



THE COURT OF APPEAL

Record No: 204/22

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

LEON SHARLOTT

APPELLANT

JUDGMENT of the Court delivered on the 29th day of July 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 19th October 2022, the appellant was convicted of 1 count of possession of firearms and 1 count of possession of ammunition, contrary to s. 27A of the Firearms Act, 1964, as substituted by s. 59 of the Criminal Justice Act, 2006, as amended by s. 38 of the Criminal Justice Act, 2007.
2. The counts relate to the possession of a Glock semi-automatic pistol, a .38 inch calibre Webley & Scott revolver, 12 rounds of 9mm ammunition and 6 rounds of .38 ammunition.

Factual Background

3. On the 15th March 2018, at approximately 1:00am, An Garda Síochána, acting upon intelligence, arrived at a council yard outside Gorey, Co. Wexford. It was believed that there were vehicles at this location with firearms on board.
4. Three vehicles were in the yard: a Volkswagen Golf, a Volkswagen Jetta and a Nissan Qashqai. Three men fled from the scene. One of the men was caught at the scene, the second man was not caught for a few hours and a third man made good his escape.
5. The three vehicles were searched. Found in the passenger footwell of the Golf vehicle was a Glock semi-automatic pistol wrapped up in socks together with ammunition, and a revolver. In the boot of the Golf a pair of Nike Air Max runners were found, which transpired to be of evidential value in that DNA on these runners matched that of this appellant.

6. Of further evidential value and found in the boot of the Golf was a pair of gloves. It transpired that these had been purchased in Lenehan's hardware shop, Capel Street, Dublin. Using the barcode on the packaging, gardaí identified the date of sale as the 14th March 2018. CCTV footage of the sale was viewed which showed two men entering the shop and going to the counter to buy the gloves. One of the men on the footage was one of the men who had been apprehended by gardaí on the night of the offence.

7. The crux of this appeal rests with this CCTV footage and one of the men on that footage. Essentially, when the appellant was arrested, a photograph was taken of him, which photograph revealed a defect on the upper portion of his left ear. This photograph was adduced in evidence following objection by the defence. It is argued on appeal that the admission of the photograph was fundamentally unfair.

8. It is argued that this unfairness was compounded when the CCTV footage from Lenehan's was shown to the jury together with commentary from the garda witness regarding the defect in the ear. While the footage was being played at trial, the witness commented on the appearance of one of the men in the footage as follows: *"You can see a very distinguishing feature on that male on his ear. So, as he turned there on his - the ear that was facing us there you could see that it looked..."* Counsel for the respondent interjected at this point and no more was said. An application was made to discharge the jury, which was unsuccessful; the judge was of the view that the jury could be warned appropriately about the comment.

9. Evidence was adduced at trial that at approximately 6:30am on the 15th March 2018, a Mr Alan O'Neill was approached by a man at Tinnock who was looking for a lift. Mr O'Neill was there to take a lift from a Mr John Dempsey and Mr Dempsey agreed to give this other man a lift. He gave him a lift as far as the Applegreen filling station at Coyne's Cross. CCTV evidence of the exterior and interior of the filling station was viewed by gardaí and before the jury during the trial. Significantly, Mr Dempsey said that the man to whom he had given a lift was missing a part of his ear and had a metal bar in his ear. He did not specify and was not asked which ear had the defect.

10. Another prosecution witness, a Mr Juskenes, gave evidence that he was approached outside the Applegreen filling station by a man asking for a lift. He initially declined but then said he felt sorry for this man who said he was cold, and he gave him a lift to the Ballyogan Luas stop. This witness claimed he would be able to recognise the man to whom he gave a lift if he saw him again. Relevant CCTV footage from this Luas stop was also before the jury.

11. Two months after the offence, the appellant was arrested pursuant to s. 30 of the Offences Against the State Act, 1939. A number of interviews took place with him. In interview, he accepted ownership of the Nike Air Max runners found in the boot of the Golf vehicle but denied being at the scene. While in custody, the gardaí took photographs of the appellant which displayed a deformity in his left ear. The grounds of appeal relate to the admission into evidence of these photographs and a comment made by gardaí in respect of the appearance of the appellant's ear in CCTV footage.

Grounds of Appeal

12. The appellant appeals his conviction on the following four grounds:-

"(i) The learned trial Judge erred in acceding to the prosecution's application to admit into evidence the custody photograph of the accused. The decision to admit said evidence

amounted to a significant error in circumstances where the prejudicial effect far outweighed any probative value.

(ii) The learned trial Judge erred in refusing the appellant's application to discharge the jury in circumstances where a prosecution witness gave evidence, not previously disclosed, in the form of commentary with the effect that the jury was prejudiced and impaired in their ability to independently and impartially consider CCTV evidence.

(iii) The learned trial Judge erred in determining that any prejudicial effect caused by the witness's commentary could be cured by the issuing of a warning and/or direction to the jury to disregard the evidence just heard. The commentary, when taken together with the admission into evidence of the custody photograph of the accused, caused irreparable prejudice that tainted the deliberations of the jury. No warning and/or direction could cure the adverse effect and, in any event, no warning and/or direction was given by the learned trial judge.

(iv) Having regard to all the circumstances, the trial was unsatisfactory and the verdict unsafe."

13. The grounds may be considered together as they are interlinked and concern two issues, the photographs and the commentary when showing the footage.

The Appellant's Submissions

14. On appeal, it was argued that the admission of the photographs was unfair particularly as there was no evidence from a witness as to which ear had the defect and no identification parade was held. The photograph, it is said amounted to identification evidence when assessed with the CCTV footage from the hardware store. Further, it is said that the process of identification in this way was contaminated by the commentary of the garda witness when the footage was shown at trial. Reliance is placed on *People (DPP) v O'Brien* [2015] IECA 312 and *R v Clare & Peach* [1995] 2 Cr App R 333.

15. Counsel argues that the defect to the ear was the lynchpin of the case and that in closing, the prosecution invited the jury to identify the appellant from the aforementioned CCTV footage. Counsel for the appellant at trial complained that the appellant was given no advice and no indication of the fact that the photographs could be used in evidence against him in a court of law.

16. It was emphasised that with an identification parade there are provisions operable to ensure fairness and fair procedures. The process used was entirely sub optimal, it is argued, and reliance is placed on *People (DPP) v Mekonnen* [2012] 1 IR 210 at paras 14 and 24, in this regard.

"It will only be in the rarest of cases that the court, in the absence of objective justification, will consider secondary evidence: when available for consideration the procedures appropriate to the method used must satisfy the normal rules."

The Respondent's Submissions

17. The respondent distinguishes the present case from *Mekonnen* on the ground that what was at issue in *Mekonnen* was an informal identification made by the complainant in Busáras.

18. Further reliance is placed on the Supreme Court judgment in *People (DPP) v Gruchacz* [2019] IESC 45. It is submitted that in the Court of Appeal, Birmingham J (as he then was) stated that there was no reason why, in appropriate cases, where high quality footage was available, juries should not be permitted to make an identification.

19. O'Malley J, at para 98 of the Supreme Court judgment stated that:-

"I can see nothing wrong in principle with the jury making its own assessment of the content of the material. This Court clarified the status of CCTV footage in DPP v. A. McD. [2016] 3 I.R. 123. The judgment of McKechnie J. refers to the frequency with which such footage is used in modern criminal trials, and observes that it is difficult to argue with the perception that it is the 'best evidence'.They are simply assessing the evidence put before them, in accordance with the guidance given by the trial judge."

20. It is further submitted that in the circumstances of the case there was no obligation to arrange an identification parade for Mr Juskenes, who drove a man from the filling station at Coyne's Cross to Ballyogan Luas Stop.

Discussion

21. The prosecution's case at trial was that the appellant was the third man who had fled the scene and was the person to whom Mr Dempsey gave a lift from the outskirts of Gorey at approximately 6:15am to Coyne's Cross service station and from there, he was given a further lift to the Ballyogan Luas stop, Co. Dublin. Mr Dempsey gave evidence that the man to whom he gave a lift was stocky and that he had a little piece missing from his ear and a bar in his ear. He was unable to give a further description. The next man from whom it is said the appellant got a lift, a Mr Juskenes, gave a man a lift to Ballyogan Luas stop from Coyne's Cross service station. He described this man as a young man, short, dark hair, and he gave an approximate height.

22. CCTV footage was shown to the jury of the purchase of the gloves which were found in the Golf, one man was identified as a co-accused and the prosecution contended that the second man was the appellant.

23. Runners were also located in the boot of the Golf, the vehicle in which the Glock pistol, revolver and associated ammunition were found, the DNA on those runners matched that of the appellant. He admitted in interview that those were indeed his, but that he had not been at the location in Co. Wexford and did not know how his runners came to be there.

24. There is no doubt that pursuant to s. 30(5)(c) of the Offences Against the State Act, 1939, a member of An Garda Síochána may photograph or cause a person who is detained under s.30 to be photographed, and no issue is taken in this respect.

25. The appellant contends that showing the photographs to the jury, coupled with the CCTV footage and the impugned commentary rendered this a visual identification which was unfair. Moreover, it is contended that an identification parade ought to have been held, it is said, giving Mr Juskenes, in particular, the opportunity to potentially identify the person to whom he gave a lift on the relevant date.

26. The reliance placed on *Mekonnen* does not in our view advance the appellant's submission. It is of course the position that where an individual's conviction is predicated in whole or substantially upon identification evidence, there are risks associated with such identification and so, the preferable method is by way of a formal identification parade with the associated safeguards.

27. However, this in reality was not such a case, this was a case based on circumstantial evidence, of which, certainly, the evidence concerning the defect to the ear was of importance.

28. Moreover, it is not clear that a formal identification parade would have significantly advanced matters for either side. Certainly, Mr Dempsey was fully entitled to give evidence that he gave a lift to a man with a defect to his ear from a location proximate to the locus. It may have been preferable if the witness had been asked if he could say which ear held the defect, but this did not render the process unfair.

29. The jury were entitled to assess all the evidence, having been given directions regarding circumstantial evidence. The photograph taken in the garda station was clearly admissible, all that pointed towards was that the man arrested by the gardaí had such a defect to his ear, which may have been readily apparent to the jury, in any event.

30. The CCTV footage was simply another piece of circumstantial evidence, albeit real evidence, where the prosecution sought to prove that not only were the particular gloves found in the Golf purchased in Lenehan's hardware store, but that the appellant was one of the persons who was party to that sale.

31. As is clear from the jurisprudence, a jury may be permitted to identify an individual from CCTV footage in appropriate cases where the probative value is not outweighed by the prejudicial effect.

32. It is important to bear in mind that the CCTV evidence was but another piece of circumstantial evidence. Juries may scrutinise high quality images by way of CCTV footage. If the jury were satisfied that the person in the footage was the appellant, that was, as we have said, another piece of circumstantial evidence which they were entitled to consider. The probative force of a single piece of circumstantial evidence must be considered not in isolation, but in conjunction with the other pieces of circumstantial evidence, which when knitted together may lead to a finding of guilt.

33. The only remaining issue is whether the words spoken by the garda in the process of showing the footage was such so as to compromise the fairness of the trial to such an extent that the trial judge ought to have discharged the jury. It is so that in any criminal trial, potentially prejudicial evidence may come about. The question is whether what was said by the garda witness was of such a character that the jury ought to have been discharged.

34. It is so that the evidence of the damaged ear given by Mr Dempsey was of considerable importance to the prosecution case. It could be said that it was a somewhat unique feature to the case. It was certainly of benefit to the prosecution if it could be proven that a person with a damaged ear bought gloves which were found in the car in which the pistol, revolver and ammunition were found and that a person with a damaged ear happened to take a lift at a time and location proximate to the gardaí arriving at the scene.

35. The footage was there for the jury to view and make their own assessment. The evidence of Mr Dempsey was also of course for their evaluation. The words spoken by the garda were very limited but drew attention to the issue of the defective ear. The dicta of O'Malley J. are apposite to this issue where she stated in *Gruchacz*:

"The CCTV footage presented in trials is often of very high quality, where the jury may well feel that their view is as valid as that of any witness."

36. The jury were free to accept or to reject the garda witness's evidence and were informed by the judge that all the evidence was for their assessment. The comment made by the garda may be distilled to pointing out to the jury that they could see "a very distinguishing feature on that male on his ear."

37. We are not satisfied that the witness strayed outside the permissible parameters to such an extent that the judge ought to have discharged the jury. He certainly by his evidence drew the jury's attention to the ear of the person in the footage, but that was something which was very much live in the case in any event and for the jury to assess on viewing the footage.

38. While it may have been preferable for the witness to refrain from making such a comment or indeed offering such an opinion, each case depends on its own particular facts and, to a degree, on the quality of the footage. In some cases, assistance of that kind may be permissible. In any event, it did not, in our view, come anywhere close to the degree of prejudice necessary to discharge the jury.

39. While the grounds of appeal assert that no warning could cure the adverse effect and that no warning was in fact given, the absence of a direct warning does not appear to us to have been pursued on appeal and in any event no requisition was raised following the judge's charge.

40. We do not therefore find favour with the grounds advanced and accordingly, the appeal against conviction is dismissed.