

## Appendix FF

Order 58, rule 15

No. 1

## SUPREME COURT

## Application for Leave and Notice of Appeal



## For Office use

Supreme Court record number of this appeal	S:AP:1E:2016:00018
Subject matter for indexing	

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

The people at the Suit of the Director of Public Prosecutions	V	Damien O'Brien	
Circuit Court Record Nr	Bill no. LK 32/2014	Court of Appeal Record Nr	CA 33/2015
Date of filing			
Name(s) of Applicant(s)/Appellant(s)	Damien O'Brien		
Solicitors for Applicant(s)/Appellant(s)	John Devane Solicitors		
Name of Respondent(s)	The Director of Public Prosecutions		
Respondent's solicitors	Grainne Glynn		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)			

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

## 1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr. Justice Birmingham, Mr. Justice McMahon and Mr. Justice Edwards
Date of order/ Judgment	12 <sup>th</sup> May, 2016

## 2. Applicant/Appellant Details

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

Appellant's full name	Damien O'Brien
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Original status	<input type="checkbox"/> Plaintiff	<input checked="" type="checkbox"/> Defendant
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party
	<input type="checkbox"/> Petitioner	

<b>Solicitor</b>			
Name of firm	John Devane Solicitors		
Email	johndevanebcl@eircom.net		
Address	7 Quinlan Street, The Crescent, Limerick	Telephone no.	(061) 314 600
		Document Exchange no.	
Postcode		Ref.	

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)

<b>Counsel</b>			
Name	Antoinette M. Simon B.L		
Email	asimonbarrister@gmail.com		
Address	Abbey House, 7 Bank Place, Limerick	Telephone no.	(061) 405566
		Document Exchange no.	
Postcode			

<b>Counsel</b>			
Name	Andrew Sexton S.C		
Email	asexton@eircom.net		
Address	The Distillery Building, 145-151, Church Street, Dublin 7	Telephone no.	(01) 8175913
		Document Exchange no.	087.2438242
Postcode			

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

Current postal address	
e-mail address	
Telephone no.	

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

### 3. Respondent Details

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

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

Solicitor Grainne Glynn			
Name of firm	Office of the Director of Public Prosecutions		
Email			
Address	90 North King Street, Smithfield Dublin 7	Telephone no.	
		Document Exchange no.	
		Ref.	
Postcode			

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

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

Counsel			
Name	John G. O'Sullivan B.L.		
Email			
Address	8 Bank Place, Limerick	Telephone no.	(061) 413 999
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

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

	Document Exchange
	Post

	E-mail
	Other (please specify)

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

Please set out below:

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

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

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

The relevant orders and findings made in the High Court and/or in the Court of Appeal

The Applicant/Appellant appeals part only of the decision of the Court of Appeal. The specific part of the decision appealed against is the finding that the application for a direction on count no. 2 in the indictment was correctly refused (as set out at paragraph 34 of the judgment of Mr. Justice Edwards for the Court of Appeal, on May 12<sup>th</sup>, 2016)

#### CRIMINAL PROCEEDINGS – FACTS NOT IN DISPUTE

Regarding count no. 2 – making of a threat with a syringe, contrary to Section 6(1)(b) of the Non-Fatal Offences Against the Person Act, 1997 (hereinafter referred to as “the 1997 Act”)

1. It is not disputed that the Appellant was present in and outside Gleeson’s shop at Catherine Street, Limerick.
2. It is not disputed that the Appellant left this shop with a Bounty bar, without paying for it.
3. It is not disputed that the two people from this shop, namely Mr. Seaghan Gleeson, and Mr. Karl Hanley went outside to confront the Appellant.
4. It is not disputed that Mr. Hanley asked the Appellant to return the Bounty Bar.
5. It is not disputed that the Appellant produced something from his pocket and made threats.
6. It is not disputed that the Appellant chased Mr. Gleeson.
7. It is not disputed that Mr. Gleeson believed the thing produced from the Appellant’s pocket to be a syringe.
8. It is not disputed that Mr. Gleeson made no claim to a belief that he might become infected with disease.

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

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

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

*In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—*

Please list (as 1, 2, 3, etc) concisely the reasons in law:

- i. why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court and
- ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court

The proper identification of the ingredients of the offence created by Section 6(1)(b) of the 1997 Act is a matter of general public importance. It is necessary in the interests of justice that there be an appeal to the Supreme Court, to identify the said ingredients and to clarify the circumstances in which these ingredients can be said to be established to a criminal standard of proof.

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

Please list (as 1, 2, 3, etc) concisely:

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

1. The Court of Appeal was wrong at law in deciding that belief about the risk of infection (i.e. belief on the part of the victim) was not a necessary ingredient of an offence under Section 6(1)(b) of the 1997 Act,

LEGAL PRINCIPLES RELATED TO THIS GROUND: (i) It is submitted that, as penal provisions should, where there is any uncertainty, be interpreted in favour of accused persons. It is submitted that the provisions of Section 6(1) of the 1997 Act are uncertain in this regard, in that whilst not expressly stating that the victim ought to have a certain belief, they are drafted in such a way that the need for such a belief is presupposed. (ii) Interpreting the said provisions by recourse to the notions of actus reus and mens rea does not assist in as comprehensive a manner as might be expected. For example, the Court of Appeal decided in its judgment that the actus reus of the offence consisted of threatening to injure another with a syringe. If this is literally so, it means that the actus reus is established even where the threat is not communicated to the victim. It is submitted that whilst the provisions do not

expressly state that the threat must be so communicated, it is presupposed that it must be just as the communication of the threat ought to be a necessary ingredient of the offence, so also ought the holding of a belief on the part of the victim.

2. The Court of Appeal was wrong at law in deciding that there was sufficient, or any, evidence (circumstantial or otherwise) of intentional or reckless creation of a belief (or the risk of a belief) on the part of the Appellant.

LEGAL PRINCIPLES RELATED TO THIS GROUND: As a matter of principle, the Respondent bore the onus of proof in relation to every ingredient of the said offence created by Section 6(1)(b) of the 1997 Act. There were no statutory provisions present which might be interpreted as shifting this onus. There were no provisions present creating any evidential presumptions. The Respondent could point to no evidence of any type establishing the intentional or reckless creation of a belief about infection, or the risk of creation of such a belief.

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

## 7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2016] IECA 146

References to Law Report in which any relevant judgment is reported

## 8. Order(s) sought

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

An Order setting aside the conviction of the Appellant of the offence set out in Count 2 of the Indictment laid against him.

What order are you seeking if successful?

Order being appealed: set aside  vary/substitute

Original order: set aside  restore  vary/substitute

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

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

**Are you asking the Supreme Court to:**

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

Yes

No

If Yes, please give details below:

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

Yes

No

If Yes, please give details below:

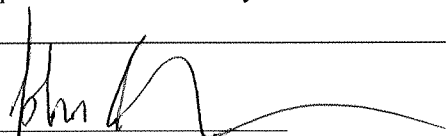
Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

The Appellant is in custody on foot of the said conviction since the 28<sup>th</sup> of October 2014

Signed: 

(Solicitor for) the applicant/appellant

**Please submit your completed form to:**

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

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

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