantation, any motivation and/or opportunity the witness had to fabricate his or her evidence when making the previous statement or when testifying at trial, the events leading up to the making of the first statement and the nature of the interview at which the statement was made (including the use of leading questions, and the existence of pre-statement interviews or coaching), corroboration of the facts in the statement by other evidence, and the extent to which the nature of the witness's recantation limits the effectiveness of cross-examination on the previous statement. There may be other factors the trier of fact should consider, and the trial judge should impress upon the trier of fact the importance of carefully assessing all such matters in determining the weight to be afforded prior inconsistent statements as substantive evidence."[23]

Cory J. also said:

> "The jury should be advised that although the statement has been ruled admissible it is up to them to decide what weight if any they should attach to it. The jury should be instructed that they may consider that the statement should be given less weight because it was not subject to cross-examination at

[21] [1993] 1 S.C.R. 740. See also *R. v Khan* [1990] 2 S.C.R. 531; *R. v Biscette* [1996] 3 S.C.R. 599; *R. v Khelawon* [2006] 2 S.C.R. 787; *R. v O'Keefe* [2007] N.J. No. 323; *R. v Kontzamanis* [2007] B.C.J. No. 2376; *R. v Devine* [2008] S.C.C. 36. The manner in which the decision in the *K.G.B.* case changed the law in Canada in relation to the admissibility of previous inconsistent statements is discussed in further detail in Marin, A., "How to Assess Reliability in *Khan* and *K.G.B.* Applications" (1995-1996) 38 *Criminal Law Quarterly* 353; Prithipaul, R., "Observations on the Current Status of the Hearsay Rule" (1996-1997) 39 *Criminal Law Quarterly* 84; Sugunasiri, S., Murphy, R., "*R. v. F. (W.J.)*: Hearsay Evidence and the Necessity of Necessity" (1999-2000) 43 *Criminal Law Quarterly* 181.

[22] See the comments of the Minister for Justice at the Committee Stage discussion of the Bill – Dail Debates, 19th April, 2006, Vol. 74.

[23] [1993] 1 S.C.R. 740, at pp.803-804.

> the time it was made and because there was not the same opportunity to assess the demeanour of the witness as there would have been had the statement been made in court. Nonetheless, the statement is to be treated like any other admissible evidence. It can be accepted as the truth of what it relates, it can be accepted in part and rejected in part; or it can be rejected completely. In assessing the statement the jury should consider all the circumstances in which it was made."[24]

In England it has also been held that the trial judge should make the jury aware of the need for caution in considering whether to rely on the testimony or the statement.[25] In *R. v Hulme*,[26] the trial judge admitted a previous inconsistent statement as evidence of the truth of its contents pursuant to s.119 of the Criminal Justice Act, 2003 and instructed the jury as to the need for caution when dealing with the statement. She also told them that they may consider whether the inconsistencies between the statement and testimony were "so great that they should not rely on [the witness's] evidence at all."[27]

Factors affecting Weight

An argument may, therefore, be made that the instruction as to weight should be relatively detailed and should make some reference to those factors that will affect the statement's weight. Many of these factors are obvious on the face of s.16 due to the fact that they will also determine the statement's reliability and, in turn, its admissibility. Other factors will spring from the particular facts of the case before the court. Having regard to the wording of s.16, as well as those factors expressly enunciated by the courts in other jurisdictions as being relevant to reliability, it may be said that the following factors will be relevant to the trial judge's instruction as to weight:

(i) Oaths, affirmations and statutory declarations

A statement may be admitted pursuant to s.16 if:

> "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"[28]

[24] *Ibid.*, at p.830. Although Cory J. delivered a dissenting judgment, he seems to have differed from the majority on the requirements as to admissibility, rather than the manner in which the jury should be charged.
[25] *See R. v Hulme* [2006] E.W.C.A. Crim. 2899. For a discussion of the direction in *R. v Hulme*, see Guerin, S., "Witness Statements as Evidence: Part 3 of the Criminal Justice Act 2006", paper delivered at the 8th Annual National Prosecutors' Conference, Saturday, the 19th May, 2007, Dublin Castle Conference Centre.
[26] [2006] E.W.C.A. Crim. 2899.
[27] *Ibid.*, at para.20.
[28] See s.16(2)(c).

In turn, the relevance of these factors to the issue of weight is obvious. As was said in the *K.G.B.* case[29]:

> "While the oath will not motivate all witnesses to tell the truth…its administration may serve to impress on more honest witnesses the seriousness and significance of their statements, especially where they incriminate another person in a criminal investigation.
> …the presence of the oath during the making of the prior statement eliminates the explanation offered by many recanting witnesses, including one of the witnesses in this case: when confronted with the prior inconsistent statement, witnesses explain that it was not made under oath, and assert that the oath they took at trial persuaded them to tell the truth. This naturally privileges the trial testimony in the mind of the trier of fact. If both statements were made under oath, such an explanation can no longer be employed. Furthermore, since both statements cannot be true, the trier of fact has an indication of the low regard in which the witness holds the oath. Therefore, while it is true that the oath in itself has no power to ensure truthfulness in some witnesses, the fact that both statements were made under oath removes resort to the absence of an oath as an indicium of the alleged unreliability of the prior inconsistent statement.
> The presence of an oath, solemn affirmation or solemn declaration will have yet another positive effect on the declarant's truthfulness and the administration of justice. A sworn prior statement will be highly persuasive evidence in any prosecution against the declarant related to false testimony (whether in the statement or at trial), and the knowledge that this evidence exists for this purpose should weigh heavily on the mind of one who considers lying in a statement, or recanting his or her prior statement to lie at trial."[30]

(ii) Video-tapes of the statement

One of the factors that the trial judge may have regard to in considering whether the statement is reliable under s.16(2)(b)(iii) is whether it was video-taped.[31] However, this is not an absolute pre-requisite to admissibility. However, if the statement was not video-taped this will have a negative impact on the jury's ability to assess its weight as it prevents it from considering the witness's demeanour at the time the statement was made. As the Court stated in *K.G.B.*:

> "a complete videotape record of the type described above, or one which duplicates the experience of observing a witness in the courtroom to the same extent, is another important indicium of reliability which will satisfy the principled basis for the admission of hearsay evidence."[32]

As a result, where such a videotape is unavailable, the trial judge should make it clear to the jury that it will "not have the advantage of seeing and hearing the witness make the statement, as you do have when witnesses give their evidence before you."[33]

---

[29] [1993] 1 S.C.R. 740.
[30] *Ibid.*, at pp. 789-790.
[31] See s.16(3)(a).
[32] [1993] 1 S.C.R. 740, at p.793-794. See also *R.* v. *F.(C.C.)* [1997] 3 S.C.R. 1183.
[33] See *Queensland Specimen Direction No. 44.*

It should be noted, however, that in *K.G.B.*, the Court also said that "it may be possible that the testimony of an independent third party who observes the making of the statement in its entirety could, in exceptional circumstances, also provide the requisite reliability with respect to demeanour evidence."[34] The Court went on state that persons who could serve this function included justices of the peace, the witness's own lawyer, where the witness is a minor their counsel, parent, or adult relative. The Court said "[i]t will be a matter for the trial judge to determine whether or not a sufficient substitute for a videotape record has been provided to allow the trier of fact access to sufficient demeanour evidence to make the statement admissible."[35] In *R.* v. *Big Eagle*[36] the trial judge (in a decision that was upheld on appeal) admitted into evidence a statement that had been made during a preliminary hearing[37] of a murder case and allowed a judicial officer who had been in attendance during that hearing to testify as to the demeanour of the witness when making the statement. He also admitted an audiotape of the hearing that had been produced and later transcribed for the same purpose.

(iii) Other circumstances in which the statement was made

Section 16(3) states that:

> "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…".

Thus, if the statement was not given on oath/affirmation or video-taped, the trial judge must take into account "the circumstances in which it was made" in determining whether it satisfies the reliability requirement. In turn, those circumstances will be relevant to the jury's assessment of the statement's weight.

These circumstances are likely to vary from case to case and so little concrete guidance can be given on them. It should be noted, however, that they are expressly limited to those circumstances "in which [the statement] was made." As a result, they do not include evidence that is extrinsic to the making of the statement but which corroborates or confirms the statement's contents. It may be argued, however, on the basis of the Canadian jurisprudence or indeed, on a first principles basis, that such evidence will be relevant to the issue of reliability and, in turn, to the statement's weight. Section 16(3) merely dictates that the court "shall" have regard to such circumstances in determining reliability and it does not prohibit the court from having regard to other material circumstances, including extrinsic evidence. Such evidence is, in turn, arguably relevant to the statement's weight and an argument may be made that the jury should be instructed to have regard to that fact. This is discussed in further detail below.

[34] [1993] 1 S.C.R. 740, at p.794.
[35] *Ibid.*, at p.794.
[36] (1997) 163 Sask. R. 3; 165 W.A.C. 3.
[37] Held under s. 507 of the Canadian Criminal Code.

(iv) Explanations given for refusals, denials or inconsistencies

Section 16(3) also dictates that in deciding whether the statement is reliable the court shall 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."

The jury should, therefore, be reminded of any explanations for the material inconsistencies in question or as to the reasons why they are denying making the statement and instructed as to how those explanations will effect the statement's weight. *Queensland Specimen Direction No. 44* recommends that the jury be instructed in the following manner:

> "If you find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this Court, and you find that no acceptable explanation has been provided for the inconsistency, it may cause you to be hesitant about the witness's accuracy, honesty, reliability and credibility generally."

An analogy may also be drawn between this scenario and those in which previous inconsistent statements are used to undermine the witness's credibility.[38]

(v) Contemporaneous cross-examination and availability for cross-examination at trial

Section 16 does not require that the witness be subjected to cross-examination at the time the statement was made and indeed, it is highly unlikely that this will occur in most cases.[39] The Canadian courts have held that where a witness is subjected to

[38] See, e.g., *R. v Jackson* (1964) Qd. R. 26, where Stanley J. said (at 29):

> "There may be some satisfactory explanation for the making of the original statement, e.g. it may have been merely ironic, or extorted by fear. If there is any alleged explanation for making the original statement, it is usually for the jury to say what weight should be attached to the evidence in the light of the circumstances. If there is no explanation, or if explanation is such that no reasonable man could give it any weight, a judge would properly direct a jury that the witness was unreliable and his or her evidence should be neglected, and that they should consider any other evidence in the case to determine whether any such other evidence alone justified a conviction beyond reasonable doubt."

See also *R. v Maw* [1994] Crim. L.R. 841 where Hobhouse L.J. said that, "[i]f the witness can give an explanation for the inconsistency, or his initial reluctance to testify, then it may be that that sets at rest any anxieties there may be about his evidence and enables him to be treated as fully creditworthy."

[39] As the Court said in the *K.G.B.* case (at p.795):

> "…it would restrict the operation of a reformed rule to judicial or quasi-judicial proceedings to require contemporaneous cross-examination, and thereby severely restrict the impact of a reformed rule. Consider the facts of the present case: when the three witnesses were interviewed by the police, no one had yet been charged with an offence. Who could have cross-examined the witnesses at that point? How could cross-examination have been effective before the case to be met was known? These and other practical difficulties in requiring contemporaneous cross-examination tip the balance in favour of allowing cross-examination at trial to serve as a substitute."

However, it should be noted that in Canada contemporaneous cross-examination may occur during preliminary hearings held pursuant to s.507 of the Criminal Code. In contrast, in Ireland the Criminal

contemporaneous cross-examination, this will greatly enhance the reliability of the statement.[40] In turn, where contemporaneous cross-examination is carried out, the trial judge should instruct the jury on the effect this will have on a statement's weight. Conversely, where the witness is not cross-examined at the time the statement is made, the jury should be reminded of that fact and instructed that it may have a negative impact on the weight to be attributed to the statement. Charging the jury in this way is nothing new and occurs in cases involving significant pre-trial delay – see *People (DPP) v R.B.*[41]

However, it should be noted that the Canadian courts have considered that the absence of contemporaneous cross-examination will be of lesser significance to reliability where the witness may be effectively cross-examined at trial. In the *K.G.B.* case the Supreme Court dismissed the lack of contemporaneous cross-examination as a factor that affected reliability, having regard to the fact that the witness must be available to give evidence during trial. Citing the decision of the United States Supreme Court in *California v. Green*[42] the Court said:

> "…the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and – in this case – one that is favorable to the defendant."[43]

Thus, it goes without saying that the absence of contemporaneous cross-examination will have less of an impact on the statement's weight where the witness has been effectively cross-examined at trial and that the trial judge should take this into account when instructing the jury as to the statement's weight.

Procedure Act 1967 abolished the taking of depositions at a preliminary stage in the District Court and, as a result, it is highly unlikely that contemporaneous cross-examination will ever take place.

[40] *R. v Hawkins* [1996] 3 S.C.R. 1043; *R. v Biscette* (1995) 169 A.R. 81; *R. v Eisenhauer* (1998) 165 N.S.R. (2d) 81. This will not necessarily be the case, however, where the line of cross-examination is in relation to matters that are not at issue in the proceedings in which the statement is to be admitted – see *Werian Holdings v Prudential Assurance Co.* (1995) 58 B.C.A.C. 283.

[41] Unreported, Court of Criminal Appeal, 12th February, 2003. It has been endorsed in a series of decisions – see *D.W. v DPP* [2003] I.E.S.C. 54; *People (DPP) v P.J.* [2003] 3 I.R. 550; *People (DPP) v C.C.* [2006] 4 I.R. 287; *People (DPP) v E.C.* [2007] 1 I.R. 749.

[42] 399 U.S. 149 (1970).

[43] 399 U.S. 149 (1970), at 159, cited in *K.G.B.* at pp.794-795. See, in contrast, *R.* v *Conway and Husband* (1997) 36 O.R. (3d) 579, where the Ontario Court of Appeal said that where the witness cannot remember making the statement or any of its contents "[c]ross-examination becomes, to a large extent, an exercise in futility and does not serve as a substitute for contemporaneous cross-examination on the prior statement, as it does in most cases"; in *R. v Tat* (1997) 35 O.R. (3d) 641; 117 C.C.C. (3d) 481, a witness had identified the accused as the perpetrator in an out-of-court statement but denied having done so at trial and the Ontario Court of Appeal stated that in such circumstances "cross-examination of the maker of the statement at trial will be of limited value in assessing the reliability of the statement where the maker of the statement denies having made the prior statement"; in *R. v Trieu* (2005) 195 C.C.C. (3d) 373, the same court said that in cases where a witness purports to have no memory of the contents of an out-of-court statement, the "opportunity to cross-examine is illusory" (at para.33).

A similar argument may be made in relation to s.16 statements. In fact, it is clear from the wording of s.16(1) that the witness's availability for cross-examination is an admissibility requirement that is separate from and additional to the reliability requirement. As a result, the absence of contemporaneous cross-examination may not be a significant factor as to weight in every case in which a s.16 statement is admitted, due to the fact that the trial judge must be satisfied in the first instance that the witness was "available for cross-examination." Of course, this will depend upon the Irish courts' interpretation of the phrase "available for cross-examination" (i.e. whether they interpret it very strictly or quite loosely).[44] A witness may yet be held to be "available for cross-examination", albeit in circumstances where that cross-examination is not as effective as it ordinarily would be or is almost entirely ineffective.

(vi) Leading questions, pre-statement interviews, evidence of coaching and the voluntariness of the statement

The Minister has said that one of the rationales underlying the reliability requirements set out in s.16 is that, "it must be clear that the witness was not cajoled into making a statement or told that he or she would not be released before giving a certain account of events." Indeed, one of the express requirements of the provision is that the statement was made voluntarily and not under pressure from members of the Gardaí.[45] It may also be argued that the trial judge should be satisfied that it was not made in response to leading questions so that a conviction will not be based upon the evidence of a coached witness. As a result, where the opposing party raises an issue as to the voluntariness of the statement, or as to the question of whether the witness was coached, the trial judge should endeavour to bring this matter to the jury's attention. In the *K.G.B.* case the Supreme Court said, "where appropriate the trial judge might make specific reference to … the nature of the interview at which the statement was made (including the use of leading questions, and the existence of pre-statement interviews or coaching)…".[46]

(vii) Time of the making of the statement

The weightiness of an out-of-court statement will diminish in proportion to the lapse of time between the making of the statement and the witnessing of the incident in question. As the Supreme Court said in *R. v Khan*,[47] the timing of the making of the statement will be a pertinent consideration in assessing its reliability.[48] Similarly, it

[44] In this regard, it may be noted that Mr. Justice Paul Carney held in the context of a trial for attempted murder in July, 2007 that where a witness refuses to give evidence they are not available for cross-examination – see "Trial collapses as victim refuses to be questioned" *The Irish Times*, 26th July, 2007.
[45] See s.16(2)(b)(iii).
[46] [1993] 1 S.C.R. 740, at p.804. See also Hardiman J.'s discussion of the Damilola Taylor murder case in *O'Callaghan v Judge Mahon* [2006] 2 I.R. 32, at 63-64.
[47] [1990] 2 S.C.R. 531.
[48] *Ibid.*, at 547. It must be noted, however, that the Court held in *Khan* that the statements were admissible as they were "necessary" due to the fact that the experience of testifying in court would be too traumatic for the child (at 546). It is clear from the wording of s.16 that it will not operate in this way. It only allows for the admission of statements where the witness refuses to testify, denies making the statement or gives evidence which is materially inconsistent with it. However, it may nevertheless be argued that many of the "indicia of reliability" outlined in *Khan* can just as easily apply to cases where a statement is admitted in such circumstances and that, in turn, they may be relevant to the content of the judge's charge.

may be noted that in Australia, in considering the weight of statements admitted under s.101 of the Evidence Act, 1977, s.102 states that:

> "In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates…".

(viii) Whether the witness had "any incentive to conceal or misrepresent the facts"

The absence or presence of a motive to lie is a prominent factor in the Canadian courts determination as to reliability.[49] In *R. v Smith*[50] the Canadian Supreme Court was satisfied that the statements in question were reliable as there was no reason to doubt the victim's veracity. In the Court's words, "[s]he had no known reason to lie"[51] Indeed, in *R. v Billingham*,[52] when instructing the jury as to the weight to be attributed to both s.119 statements, the trial judge reminded the jury of the evidence of Walden's father and his younger brother to the effect that he was a liar, as well as the possibility that Walden had implicated the appellants in order to influence his sentence. Both these factors were relevant to the jury's consideration of the previous statements' weight as, had the jury disbelieved Walden's testimony for these reasons, then this would arguably bolster the weight to be attributed to the statements. Similarly, in respect of Blanchard's evidence, the trial judge had reminded the jury of the possibility that she held a grudge against one of the appellants because he had not reciprocated the romantic interest that her daughter had shown in him after they had slept together.

(ix) Presence of corroborative or confirmatory evidence

It is arguable that in determining reliability the trial judge is not confined to a consideration of the circumstances surrounding the making of the statement. As has already been discussed herein, s.16(3) merely states that the court "shall" have regard to the circumstances in which the statement was made in deciding whether it is reliable. Thus, other evidence, be it corroborative or merely confirmatory, may also be taken into account in determining reliability. In this way, reliability is considered in the broader sense, rather than being limited to those circumstances relevant to the hearsay dangers ordinarily associated with out-of-court statements (i.e. the absence of an oath; the inability of the trier of fact to assess the witness's demeanour at the time; the lack of contemporaneous cross-examination). As the Supreme Court of Canada said in its recent decision in *R. v Blackman*[53]:

---

[49] As to the effect of an absence of such motivation, see *R. v Khan* [1990] 2 S.C.R. 531; *R. v Chahley* (1992) 72 C.C.C. (3d) 193; *R. v Letourneau* (1994) 87 C.C.C. (3d) 4819; *R. v Hanna* (1993) 80 C.C.C. (3d) 290; *R. v Sterling* (1995) 137 Sask. R. 1; *R.* v *R.(D.)* (1995) 131 Sask. R. 81; *R. v Kharsekin* (1994) 117 Nfld. & P.E.I.R. 89. As to the effect of its presence, see *R.* v *Tam* (1995) 100 C.C.C. (3d) 196; *R.* v *Rose* (1998) 108 B.C.A.C. 221; *R.* v *J.W.L.* (1994) 94 C.C.C. (3d) 263.
[50] [1992] 2 S.C.R. 915.
[51] *Ibid.*, at p. 935.
[52] [2009] E.W.C.A. Crim. 19.
[53] [2008] 2 S.C.R. 298.

> "the Court clarified [in *R. v Khelawon*[54]] that in appropriate circumstances, a corroborative item of evidence can be considered in assessing the threshold reliability of a statement. Consider, on the one hand, the hearsay statement of a complainant who asserts that she was repeatedly stabbed but has no injury to show in support. The lack of corroborative evidence would seriously undermine the trustworthiness of the statement and, indeed, would likely be fatal to its admissibility.[55] On the other hand, an item of corroborative evidence can also substantiate the trustworthiness of a statement. Recall the semen stain in *R. v. Khan* [1990] 2 S.C.R. 531. Where an item of evidence goes to the trustworthiness of the statement, *Khelawon* tells us that it should no longer be excluded simply on the basis that it is corroborative in nature."[56]

If the Irish courts adopt this approach, then clearly an argument may be made that the trial judge can refer to corroborative or supportive evidence in summing-up when reminding the jury of all factors affecting the weight of the statement.

Obligation to Summarise Inconsistencies for the Jury?

Where a statement is admitted because the witness has denied making it or has given evidence that is materially inconsistent with it, the jury will have to decide whether it prefers the statement to what the witness has said in court.[57] A question may arise as to whether the trial judge should (a) give the jury a summary comparison of both the oral testimony and the statement and (b) draw its attention specifically to the inconsistencies between both. In *R. v Hulme*,[58] it was argued that the trial judge had erred in failing to do so. Section 119 In the Court of Appeal Richards L.J. noted that:

> "As it was, the oral evidence was summarised in detail and there was a reminder of some of the circumstances concerning the taking of the witness statement, but there was no comparison between the oral evidence and the witness statement and no explanation of the extent and significance of inconsistencies."[59]

Although the Court concluded that "the case against the Appellant was so strong that the judge's errors did not affect the safety of his conviction,"[60] it nevertheless commented that:

---

[54] [2006] 2 S.C.R. 787.
[55] On this point see also *R. v Unger* (1993) 85 Man. R. (2d) 284; *Reference re Gruenke* (1998) 131 Man. R. (2d) 161; *R. v J.R.C.* (1996) 144 Sask. R. 314.
[56] [2008] 2 S.C.R. 298, at para.55. See also *R. v Big Eagle* (1997) 163 Sask. R. 73; *R. v U.(F.J.)* (1994) 90 C.C.C. (3d) 123; *R. v Pearson* (1994) 36 C.R. (4th) 343; *Winnipeg Child and Family Services v L.L.* [1994] 6 W.W.R. 458; *R. v Couture* [2007] S.C.C. 28, at para.84. See, to the contrary, the decision of the Ontario Court of Appeal's decision in *R. v C.(B.)* (1993) 12 O.R. (3d) 608 (relying on the US Supreme Court's decision in *Idaho v. Wright* 497 U.S. 805 (1990)).
[57] This issue may not arise where the witness refuses to give evidence as there will be no testimony before the court to consider.
[58] [2006] E.W.C.A. Crim. 2899.
[59] *Ibid.*, at para.17.
[60] [2006] E.W.C.A. Crim. 2899, at para.29.

> "It may be that the judge also ought to have done more to draw the jury's attention to differences between the oral evidence and the witness statement, although those differences were more ones of degree (as to the number of punches, the Complainant being knocked unconscious and punched further while unconscious on the ground) rather than conveying a fundamentally different story from that which emerged from her oral evidence."[61]

This comment seems to suggest that where the differences between the statement and the testimony is of a more fundamental nature, the case is stronger for a requirement that the trial judge draw the jury's attention to each inconsistency.

Instructing the Jury where Statements are adduced by the Defence

The wording of s.16 does not exclude the possibility that the defence may seek to rely upon it. In fact, the Canadian courts have suggested that the effect of Charter rights may help the accused to get a statement admitted under the principled exception to the hearsay rule. Although the concept of "fairness as between the parties" generally dictates that the rules of evidence ought to be applied in an even-handed manner, there are pressures for departure from this principle in criminal cases. For example, the fact that the prosecution always bears the burden of proof is a "thumb on the scale of justice" favouring the accused. In the face of the superior resources of the State, there is an argument to be made that the reliability requirements set out in s.16 should also be relaxed in the interests of an accused's right to "full answer and defence." As the Ontario Superior Court of Justice said in *R. v Hankey*[62]:

> "…the standard [as to reliability] may be relaxed where it is the accused who seeks to make use of such statements. As stated by the Ontario Court of Appeal in *R. v. Folland* (1990) 132 C.C.C. (3d) 14 at paras. 48 and 49:
> '[48] In determining whether the defence should be permitted to make substantive use of this evidence, the trial judge will wish to bear in mind the comments of Martin J.A. in *R. v. Williams* (1985) 18 C.C.C. (3d) 356 (Ont. C.A.) at 378:
>
> > "It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist."
>
> [49] This passage was approved by Cory J. in *R. v. Finta* (1994) 88 C.C.C. (3d) 417 (S.C.C.) at 527. In my view, while the trial judge must be satisfied that the prior out-of-court utterances have some reliability, the strict standards set, in the context of an application by the Crown to make substantive use of prior inconsistent statements incriminating the accused, in *R. v. B. (K.G.)* do not apply: c.f. *R. v. Eisenhauer* (1998) 123 C.C.C. (3d) 37 (N.S.C.A.) at 64, application or leave to appeal to the Supreme Court of Canada dismissed, August 20, 1998 [126 C.C.C. (3d) vi].' "[63]

[61] *Ibid.*, at para.20.
[62] [2008] O.J. No. 5269.
[63] *Ibid.*, at para.22. See also *R.* v *Chahley* (1992) 72 C.C.C. (3d) 193.

In turn, a similar argument may be made in respect of an accused's constitutional right to a fair trial in Ireland.[64] Of course, one must question whether this argument will be entirely successful in circumstances where the impetus behind the introduction of s.16 was the need to rebalance the law in favour of "abiding communities who are daily threatened by gangland activity."[65]

In any event, it seems that the defence may seek to admit s.16 statements in two scenarios. In the first instance, an accused may seek to rely upon the provision where his/her own witness satisfies the requirements outlined therein. Of course, it may be more difficult for the defence to satisfy the court that the statement is reliable in such circumstances, as the witness may not have taken the oath prior to making the statement, may not have been video-recorded, etc. The provision may prove useful to the defence, however, where a co-accused pleads guilty to the offence with which he is charged, having made a statement in custody which incriminates himself but exculpates the accused. Generally, such persons will be reluctant to give evidence on behalf of their co-accused. However, the English courts have suggested that in such circumstances, the accused is free to summons his co-accused to give evidence and, in the event that the latter proves adverse, to admit the previous statement as evidence pursuant to s.119 of the Criminal Justice Act 2003. Needless to say, it must be conceded that there is a very significant degree of risk to the accused's case in calling such persons as witnesses and the uncertainty involved will likely render such a course of action very unattractive to most defence counsel.

All the same, it is a course of action that is potentially open to an accused, as is evidenced in *R. v Finch*.[66] In that case, the appellant had been charged, alongside his co-accused, one Richer, with possession of a prohibited firearm and ammunition. Both had been stopped by the police on the motorway, the co-accused being the driver and the appellant the passenger in the car. There was a drawer underneath the passenger seat, in which a 9 mm self-loading pistol with a loaded magazine in place was found. The appellant claimed that he was merely accompanying the co-accused on the journey and that he had no idea there was a gun in the car. The co-accused also told the police in interview that the appellant did not know that the gun was in the car and he later pleaded guilty at trial. The appellant had sought to have the police interviews admitted pursuant to s.76A of the Police and Criminal Evidence Act 1984, and s.114(1)(d) of the Criminal Justice Act 2003 but the trial judge refused this application On appeal, the Court of Appeal said:

---

[64] See, e.g., *In re Haughey* [1971] I.R. 217, where Ó'Dálaigh C.J. acknowledged (at p.264) that "a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself" and identified those means as (at p.263):

> "(*a*) that he should be furnished with a copy of the evidence which reflected on his good name; (*b*) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (*c*) that he should be allowed to give rebutting evidence; and (*d*) that he should be permitted to address, again by counsel, the Committee in his own defence."

[65] The Minister for Justice has said that:

> "The [2007] Act, taken together with the changes made in the Criminal Justice Act 2006 in relation to, for example, the admissibility of witness statements will go a long way towards redressing the balance in favour of the law abiding communities who are daily threatened by gangland activity."

See Press Release, "Criminal Justice Act 2007 brought into operation", 21st May, 2007, available at www.justice.ie/en/JELR/Pages/PR07000665.

[66] [2007] E.W.C.A. Crim. 36; [2007] Crim. L.R. 481.

> "We do accept that there are some difficulties for an Appellant and his counsel in this situation when faced with a potential witness [i.e. the co-accused, Richer] who is reluctant to give evidence. Richer would not of course have been called entirely blind. There may not have been a recent proof of evidence but there were the interviews with the police, properly recorded, available as an indication of what he could say. Had he in evidence not supported them it would have been open to Miss Radcliffe to seek to treat him as adverse and, had that been done and his previous inconsistent statements put to him, the latter would under the modern law have stood as evidence of any matter stated in them – see s.119 of the new Criminal Justice Act 2003. We understand, nevertheless, that an Appellant might well decide, as this one did on advice, that calling such a witness was a risk that he was unprepared to take. It does not, however, follow that wherever that happens the interests of justice call for the admission in evidence of something which the reluctant witness has said out of court but is not prepared to support on oath. On the contrary, the reluctance only undermines the reliability of the evidence. We agree with the judge that in this case Richer's refusal to give evidence voluntarily plainly carried the suggestion that he was anxious that he would not be believed. Whether he was anxious that he would be disbelieved about the role of Finch or about his own role or about both we cannot tell, and nor could the judge, but either way his credibility was put severely in question by his reluctance to enter the witness box. We should say that we reach that conclusion without examining in detail what are said to be several doubtful features of Richer's assertions which exonerate Finch. In the end, had his evidence been before the jury those criticisms of what he said would have been, we accept, for the jury."[67]

The second situation in which the defence may seek to rely on s.16 is perhaps more interesting and will not doubt provide some grounds for debate and that is where there is a material inconsistency between a prosecution witness's testimony and their out-of-court statement. The English courts have allowed the defence to admit previous inconsistent statements pursuant to s.119 in such circumstances, as can be seen in the recent case of *R. v Billingham*.[68] Of course, it must be noted that s.119 allows for the admission of merely "previous inconsistent statements." In contrast, s.16 refers to situations in which the witness's testimony is "materially inconsistent" with the statement. As a result, the potential circumstances in which s.119 may apply are wider than those covered by s.16. Nevertheless, it is clear that there is a potential for s.16 to be used in cases where there are inconsistencies between a prosecution witness's testimony and their statement.

(i) Burden of proof

The UK Court of Appeal has suggested that where the defence adduces an out-of-court statement pursuant to s.119 the trial judge should be careful to modify his charge so as to take into account the manner in which the burden of proof operates. In *R. v Billingham*[69] the Court of Appeal considered that *JSB Specimen Direction No. 29* should be reconsidered in order to take into account those cases where a previous

[67] *Ibid.*, at para.23.
[68] [2009] E.W.C.A. Crim. 19.
[69] *Ibid*.

inconsistent statement is exculpatory of a defendant. At present, *JSB Specimen Direction No. 29* states:

> "[X has admitted that he] [You may be satisfied that X] made a previous statement which was inconsistent with the evidence he gave in court. [Identify the inconsistency.]
> You may take into account any inconsistency [and X's explanation for it] when considering X's reliability as a witness. It is for you to judge the extent and importance of any inconsistency. (If appropriate:) If you conclude that he has been inconsistent on an important matter, you should treat both his accounts with considerable care.
> If, however, you are sure that one of X's accounts is true [in whole or in part], then it is evidence you may consider when deciding upon your verdict[s]."

In *Billingham* the Court said:

> "…the present JSB direction should be reconsidered. Where the previous statement is exculpatory of the defendant, it is sufficient for the jury to conclude that it may be true: the present direction requires the jury to be sure[70] that even an exculpatory statement is true. It would be preferable for the direction to make this distinction."[71]

(ii) Summarising the defence case

The trial judge should also be careful to adequately summarise the defence case where a s.16 statement is adduced on behalf of an accused. In *Billingham* the appellants argued that the trial judge had "failed to draw the strings of [the defence] case together: to remind the jury not simply that the earlier accounts of Walden and Theresa Blanchard were consistent with and supported the Appellants' case at trial, but also to remind them of the content of the earlier statements and in what respects they were supportive of their case."[72] On this point the Court of Appeal said:

> "We would agree that the summing-up would have been improved if the judge had drawn together the threads of the defence case as has been suggested on their behalf. However, the jury knew that Walden's and Blanchard's previous inconsistent statements were exculpatory of the Appellants, and it was obvious that the evidence of Messrs Heaford and Chater was supportive of Mark's case. The jury were clearly warned of the need for caution when considering the testimony of Walden and Blanchard, and the need to consider those inconsistent statements. The fact that Walden and Blanchard had changed their accounts was emphasised more than once. In our judgment, the summing-up was adequate."[73]

---

[70] The English courts have held that the trial judge may instruct the jury that in order to be satisfied beyond a reasonable doubt it must be "sure" of the accused's guilt – see *R. v Adey* [1998] E.W.C.A. Crim. 718; *R. v Summers* [1952] 36 Cr. App. R. 14; *R. v Head and Warrener* [1961] 45 Cr. App. R. 225; *R. v Angeli* [1978] 3 All E.R. 950. See also *JSB Specimen Direction No.2* which recommends that the jury be instructed that the prosecution must make it "sure" of the defendant's guilt.

[71] [2009] E.W.C.A. Crim. 19, at para.68.

[72] *Ibid.*, at para.66.

[73] [2009] E.W.C.A. Crim. 19, at para.67.

(iii) Modifying the Instruction as to Inconsistencies and Weight?

Some English commentators are concerned with the potential for s.119 to be used by defence counsel against prosecution witnesses where the inconsistency between the latter's previous out-of-court statement and their testimony in court is "more apparent than real."[74] They argue that:

> "One of defence advocacy's chief weapons is the previous inconsistent statement. Typically, these are discrepancies en the witness's statement to the police and evidence in court. They amount to stark self-contradiction, omission or merely differences of degree and emphasis. They may constitute real disparities but they can also be more apparent than real, often the result of built-in deficiencies in the process by which most statements are still produced – by an officer writing out the statement on behalf of the witness with no back-up tape-recording to check what was actually said."[75]

Indeed, they argue that the "anodyne directions" set out in *JSB Specimen Direction No. 29* are insufficient in such cases, as they "fail to do justice to the difficult psychological issues raised by witness inconsistency, and do not adequately address the factual issue of whether there was any inconsistency in the first place."[76] Deleting the final sentence of the second paragraph of *JSB Specimen Direction No. 29*, they put forward the following amended specimen direction:

> "Part of the examination of the witnesses' evidence in this case has involved questions designed to highlight inconsistencies between what the witnesses have said about relevant events at various times prior to the trial, for example when making their statements to the investigating police, and what they said when giving evidence before you in the witness box and [defence] counsel has addressed you on this issue.
> As you may be only too well aware from your own experience human memory is far from infallible. With the passage of time memory for detail usually falls away to some extent. Sometimes the conscious memory of even important and graphic episodes is lost. On the other hand, memory over time can sometimes improve, as the witness has the leisure to contemplate and recall the event in question. The important point to note is that when describing details of an event which they witnessed, people are apt to express themselves at different times in different ways. On one occasion, they may not recall a certain important fact. Later, when trying to describe the incident or episode again they may remember it. Or they may forget.
> When a witness is giving an account to somebody else, for example a police officer taking a witness statement, much will depend on a range of conditions existing at the time. How was the description of events drawn from the witness, by leading questions – those suggesting the answer – or by neutral

[74] Heaton-Armstrong, A., and Wolchover, D., "A plea for better JSB model directions on inconsistency" [2009] 3 *Archbold News* 7, at p.7.
[75] *Ibid.*, at p.7. The same writers also state (at p.7) that:
> "We sought to compute an estimate of the almost certainly very high and troubling incidence of wrongful acquittals attributable to this in 'Taping witness statements for truer verdicts' (2009) 173 C.L. & J.W. 84."
[76] Heaton-Armstrong, A., and Wolchover, D., "A plea for better JSB model directions on inconsistency" [2009] 3 *Archbold News* 7, at p.7.

ones? What was the witness's state of health at the time? How fresh or tired were they? What was their frame of mind? Were they calm or excited content or angry?

You should be careful to take account of the fact that where the statement of a witness is written down by someone else, more often than not a police officer, there will always be a risk that the writer will unwittingly omit or distort what the witness says. Police officers taking statements from witnesses will usually ask the witness questions and the answer will be formed into a continuous written narrative which does not record the detail of the questions put to the witness. So it will often be difficult to discover the extent to which the questions have influenced the outcome of the statement.

You should also take into consideration the possibility that witnesses sometimes leave out some matter in the course of giving their account to the recording officer not because they have forgotten it but because they didn't think it was important at the time or because they weren't asked questions which might have focused their attention on the point.

When considering the significance or otherwise of any apparent inconsistencies or discrepancies between the witness's account on different occasions you need to focus on the obvious core issues in the case bearing in mind the guidance I have given you. Might the inconsistencies have been more apparent than real? In other words, might it be that the officer taking the statement failed to do justice to what the witness actually said or wanted to say, so that in fact there was no discrepancy?

On the other hand, is it possible that the witness was actually inconsistent on those points to which the defence have drawn your attention? If you find that the witness was inconsistent you should then move on to consider the extent to which that inconsistency helps you to assess the witness's reliability on the essential issues in the case. Ask yourselves whether the discrepancy or discrepancies are so serious as to go to the heart of the witness's general credibility, or whether, in spite of some inconsistency in the witness's evidence, you can rely on the essential elements of the witness's evidence."[77]

The above direction may be best limited to those cases in which it is quite plain that the inconsistencies are, in the authors' own words, "more apparent than real." However, it must be borne in mind that the determination of that issue is not always going to be clear cut and will, in most cases, be a matter of degree. There may be cases in which numerous inconsistencies, considered collectively, will lead the jury to reject a witness's evidence as entirely incredible, even though those inconsistencies, when considered separately, may not seem material and may even appear to be attributable to trivial errors on the part of those Gardaí responsible taking down the statement. One example of such a case is the Damilola Taylor murder case, the facts of which are explained in some detail in Hardiman J.'s decision in *O'Callaghan v Judge Mahon*.[78]

Instructions to be given where a Statement is produced as an Exhibit

[77] *Ibid.*, at p.8.
[78] [2006] 2 I.R. 32, at pp.63-64.

Where a s.16 statement is produced as an exhibit, the English courts have held that in general the trial judge should not exercise his discretion to allow it to accompany the jury when they retire. The reasons why are set out in *R. v Hulme*[79]:

> "In our judgment the judge was wrong to allow the witness statement to accompany the jury when they retired to consider their verdict. The reason given by the judge that the document was needed in order to make sense of the case and for the evaluation of Miss Durao's evidence was in our view an insufficient reason to justify the course adopted. The jury would have been in a position to make sense of the case and to evaluate the evidence if the matter had been dealt with in the normal way by a reminder in the summing-up of the contents of the witness statement and of what Miss Durao had said about that document and the circumstances in which it was made. There was no special feature of the document that made it necessary for the jury to have the document itself before them. The jury could have been reminded orally of the one manuscript correction admittedly made before Miss Durao signed the document – a matter relied on by the Crown as showing that she had exercised some care before signing the document. The jury did not need the document itself for that purpose.
>
> The reason why we think that the matter should have been dealt with in that way rather than by giving them a copy of the document itself is the undoubted risk that the jury would place disproportionate weight on the contents of the document, as compared with the oral evidence, for the reason that they had the document there in front of them. That is why it is generally inappropriate for the jury to take with them written material of an analogous nature such as a transcript of evidence given by way of a video recording of an interview with a witness. The judge does not appear to have taken that factor into account in her balancing exercise. Once it is taken into account and due weight is given to it, then in the circumstances of this case we do not think that the situation was one where the judge could properly conclude that it was appropriate to make an exception to the general rule set out in the opening words of s 122(2) that such documents must not accompany the jury when they retire.
>
> It is fair to say that the judge considered the matter on the basis of a concession by defence counsel that the jury were entitled to read the witness statement in the jury box before retiring to consider their verdict. The course adopted by the judge in allowing the jury to take the document with them went only one step further than that. In our view, however, Mr Lawrence was right to submit before us that his concession at trial was wrongly made. To have allowed the jury to have a copy of the witness statement to read in the jury box would also have carried with it the risk (albeit to a lesser degree) of disproportionate weight being placed on the document. It seems to us that that course was not necessary for a proper understanding of the case or of Miss Durao's evidence."[80]

However, where this does occur, be it by accident or otherwise, the trial judge must go even further than the general directions to be given regarding s.16 statements. The Court said:

---

[79] [2006] E.W.C.A. Crim. 2899.
[80] *Ibid.*, at paras. 19-20.

> "But if the document was there before the jury, more was needed than those general directions. It was necessary for the judge to impress on the jury the reason why they were being given the document and the importance of not attaching disproportionate weight to it simply because they had it before them, whereas they had to rely on their recollection of the oral evidence and of the judge's summing up of that evidence. No directions along those lines were given."[81]

Conclusion

Section 16 has caused a shift away from the general position at common law that affords primacy to the spoken word in court. That primacy stems from the recognised "hearsay dangers" that attach to out-of-court statements. The rationale underling the provision is that such dangers will not constitute an adequate reason to exclude a statement where its admission is both necessary and its contents sufficiently reliable. Be that as it may, it is clear that even where a statement is admitted for these reasons, the hearsay dangers will have an impact upon the weight to be attributed to it. As a consequence, in deciding whether to believe what a witness says in court over what they have said in their statement, the jury must have regard to all factors that will affect the weight of the latter.

It is the trial judge's role to ensure that the jury is reminded of all such factors, as it is prosecution counsel's job to ensure that any misdirections or non-directions in that regard are brought to his attention. However, one should bear in mind that the range of these factors is by no means certain. In particular, the Irish courts have yet to address precisely what it means for a witness to be "available for cross-examination" or how this will affect the statement's weight, where the witness was not cross-examined at the time the statement was made. Furthermore, the issue of whether corroborative/confirmatory evidence may be taken into account in assessing a statement's weight has yet to be tackled. It seems, therefore, that until the higher courts give some concrete guidance on the operation of the section, prosecution counsel may deem it prudent to ensure that every possible factor relating to weight is brought to the jury's attention in order to guarantee the validity of all convictions challenged on appeal.

[81] [2006] E.W.C.A. Crim. 2899, at para. 20.