THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

22/2017

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Declan Tynan

Appellant

JUDGMENT of the Court delivered on the 7th day of July 2017 by

Mr. Justice Birmingham

1. On 16th December, 2016, the appellant was convicted in the Dublin Circuit Criminal Court of the offence of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994 as amended and was subsequently sentenced to a term of four years imprisonment with the final year suspended. He has now appealed against that conviction and sentence. This judgment deals with the conviction aspect.

2. The trial related to events that occurred at the premises of Ladbrokes Bookmakers in Killinarden, Tallaght on 13th December, 2012. In the course of the trial, employees of the bookmakers gave evidence that at about 5.30 pm on that day a number of men ran into the premises, one of them armed with a knife. An employee described those who entered as running after one of the customers in the shop who was knocked to the ground and that she saw one of the men swinging a knife in the direction of the person on the ground. The brother of the person who was knocked to the ground was also in the premises and attention was directed towards him by those who had entered. The knife was swung in his direction and a bin or a stool was thrown at him. The individuals who had entered the premises and taken part in this incident then left.

3. Members of An Garda Síochána were summoned to the scene. Sergeant Loughrey was quickly on the scene and he encountered a person with obvious stab wounds. That person was removed to Tallaght Hospital. It is to be noted that neither this person nor his brother were willing to co-operate with the investigation and there was never any medical reports obtained, nor was a victim impact report produced.

4. Sergeant Loughrey made arrangements to take possession of the CCTV footage that covered the incident, contacting Ladbrokes' headquarters in the UK for this purpose. Having obtained CCTV footage of the incident, he arranged for it to be viewed by a member of the Gardaí from Kevin Street Garda Station in Dublin. The member in question, Garda Patrick McAvinue purported to recognise the appellant and indeed the two other men who were shown entering the bookmakers and participating in the incident. This identification was absolutely central to the prosecution case.

5. A number of grounds of appeal have been formulated and these have been grouped as follows in the course of the written submissions filed on behalf of the appellant:-

> (i) The provenance and admissibility of the recognition evidence.
>
> (ii) A statement that was made while giving evidence by the investigating member, Sergeant Ciarán Loughrey in the presence of the jury to the effect that there were other witnesses available but that were not being called by the prosecution.
>
> (iii) The manner in which a question that was posed by the jury in the course of their deliberations was dealt with by the trial judge.
>
> (iv) The fact that the appellant was not provided with certain Garda PULSE records that he sought.

The recognition evidence

6. At the outset of the trial it was indicated that there would be an issue in relation to the recognition evidence and there followed a *voir dire*. In the Circuit Court and now on appeal, the appellant takes as his starting position that various Irish authorities referred to by the DPP go no further than saying that evidence from a member of An Garda Síochána that he recognised an accused person from images of the crime being committed is not inadmissible per se. The appellant is quick to point out that he does not take issue with that but that rather his point is that the admissibility of such evidence should be governed by an assessment of whether the process by which the evidence had been garnered was adequate to ensure that any probative value was not diminished to the extent that it was outweighed by the prejudicial effect. In the course of argument, the appellant has referred to and relied on a number of authorities of the English courts, in particular the case of *R. v. J.D.* [2012] EWCA Crim. 2637 and the earlier case of *R. v. Smith and Ors.* [2008] EWCA Crim. 1342. The appellant accepts that those cases were decided under a different statutory regime but says nonetheless that the considerations which are identified there as matters of first principle and common sense are highly relevant and should be applied in this jurisdiction. He says that support for the position for which he contends can be found in the case of *The People (DPP) v. Crowe* [2015] IECA 9, a case that was concerned with the question of voice recognition or voice identification.

7. In the course of the *voir dire* it emerged that Sergeant Loughrey, having received the CCTV footage, provided this to a member of An Garda Síochána referred to as the "Criminal Intelligence Officer". This did not give rise to any purported identification or recognition. On 21st January, 2013, Sergeant Loughrey met with Garda McAvinue of Kevin Street Garda Station in that station and showed him the CCTV footage along with stills which had been taken from the footage and he was asked if he could identify any of the suspects involved. Prior to that meeting, Sergeant Loughrey had contacted Garda McAvinue by telephone. In the course of the

voir dire, great emphasis was placed on the fact that no notes were taken at the time of the telephone contact between the two members nor were notes taken of what transpired in Kevin Street Garda Station.

8. Garda McAvinue's evidence on the *voir dire* was that he had joined Kevin Street Garda Station in November, 2007 and was initially assigned to a community policing unit. His duties involved foot patrol and mountain bike patrol. His evidence was that he met and spoke to Declan Tynan on a number of occasions while in that role. In 2009, Garda McAvinue was assigned to a drugs unit at Kevin Street Garda Station and he fulfilled that role for four years. He also interacted with the appellant during that period. Garda McAvinue had made entries on the PULSE system in relation to the appellant on a number of occasions and he had referred to these PULSE records when making a second statement. Garda McAvinue's evidence was that he immediately recognised the appellant from the CCTV footage and stills and when asked by prosecution counsel during the course of direct evidence if he could be wrong he denied that this could be the case. In the course of cross examination, he confirmed that he had made his first statement in relation to the matter on 15th March, 2013 and had done so on foot of a statement request from Sergeant Loughrey. That request referred to what had occurred on 21st January, 2013 when the Sergeant had gone to Kevin Street Garda Station in possession of CCTV footage and stills which the Garda then viewed. In the course of his evidence, Garda McAvinue referred to getting to know the appellant as a result of his involvement in "community based projects" but accepted that the "community projects" phrase was not the ideal one.

9. The appellant acknowledged that recognition evidence from a member of the Gardaí is not inadmissible *per se*. However, the appellant submits that the admissibility of such evidence should be governed by an assessment of whether the process by which the evidence had been garnered was adequate to ensure that any probative value thereof is not diminished so as to be outweighed by the prejudicial effect and to ensure that the defence had an adequate opportunity to test the identification evidence. The appellant says that the overriding concern should be to ensure that evidence of this sort has a minimum degree of cogency as already referred to.

10. The appellant has placed particular reliance on the case of *R. v. J.D.* [2012] EWCA Crim. 2637 however, the facts of that case differ very greatly indeed from the facts of the present case. What was in issue there was purported recognition of an individual involved in an affray in a public house by a Detective Constable Churton. The evidence of the investigating member, PC Gorringe, was that on a particular occasion she spoke to Detective Constable Churton and asked him if he remembered dealing with a man called J.D. Her evidence continued as follows:-

> "He [Churton] confirmed to me that he did and I therefore asked him to view a CCTV disk for me for an incident I was dealing with where I believed that D. was involved in the public order offence."

Detective Constable Churton's statement of evidence was as follows:-

> "On Tuesday, 27th September, 2011 I was on duty in plain clothes when PC Gorringe asked me if I remembered dealing with a male called J.D. of [the address is given]. I confirmed that I did, PC Gorringe asked me if I would view some CCTV footage that she believed had D. on it."

It was not in dispute in the *J.D.* case that Code D of the Police and Criminal Evidence Act, 1984 was applicable to the situation and also not in dispute that it had not been applied. The trial judge described what had occurred as a "flagrant breach" of Code D and as "lamentable". The Court of Appeal dealt with the matter at para. 26 of its judgment in these terms:-

> "It is clear in the present case that what happened here was contrary to the Code. There was no reason, moreover, for Police Constable Gorringe, having named the appellant to Detective Constable Churton as she did, then to say to him that she believed the appellant was on the CCTV. What she could and should have simply asked him to do was to view the CCTV to see if he recognised anyone on it. That would have been in accordance with the approach of Annex A and Annex A is, in this regard, expressly adopted by analogy in this part of Code D."

In the present case the evidence of Sergeant Loughrey was that he had not identified anyone in advance of his meeting with Garda McAvinue. When asked about that he answered:-

> "No, I had no idea who these individuals were."

Sergeant Loughrey's evidence was that he had not met Garda McAvinue before 21st January, that he had spoken to him on the phone and informed him that he was trying to identify a number of suspects and made an arrangement to meet him on a particular date. Garda McAvinue's evidence was also that he had not known Sergeant Loughrey previously. The evidence in the Circuit Court was that Sergeant Loughrey did what the Court of Appeal said that Police Constable Gorringe could and should have done. In those circumstances 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. This Court notes that the case for admitting the identification evidence was, if anything, a stronger one than that in the case of *DPP v. Larkin* [2009] 2 I.R. 381 which was an attempted murder case where two Gardaí gave evidence of having viewed CCTV footage of the crime. The Court of Criminal Appeal upheld the conviction and supported the ruling of the trial judge to admit the evidence notwithstanding the fact that both Gardaí when they came to the station to view a video knew that the accused had already been identified. He was, as the trial judge put it, "in the frame for the offence"

11. The appellant has drawn comfort from the decision of this Court in *The People v. Christopher Crowe* [2015] IECA 9, a decision of 3rd February, 2015 where the judgment of the court was delivered by Edwards J. The appellant says that remarks made by the Court on the issue of voice recognition have a resonance for this case. In the Court's view, if one has regard to the facts of *Crowe* it is clear that the decision has little relevance. In that case the appellant had been convicted of the offence of sending a menacing message. A Detective Sergeant was woken at 7.12 am and took a call on his mobile phone. The caller made threatening remarks. The call was a brief one, its duration was 32 seconds. On the following day, 28th November, 2008, the Detective Sergeant went to Clondalkin Garda Station where he was shown a video recording of an interview that had taken place on the previous day between members of An Garda Síochána and the appellant. The Detective Sergeant gave evidence at trial that he immediately recognised the voice of the appellant as that of the telephone caller. Prior to viewing the video, the detective sergeant knew of the circumstances of the appellant's arrest and was aware that a mobile phone had been recovered from under the pillow on which the appellant was sleeping prior to his arrest which was the phone from which the offensive call was made. In those circumstances, the fact that the Court of Appeal accepted that there were significant infirmities in the voice identification evidence that exposed it to legitimate criticism is scarcely surprising. The Detective Sergeant knew that the person being interviewed was the only suspect in the case. The identification was not based on any specific identifying characteristic such as accent, timbre or voice or any attribute or trait such as

a lisp, a stutter or a stammer.

12. It must be appreciated that what occurred in the present case differs from what is usually at issue in cases involving visual identification or indeed voice identification. What ordinarily happens is that a witness, at a time after a crime was committed is asked to view an identification parade or view a number of people at an identification opportunity with a view to seeing whether they can pick out someone and say that the person they are viewing was the same person as they saw commit the crime on the earlier occasion. Here, what is happening is quite different. Here, there is footage actually showing the crime being committed in the sense that it shows those involved in the incident present at the crime scene and the person viewing the footage is doing so in order to see whether he can identify anyone on screen as someone who was previously known to him. This is a fundamental difference and it may mean that procedures suitable for a visual identification parade or voice recognition opportunity may not be readily transferable.

13. In this case, the jury had an opportunity to view the stills and CCTV footage and to make use of these as a tool in assessing the reliability of Garda McAvinue. In the course of the appeal hearing, this Court has seen the stills and viewed the CCTV footage. The Court would describe the quality of the CCTV footage and of the stills as very good, as opposed to great or outstanding but certainly they would have been very valuable tools indeed to assist the jury. That high quality images are often now available which contrast favourably with the blurred or grainy images which were the norm until recent years should not be lost sight of and does mean that earlier cases and certainly the outcome of earlier cases require to be treated with a degree of caution.

14. In the circumstances of this case the Court is not persuaded by any of the arguments in relation to the recognition issue and dismisses this ground of appeal.

The application to discharge the jury

15. This arose from matters that occurred as Sergeant Loughrey was concluding his evidence. Counsel on behalf of the appellant had conducted a robust and forensic cross examination. A major theme of the cross examination was that notwithstanding that there was only one identification witness, that the member in charge had been told there were witnesses and the appellant when interviewed had been asked about witnesses. What happened then was that counsel having put his last question commented:-

> "Q. If you just bear with me a moment, I want to make absolutely sure that I haven't forgotten to ask you anything.
>
> A. Judge, if I can clarify a point.
>
> Q. It's a matter for the Court as to whether – I haven't asked you any further questions yet. It's a matter for the trial judge.
>
> A. Just in terms of it being put to me that – the question has been put to me I said that one person identified him and that was the end of the matter in terms of that no other persons were asked, there were other witnesses and I have to be careful of what I say because they're not being called but who would support –
>
> Judge: That's fine.
>
> Defence Counsel: An issue arises, Judge."

16. Counsel then applied for the discharge of the jury. In the absence of the jury, it emerged that what Sergeant Loughrey had in mind was the fact that a statement from a Garda Redican had been made available by way of disclosure. His statement recorded that he had stopped the appellant on a date subsequent to the date of the offence in the presence of the two co-accused. Sergeant Loughrey was of the view that this would in a broad sense support the identification in terms of the fact that there were three people picked out by Garda McAvinue as suspects and all three were then seen together by Garda Redican on a different occasion.

17. On behalf of the appellant the point is made that the significance of what occurred was increased by the fact that the remark was made in the course of a short trial. On the first day of the trial the jury was sent away so that the *voir dire* could take place. The evidence in its entirety was heard during the course of the second day with closing speeches and charge on the third day. Thus it is said that what had occurred was far more damaging than would have been the case if a similar incident had occurred at an early stage of a long trial.

18. The circumstances in which the issue arose are slightly unusual. Applications for a discharge more typically arise in circumstances where something is said that indicates that an accused has been charged with other offences or has a prior criminal conviction. In ruling on the matter the judge indicated that she was not acceding to the request for the discharge of the jury but added:-

> "In the charge it will be said, and well said, right, that this is a one witness case."

She indicated that she would also be telling them that no notes were taken and that the jury had to concentrate on the evidence given and nothing else and that they could not speculate or engage in conjecture or guessing or suspicion. In the course of her charge, the judge said:-

> "This case involves the purported recognition of Garda McAvinue of Declan Tynan, and there is no other evidence in the case. So one witness and one witness alone, Garda McAvinue, purported to identify Declan Tynan from the video footage."

The remark which gave rise to the application for the discharge of the jury was unfortunate, though the desire to clarify the position given the nature of the cross examination is perhaps understandable. However, in the Court's view, the judge was entitled to take the view that the remark, which she closed down so quickly, was not of such moment as to require the discharge of the jury. Accordingly this ground of appeal fails.

The question posed by the jury

19. When the jury was brought back to court at 12.58 pm to be sent to lunch they indicated that they had a number of questions. The first question posed by the foreman was:-

> "Are we correct in saying to us it is not our role to make a physical identification?"

To this the judge responded:-

> "No, it's not. You have to assess the credibility of the Garda witness who purported to make the identification and be satisfied of his identification beyond reasonable doubt, alright?"

The judge then added:-

> "It's not up to you to say, 'yeah', you know, make any identification, alright?"

The foreman then asked:-

> "Garda McAvinue, (…) his evidence, he has provided on footage and stills, or just footage?"

The judge responded:-

> "He said that he made – he had both and when the footage was played, he identified him, and I'll just briefly go through that and if there's any question about it, I can talk to you at lunchtime."

And then added:-

> "He played the CCTV, he identified -- 'I viewed the stills and in conjunction with CCTV, I was able to identify Mr. Tynan', and he said when he looked at the CCTV, the particular image where he turned and faced, that is what he was able to identify. But I'll briefly tell you exactly at 2 o'clock, okay?"

The judge seems to have had some doubts as to whether she had correctly interpreted the question because she then asked the jury:-

> "As regards the second question, was it from the stills and the footage that he identified him?"

To this the foreman responded:-

> "It's not so much that, Judge, but is it -- are we to totally rely on Garda McAvinue's evidence that it was just the footage or that – and the Court accepts that it was the footage and the stills?"

The judge said that she would answer that question at 2 o'clock. There followed a debate in the absence of the jury between the judge and counsel. In the course of that debate counsel for the defence commented:-

> "I think this is an absolutely critical issue, and that the jury, in asking this question, are addressing a very important part of Garda McAvinue's evidence and a very important part of the basis on which I closed as well."

Counsel then recapitulated in relation to the sequence of events accepting that the first account given by Garda McAvinue was that he had used the footage and the stills and could identify Mr. Tynan from them but he says the situation changed following cross examination. Counsel said that, in cross examination, the witness resiled from his first position, changed it and said that he had made his identification from the footage. Prosecution counsel submitted:-

> "We can't treat this in an artificial way, he had the footage and the stills. It would be artificial to say that the stills played no part at all in terms of the overall identification either."

At that stage the DAR (Digital Audio Recording) was played to the Court. The debate continued with counsel for the defence urging that the witness had eventually been unequivocal in confining his identification to the CCTV footage. In the course of further debate the judge commented:-

> "But he made the identification from the footage as it was being played, and he was shown the stills and he made the identification from the footage and the stills."

When the jury eventually returned the judge confirmed that the outstanding question was whether the jury was to regard the identification from Garda McAvinue as being made from the footage or from the footage and the stills. At that stage the judge said to the jury:-

> "Detective Sergeant Loughrey said that he asked him to view the CCTV and the stills, and he asked could he identify anybody. And Detective Garda McAvinue said that, 'He came in, he had a laptop, he inserted the disc, the CCTV was played and he had the stills' and he described how he viewed it and he identified it. He viewed – he looked at the CCTV and he viewed the stills and in conjunction with the CCTV he was able to identify Mr. Tynan. And he said in cross examination that the footage was played and, 'I made the identification, the stills were taken from the footage, I made the identification from the footage as it was being played.'"

20. The appellant remains dissatisfied with what was said. He contends that Garda McAvinue's last word on this subject was what he had to say in cross examination and that there he was unequivocal in grounding his identification on the CCTV footage.

21. It is the case that the Garda used different formulations at different stages. In the course of his direct evidence he said:-

> "I viewed the footage and from viewing the footage I identified Mr. Tynan."

A little later he said:-

> "Well, there was a number of stills, similar to the ones here, I viewed them as well and in conjunction with the CCTV I was able to identify Mr. Tynan from them."

22. In the course of cross examination his attention was drawn to a sentence in his witness statement which began:-

> "From viewing this footage I am satisfied…"

He was then asked whether counsel could take it, on the basis of what was said in the statement, that the identification was from

the footage and not from the stills. The witness responded:-

> "Well, reading that sentence you could take it from that but in conjunction with the stills and I believe the footage that was shown there it's perfectly clear."

At another point in the cross examination, the Garda made the point that the stills were captured from the footage. At a later stage he said:-

> "I am happy that I viewed the footage and made my identification from the footage."

Counsel then observed:-

> "The first thing we can do then is I suppose dispense with the stills really, can't we, because you made your identification before anyone showed you those stills, hadn't you?"

To which Garda McAvinue responded:-

> "I identified Mr. Tynan from the footage that was played."

23. When the evidence of Garda McAvinue concluded there was some further debate about whether the stills should be made available to the jury as exhibits. In the course of that debate the judge commented:-

> "But I mean he's quite clear that he made the identification from the footage."

24. There is no doubt that what the jury was told by the judge was more equivocal than her observation at the conclusion of Garda McAvinue's evidence that it was quite clear that he made the identification from the footage. However, what she did do was tell the jury what the Garda said initially and what position he took on cross examination. While the judge might have answered the question in a single sentence by saying "from the footage", the Court does not believe that she is to be faulted for the approach that she took.

25. The Court does feel that there is some substance in the contention by the prosecution at trial that the attempt to separate footage and stills was somewhat artificial given that the Garda had access to both and that the stills were all taken from the footage. The response of the foreman when asked by the judge to clarify just what the concern was after the issue was first raised was as follows:-

> "It's not so much that, Judge, but is it -- are we to totally rely on Garda McAvinue's evidence that it was just the footage or that – and the Court accepts that it was the footage and the stills?"

This would suggest that jurors were alive to the fact that Garda McAvinue was saying that he made his identification by reference to footage though there was also evidence he viewed footage and stills.

26. The question that remained for consideration by the jury was whether they were satisfied beyond reasonable doubt of the reliability of Garda McAvinue's identification. The majority verdict of the jury was that they were so satisfied. In these circumstances the Court is not prepared to uphold this ground of appeal.

Pulse Records

27. The evidence was that, when preparing his second statement which related to how well he knew the appellant, the extent of previous encounters and so on and therefore his capacity to make an identification, Garda McAvinue had accessed PULSE records of entries made by him on the system after encounters with Mr. Tynan. The defence sought access to these entries, if necessary in redacted form. This was resisted by the prosecution, who contended that the entries contained privileged material. In the course of argument prosecution counsel commented:-

> "So, I'd reviewed that, Judge, and I'm satisfied that what [Garda McAvinue] said having seen the PULSE record is correct in terms of the details that he's given as per correct. And it's in line with my duties as a prosecutor to ensure that, Judge. So I'm satisfied that that the – there's no prejudice to the defence in relation to their position in terms of testing these incidents, Judge, in terms of that they do tally with what's in PULSE, Judge. But we still claim privilege in relation to them because they are matters which would come in under the privilege rule, Judge in terms of the exceptions to that."

The judge reminded prosecution counsel that the defence had conceded that the entries could be redacted to which prosecution counsel responded:-

> "Effectively, the redaction -- would result in the same information as the statement, Judge."

28. The judge ruled on the matter as follows:-

> "And the first point made in that application was that the PULSE record should be given to the defence and the same PULSE records to be redacted because further information would be gleaned from those PULSE records and be tested by cross examination. And by just giving dates and places where it is alleged that Garda McAvinue (…) made the purported meetings with the defendant, that they should be entitled to that and because they aren't entitled to it, they are actually cross examining with in fact one hand, or arm, behind their back. The Court has heard the objection to the release of those PULSE records, even redacted, because it is privileged. The Court has carefully considered the matter and as regards the PULSE records the further statement of (…) the prosecuting member of An Garda Síochána, Garda McAvinue. As regards his purported meeting with the accused, the Court has carefully considered his evidence and the statement that he has given today in court and the details of when and where he says that he met Declan Tynan and the Court is satisfied that those, what he has given so far in evidence is appropriate and gives such detail as is necessary, referring to Bridgefoot Street, referring to Vincent's Street flats complex, referring to a café on Meath Street and detailing other members, or other people present. So, these matters are such detailed and there's no -- it should be admitted in evidence without the necessity of furnishing PULSE records even though they are -- even if redacted."

29. The Court is slightly surprised that there should be any great controversy about this issue at this stage. It is hard to see how entries made by Garda McAvinue after his various encounters could assist the defence in mounting a case or assist them in

undermining the prosecution case. By the same token, the Court would be surprised if PULSE records made after encounters with an individual of the nature of the encounters dealt with in the statement of Garda McAvinue contained information to which privilege would attach. The Court notes the assurance of prosecution counsel to the trial judge that he reviewed the material and satisfied himself that there was nothing there that would assist the defence and that to redact the PULSE entries that one would be left with the same content as formed the statement of Garda McAvinue. If the defence was not happy with what was being stated then the appropriate course would have been to request the trial judge to review the entries. There was no such request and in the absence of same, in the view of this Court the trial judge was entitled to rule on the matter in the way that she did. This ground of appeal therefore fails.

30. Accordingly, the Court has not been persuaded to uphold any ground of appeal and so the Court dismisses the appeal and affirms the conviction. .