

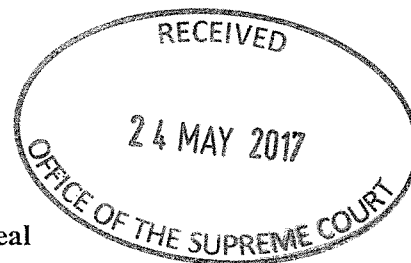
## Appendix FF

Order 58, rule 15

No. 1

## SUPREME COURT

## Application for Leave and Notice of Appeal



## For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

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

The Director of Public Prosecutions	V	Sabrina Cummins
High Court Record	CCDP0042/2014	Court of Appeal Record
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Sabrina Cummins	
Solicitors for Applicant(s)/Appellant(s)	Cahir O'Higgins & Co., Solicitors, Kingsbridge House, 18-22 Parkgate Street, Dublin 8.	
Name of Respondent(s)	The Director of Public Prosecutions	
Respondent's solicitors	The Chief Prosecution Solicitor.	
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	

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

## 1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham, Mahon, Edwards JJ. (Court of Appeal)
Date of order/ Judgment	Judgment of 23 <sup>rd</sup> March, 2017; Order perfected 26 <sup>th</sup> April, 2017.

## 2. Applicant/Appellant Details

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

Appellant's full name	Sabrina Cummins
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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	Cahir O'Higgins & Co.		
Email	DLinehan@coh.ie		
Address	Kingsbridge House 17-22 Parkgate Street	Telephone no.	01-8744744
Postcode	Dublin 8	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	Mr. Blaise O'Carroll, S.C.		
Email	Blaise.ocarroll@gmail.com		
Address	Law Library Four Courts Inns Quay	Telephone no.	0878117124
		Document Exchange no.	301152
Postcode	Dublin 7		

<b>Counsel</b>			
Name	Mr. Karl Monahan, B.L.		
Email			
Address	Law Library, Four Courts, Dublin	Telephone no.	0876771554
		Document Exchange no.	810263 Four Courts
Postcode	Dublin 7		

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"/>	<input type="checkbox"/>
Post	Other (please specify)

### 3. Respondent Details

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

Respondent's full name	The Director of Public Prosecutions
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Original status

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

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

Solicitor			
Name of firm	The Chief Prosecution Solicitor		
Email			
Address	90 North King Street, Smithfield	Telephone no.	01-8588500
		Document Exchange no.	AGENT
Postcode	Dublin 7		

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail : dlinehan@coh.ie
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel: Mr. Remy Farrell, S.C.			
Address	Suite 237 The Capel Building Mary's Abbey	Telephone no.	01-8175222
		Document Exchange no.	810037
Postcode	Dublin 7		

Counsel Mr. Garrett Baker, B.L.			
Address	Law Library Four Courts Inns Quay	Telephone no.	01-8175270
		Document Exchange no.	301079
Postcode	Dublin 7		

If the Respondent 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 type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

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

##### Concise statement of the facts found in the High Court

The Applicant was indicted before the Central Criminal Court (along with a co-accused) on a charge of murder arising from the death of Thomas Horan at Cambridge Court, Ringsend, Dublin on 6<sup>th</sup> January, 2014. The Applicant pleaded not guilty and was tried by Mr. Justice Hunt with a Jury over 24 days in October and November, 2015. The Jury found the Applicant guilty of murder. The Applicant was sentenced by Hunt J. on 20<sup>th</sup> November, 2015 to life imprisonment as mandated by statute.

At trial, the Applicant gave evidence in chief and was cross-examined by counsel for the Respondent on 4<sup>th</sup> November, 2015. The Applicant's evidence included allegations against her co-accused. The cross-examination of the Applicant on behalf of the Respondent did not conclude on 4<sup>th</sup> November, 2015 and the trial was listed to resume on 5<sup>th</sup> November, 2015. On that date, the Applicant, who was in custody, did not attend Court as she was unwell. A doctor attended at the Criminal Courts of Justice on the afternoon of 5<sup>th</sup> November, 2015 and opined that the Applicant was fit to resume giving evidence on 6<sup>th</sup> November, 2015. On 5<sup>th</sup> November, 2015, the Applicant refused to resume giving evidence.

In response to this situation, counsel for the Prosecution indicated (at pages 1 to 2 of the transcript) that he would comment on this position in closing. The learned trial Judge similarly indicated that he would tell the Jury that this was something they could take account of.

Subsequently, the learned trial Judge gave the following indication to the Appellant's counsel (at page 5 of the transcript):

“I just want to make three things perfectly clear. And I'm going to give her, while the application is going on, a last chance to consider this if she hasn't already. Firstly, if she's acquitted by any chance, because this trial is continuing in relation to her, she won't -- very unlikely to be going anywhere for a while. It's flagrant, direct contempt of Court and I intend to deal with it as such. Secondly, if she's convicted of manslaughter that gives rise to obviously a range of possible sentences. This will be a hefty aggravating factor in any sentence to be imposed, make you no mistake about that. Thirdly, if she's convicted of murder, she's going to get a life sentence. That's fine. But the sentencing transcript is something that will undoubtedly arise at some later time, and it will contain remarks that may not be helpful to her.”

At page 9 of the transcript, the learned trial Judge addressed the Appellant directly in the following terms:

“Right, Ms Cummins, I gather you don't wish to continue your evidence. That has very serious consequences in this trial. I'm not going to speculate as to the reasons for this change of mind. Your trial is continuing. Let me assure you about that. You're in contempt of Court - that is the position - by refusing to continue the evidence that you, yourself, voluntarily commenced. That has, as I've pointed out, serious and expensive consequences. I want you to meditate for the next eight minutes on the following three propositions. And give you -- I'm giving you a last chance to continue with your evidence. If you're acquitted, by some chance, in this case in view of your contempt of Court it's highly unlikely that you'd be going anywhere for a lengthy period of time because I'm going to deal with that in the event that you're acquitted. In the event that you're convicted of manslaughter, I have a discretion in terms of the sentence that might follow. Aggravating factors and mitigating factors determine what the ultimate sentence will be. This conduct -- and I'm satisfied it's voluntary misconduct. It's in no way conditioned by illness, such illness was on display or reflected in evidence yesterday was of an entirely trivial variety. This will be regarded as a hefty aggravating factor, and will weight very heavily in the sentence that will be likely to be imposed if you persist in this misconduct. If you're convicted of murder, well, it's a life sentence anyway. But, of course, the custodial part of a life sentence is subject to the discretion of the Executive, the Minister for Justice. And he or she, or they, or whatever committee deals with these matters, they have a discretion in relation to when you might ultimately be released. And there will be remarks on the transcript arising out of this conduct which will be unlikely to be helpful to you in that event. So I want you to take all of those consequences into account in deciding whether or not you're going to persist with this misconduct. I want you to complete your evidence. It's going to be a very short time. Mr Farrell is nearly finished. Mr Ó Lideadha says he'll be short. You've started so you should finish. But let me assure you this is not a consequence free decision. So we'll be back at 20 past 11 and we'll see what the position is then.”

The learned trial Judge did not suggest to the Applicant a fourth alternative, namely that in the event of her not resuming evidence, he would direct the Jury to disregard her evidence-in-chief and/or to take account of her refusal to resume giving evidence as a factor affecting her credibility. The Applicant's evidence at this point, although exculpatory of the Applicant and inculpatory of her co-accused, was broadly in line with her statements in Garda interview, which were before the Jury in any event.

The Appellant subsequently indicated her willingness to resume giving evidence. The learned trial Judge stated in response to this situation (at page 10 of the transcript):

“Therefore, let me make it perfectly clear, if they could be regarded as threats - that might be a strong term but I suppose that's what they were - well, they're off the menu now as long as she completes her evidence.”

The Applicant's cross-examination resumed and concluded on 6<sup>th</sup> November, 2015. During the course of cross-examination, the Applicant made admissions in respect of the ingredients of the offence charged. This included the following exchange at p. 15 of the transcript:

“Q. So when you kicked and punched Thomas Horan, you knew Kenneth was trying to kill him,

isn't that right?

A. Correct.

Q. Yes. Because he had been strangling him, isn't that right?

A. Yes.

Q. And you joined in trying to kill him, isn't that exactly what happened?

A. Yes.”

The Applicant appealed to the Court of Appeal *inter alia* on the basis that her evidence was improperly procured by “threats” made by the learned trial Judge in breach of the protection afforded to an accused person by Section 1 of the Criminal Justice (Evidence) Act, 1924 (“the 1924 Act”) which provides that such a person is a competent witness but not a compellable witness and that the conduct of the learned trial Judge constituted an irregularity in the conduct of the trial. In respect of the latter point, the Applicant relied upon the judgment of the English and Welsh Court of Appeal in *R. v. John Joseph O’Boyle* (1991) 92 Cr.App.R. 202.

#### **Concise statement of the judgement of the Court of Appeal**

The Court of Appeal dismissed the Applicant’s appeal. In respect of the Applicant’s reliance upon the 1924 Act, the Court held:

“18. The Court is quite satisfied that the 1924 Act has no application whatsoever. Ms. Cummins was free to decide not to give evidence. That was an option exercised by her co-accused but once she chose to give evidence she was required to make herself amenable to cross examination. It is absolutely fundamental to an adversarial trial system that a witness giving evidence must be available for cross examination by the party against whom she has given evidence.”

In respect of the *O’Boyle* case, the Court of Appeal held that this was distinguishable particularly because in that case the trial Judge had threatened the use of physical force to return the appellant to Court if he tried to leave the dock or remain below. The appellant in that case returned to the witness box against his will where counsel for a co-accused invoked statutory procedures to allow her to put to him a confession which had been ruled inadmissible. When he denied this confession, the relevant witnesses were called to give evidence at length in respect of it.

In the instant case, the learned trial Judge had specifically eschewed the prospect of using force to compel the Applicant to return to the witness box, observing as he did: “...I could force her into the witness box. Can't force her to open her gob, can I?”

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

Section 1 of the Criminal Justice (Evidence) Act, 1924, specifically provides that an accused person is not compellable as a witness in their own case. Section 1(e) provides that a person who is charged with an offence and who is a witness in pursuance of the Act may be asked questions which incriminate him as to the offence charged. The question at issue in the within proceedings was the extent to which the Applicant’s right not to give evidence was abrogated by the provisions of Section 1(e) of the Act. It was incorrect for the Court of Appeal to find that the Section itself did

not apply.

As a matter of statutory interpretation, the 1924 Act does not admit of such a construction. This is a matter of exceptional public importance which it is in the public interest be determined by the Supreme Court.

The Court of Appeal has also held that it was in order for the learned trial Judge herein to threaten the Applicant (the learned trial Judge himself described his remarks as “threats”) that if she did not resume giving evidence for the purpose of cross-examination, he would (a) in the event of an acquittal impose a lengthy sentence as a punishment for contempt of court; (b) in the event of a conviction for manslaughter, treat the Applicant’s refusal to resume giving evidence as “a hefty aggravating factor” in determining sentence; or (c) in the event of a conviction for murder, make comments of an unhelpful nature for the purpose of having the same on the sentencing transcript effectively with a view to influencing the Parole Board in due course.

The Applicant was coerced to resume giving evidence by these “threats” and in the course of that evidence made damaging admissions.

Whilst not identical on its facts, broadly similar conduct by a trial Judge in *R. v. O’Boyle* (1991) 92 Cr.App.R. 202, whilst admittedly involving a threat of actual force to return the appellant to the witness box, was found to constitute an irregularity at trial sufficient to warrant the overturning of the appellant’s conviction.

The propriety of the course of action adopted by the learned trial Judge in the instant case, constituting on the Applicant’s case an irregularity in the conduct of the trial, gives rise to a question of exceptional public importance which it is in the public interest be determined by the Supreme Court.

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

1. The Court of Appeal erred in law in ruling that Section 1 of the Criminal Justice (Evidence) Act, 1924 was of no application in the instant case and that the Applicant was therefore a compellable witness having commenced evidence-in-chief and cross-examination.
2. The Court of Appeal erred in law in ruling that there was no irregularity in the learned trial Judge threatening the Applicant to resume giving evidence for the purpose of completing her cross-examination.

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

Karl Monahan, B.L.

Blaise O’Carroll, S.C.

#### 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

[2017] IECA 138.

References to Law Report in which any relevant judgment is reported

1. *R. v. John Joseph O'Boyle* (1991) 92 Cr.App.R. 202
2. *Attorney General v Murray* [1926] I.R. 266

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 (1) setting aside the Order of the Court of Appeal; (2) setting aside the conviction of the Applicant by the trial Court; and (3) directing a retrial of the Applicant.

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

N/A

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

If the Court finds that Irish law permits a trial Judge to coerce an accused person to give evidence in the manner adopted by the learned trial Judge herein, it is contended that such a rule of law is in breach of the Applicant's right to a fair trial under Article 6 of the European Convention on Human Rights.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?  Yes  No



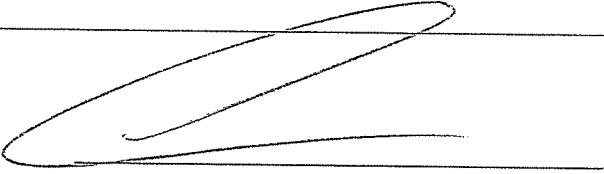
If Yes, please give details below:

make a reference to the Court of Justice of the European Union?  Yes  No  No

If Yes, please give details below:

Will you request a priority hearing?  Yes  No  No

If Yes, please give reasons below:

Signed: 

(Solicitor for) the applicant/appellant  
Cahir O'Higgins & Co.,  
Solicitors,  
Kingsbridge House, 17-22 Parkgate Street,  
Dublin 8.

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.