[2023] IECA 285

THE COURT OF APPEAL

Edwards J.

McCarthy J.

Kennedy J.

Record No 57/2019

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

PASCAL KELLY

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 31st of October 2023.

Introduction

1. On the 7th of December 2018 the appellant was convicted, following a lengthy trial, by unanimous verdicts of a jury in the Dublin Circuit Criminal Court, of seven offences on Bill No DUDP0117/2017, comprising: one count of burglary, contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001 (i.e. "the Act of 2001") (being count no. 1.); one count of robbery, contrary to s. 14 of the Act of 2001 (being count no. 2); one count of making threats, contrary to s. 5 of the Non-Fatal Offences against the Person Act 1997 (i.e. "the Act of 1997") (being count no. 3); three counts of false imprisonment, contrary to s. 15 of the Act of 1997 (being counts nos. 4, 5, and 6, respectively) and a count

of taking a vehicle without authority, contrary to s. 112 of the Road Traffic Act 1961, as amended by s. 65 of the Road Traffic Act 1968, and as amended by s. 18 of the Road Traffic Act 2006. The offences in question were committed in the context of what is colloquially known as a "*tiger kidnapping*".

2. On the 1st of February 2019 the appellant was sentenced to 11 years and 6 months' imprisonment for the burglary offence; to 14 years' imprisonment for the robbery offence; to 7 years and 6 months' imprisonment for the offence of making threats; to 18 years' imprisonment on each of the false imprisonment counts, and; to 3 years and 6 months' imprisonment for the offence of taking a vehicle without authority. All sentences were to date from the date of sentencing (subject to credit being given for any time served by the appellant on remand exclusively in connection with the offences on Bill No. DUDP117/2017) and were to run concurrently.

3. The appellant has now appealed both against his said convictions and the severity of the sentences he received in connection therewith. This judgment deals solely with his appeal against his said convictions.

Evidence as to the Central Events Adduced Before the Jury

4. The jury heard evidence from a Ms. L who in September of 2014 lived at an address in North County Dublin with her two daughters, E and S. At that time, the witness was the postmaster at Bayside post office, and she was helped in that role by her daughters who worked part-time in the post office. On the morning of the 24th of September 2014 the witness left her home at 8:00am, dropped her daughter S to a nearby train station, then stopped for coffee and from there proceeded to work, arriving at the post office at approximately 8:40am. Thereafter, it was a quiet morning in the post office and most of the people attending there that day were regular customers. She then met her daughter E for lunch, and shortly after she had returned to the post office a G4 security van arrived with a

cash delivery, which she signed for and placed in a safe on the premises in accordance with standard procedure.

5. Ms. L's daughter, E, was working with her that afternoon. At about 4:20pm Ms. L noticed two people walking by the post office. She later described those people as wearing shiny black jackets and to have been in their late thirties or in their forties.

6. At about 6:10pm she locked up for the evening. Her daughter E had left before her. At close of business, there was cash to the approximate value of €90,000 on the premises, some of which was in U.S. dollars. Ms. L put the lock on the safe and separated the safe keys (which was a required security procedure). She then set the alarm, locked the door and pulled down the shutter.

7. After Ms. L had left the post office she attended a social engagement and did not return home until about 10:30pm, stopping on the way home to purchase some milk at a Spar shop in response to text received from her daughter E requesting her to do so. As she was driving home, she noticed a car driving behind her but when she turned the corner to go into her estate it drove straight on. She was not concerned by this and proceeded to her home. Her daughter's car, a Nissan Micra, was in the driveway when she arrived. Ms. L had an Italian student saying at home at the time, and the light was on in the student's bedroom as she approached the house. On entering the house she found that her daughter E was still up, and they had tea in the kitchen and were talking for between half an hour and three quarters of an hour and then she went to bed. Ms. L locked up the house before she went to bed.

8. Having gone to bed, Ms. L was sleeping lightly when she was disturbed by a scream from her daughter. She could hear men's voices saying, "*Where's your mom?*". Ms. L picked up the phone on her locker and immediately rang a special "*tiger aid*" hotline number provided to her by An Post to be used in the event of a "*tiger*" incident. Having dialled the number, she immediately slid the phone under the covers. She was unaware if anybody had

answered. At that point a man appeared in her bedroom. He was dressed in black and was around five or 10, with blue eyes, grey sideburns and a wide face. He shouted at her, "*Did you make a call?*", "*Did you make a call?*", "*Where's your phone?*" . Ms L said "*No*", and then handed him the phone, before getting up and standing beside her bed.

9. At that point another man entered the room, accompanied by Ms. L's daughter E and the Italian student. This man approached Ms. L and placed duct tape across her mouth. As he was attempting to do so, she pleaded with him not to, as she had asthma and feared that she would be unable to breathe. In response, he asked her where her inhaler was and, having been told of its whereabouts, he fetched it from her handbag. This man then put trousers on Ms. L, and helped her to put her boots on, before binding her hands with cable ties at the front. Ms. L was deeply concerned for her daughter and for the Italian student, as well as for her own safety. During the incident Ms. L observed a small handgun on the bed.

10. The first man was anxious to get everybody out of the house because E was screaming so much. The raiders brought their captives downstairs and demanded the keys of Ms. L's car, and the keys of the post office. Ms. L was told to bring a jumper to put over her head so that she would not see where they were going. She was placed in the back seat of her own car, behind the passenger seat. The two girls were then brought out and placed beside in the back seat, with her daughter E closest to the window on the other side. The car was locked with central locking and the two men sat in the front seats of the vehicle. The first man she had encountered was driving and the second man was in the passenger seat. The vehicle then reversed out of the drive and proceeded out of the estate. At this point Ms. L had the jumper over her head. She also had tape placed over her eyes by the second man, but it did not fully cover her eyes and she could still partially see.

11. The first man was on the phone as they drove along, and the raiders were described by Ms. L as being agitated because they were due to meet someone else and, apparently, that

person had got lost. She heard him being instructed to flash his lights if he was approaching them. Lights were flashed and then Ms. L's own phone rang. This prompted an angry reaction from the first man, who accused Ms. L of having made a call even though she had denied it in the bedroom. He said that he was going to shoot her if she had made a call.

12. After the other car had flashed them, the raiders turned their vehicle around and it proceeded for a while before eventually stopping, as did the other car. The second man then walked across the road and approached the other car. The second man then got back into Ms. L's car and both cars then took off again and drove for some further time before stopping again. On this occasion both raiders got out of the car and appeared to be talking. With that, a third man then got into Ms. L's car and he said, "*I heard yous made a call*", to which Ms. L responded, "*No*" . She had no idea where they were at that stage, other than that they had been going in the general direction of Donabate.

13. The third man said that the other two men were angry because they thought Ms. L had made a call. They then came back to the car and removed Ms. L from the car. The second raider was guiding Ms. L. It was pitch black and she did not know where they were going. She was brought to the other car and placed inside it. Once inside the car, she was questioned about the post office, about the alarm, about the codes for the alarm, about how much money was on the premises and other such matters. The questions were asked by the first raider. In the course of his questioning he repeatedly threatened to shoot Ms. L. After 15 or 20 minutes, Ms. L was returned to her own car. The occupants were then informed by the raiders, "*Right were going over to the post office now*". Ms. L was then brought back to the second car, and both cars moved off.

14. As they were driving along Ms. L said to the raiders, "*You know the safe won't open until 8 o'clock*". The first raider then jammed on the brakes and appeared really angry. He turned around in his seat and started punching Ms. L, saying "*You're lying. You lied about*

the call and you're lying about this now", in response to which Ms. L said, "*No, I'm not.*". The first raider then said he was going to break E's arm, pour petrol over the car and kill them all. At this Ms. L became very upset, and the second raider intervened to say, "*That's enough, that's enough.*" Ms. L was then brought back to her own car and was allowed to re-join her daughter and the student. The second raider said to her at this point, "*Nothing will happen. They'll will be fine.*" Despite this attempted reassurance, Ms. L became alarmed when she heard the sound of something being sprayed. She thought that petrol was being sprayed on the vehicle and that they were going to burn the car. However, seeing her mother's alarm, E said to "*He's after explaining to us that it was a detox or Dettol, something like that to spray because he wanted to get rid of DNA that was in the car*", and this had the effect of calming Ms. L somewhat.

15. Sometime after that Ms. L asked the third raider if they could be allowed go to the toilet, and this was facilitated but they had to go to the toilet in the presence of the second raider, who pulled down Ms. L's clothes for her in circumstances where her hands were still tied. She was told by the second raider, "*We're not here for anything sexual or that. We just want the money. If you go along with us, yous won't get hurt.*" After being allowed to go to the toilet they were initially placed back in the car, then Ms. L was separated from the others again. It was said to her, "*Come with us, we're going over to the post office*", and the second raider whispered in her ear ,"*You'll be fine, we won't hurt you, the girls will be fine, they'll be found in the morning with the hazards on the car*". At this point Ms. L was placed in the back seat of the other vehicle and told to lie down. She was very afraid at this point as the first raider persistently shouted at her that he was going to shoot her.

16. When the car moved off, Ms. L, with great courage and presence of mind, managed to deposit some of her hair on the back seat of the car, and to dig her nails into the back seat, so as to ensure that there would be forensic traces of her presence there both in the car and under

her nails. She also spat into the back seat of the car again with a view to leaving a trace of evidence for the assistance of the authorities. Eventually the car pulled up at a car park in Bayside near the post office. Her own vehicle was already there. By this stage the tape had fallen off her eyes.

17. Using Ms. L's keys the raiders opened the shutter, and the door, to the post office. The second raider then brought Ms. L into the building, and, under duress, Ms. L disarmed the alarm. The first raider remained outside in the car, but he had warned Ms. L before she entered the building to put the correct code into the alarm system and not to alert gardaí. Ms. L was then placed at the back of the post office where there was a safe room. Her daughter E and the Italian student were then brought into the post office and she was relieved to see that they were safe and alive. They were brought in by the third raider. Ms. L was then locked inside the safe room at the back of the post office, separated from her daughter and the student who were not locked in the same room. Ms. L could still hear what was going on outside the safe room. The first raider kept ringing the second raider within the post office, and he was trying to reassure him, telling him that the captives were locked up. Even though it was untrue, the second raider actually stated to him that the captives were tied up face down on the ground with guns to their backs, and that he ought not to worry.

18. At about 6:15am the first raider rang again and he reported seeing someone at the shopping centre. Ms. L suggested to the second raider that maybe it was the manager of the supermarket getting ready to open the supermarket for the day, and this calmed the raiders somewhat. The shutter to the post office had been pulled down after the raiders entered so it would look normal.

19. The three captives were weary and tired, and E and the student were very upset. The second raider told the first raider over the phone that the safe was ticking along, that he had

tried to open it but could not do so. He said to him, "*She's telling the truth, she is going along with everything.*"

20. At 8:00am they opened the safe. The contents of the safe included a bundle of €20 notes, the serial numbers of which had been recorded specifically in case of a robbery. Using a post office bicycle for transportation purposes, the first thing the raiders (unwittingly) put into the post office bag was the said bundle of €20 notes. They then emptied the remainder of the cash in the safe, including foreign currency, and prepared to leave. The captives were then bundled into a small toilet room, and an effort was made to secure the door. The captives waited until they heard the shutter going up and the raiders leaving, before endeavouring to escape from the small toilet room, which they achieved with little difficulty, following which Ms. L activated a panic button and then rang the gardaí.

21. Both Ms. L's daughter E and the Italian student also give evidence before the jury corroborating Ms. L's account.

22. It was the prosecution's case that the first raider was the appellant. There was evidence that the raiders left the scene in a Volkswagen (or "VW") Golf driven by the appellant. The VW Golf was observed leaving Bayside DART station car park at 8:15am by a Garda Carolan of the Garda National Surveillance Unit (i.e. "NSU"). The driver was described was described as wearing a dark coloured jacket, and dark coloured woollen hat (the other raiders each wore a dark jacket and either a dark hat or hoodie). The evidence was that the VW Golf proceeded towards the Dublin Road, Malahide and the VW Golf's route was tracked by gardaí.

23. As the VW Golf approached the junction of the Back Road and the Dublin Road, it was observed by Detective Gardaí Maher and Kavanagh (otherwise "D/Garda Maher" and "D/Garda Kavanagh", respectively) who were driving an unmarked car. The VW Golf turned

right onto the Dublin Road travelling north to Malahide and, once it had turned, was followed by these gardaí.

24. The VW Golf came upon a line of traffic stopped at traffic lights at the junction of the Dublin Road and the Swords Road. As D/Garda Maher pulled up behind the VW Golf, he noticed a flurry of activity and that the VW Golf was beginning to move forward. He suspected that it was about to attempt to overtake awaiting traffic and decided to prevent this. D/Garda Maher told D/Garda Kavanagh of his intention, who then alighted from the Garda car and ran towards the passenger side of the VW Golf while D/Garda Maher drove alongside the VW Golf. As he drove alongside the VW Golf, D/Garda Maher looked directly across at the appellant who looked back at him. D/Garda Maher contended in evidence that he had an unobstructed view of the appellant. In his evidence to the jury he described him as being of approximately 50 years of age, and wearing a dark jacket, dark hat and dark gloves, and as having an unkempt grey beard.

25. D/Garda Kavanagh entered the front passenger seat of the VW Golf and subdued the driver, placing his right forearm onto the driver's face and buckling his seatbelt. D/Garda Kavanagh described the driver as being a male in his late forties, of stocky build and wearing dark clothing. He recalled the driver was wearing a rolled-up balaclava and had a hood on at this stage. D/Garda Kavanagh then noticed the two other raiders in the rear seat. They alighted from the VW Golf and fled southwards, pursued on foot by D/Garda Kavanagh.

26. The evidence was that D/Garda Maher alighted the Garda car and drew his firearm. As he did so, he noted that two other men had alighted from the VW Golf and were being pursued by D/Garda Kavanagh. D/Garda Maher then joined in that pursuit, chasing one of the raiders into a wooded area. He said that he shouted "*Armed gardaí*", and for the appellant to stop. The raider did not stop, rather he turned towards D/Garda Maher, who saw what he believed to be a firearm in the raider's right hand. D/Garda Maher again shouted "*Armed*

gardaí, stop". When the raider did not react, D/Garda Maher then fired a shot at him. The raider continued to move towards D/Garda Maher, who then fired a second shot. At this point the raider dropped to the ground briefly, but he got up again and made his escape.

27. Once both D/Garda Maher and D/Garda Kavanagh had commenced pursuing the two fleeing raiders the driver of the VW Golf was left unattended, whereupon he opted, after moving a short distance forward, to alight from the VW Golf and also flee.

28. In coming to a halt the VW Golf had collided into the side, or had sideswiped, another vehicle. That vehicle had belonged to a Mr. K.D., who also gave evidence at the trial. His recollection was of the side of his vehicle being impacted by a VW Golf that ended up just ahead of him. He recalled two individuals getting out of that vehicle and running in different directions and the arrival of two plain clothed gardaí very quickly on the scene. He recalled that the gardaí were driving a navy or black jeep-type vehicle. He said it all happened very fast. Under cross-examination he was asked if he had seen a Garda get into the car and then the two men get out and he replied, "*No. That –they (sic) two gentlemen were out of the car by the time the detectives were there*".

29. D/Garda Kavanagh managed to apprehend one of the assailants that he was pursuing. This was a Mr. Stephen Murray, and he was apprehended on the Dublin Road approximately 75 to 100 metres south of the Garda car. D/Garda Kavanagh restrained on the ground, and having done so returned him to the Garda car where Mr. Murray was arrested by an Inspector Hanrahan.

30. D/Garda Maher, having pursued Mr. Murray's companion in the direction of Auburn Grove was unsuccessful in apprehending him.

31. The driver of the VW Golf, later identified as the appellant, having alighted from the vehicle ran north to the junction and then west onto the Swords Road, passing Lawson Spinney Road, and proceeded towards Gaybrook Lawns estate. He was observed by a Mr. H,

who was sitting in traffic on the Swords Road. Mr. H gave evidence before the jury and described the person he saw as being 50 to 60 years old, of a large build and as being, "*approximately 6 foot, pale skin, had a -- greyish hair, receding hairline, at tight beard with sort of patchy darker grey on the chin, dressed all in black, jacket and trousers –*". In cross-examination of Mr. H it was elicited that he was not asked at any stage to view an identification parade. He had, however, later cooperated with a Garda sketch artist to facilitate the preparation of a photo-fit image of the person concerned.

32. In his evidence at the appellant's trial, D/Garda Maher had no recollection of providing a description of the persons who had absconded to anybody while at the scene.

33. However, a description was obtained. It was uncontroversial that a description of the driver of the VW Golf as being a man in his fifties with a grey beard and wearing a hat was circulated by Garda radio to Garda personnel on the ground in Malahide.

34. At circa 10.30pm, on the 25th of September 2014, a Mr. P.G., a taxi driver, picked up a man at Gainsborough, Malahide, and drove him to the Dun Saithne estate, Balbriggan, the estate in which appellant's partner lived. On this journey, he stopped at the Lusk M1 Applegreen service station (i.e "the Applegreen service station") to allow the appellant to buy cigarettes. Mr. P.G. identified his taxi on CCTV footage later recovered by gardaí from the Applegreen service station (exhibit PM4).

35. During the trial the jury also heard evidence concerning various aspects of the Garda investigation that ensued following their notification of the robbery, including crime scene examinations at various locations and of various vehicles, in the course of which items were recovered, forensically examined, and reported on. Relevant exhibits were produced in evidence by the appropriate witnesses before the jury and relevant experts provided testimony concerning trace evidence found. Amongst the physical items recovered from the VW Golf were water bottles, the post office bag containing the proceeds of the robbery, and other

items. Further, items of clothing, were recovered from, or in the vicinity of, various properties at Gaybrook Lawns, as well as mobile phones which were believed to be phones used by the raiders in the course of the raid. The jury also heard evidence concerning the harvesting of considerable quantities of CCTV footage from various locations during the follow-up Garda investigation.

36. The jury heard evidence that on the 1st of October 2014, the Senior Investigating Officer in the case, a Detective Chief Superintendent Anthony Howard (otherwise "D/Chief Supt. Howard"), visited Malahide with D/Garda Maher and other gardaí for the purpose of investigating the matter and the routes taken by the suspects. D/Chief Supt. Howard's notes from this meeting contained information provided by D/Garda Maher, which included an entry stating: "*VW Golf in line of traffic, two in rear got out on foot and running, car kept going*". D/Chief Supt. Howard did not recall D/Garda Maher giving an account that the gardaí pulled up alongside the VW Golf, or that D/Garda Maher had viewed the driver of the car. On cross-examination, he accepted that he would have made a note of such information had it been provided to him.

37. The jury heard evidence that on the 3rd of October 2014, D/Garda Maher was shown CCTV footage from 100 Gaybrook Lawns, a house on the Swords Road at the entrance to the Gaybrook Lawns estate, which was recorded on the 25th of September 2014 (exhibit BR1). This footage showed one person walking up the driveway of that house. D/Garda Maher recognised the person shown in that footage as the driver of the VW Golf.

38. On the 4th of October 2014, D/Garda Kavanagh was shown the same CCTV footage from 100 Gaybrook Lawns (exhibit BR1), and D/Garda Kavanagh also recognised the person shown in that footage as having been the driver of the VW Golf.

39. The jury heard evidence that prior to viewing BR1 neither D/Garda Maher nor D/Garda Kavanagh had made any note or other record describing the driver in any way or

recording that they had seen the driver at the material time (i.e., when they intercepted the VW Golf at the intersection of the Dublin Road and the Swords Road on the morning of the 25th of September 2014).

40. On the 15th of October 2014, the appellant was arrested by gardaí from the Emergency Response Unit (i.e. "ERU") at Castlepollard, in execution of three bench warrants which had been issued prior to, and which were unrelated to, the Bayside post office robbery. He was subsequently brought to Pearse Street Garda station in Dublin. D/Garda Maher and D/Garda Kavanagh were a part of the team involved in that arrest, although this fact had not been disclosed to the defence and the defence only became aware of it at a relatively late stage of the appellant's trial, and after both of those gardaí had already given evidence both at a voir dire and before the jury. The information emerged in cross-examination of a Detective Sergeant Daniel O'Driscoll (otherwise "D/Sgt. O'Driscoll") concerning the circumstances of the appellant's arrest.

41. D/Sgt. O'Driscoll gave evidence that he was the leader of a small team of ERU members which included D/Gardaí Maher and Kavanagh which were involved in the Castlepollard operation. Before that operation D/Sgt. O'Driscoll knew that the appellant was a suspect for the Bayside robbery and that D/Gardaí Maher and Kavanagh had alleged that they had seen the driver of the getaway car. The evidence was that D/Garda Maher had left the area before the arrest was effected. D/Sergeant O'Driscoll's evidence was that D/Garda Kavanagh was definitely involved in the intervention (i.e. the arrest of the appellant) at Castlepollard, but he expressed the belief that D/Garda Kavanagh was not present in the Garda car which conveyed the appellant to Pearse Street Garda station following his arrest. Prior to the intervention D/Sgt. O'Driscoll was shown photos of the appellant, and these would have been available to the rest of his team.

42. The jury also heard from a Detective Superintendent William Johnson (otherwise "D/Supt. Johnson"), who gave evidence that he was head of the NSU which had been engaged in the Castlepollard operation to arrest the appellant from approximately the 5th of October 2014. From approximately the 10th of October 2014 the NSU were assisted by the ERU. When the NSU were initially engaged there would have been briefings to identify Mr. Kelly (i.e. "the appellant") and these would have included a photograph of him. Upon the involvement of the ERU, there were joint briefings at which the NSU would have briefed the ERU with material including photographic material of the appellant.

43. While the appellant was detained at Pearse Street Garda station, CCTV footage was captured of the appellant from which stills were prepared (exhibit DB1).

44. During the detention of the appellant, a cigarette butt discarded by him was picked up (exhibit RL1), from which the appellant's DNA profile was generated.

45. The jury further heard from a retired Garda Sergeant, a Mr. Donal Brassel (otherwise "D/Sgt. Brassel"), who said that in the aftermath of the Bayside post office robbery he had been the supervisory investigator in the investigation of that crime. While unable to specify an exact date, he stated that on a date that "*would have been very, very close to the recovery of*" the CCTV footage from 100 Gaybrook Lawns (exhibit BR1) he had viewed that footage; as well as further CCTV footage (PM4), which the jury separately heard had been recorded at the Applegreen service station on the evening of 25th of September 2014, and which showed a man who had exited from a taxi entering a shop; the photofit image prepared with the assistance of Mr. H; and the CCTV stills from the recording of the appellant at Pearse Street Garda station (DB1). He was satisfied that the person captured on each of these recordings/images was the same individual, and that this person "*bore a striking resemblance to Paschal Kelly*" (i.e., the appellant) who was known to him for "*possibly 20 years*".

46. On the 5th of March 2015, D/Garda Maher viewed the CCTV recording (PM4). Having viewed the footage he recognised the driver of the VW Golf whom he had observed on the 25th of September 2018, when he had brought his garda vehicle alongside that car, as being the person who could be seen exiting the taxi and going into the shop on the recording.

47. No contemporaneous records were kept of the process by which D/Garda Kavanagh viewed CCTV footage (BR1) and D/Garda Maher viewed footage (BR1 & PM4), and identified the person shown as having been the driver of the VW Golf.

The Prosecution's Case at Trial

48. The case against the appellant was in large measure a circumstantial one. In addition to the accounts of the immediate victims, namely Ms. L, her daughter E, and the Italian student, and of personnel concerned in the pursuit of the getaway car and in the subsequent Garda investigation, there was reliance, *inter alia*, on the specific further elements hereinafter listed:

> "*a. evidence of recognition by both D/Garda Maher and D/Garda Kavanagh of the man entering the curtilage of 100 Gaybrook Lawns in the CCTV footage (BR1) as having been the driver of the VW Golf;*
>
> *b. evidence of recognition by D/Garda Maher of the man exiting the taxi and entering the shop , in CCTV footage (PM4) recovered from Lusk Applegreen Service Station, as having been the driver of the VW Golf;*
>
> *c. evidence from Mr. P.G describing the taxi journey taken from Malahide to near the home of the appellant's partner in the Dun Saithne estate, Balbriggan via that Applegreen Service Station;*
>
> *d. the nomination of the appellant as a suspect following retired D/Sergeant Brassel's characterisation of the person captured in the CCTV footage comprising BR1, and PM4, respectively, and the CCTV stills (DB1), and represented in the*

photo-fit image, as bearing a striking resemblance to the appellant, who was known to him;

d. the finding of a DNA profile matching that of the appellant on a water bottle that had been in the centre console of the VW Golf, within reach of the driver of the car (SOD22(vi));

e. the finding of a DNA profile matching the appellant's DNA profile on a water bottle located in the passenger door pocket of the VW Golf (SOD22(iv)), which was mixed with the DNA of another (whose own DNA was also found inter alia on other items of clothing found in 156 Gaybrook Lawns and on a water bottle found in the post office bag containing the proceeds of the robbery);

f. the finding of a DNA profile matching the appellant's DNA profile on a neck warmer and woollen hat (RM15) located at 154 Gaybrook Lawns (where one of the phones used in the commission of the offence was found (Garda exhibits BH1&2 – referred to throughout the trial as 'the dog phone');

g. the finding of a DNA profile matching the appellant's DNA profile on the left glove of a pair (RM16) found at 157 Gaybrook Lawns (alongside the back of a mobile phone and a lighter). Also found on this glove was DNA from the other person referred to above at (e);

h. the similarity of the clothing found at 154 & 157 Gaybrook Lawns with those found in the bin of 156 Gaybrook Lawns (RM17) in the jacket of which the second mobile phone believed to have been used in the robbery was found (referred to in the trial as "the jacket phone");

i. the finding of fibres matching those from the neck warmers (RM15 & RM17) in the VW Golf and in Ms L's Nissan Qashqai;

j. the finding of fibres matching those from the hat (RM15) in the VW Golf and Ms L's Nissan Qashqai;

k. that the appellant matched the various descriptions given by witnesses of the offender concerned."

It is not contended that this represents an exhaustive list of every circumstance and piece of evidence relied upon by the prosecution, but rather it serves to highlight what were the main ones.

The Defendant's Stance at Trial

49. The facts in respect of how the kidnapping and robbery were carried out were not contested by the appellant during the trial. However, the appellant's legal team challenged the allegation that he was one of the assailants engaged in a joint enterprise to commit the various criminal offences perpetrated during the Bayside post office robbery, and; in particular, the prosecution's assertion that he had been one of the raiders (the first raider) described by Ms. L, and the driver of the VW Golf.

50. The admissibility of certain of the CCTV evidence and the gardaí's identification evidence was unsuccessfully challenged on a *voir dire*. Further, the appellant unsuccessfully sought a direction at the close of the prosecution's case on various grounds, including on *P.O'C.* grounds and on *Galbraith* grounds (relying on the second limb thereof), based, *inter alia*, on the alleged frailty of, or infirmities in, the identification evidence. Following the trial judge's refusal of that direction application the defence did not go into evidence, as was their entitlement.

The Grounds of Appeal

51. By a Notice of Appeal dated the 12th of March 2019 the appellant sought to appeal against his convictions on ten stated grounds. However, ultimately the appellant relied on just four of those grounds, and they are as follows:

"*1. The Trial Court erred in admitting the evidence of the prosecution witnesses Detective Garda Maher and Kavanagh which purported (sic) that the person shown in CCTV footage, marked BR1, was identifiable by them as being the driver of a VW Golf vehicle used by the robbers.*

2. *The Trial Court erred in failing to direct the jury not to attempt to make any identification of the Appellant from the CCTV footage marked BR1 on the grounds that its quality was such that no identification was permissible.*

3. *The Trial Court erred in admitting the opinion evidence of Detective Garda Maher purporting to identify a person depicted in CCTV footage marked PM4 as being the same person depicted in CCTV footage marked BR1.*

4. *The Trial Court erred in admitting the CCTV evidence contained in PM4.*"

Submissions on behalf of the appellant

52. In counsel for the appellant's written submissions, ground nos. 1 to 4 are not addressed individually but rather collectively as a group, which was sensible. These interrelated grounds are all components to the appellant's submission that the purported identification evidence of the driver of the VW Golf (i.e., by D/Garda Maher and D/Garda Kavanagh, based on having viewed him in the vehicle at the point at which it was stopped by them on the Malahide Road) was unreliable and should have been excluded on that account, and further that the trial court should not have permitted the gardaí to have adduced evidence that the person (or persons) depicted in exhibits BR1 and PM4, respectively, was the same person as the driver of the VW Golf on the Malahide Road at the time of its interception by

gardaí. It is suggested in the written submissions that the Court of Appeal needs to be concerned with the following issues:

"*i. Whether there was an initial sighting of the suspect driver by the Gardaí and if so the circumstances of the alleged viewing;*

ii. The unsatisfactory circumstances of the subsequent identifications from the CCTV material;

iii. The quality of BR1 for the purposes of making an identification either by the Gardaí or by the jury."

Whether there was an initial sighting of the suspect driver by the gardai and if so the circumstances of the alleged viewing

53. The appellant's submissions address aspects of the evidence given by both D/Garda Maher and D/Garda Kavanagh, respectively. It was submitted that by either Garda's account the viewing of the driver of the VW Golf was fleeting, lasting only seconds. Further, it was submitted that the opportunity to perform an identification of the driver was, on any account, significantly restricted by the fact that the driver was seated in the vehicle. D/Garda Maher's view, on his account, was a view of the person's head only through a car window and D/Garda Kavanagh's view could only have been of a seated person. Both gardaí had described the driver as having a head covering. It was submitted that the purported identification would have taken place in a highly charged situation, as the gardaí were attempting to stop a car that contained potentially armed suspects.

54. The Court was referred to an lengthy extract from the cross examination of D/Garda Maher, in which the witness stated that he and his colleague had responded to an earlier radio communication received by them at approximately 8.30am when they were on the Kinsealy Road, and in which he conceded that certain elements of the incident that unfolded had

happened very quickly, that he was concerned that the men might be armed, but that he was not apprehensive.

55. The Court was also referred to the trial judge's reference to the circumstances of the viewing in his charge in which he instructed the jury that:

> "*You consider the opportunity they had to observe the driver. You consider the time of day. We know it was around 8:30 in the morning on a September morning. You consider the situation that the two Gardaí were in, that this was a highly charged situation; there were lots of members of the public around, there were children being brought to school.*"

56. It was submitted that the evidence of the two Garda witnesses about their respective viewings of the driver were inconsistent and contradictory. D/Garda Maher purported to view the driver sitting in the getaway car as he pulled alongside the VW Golf. At this same time it was D/Garda Kavanagh's contention that he had exited the Garda car and got into the getaway car and subdued the driver by placing his arm across the face of the driver, which would have had the effect of obscuring the driver's face. D/Garda Maher gave evidence that he did not see D/Garda Kavanagh enter the car and subdue the driver.

57. It was also said that there was a significant contradiction in the prosecution's own evidence about whether the purported identification of the driver could have ever taken place as described by the gardaí. Independent evidence called by the prosecution contradicted and undermined the gardaí's evidence that they had arrived at the scene before the occupants had gotten out of VW Golf. A civilian witness, Mr. K.D., gave an account that completely conflicted with the gardaí's evidence inasmuch as he stated that the VW Golf had crashed into the side of his vehicle and was just ahead of him, that one individual then got out of the VW Golf and ran towards a wooded area in the direction of Malahide, while another got out, stopped, and ran towards the junction at McAllister's garage. He said two plain clothed

detectives then came on the scene. When asked under cross-examination: "*But did they come after the people had got out of the car?*", the witness replied, "*They did, yes*".

58. It was submitted that the account provided by Mr. K.D. could be seen as broadly consistent with the account recorded from D/Garda Maher by D/Chief Supt. Howard, with whom he met to discuss the incident in detail at the scene on the 1st of October 2014. D/Chief Supt. Howard did not recall D/Garda Maher giving a description of the driver and he stated he would have recorded such detail had he been provided with it. Such contemporaneous notes as were recorded by D/Chief Supt. Howard from his meeting with D/Garda Maher contradict that Garda's account of the alleged viewing the driver. The note records: "*VW Golf in line of traffic, two in rear got out on foot and running, car kept going*".

59. The point was made that as D/Garda Maher had discharged a firearm in pursuit of an assailant fleeing the rear of the vehicle, he was required to give an account of the incident to a Superintendent Russell (otherwise "Supt. Russel") in order to facilitate a notification to GSOC. There was evidence given before the jury as to this and as to the provision of D/Garda Maher's weapon to a Detective Sergeant Grogan (otherwise "D/Sgt. Grogan") for inspection. D/Garda Maher agreed that he understood that it was imperative that he provided a "*full and accurate account*" of the incident to Supt. Russell, and that the details of how he came across the getaway vehicle, prior to the chase, would have been discussed. However, D/Garda Maher gave evidence that he did not recall providing a description of either the suspect he fired his weapon at, or of the driver of the getaway vehicle, to either D/Sgt. Grogan or Supt. Russell. In cross-examination, D/Garda Maher accepted that helicopters were actively looking for the assailants at the time of his account, and that one of the assailants was potentially injured by gunshot. Nevertheless, as counsel for the appellant pointed out, the resulting GSOC report does not contain a description of either assailant, and notes that the intended target of the weapon discharge was "*unknown*".

60. Counsel for the appellant has argued that it is incumbent on this Court to conduct its own assessment of the reliability of the alleged identification. Further, that this must involve determining whether we are satisfied on the available evidence that there was both the opportunity to view the offender and that a viewing did occur. Counsel submitted that if, and only if, we are so satisfied, it would then be necessary for us to go on to examine the conditions in which the viewing occurred and make a determination as to the quality of the purported identification.

61. It was submitted that on the available evidence the trial court could not have been satisfied that a reliable facial viewing of the offender had occurred in the circumstances alleged by either officer. In any event, even if it had, such viewing as could have occurred must have been assessed as "*poor*" due to the opportunity provided and the circumstances prevailing at the relevant time.

The alleged unsatisfactory circumstances of the subsequent identifications from the CCTV material

62. Insofar as the subsequent identifications from the CCTV material were concerned, the appellant says that the nature of the processes used were such as to render any purported identifications unreliable and unfair.

63. The evidence was that D/Gardaí Kavanagh and Maher made no notes of the incident in their Garda notebooks. Their first recorded descriptions of the driver were those given in their Garda statements of evidence, made 10 and 11 days, respectively, after the incident, and following their viewing of the CCTV evidence of BR1. Indeed, prior to viewing BR1, neither Garda had made any written record of even having seen the driver.

64. D/Garda Kavanagh stated under cross-examination that it was "*prudent*" that he made his first statement on the incident after viewing BR1, as that way he would only be required to draft one statement to address both the alleged sighting and subsequent viewing. However,

in fact, he drafted two statements on the 5th of October 2014, with the first statement dealing with the incident, and the second dealing with the alleged identification in BR1.

65. In relation to contemporaneous descriptions of the offenders, the following agreed statement of fact was read to the jury at trial:

> "*On a morning of the 25th of September 2014, a number of communications circulated by Garda radio to those on the ground in Malahide from the time the Volkswagen Golf was stopped. Including in those communications there were several descriptions of the driver of the Volkswagen Golf describing him as a man in his 50s with a grey beard and wearing a hat.*"

66. There was no evidence, however, to suggest that any of the descriptions provided over the Garda radio had emanated from either of the identifying gardaí witnesses. D/Garda Maher could not recall giving a verbal description of the driver to any person prior to viewing BR1, including D/Chief Supt. Howard with whom he met to discuss the incident in detail at the scene on the 1st of October 2014 several days before the CCTV viewing (see above).

67. We are further asked to note that the CCTV evidence BR1 was shown to D/Gardaí Kavanagh and Maher by a Garda Roche, who was an investigating officer in the case. The gardaí were shown only this piece of CCTV, which depicted one individual. No notes were taken of the process of the CCTV viewing or the purported identification from the CCTV. Although D/Garda Kavanagh gave evidence that he viewed BR1 on the 4th of October, Garda Roche's notebook indicates that D/Garda Kavanagh viewed BR1 on the 3rd of October 2014, the same day as D/Garda Maher.

68. Counsel for the appellant also places reliance on the fact that in mid-October 2014 both identifying officers were concerned in the surveillance and subsequent arrest of the appellant at Castlepollard. Their involvement with the appellant in the Castlepollard only emerged late in the trial because, it is contended, D/Sgt. O'Driscoll had misunderstood a

question in cross-examination about whether he had briefed D/Gardaí Kavanagh and Maher on "*that morning*". The question had been intended to relate to the morning of the robbery, but the witness answered it in relation to his briefing of the officers on the morning of the appellant's arrest at Castlepollard. This was seven weeks into the trial and after the identifying officers had given evidence both in the course of a *voir dire* and before the jury. Moreover, their involvement with the appellant at Castlepollard in mid-October was not disclosed in any material or information provided to the appellant in advance of what is characterised as D/Sgt. O'Driscoll's "*inadvertent*" revelation.

69. The appellant maintains the concealment of the involvement of D/Gardaí Maher and Kavanagh in the surveillance and arrest of the appellant was a deliberate and conscious attempt by the gardaí to withhold relevant facts from the trial court in order to manipulate the trial proceedings in relation the process of identification.

70. It was submitted that it is relevant that both identifying officers were part of the ERU which had been engaged in the surveillance and arrest of the appellant at Castlepollard. The evidence suggested that the ERU were aware that the appellant had been identified as a suspect for the Bayside tiger-kidnapping and robbery and they were shown images of the appellant prior to his arrest. D/Garda Maher was directly involved in the "*intervention*" (i.e. arrest) of the appellant and may also have been present in the Garda car which conveyed the appellant to Pearse Street Garda station.

71. After evidence emerged of the presence of the identifying officers at Castlepollard, a Detective Garda Donal O'Connell (otherwise "D/Garda O'Connell") confirmed that the appellant had been identified as a suspect for the tiger kidnaping offences from the 3rd of October and thus on the same day or prior to the identification from BR1 and prior to the appellant's arrest at Castlepollard. It was submitted that in preparation for the Castlepollard arrest, both D/Garda Kavanagh and D/Garda Maher would have been shown photographs of

the target of the arrest, and D/Garda Maher, in particular, saw the appellant in person at Castlepollard.

72. Notwithstanding D/Garda Maher's involvement with the appellant at Castlepollard, and the associated information and images he was provided with, on the 5th of March 2015, he was asked to view the CCTV footage PM4, from the Applegreen service station (which the prosecution claims shows the appellant). This was shown to him by the officer leading the investigation, D/Garda O'Connell, for the alleged purposes of ascertaining if the individual on camera could be "*linked to the crime*". No notes were taken of the CCTV viewing process.

73. The appellant's complaint is that in the prosecution's case the person depicted in PM4 is the appellant. D/Garda Maher was therefore being asked to identify the appellant as being "*linked to the crime*" in circumstances where the appellant had already been visually identified to the officer and had already been nominated as a suspect for the robbery.

74. Accordingly, it has been submitted on behalf of the appellant that irrespective of the reliability of the initial viewing of the driver, the subsequent purported identification by D/Garda Maher of the person in PM4 as the driver was totally unreliable, unfair and inadmissible. On one view, D/Garda Maher was doing no more than confirming the information he had received from Garda sources in the preceding weeks.

75. The evidence identifying the person in PM4 as being the driver was central to the prosecution's case. In the course of the appellant's trial, undisputed images of the appellant (the CCTV stills (DB1)) were produced to allow the jury to compare them with the footage in exhibits BR1 and PM4.

76. Significantly, counsel for the appellant says, there was no evidence that either Garda had identified the appellant to have been the driver of the vehicle on the Malahide Road or the individual they had viewed in BR1 in the course of the Castlepollard operation.

77. Further, there were a number of independent witnesses who said that they saw the driver of the VW Golf on the morning in question. However, none of these witnesses were asked to participate in an identification parade (or "ID parade") or photo line-up involving the appellant. The gardaí's explanation for this failure was that the appellant's appearance had changed between October 2014 and his arrest in April 2015. However, as counsel for the appellant maintains, this does not explain why an ID parade was not held at an earlier stage. The appellant was a suspect for the crime and was being held in custody from October 2014 onwards. Further, it would have possible to hold a photo-line up at any stage in the investigation process, as gardaí had photographic stills of the appellant (DB1) from the CCTV footage recorded at Pearse Street Garda station.

78. It was submitted that in all of the circumstances, the purported identification evidence in respect of BR1 and PM4 should have been excluded on the ground that it did not meet minimum standards of reliability and that for the trial judge to have admitted it was unfair to the appellant.

79. It was further submitted that the trial judge's admissibility ruling failed to address these issues. Whether or not the CCTV footage remained admissible as a piece of "*real evidence*" is beside the point. The unfairness and unreliability complained of was the Garda's purported identification from the pieces of CCTV evidence which was central to the prosecution's case against the appellant.

The quality of BR1 for the purposes of making an identification either by the gardai or by the jury.

80. The submission made on this issue was straightforward. It was said that the trial court should have excluded the purported identification of the driver from BR1 because it was of such poor quality as to prevent a reliable facial identification either by the gardaí or by the jury.

Submissions as to how the court should

approach identification evidence generally

81. It was submitted on behalf of the appellant that where a case relies substantially on identification evidence, the Court must consider whether the identification evidence is sufficiently reliable that it may to be left to the jury to assess with a *Casey* warning, or whether it should be withdrawn from the jury.

82. The court has been referred to Declan McGrath on *Evidence* (2nd edn, Round Hall 2014) where the author suggests that where concerns with identification evidence bear on *reliability*, and not credibility, the principles set forth in *R v Galbraith* should not be applied. McGrath states (at para 4-224 of the cited work):

> "*There has been surprisingly little judicial consideration of the test to be applied by a trial judge when deciding whether identification evidence should be withdrawn from the jury. In People (DPP) v O'Toole* [unreported, CCA, 26th May 2003] *the issue was decided by reference to the general principles laid down by the English Court of Appeal in R v Galbraith* [[1981] 1 W.L.R 1039] *in relation to applications to withdraw cases from the jury. However, it is submitted that the use of these principles, which are primarily directed towards circumstances where concerns are raised about the credibility of the evidence adduced on behalf of the prosecution, is inappropriate where the reliability of identification evidence is challenged.*"

83. McGrath notes that the test to be applied is whether the identification evidence is sufficiently reliable that it can ground a conviction or whether it is so unreliable that there would be a miscarriage of justice if it is left to the jury. He adds:

> "*This accords with the approach taken in R v Turnbull* [[1977] Q.B. 224 at 229-230] *where it was held by the Court of Appeal that, if a trial judge forms the opinion that the quality of identification evidence is "poor", he or she should withdraw the case*

from the jury and direct an acquittal unless there is other evidence which serves to support the correctness of the identification. This was the approach adopted by the Court of Criminal Appeal in People (DPP) v Christo [[2005] IECCA 3 at 8-9]."

84. It was submitted that the Court of Criminal Appeal in *Christo* noted *Turnbull* with approval, citing the test to be applied for determining whether a caution to the jury is insufficient, at pp. 8 – 9:

"*when, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification*".

85. The appellant has submitted that in this case, the infirmities in the evidence were far more acute than in cases where there was simply some concern about the conditions of observation. It has been urged upon us that practically every aspect of these purported identifications was highly unsatisfactory. Taken together, it is submitted that these factors ought to have led to the exclusion of all of the identification evidence of D/Gardaí Kavanagh and Maher.

86. Counsel for the appellant has further argued that even if this Court is not of the view that the identification evidence of D/Gardaí Kavanagh and Maher should have been excluded on the basis of a doubt as to whether the alleged viewings of the driver had occurred at all or, that if they occurred, that they had taken place in poor conditions, the Court should nonetheless find that the evidence as to the subsequent identifications by them, based on their viewing of the CCTV footage in exhibits BR1 and PM4, should not have been admitted, because the gardaí did not follow appropriate procedures in the conduct of that CCTV footage. It was submitted that the conditions of the CCTV viewing (both BR1 and PM4) gave

rise to a likelihood of bias that undermines the reliability of the alleged identification. Further, no attempt was made to hold an ID parade or a photo-line up with a number of available witnesses who had seen the driver of the vehicle. None of the witnesses were invited to make the same identification from the footage of BR1 or PM4.

87. Although they have absolutely no application in this country, we were referred to the procedural requirements in that regard in Northern Ireland, as set down in the PACE (NI) Order 1989, Code D, and we have noted these for what they are worth.

88. We were further referred to observations by this court in *The People (DPP) v. Kirwan* [2015] IECA 228 at para. 32, concerning the desirability of contemporaneous records being kept in circumstances where gardaí were making an identification from CCTV evidence.

89. It was submitted that the failure to make a contemporaneous record of the CCTV viewing, coupled with the initial viewing conditions increasing the potential for a tainted observation, and the inability of the appellant to objectively assess the identification, amount to a fundamental unfairness. Consequently, it is said, the identification evidence based on the viewing of BR1 and PM4 should not have been admitted at trial.

Submissions on behalf of the Respondent

90. The respondent's written submissions, and submissions at the oral hearing of the appeal, contest a central plank of the appellant's case, namely that without the identification evidence there would have been no case to answer. The respondent contends that, quite apart from the identification evidence, the other evidence in this case was sufficient to allow a jury to find that the appellant had committed the offence alleged beyond reasonable doubt.

91. That having been said, the respondent nonetheless engages with the complaints made by the appellant concerning the admission by the trial court of the identification evidence. The respondent also relies on McGrath on *Evidence*, the same work as was relied upon by the

appellant, but a more recent (i.e., the 3rd) edition, and paragraph 4-264 was cited to us as setting out the test to be applied in the assessment of identification evidence:

> "*The decision as to whether identification evidence is sufficiently reliable to be safely left to the jury is ultimately based on an assessment of the possibility of a mistaken identification. A trial judge is, therefore, required to consider all facts and circumstances which bear upon the reliability/correctness of the identification evidence including the conditions of initial observation, the characteristics of the witness, the demeanour of the witness giving evidence and the adequacy of the identification procedures used. Where it is present, the trial judge should also have regard to any other evidence which implicates or connects the accused with the crime, as this may provide a satisfactory basis for a conviction when taken in conjunction with the impugned identification evidence.*"

92. The respondent emphasises that all the facts must be considered including other evidence tending to implicate or connect the accused with the crime, when a trial judge is considering whether proposed identification evidence can safely be left to the jury.

93. The respondent further relies on the same passage from the judgment of Lord Widgery LCJ in *Reg v. Turnbull,* approved by the Court of Criminal Appeal in *People (DPP) v. Christo* [2005] IECA 3, as was cited to us by counsel for the appellant, quoted earlier in this judgment at para. 84 above, but lays emphasis on the words "*unless there is other evidence which goes to support the correctness of the identification*".

94. The respondent says that it is significant in the instant case that the probative evidence of the appellant's involvement in the commission of the offences alleged is not predicated solely or mainly on the identification evidence.

95. Turning then to address appellant's complaint that the trial judge had been wrong in concluding that the state of the evidence was such that, if the jury was minded to accept it,

they could be satisfied beyond reasonable doubt that D/Garda Maher and D/Garda Kavanagh had each had an opportunity to view the driver of the VW Golf while he was seated in that vehicle, it having stopped at the junction of the Dublin Road and the Swords Road; counsel for the respondent emphasised that D/Garda Maher had stated that he had a clear unobstructed view of the driver who looked directly at him. He had given the following evidence in the *voir dire*:

> "*I looked directly across at the driver of the Golf. I would say at this -- and he looked directly at me, Judge. The two cars were parallel at this point and stationary. I would say I was no more than two metres from him, both of us in a seated position in the vehicles. I saw a man that I estimated to be approximately 50 years of age. I saw he was wearing a dark jacket and a dark hat. He had a grey unkempt beard and he was wearing dark gloves. I saw his two hands wearing the dark gloves on the steering wheel of the vehicle, his hands were in the 10 to 2 position on the steering wheel of the Golf.*"

96. It was accepted that this had occurred within the number of seconds. While D/Garda Maher did not see D/Garda Kavanagh enter the car and attempt to subdue the driver, he had further described in his evidence alighting from his vehicle and drawing his weapon, and of becoming aware as he did so that two men had exited the VW Golf and were being chased at that point by D/Garda Kavanagh.

97. Counsel for the respondent has also directed us to D/Garda Kavanagh's evidence that he exited the unmarked Garda car, moved up the passenger side of the VW Golf, got into the front passenger seat and then attempted to subdue the driver by placing his right arm up to the driver's face, and then came back down into the passenger side of the car. D/Garda Kavanagh had gone on to state:

"*I was able to get a look at him at that stage. He was a male in his late forties. He had a round, heavy-set face and had a grey beard. He was also wearing a balaclava or skull-type cap. He had his hood up at that stage and was wearing dark clothing.*"

98. It was submitted that what was referred to by counsel for the appellant as the inconsistent and contradictory evidence of D/Garda Maher and D/Garda Kavanagh was an incorrect characterisation. It was suggested that a proper construction of the evidence was that as D/Garda Kavanagh made his way around to the passenger side of the Golf, D/Garda Maher drove alongside the car, and observed the driver. The evidence was that D/Garda Maher did not notice D/Garda Kavanagh attempting to subdue the driver, which was in no way inconsistent with him having made his observation in sequence with D/Garda Kavanagh's attempt to subdue the appellant, as opposed to D/Garda Maher having made his observation simultaneously to D/Garda Kavanagh's attempt.

99. Counsel the respondent also sought to address alleged inconsistencies between the evidence of D/Garda Maher and D/Garda Kavanagh on the one hand and that of the lay witness Mr. K.D. on the other hand, being relied upon by the appellant. He submitted that the evidence of Mr. K.D. whose vehicle was impacted by the VW Golf was evidence the jury was required to consider and evaluate in the light of the other evidence relating to what had happened on the Dublin Road. D/Garda. Kavanagh's testimony of looking backwards as he chased a former occupant of the car southwards and seeing the VW Golf drive off and strike another car, was consistent with Mr. K.D.'s observations (beginning as they did with the impact to his car) referring to matters that occurred after the initial interception of the VW Golf.

100. Further, Mr. K.D.'s evidence that the gardaí were driving a navy or black jeep was also consistent with evidence that had been given by a Sergeant Paul Cornish (otherwise "Sgt. Cornish") that he and D/Sgt. O'Driscoll had arrived in a black BMW X5 (i.e., a jeep-

type vehicle), whereas the evidence was that D/Garda Maher and D/Garda Kavanagh had been in an unmarked estate car. This was consistent with evidence adduced before the jury concerning the arrival of other gardaí on the scene shortly after the two assailants fled, in particular Sgt. Cornish and D/Sgt. O'Driscoll.

101. While it was accepted that D/Garda Maher and D/Garda Kavanagh's encounters with the driver had been brief, it was not accepted that this was a basis to deprive the jury of the evidence of the two gardaí in question. Though the opportunity for observation had been limited by the short duration of the encounter there was other evidence tending to support the correctness of the identifications. In regard to that, the Court's attention was drawn to para. 14-7 of Mark Lucraft (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2019 edn, Sweet & Maxwell), wherein the author states:

> "*When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different.* ***The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not to be so if its effect is to make the jury sure that there had been no mistaken identification*** […]"
>
> [emphasis by the respondent]

102. The respondent submitted that there was a wealth of other evidence in the case, particularly DNA evidence and other real and circumstantial evidence, supporting the correctness of the limited identifications provided by the two gardaí in question, based on their viewing of the driver while he was seated in the VW Golf. The trial judge was fully alive to the existence of such other evidence, as was clear from her lengthy ruling on the 26th of October 2018 following the conclusion on the *voir dire* which expressly references it.

Moreover, when counsel for the accused subsequently sought a direction at the end of the prosecution case, and in doing so had sought to reiterate his earlier contention that the identification evidence was incapable of being relied upon, a written submission entitled "*Application for Directed Verdicts of Not Guilty*" was provided to the trial court (which document was in turn provided to the Court of Appeal in advance of the appeal hearing), which expressly acknowledges and seeks to address, and engage with, the fact that there was other evidence against the appellant on which the prosecution were relying as supporting the correctness of the controversial identifications. Again, in the trial judge's ruling on the 4th of December 2018 refusing the application for a direction she expressly rejected the defence contention that the prosecution case was wholly dependent on the identification evidence, and referenced specifically the other evidence being relied upon.

103. Moreover, other than the brief nature of the encounter, there was nothing in the nature of difficult conditions to impugn the quality of the observations of D/Garda Maher and D/Garda Kavanagh. Both gardaí had been clear that they had an unobstructed view of the driver, and were able to provide descriptions. The reliability in the qualitative sense of the evidence they proposed to give could not have been in doubt. As to whether their evidence could be regarded as credible, that would be uniquely a matter for the jury. Accordingly, the respondent submitted, the trial judge had been correct in admitting the evidence of both gardaí concerning their viewing of the driver while he was seated in the VW Golf.

The identifications from BR1 and PM4

104. Counsel for the respondent has made the point that, insofar as BR1 is concerned, D/Garda Maher and D/Garda Kavanagh made their identifications on different days. D/Garda Maher viewed the CCTV footage from 100 Gaybrook Lawns (BR1) on the 3rd of October 2014; D/Garda Kavanagh viewed it on the 4th of October 2014. Both nominated the person shown in that footage as the driver of the Volkswagen Golf.

105. The appellant has complained of the absence of a contemporaneous record of the video identification. Responding to this complaint, counsel for the respondent says there is no requirement in law or practice that such records be kept, and in support of this cites a decision of this Court, namely *People (DPP) v. Tynan* [2017] IECA 202. The context was that the appellant in that case was convicted of violent disorder. CCTV footage of the offending had been viewed by a Garda who knew the appellant, and who had recognised him. Giving judgment for the Court, and addressing an argument that, faced with such evidence, the Irish courts should demand that the gardaí should have applied similar procedural safeguards to those that provided for in the Police and Criminal Evidence Act in England and Wales, including the taking of contemporaneous notes, Birmingham J (as he then was) stated at para. 10 of his judgment:

> "[…] *the challenge amounts to a criticism of the failure to take contemporaneous notes on the occasion of Sergeant Loughrey's visit to Kevin Street. There was no statutory obligation to take contemporaneous notes and the Court does not feel that there was any obligation on the trial judge to exclude the evidence by reason of the absence of notes. Those who had participated in the viewing that was organised at Kevin Street Garda Station were in a position to give their evidence as to what occurred and did in fact give their accounts.*"

106. The respondent says that in respect of the CCTV footage BR1, both D/Garda Kavanagh and D/Garda Maher gave evidence of their viewing of the footage, and their nomination of the person shown in that footage as the driver of the VW Golf. Where they each gave evidence of their separate nominations, these pieces of evidence support each other. They were also supported by the evidence of the appellant's DNA found on the various items discarded within the Gaybrook Lawns estate.

107. In respect of D/Garda Maher's viewing of PM4 and his recognition of the Volkswagen's driver, this evidence was, in the *voir dire*, supported by the evidence of D/Sgt. Brassel who noted that the appellant bore a striking resemblance to the person shown in that footage, the photofit, and the CCTV footage BR1. It was also supported by the evidence that the person shown in the footage was taken by taxi from Malahide on the day of the robbery, and brought to the Dun Saithne estate, where the appellant's then partner lived.

108. There was no issue as to the quality of the footage in PM4. While the quality of the footage in BR1 was less good than that in the case of PM4 the trial judge ruled at the *voir dire* as follows:

> "*With regard to BR1, I regard the material to be probative and admissible. It is real evidence and it is relevant evidence. There is no legal basis on which it should be excluded. Inconsistencies in the evidence, differences between witnesses, are matters for the jury to adjudicate upon unless it would create an unfairness to the accused to allow the material to be admitted. I am not satisfied that any unfairness would be visited upon the accused. Similarly in respect of PM4, this is real evidence, the evidence of Mr Gaffney, identifying his taxi and the man he picked up in Malahide, is relevant and admissible. The quality of the footage at Gaybrook, although fleeting, the quality is certainly of a high enough standard for the jury to be in a position to make an assessment. The quality in Applegreen is of a good standard and has the advantage of a number of angles. I am satisfied that the footage meets the test contained at paragraph 52 of Mr Justice McKechnie's judgment in DPP v. O'Shea* [[2014] IECCA 49]*, quote, "If continuity, clarity and coherence are established, then one may ask whether the evidence is of such a quality that a jury can conduct a fair and reliable assessment of it. If so, what weight, cogency and credibility should be given to it is a matter for them", unquote. This visual identification evidence will*

> *require a warning to the jury which must be specific to the case in hand, and such a warning will be given in this case* […]" [Neutral citation for the *O'Shea* case inserted by the Court of Appeal.]

109. In counsel for the respondent's submission the available supporting evidence in respect of the identifications of both gardaí on both occasions significantly lessens the prospect that the identification evidence was erroneous.

110. A complaint was made that there ought to have been an identification parade and/or a process of photographic identification. Citing *People (DPP) v. Lynda Lee* [2004] 4 I.R. 166, counsel for the respondent maintained that this was not fatal to the prosecution's application to have the evidence admitted. The point was made that there was a reasonable explanation put forward by the respondent for not holding a formal identification parade for the civilian witnesses. The evidence was that the suspect concerned (which the prosecution says was the appellant) had substantially changed his appearance by the time the investigation team was in a position to detain him the purposes of the investigation. He was clean shaven at this point, whereas at the time of the alleged offending the driver of the VW Golf was said to have been bearded.

111. Moreover, and in any case, the respondent relies on the following statement of Murray J. (as he then was) in the *Lynda Lee* case at p. 180 of the Reports:

> "*Neither should it be said that the absence of the holding of a formal identification parade without adequate explanation would in all circumstances be a bar to a jury being permitted to consider evidence of an informal identification provided that the circumstances in which it occurred were not such as to materially prejudice an accused in the conduct of his or her defence.*"

112. Counsel for the respondent says that there was a reasonable explanation, but that in any case the circumstances in which D/Garda Maher and D/Garda Kavanagh made their

respective identifications were not such as to materially prejudice the appellant in the conduct of his defence. In regard to the latter contention, while the appellant argues strongly that the circumstances in which those identifications were made did prejudice his defence by virtue of the involvement of those gardaí in the arrest of the appellant at Castlepollard, the respondent contends that the arrest a Castlepollard was, and is, irrelevant for reasons to be addressed in more detail below.

113. Before doing so, however, we should record that as regards the alleged unsatisfactory circumstances of the identifications from the CCTV material in exhibits BR1, the respondent further places reliance on the fact that, notwithstanding that the BR1 recording was not of high quality, it was accepted both at the trial and at the appeal hearing by counsel for the appellant that the individual captured on the recording that is exhibit BR1, who is walking up the driveway of 100 Gaybrook Lawns, was probably the driver of the VW Golf.

114. As alluded to in the penultimate paragraph above, counsel for the appellant further complains with regard to the identifications based on the two gardai in question having viewed BR1 and PM4, that their evidence should have been excluded as being "*fatally flawed and unfair*". The argument in that regard was succinctly stated by counsel for the appellant in his oral submission to the Court of Appeal on the 13th of October 2022. Speaking specifically of the involvement of D/Garda Kavanagh at Castlepollard (though he would make a broadly similar argument in regard to that of D/Garda Maher), he stated:

> "*MR O'ROURKE: What happened then was that, on the 4th of March, I think it was, 2015 so some five months or so after this Castlepollard incident, he was taken again to Coolock Station to look at PM4 which was a video recording of a man at Applegreen Station in Lusk.*
>
> *JUDGE: Yes.*

MR O'ROURKE: And he looked at that footage and he concluded that that was the driver that he saw and was the same man as in BR1 and we respectfully say that that identification is fatally flawed in light of what happened at Castlepollard. He was simply being asked to go out and identify Paschal Kelly and the prosecution case is that the man in Applegreen is Paschal Kelly. He had already been told all about Paschal Kelly and shown a photograph of him and he would simply be going out to ask -- to identify that man. So he should never have been asked to conduct that identification."

115. What the respondent says in response is that it was established in evidence, after both D/Garda Maher and D/Garda Kavanagh had given evidence in the *voir dire* and before the jury, that they had been present in Castlepollard at some time preceding the arrest of the appellant on the 15th of October 2014. This was at a time when the NSU was conducting surveillance of the appellant with a view to his arrest in unrelated matters.

116. The appellant's defence involved, *inter alia*, suggestions of police impropriety and concerted police dishonesty embarked upon with the objective of implicating the appellant in the commission of the offences the subject of this appeal. A great deal of alleged significance was attached to this and the manner in which the details of the Castlepollard operation emerged during the course of the trial. Notwithstanding this, the appellant had refused the prosecution's offer to have D/Garda Maher and D/Garda Kavanagh recalled for further cross-examination. Also, it was notable that the appellant did not seek to re-open the *voir dire* about the identification evidence or seek the discharge of the jury, instead waiting until the close of the prosecution case to seek a directed acquittal.

117. Absent the evidence of D/Garda Maher and D/Garda Kavanagh on their role in Castlepollard, the Court of Appeal is asked to suppose what that evidence would be. The

respondent says the appellant's submissions relating to the identification is predicated on the following supposition:

> "*a. that D/Gda. Kavanagh and/or D/Gda. Maher saw the Accused at Castlepollard, and*
>
> *b. that both saw a photograph of the Appellant where their failure to spontaneously recognise him as the driver of the VW Golf, and advise their superiors of this, undermines their evidence of identifying him.*"

118. Counsel for the respondent submitted that while the ERU may have been in Castlepollard before the 15th of October 2014, counsel for the appellant attempts to paint D/Garda Maher and D/Garda Kavanagh's role in the interception of the appellant as one that necessarily invites the inference that they came face to face with the appellant or otherwise had sufficient opportunity to personally observe him, and that their failure to recognise him, tell their superiors of this recognition and/or give evidence of it, is a matter of consequence.

119. We were asked to note that it emerged from the evidence of D/Sgt. O'Driscoll that D/Garda Maher had left the operation before the arrest of the appellant was effected. Moreover, there was no evidence either D/Garda Maher nor D/Garda Kavanagh had come face to face with the appellant.

120. It was submitted that the appellant's submissions fall in the absence of any evidence that either D/Garda Maher or D/Garda Kavanagh saw the appellant during the operation concerned, or that they saw a photograph of the appellant that could reasonably have been expected to trigger their recognition. The evidence before the trial court was that the NSU conducted the pre-interception surveillance, not the ERU. D/Garda Maher left Castlepollard before the interception occurred. It was submitted that however sceptical the appellant may be, this evidence remained fundamentally undisturbed by the cross-examination of D/Sgt.

O'Driscoll, and was not the subject of any further cross examination of either D/Garda Maher or D/Garda Kavanagh although an opportunity to do so had been proffered to the defence.

121. It was submitted that the appellant by failing to accept the respondent's offer to recall these witnesses for further cross-examination deprived himself of an evidential basis upon which to contend that the involvement of D/Garda Kavanagh and D/Garda Maher in Castlepollard served to undermine their identification evidence.

122. Notably, the trial judge held, albeit in response to the appellant's application for a directed acquittal, but where the issue of the Castlepollard evidence arose:

> "*I have reviewed the evidence in relation to Castlepollard, and can find no basis for the inferences that the gardaí either did not recognise the defendant as being the driver of the vehicle, or that he was discarded as a suspect.*"

123. It was submitted that the trial judge was correct in this ruling and that the evidence relating to the arrest at Castlepollard does not support the appellant's criticism of the Garda identification in this case.

124. The respondent therefore says that, for the reasons stated, the trial judge could be, and was, satisfied that the identification evidence in this case was, notwithstanding any frailties alleged by the appellant, reliable. The credibility of witnesses was a matter for the jury. Accordingly, the trial judge was correct to allow the admission of evidence of the identifications made by D/Garda Maher and D/Garda Kavanagh based on their viewings of BR1 and PM4 respectively.

BR1 and PM4 as real evidence

125. The trial judge had ruled that the jury could view the footage in BR1 and PM4 as real evidence, and conduct their own assessment of its value. However, before this ruling was made it had been submitted by the defence that the quality of the BR1 recording was too poor to permit of an identification. A complaint is now made to this Court that the trial judge erred

in failing to direct the jury not to attempt to make any identification of the appellant from the CCTV footage on recording BR1 on the grounds that its quality was such that no identification was permissible.

126. The argument advanced in that regard was somewhat nuanced. No similar objection was being raised in respect of PM4. On page 15, lines 13 to 17, of the transcript of the 13th of October 2022, which was the first day of the appeal hearing, counsel for the appellant says (with respect to what is shown on the BR1 recording):

> "*Let me make it clear, I'm not suggesting for a moment that that isn't the person involved in the incident. My submission is that you can't facially identify that person. That's the point. It's not the fact that that person's involved in the incident, it's the fact that you cannot facially identify.*"

A little later on the same transcript, on page 17, lines 6 to 15, counsel for the appellant again sought to emphasise the nuance in this facet of his argument relating to BR1:

> " *– the evidence was admissible as real evidence because it's relevant to the events and the prosecution were saying it's part of the narrative. I don't really have an issue with that. It's the identification that we take issue with. We say that they were entitled to play it, as this is one of the robbers at the location, insofar as that was relevant to the issues, but the jury should have been specifically told: "Don't attempt to make an identification from that. It's not clear enough to do that." And if it's not clear enough for the jury to do it, it's not clear enough for the officers to do it.*"

Further, on the transcript of the 19th of December 2022, the second day of the appeal hearing, from page 30, line 30 to page 31, line 12, the following exchanges are recorded between members of the Court and counsel for the appellant:

> *"MR JUSTICE MCCARTHY:* […] *To use Barron J's phrase, that the evidence shouldn't offend against the rules of common sense. There's a certain unreality in*

saying to the jury: "Listen, you've got to decide whether the gardaí are correct or not in their identification. And it might be legitimately, if one were dealing with such a situation, one might say: 'Well, we'll look ourselves as well and we'll see what weight we attach to it.'" But you're saying they should be told not to do that.

MR O'ROURKE: They should be told not -- if the quality and coherence --

JUDGE: Is poor, okay.

MR O'ROURKE: -- is insufficient, which we say BR1 is --

MS JUSTICE KENNEDY: So the principle, you are saying, then, is that the jury aren't entitled to test the evidence of various witnesses by their examination themselves of the CCTV footage?

MR O'ROURKE: I think -- yes --

MS JUSTICE KENNEDY: So what's the point of showing them the CCTV footage?

MR O'ROURKE: Because it was admissible as a piece of real evidence to establish that, as we readily conceded, that he probably was the driver."

127. Conversely, while it was expressly not accepted by counsel for the appellant that the man to be seen getting out of the taxi and going into the Applegreen service station, on the recording that is PM4, was the driver of the VW Golf and the appellant, the PM4 recording represented good quality footage, a fact again accepted by counsel for the appellant. Further, counsel for the appellant had expressed contentment that the jury could look at PM4 and make their own identification from that footage, in contradistinction to the position with respect to BR1. In the transcript on the 19th of December 2022, at page 29, lines 10 to 11, counsel says, "*PM 4 is different. It is good quality and they were quite entitled to look at it and to look across it –*"

128. In addressing this ground of appeal, which counsel for the respondent stressed was not against the admission of BR1 as a piece of real evidence to be assessed by the jury, but which

was concerned rather with an alleged error by the trial judge in failing to warn the jury not to attempt to make any identification themselves based on BR1, because of its quality, the point is made that, even if it were warranted in the circumstances of the case (which the respondent does not accept), no requisition was raised on behalf of the appellant following the trial judge's charge to the jury complaining about this alleged deficiency in the charge. In the circumstances the respondent relies upon the well-known jurisprudence of the Supreme Court in *People (DPP) v. Cronin (No 2)* [2006] 4 I.R. 329 and submits that this Court should not in the circumstances entertain this ground of appeal.

129. In response, counsel for the appellant has suggested to us that *Cronin* is not engaged in circumstances where he had made clear during the *voir dire* that the defence's position was that the quality of the BR1 recording would not permit any facial identification. A requisition was not raised because the trial judge had ruled against the defence on that issue, stating: "*The quality of the footage at Gaybrook, although fleeting, the quality is certainly of a high enough standard for the jury to be in a position to make an assessment*". He suggested that to have raised the suggested requisition in those circumstances would have been argumentative, and that his view that the trial judge had been wrong in principle in allowing the video evidence to be so assessed by the jury, in circumstances where they might attempt their own identification, was a matter to be ventilated on appeal rather than one to be revisited before the trial judge in a requisition.

Analysis and Decision

Ground of Appeal No. 1

130. We have considered the evidence in the case as reflected in the transcript, as well as the arguments made by the parties at trial, and reprised before us on appeal, and we do not regard the trial court as having erred in admitting the evidence of the prosecution witnesses D/Gardaí Maher and Kavanagh, respectively, which purported to identify the person shown

in the CCTV footage, marked BR1, as being the driver of a VW Golf vehicle used by the robbers.

131. We are satisfied that there was evidence that both gardaí had an unobstructed, albeit brief, view of the driver following the stopping of the VW Golf at the junction of the Dublin to Malahide Road with the Swords Road, in circumstances where there was nothing else about the encounter that would tend to raise a doubt in regard to the quality of the observation. Any alleged contradictions/inconsistencies in the evidence pointed to by the appellant, while possibly relevant to the credibility of those witnesses, were not relevant to the reliability of their purported observations on that occasion.

132. Further, in regard to the alleged contradictions/inconsistencies relied upon, they were each potentially amenable to explanation, as counsel for the respondent has suggested, if the jury were willing to accept the possible explanations put forward. If they were relevant at all, they would bear only on the credibility of the Garda witnesses in question. From the outset of the case, counsel for the appellant made clear that his client vehemently contested that the alleged observations took place at all. This was a credibility issue. Whether the purported observations took place or not was, in our judgment, quintessentially a matter for the jury to resolve. There was certainly evidence on which a jury could be satisfied beyond reasonable doubt that D/Gardaí Maher and Kelleher, respectively, made the observations that they claim to have made. There was no basis for excluding that aspect of their evidence and the trial judge was right to admit it.

133. However, the fact that these gardaí may have clearly seen the driver of the VW Golf while he was still seated in the vehicle was a circumstance that represented only one strand of the prosecution's case. For their observations to have probative value on the issue of the possible guilt of the appellant, it had to be shown that the driver of the VW Golf could be connected to the Bayside post office robbery, and further that that person was the appellant.

The prosecution sought to do this by building a circumstantial case comprised of multiple other strands of evidence, including, *inter alia*, certain lay witness testimony such as that of Mr. H. who saw the driver of the VW Golf proceed on foot into Gaybrook Lawns estate, and that from the taxi driver P.G. who later brought a man, believed by gardaí to be the driver of the VW Golf, from Gainsborough, Malahide to the Dun Saithne estate, Balbriggan where the appellant's partner lives; CCTV footage from the Gaybrook Lawns estate (BR1); CCTV footage from a brief stop at an Applegreen service station during the taxi journey (PM4); items and trace evidence, including DNA and fibres, recovered from items in the abandoned VW Golf and from the Gaybrook estate; DNA profiles matching the appellant's profile on various items recovered from relevant locations; a photofit image based on Mr H's observation of the driver, stills showing the appellant (DB1) taken from CCTV recorded at Pearse St Garda Station, lay testimony from retired Garda Sergeant Donal Brassel who knew the appellant for more than 20 years and who, having compared the imagery in BR1, PM4, the photofit and DB1 was satisfied that they each showed the same person, and that it was the appellant.

134. Against this background, the appellant says that the evidence of D/Gardaí Maher and Kavanagh, respectively, which purported to identify the person shown in the CCTV footage, marked BR1, as being the driver of a VW Golf vehicle used by the robbers should not have been admitted because the quality of the recording in BR1 was insufficiently good to have permitted a facial identity or indeed any identification. In our assessment that submission lacks reality. The case is not made out that there was nothing of probative value to be seen on BR1, merely that a facial identity was not possible on BR1 alone. Of very considerable significance, in our assessment, is that the appellant concedes that the man shown on BR1 was "*probably*" the driver of the VW Golf. Moreover, counsel for the appellant stated expressly that he did not have an issue with BR1 being admitted as real evidence. He

admittedly qualifies that now by saying that, in making that concession there was an expectation on his part that the jury would be instructed not to seek to make their own identification using BR1, which did not happen. However, the significance of the concession that BR1 was properly admissible as real evidence is that BR1 was thereby acknowledged as being relevant and potentially probative in at least some (admittedly unspecified) respects and to some degree. It is not difficult to conceive of how it might be of assistance to somebody in making an identification, notwithstanding that it could not provide the basis for a facial identity. For example, while BR1, which the Court of Appeal has viewed, does not clearly show the visage of the man concerned in sufficient detail to allow for facial recognition, there is more than a face to be seen, such as the person in question's build, manner of dress, gait, comportment, direction, and route travelled while on camera. In her ruling on the *voir dire* the trial judge herself refers to the fact that "*BR1 shows a person of a particular appearance -- dark beard, grey hair, thinning on top, of a particular build.*"

135. The trial judge concluded at the end of the *voir dire* that there was no legal basis for excluding BR1 (or for that matter PM4). She said:

> "*The quality of the footage at Gaybrook, although fleeting, the quality is certainly of a high enough standard for the jury to be in a position to make an assessment. The quality in Applegreen is of a good standard and has the advantage of a number of angles. I am satisfied that the footage meets the test contained at paragraph 52 of Mr Justice McKechnie's judgment in DPP v. O'Shea, quote, "If continuity, clarity and coherence are established, then one may ask whether the evidence is of such a quality that a jury can conduct a fair and reliable assessment of it. If so, what weight, cogency and credibility should be given to it is a matter for them.*"

136. In our judgment, the trial judge was well equipped to make the assessment that she did, namely, applying the *O'Shea* test and having, by necessary implication from her ruling

(in circumstances where she had just quoted the test), found sufficient continuity, clarity and coherence in the first instance, and then finding that BR1 was of sufficient quality to allow it to be safely admitted before the jury as real evidence so that they might conduct a fair and reliable assessment of it. We consider that the trial judge has not been demonstrated to be in error in so doing.

137. In circumstances where the trial judge satisfied herself that that the quality of footage was "*certainly of a high enough standard for the jury to be in a position to make an assessment*" as to whether that real evidence was going to be of any value to them in resolving some factual issue in controversy in the case (which could, *inter alia*, have included the credibility of an identification by a third party or third parties such as that that was offered by D/Gardaí Maher and Kavanagh, or retired D/Sgt. Brassel; or perhaps they might have derived assistance by comparing the man shown in the BR1 footage with the man shown in PM4, in the photofit image and in the DB1 stills). Providing there was evidence to support the assessment, we do not think it can tenably be argued that a mere witness or witnesses could not equally rely on a consideration of that real evidence for what it might be worth, even to the extent of enabling an identification. It cannot, in our view, be tenably argued that while the jury would be allowed to assess if the recording had any value in resolving factual issues in the case, D/Gardaí Maher and Kavanagh were not equally entitled to have regard to it to see if they recognised anybody in it, or if it otherwise assisted in furthering the Garda investigation into the Bayside post office robbery.

138. It must be appreciated that the prosecution case in regard to the identification by D/Gardaí Maher and Kavanagh of the man visible in BR1 as being the same person that had been driving the VW Golf, notwithstanding that the recording did not permit of a facial recognition, was not stand-alone identification evidence, nor was it unsupported forensically. The two identifications supported each other. Also, there was other witness evidence tending

to suggest the correctness of this identification, and there was forensic evidence tending to support it. The prosecution were not saying that the two gardaí in question, or the jury, or anybody else, could be satisfied to the standard of beyond reasonable doubt of the guilt of the appellant purely on the basis of the BR1 identification alone. No one would dispute that, as a isolated piece of circumstantial evidence, the BR1 based identification came with certain frailties. Be that as it may, it was a circumstantial evidence case and, although it may be regarded as something of a cliché at this stage, the essence of a circumstantial case is that many strands make a rope. While the BR1 identification on its own could certainly not support a verdict of guilty, the correctness of that identification was supported by significant other evidence. The BR1 identification fell to be considered by the jury not in isolation but in the light of all of the other evidence in the case. In our judgment, it was entirely proper for the trial judge to have admitted the evidence of D/Gardaí Maher and Kavanagh to the effect that, having viewed BR1, they were satisfied that the person shown on that footage was the same person as the driver of the VW Golf. The issue as to the credibility of that purported identification was, thereafter, a matter for the jury. The defence had a full opportunity to test the evidence of both gardaí in regard to the purported identifications in cross examination before the jury. There was nothing unfair in the jury receiving their evidence in that regard.

139. In our judgment Ground of Appeal No. 1 must therefore be rejected.

Ground of Appeal No. 2

140. The appellant complains that the trial court erred in failing to direct the jury not to attempt to make any identification of the appellant from the CCTV footage marked BR1 on the grounds that its quality was such that no identification was permissible. The respondent is correct in saying that no requisition was raised in that regard by counsel for the defendant following the judge's charge. We do not agree with counsel for the appellant that it would have been argumentative for defence counsel to have raised such a requisition at the trial. The

judge had made no specific finding that the quality of the CCTV footage marked BR1 was such that no identification was possible. The trial judge had ruled that BR1 was admissible as real evidence and could be placed before the jury for their possible assistance because the footage was relevant and potentially of some probative value, but that it would be a matter for the jury to assess what weight, cogency, and credibility they could attribute to it. . She alluded with specificity, in her ruling on the *voir dire*, to certain ways in which the jury might find it to be of utility. She stated, *inter alia*:

> "*BR1 shows a person of a particular appearance -- dark beard, grey hair, thinning on top, of a particular build. It was submitted that this is consistent with the evidence given by the complainant's regarding the description of one of the men who entered their home. The footage from the Apple Green station is of a man, and the jury are entitled to compare that to the man in BR one footage appears to have a grey or dark beard, grey hair thinning on top. The evidence of Mr G, taxi driver, it was submitted, links those two pieces of footage. He is able to say that he collected a man on the 26th evening of the 25th of September from Malahide and stopped at the Applegreen station. He identifies his taxi on the footage and the money picked up. Stills from footage in Pearse St, Garda station have been prepared and reveal a person whose features are strikingly similar the other footage.*
>
> […]
>
> *It was submitted that the real evidence from the CCTV footage from BR1 and Applegreen service station and Pearse Street support the contention of Detective Garda Maher and Detective Garda Kavanagh in respect of the driver of the Golf*"

141. What the trial judge did not do was to seek to limit in any way the use which the jury might make of BR1. This is not really surprising; she was not asked to do so. What is perhaps surprising is that she was not asked to do so by defence counsel. It cannot be said that it was

not apprehended by anybody that the jury might employ BR1 for the purpose of making their own identification. In his submissions on the *voir dire,* defence counsel stated, *inter alia*:

> "*The purpose of the prosecution seeking to admit that footage is twofold; firstly, to allow Detective Garda Maher and Kavanagh to purport to identify the person in the footage has being the driver of the Volkswagen Golf* […] . *And the second reason that the prosecution seek to admit the evidence is to invite the jury themselves to identify the defendant as the person in that footage.*"

142. Despite that appreciation, we have not had it brought to our attention that any specific submission was made requesting that the trial judge should seek to place limitations on the use which the jury might make of BR1, or that she should warn the jury not to attempt an identification of their own using BR1. No submission was made to the trial judge either during the *voir dire*, or at any other point up until the conclusion of the judge's charge, that if BR1 was to be admitted before the jury as real evidence that she should warn them not to use it to perform an identification of their own.

143. While it is certainly the case that defence counsel at the trial suggested in the course of submissions that the quality of BR1 was insufficient to permit of any form of identification at all, that submission was in support of an application that BR1 should not be admitted before the jury in any circumstances. The issue of possible warnings, or restrictions on the use that might be made of BR1, if that submission were to be rejected (as in fact it was) and if BR1 was in fact to be admitted as real evidence, was not raised nor discussed.

144. It is clear from her ruling that the trial judge did not accept that BR1 did not contain identifying evidence or that it could not be relied upon in support of an identification. She was completely clear that she regarded BR1 as being potentially relevant and potentially probative and that it was right and proper for it to be admitted before the jury. The Court of Appeal has viewed BR1 and agrees with her assessment in that regard.

145. In the absence of any specific submission at the trial as to possibly limiting the use which could be made of BR1 if it was, in fact, to be admitted as real evidence, or a suggestion that the jury would require to be warned not to attempt any identification themselves using the BR1 footage, we do not think that the appellant can be permitted at this point to seek to make a case in the context of this appeal that the trial judge's charge was deficient in failing to warn the jury in that respect. Moreover, and in any case, we have not been persuaded that such a warning was, in fact, required in the circumstances of this case, given our view that the trial judge was, in any event, correct in regarding BR1 as relevant and potentially probative in numerous respects, including that the man shown on the footage exhibited the previously mentioned discernible features and characteristics, which may have enabled or supported, either on a standalone basis or in conjunction with other evidence, his identification by those viewing the footage. While we do not know if the jury attempted to make an identification themselves using the BR1 footage, we consider that if, in the circumstances of this case, they had attempted to do so, it would not have been unfair in any respect to the appellant.

146. In the circumstances we also reject Ground of Appeal No. 2.

Ground of Appeal Nos. 3 and 4

147. It is complained in Ground of Appeal No. 3 that the trial court erred in admitting the opinion evidence of D/Garda Maher purporting to identify a person depicted in the CCTV footage marked PM4 as being the same person depicted in CCTV footage marked BR1. It is further complained in Ground of Appeal No. 4 that the footage in PM4 should not have been admitted before the jury at all.

148. Taking these complaints in reverse order for convenience, there is no complaint concerning the quality of the PM4 footage, and we are unaware of any other tenable basis on which it might be said it ought to have been excluded. Insofar as we understand the appellant's case, to the extent that it involves PM4, it is not that the footage should have been

excluded but rather that the identification evidence of certain persons, particularly that of D/Garda Maher and D/Garda Kavanagh, but also others such as D/Sgt. Brassel and Mr P.G., should not have been admitted, because those identifications had not taken place in circumstances that were sufficiently regulated and controlled and which met minimum standards of reliability and fairness. Specifically, the complaints in that respect are, as we understand them, that there was no contemporaneous written record kept concerning the viewing of PM4, and the circumstances in which that occurred; there was no attempt to convene an identity parade; and the identifications by D/Garda Maher and D/Garda Kavanagh were made in circumstances where they had previously been shown photographs of the suspected person, and there were reasons, the defence say, to suspect that at the time at which they made their purported identifications based on PM4, the appellant was already known to them as being a person who was suspected of having been involved in the Bayside post office robbery.

149. We have no hesitation in rejecting these grounds of appeal. We accept that the position in law on the keeping of records at identification procedures such as that which was conducted in this case, and with respect to the requirement to conduct an identity parade, is as stated in the respondent's written submissions. There was no requirement in law to keep a contemporaneous record of the viewing of PM4. The relevant witnesses were available for cross-examination and any concerns relating to the circumstances in which the viewing occurred were capable of being ventilated before the jury. There was nothing in the evidence adduced in this case to indicate any intrinsic unfairness in what occurred. With regard to the holding of an identity parade there was, as was submitted by the respondent, a reasonable explanation provided as to why that was not done. The evidence was that the appellant had changed his appearance, at the point at which the possibility of holding an identity parade fell for consideration. We are satisfied that there was no unfairness in the circumstances. As

regards the involvement of D/Garda Maher and D/Garda Kavanagh in the Castlepollard operation, there was no evidence that either of them saw the appellant in the course of that intervention and connected him to the Bayside post office robbery. While they may have been shown photographs of the appellant in advance of his arrest on that occasion, there is nothing in the evidence to suggest that they had recognised the appellant at that time as having been the driver of the VW Golf, or that they had appreciated that he had possibly been involved, or was suspected of being involved, in the Bayside post office robbery; or that they were improperly influenced, or biased, in any way when they came to view the PM4 footage many weeks later. Any suggestion that might have been made to the contrary was capable of being explored in the cross-examination of those witnesses. The prosecution offered to recall them for the purpose of being further cross-examined when their involvement in the Castlepollard intervention came to light, and that invitation was declined. In the circumstances, we are not disposed to uphold the suggestion in Ground of Appeal No. 4 that PM4 should not have been admitted before the jury.

150. In so far as Ground of Appeal No. 3 is concerned, D/Garda Maher gave clear evidence of conducting the comparison and of being satisfied that the same person was to be seen in both PM4 and BR1. While the quality of BR1 was admittedly not as good as that in PM4, and in particular did not admit of facial recognition, the BR1 footage exhibited other discernible features and characteristics of the man captured on the recording. D/Garda Maher was available for cross-examination and was cross-examined concerning the basis of his identification. The transcript suggests that he gave clear and cogent evidence in that regard. Moreover, there was extrinsic evidence tending to support the correctness of his identification. Any issue as to his credibility was a matter for the jury. There was, in our judgment, no basis for justifiably excluding this evidence. We therefore also reject Ground of Appeal No. 3.

Conclusion

151. In circumstances where we have not been disposed to uphold any of the appellant grounds of appeal against his conviction, the appeal is dismissed. We have no reason to believe that the appellant's conviction was other than safe and satisfactory.