



THE COURT OF APPEAL

Record Number: 254/19

Neutral Citation Number: [2021] IECA 87

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

GRAHAM CORBALLY

APPELLANT

JUDGMENT of the Court delivered on the 25th day of March 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 22nd October 2019 the appellant was convicted of three counts, namely, possession of a firearm in suspicious circumstances; possession of ammunition in suspicious circumstances, contrary to section 27A of the Firearms Act 1964, as substituted by section 59 of the Criminal Justice Act 2006 and as amended by section 38 of the Criminal Justice Act 2007; and possession of a firearm without a firearms certificate contrary to section 2 of the Firearms Act 1925, as amended.

Background

2. On the 18th January 2017 members of An Garda Síochána attended the Johnstown Gardens area in Finglas on foot of information that there was a person present in possession of an illegal firearm. Upon arrival at the location, Sergeant Mullan observed the appellant standing on the footpath. He and Detective Garda O'Hare alighted from the garda vehicle and approached him. The appellant ran away and a chase ensued. Sergeant Mullan observed that he was holding a bulky item within his jacket. Upon reaching number 115 Ballygall Parade, Mr Corbally ran into the front garden, removed the package from inside his jacket and threw that into the rear garden. The package was described by Sgt. Mullan as being shotgun shaped, wrapped in plastic and with green electrical tape. He then jumped the garden wall to access the rear garden, retrieved the package and threw the package into the garden of number 113, he again jumped over the wall into that garden from where he threw the package into the rear garden of number 121. Sergeant Mullan remained there to secure the item and directed his colleague as to the appellant's direction of travel. The appellant travelled towards the Ballygall Crescent area

where he was apprehended by Gardaí. Sergeant Mullan retrieved the package from the rear garden of House 121. An examination of the items found was carried out at Finglas garda station. The items found included a sawn-off shotgun and several rounds of ammunition within a latex glove.

3. This appeal centres on the chain of evidence concerning a swab taken from the appellant for the purpose of DNA analyses. The background lies in a buccal swab taken by Garda Geraghty while the appellant was detained on foot of an authorisation granted pursuant to s.13(2) of the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014. The swab was conveyed to Forensic Science Ireland for analyses which disclosed that the DNA profile obtained from the swabs taken from the shotgun and from the inside of the latex glove matched that of the appellant.
4. The first point raised is that the sample was placed in a sealed pack and labelled BG1, which was then marked as exhibit 11 at trial, however, exhibit 11 was an empty plastic bag which bore no markings of BG1. Secondly, it is argued that the respondent failed to recall Garda Geraghty in order to identify an 'FTA' card from which the DNA sample was generated.
5. No issue is taken with the authorisation granted, the conveyance of the exhibits to Forensic Science Ireland or the subsequent analyses. Consequently, the appellant relies on a single ground of appeal in the following terms:

"The learned trial judge erred in law and in fact in refusing an application by counsel for the appellant in relation to the chain of evidence concerning the DNA sample of the appellant in circumstances where documents were lost, misplaced or not properly retained in accordance with best practice and procedure as is required in a criminal trial, therefore resulting in all the circumstances of an unsafe and unsatisfactory conviction."

The DNA evidence

6. Garda Brian Geraghty gave evidence that on the 18th January 2017 he took a buccal swab from inside the appellant's mouth. The process involved the witness taking a swab from a sealed container, swabbing the inside of the cheek, replacing the swab in the container, sealing the container and the entire swabbing kit is then sealed. In the present case, the item was labelled as BG1. Garda Geraghty handed the kit to Garda Redmond O'Leary, the exhibits officer.
7. In cross-examination, Garda Geraghty accepted that the exhibit handed to him was an empty bag which did not have BG1 written upon it and he could not say definitively that the bag handed to him in evidence was the bag in which he had placed the swabbing kit.
8. Garda O'Leary gave evidence that he transferred BG1 to the Forensic Science Laboratory on the 27th January 2017 and handed it to Ms. Ciara McCahey, Executive Officer of Forensic Science Ireland.

9. Ms McCahey gave evidence that she received a bag bearing the marking BG1 and what she described as an FTA card of the appellant on the 27th January 2017 from Garda O'Leary. She placed a sticker on the bag bearing the laboratory ID: C17/00706/002/01. The bag was transferred by her to Dr Hilary Clarke on the same date by way of a "person to person transfer". The witness explained that an FTA card is a DNA sample contained on a piece of paper, together with other written details.
10. Dr Hilary Clarke was asked about BG1, described as C17/00706/00201 and identified a tamper-evident bag in which the FTA card was originally contained. She confirmed that she opened the bag, which she identified as BG1 which came into the lab on the 27th January 2017 containing an FTA card with the appellant's swab on it, which she analysed.
11. She explained that the laboratory retains the FTA card and the empty bag in which it was contained is returned to the exhibits officer. The card itself was destroyed, however, a photocopy of the card was maintained and was exhibited during the voir dire. The card contained information concerning the appellant, such as his date of birth, the date the sample was taken and by whom.
12. Counsel for the defence argued that there were lacunae in the chain of custody which rendered the DNA evidence inadmissible.

The trial judge's ruling

13. The trial judge summarised the salient question as being whether she could be satisfied to the standard of beyond reasonable doubt that the copy of the FTA card that Dr Hilary Clarke worked on contained the information taken by Detective Garda Geraghty on the 18th January 2017. In concluding that she could be so satisfied the trial judge outlined the relevant evidence as to chain of custody as follows:-

"Detective Garda Geraghty's evidence confirms the steps taken by him with regard to the sample from Graham Corbally and the information contained on the exhibit copy confirms and is supportive of that evidence. I have direct evidence from Detective Garda O'Leary, Ms McCahey and Dr Clarke with regard to the receipt of the bag marked BG1, that is Brian Geraghty, which ultimately was handed to Dr Clarke which she confirmed and which she references in her report as item No. BG1 which is linked with number generated by Ms McCahey, C117/00706/0024/01 and refers to the FTA card of Graham Corbally. Dr Clarke, in her evidence, suggested the absence of BG1 on the bag before the Court suggests that that bag has now gone missing. The Court knows that the evidence bag before the Court, the suggested second bag, has the number C117/00706/0024/01 as well as 11978 on it which a) are linked to BG1 and Dr Clarke's report and b) the reference C117/00706/0024/01 is also marked on the copy of the FTA card taken by Dr Clarke of the original FTA submitted to her in BG1, as per her evidence. Number C, the copy of the FTA cards marked 27/01/2017 by the Forensic Science Laboratory and was received by them as tested by Dr Clarke and dated the 18/01/17 in which a swab was taken by Detective Garda Geraghty of the accused. The date in which the swab was taken by Detective Garda Geraghty of the accused. D) I further note

that the copy FTA is not signed or was it required to be signed by the person taking the sample, it simply requires the name and registration is required and that is filled in. The section 13 explanatory note requires a signature and it is seen that on that document, Detective Garda Geraghty signed his name to it and this was identified by Detective Garda Geraghty in evidence.

Having considered the evidence, the submissions and the law as set out, in answer to the question already posed, this Court is satisfied to the required standard that the prosecution have established that it was one in the same item as was originally taken by Garda Geraghty and ultimately examined by Dr Clarke. Is it lamentable that the original BG1 bag is not available in its originating form? Yes, of course it is. But in this case, it is not fatal to the prosecution case when one considers all the evidence which the Court has heard in this regard, in particular the direct evidence of the gardai from Detective Garda Geraghty to Detective Garda O'Leary to Ms McCahey to Dr Clarke."

Submissions of the appellant

14. The appellant argues that there is an absence of a direct evidential link from the taking of the sample by Garda Geraghty to the exhibit before the Court. In particular, the appellant points to the lack of evidence given by Garda Geraghty in relation to the completion of an FTA card.

15. In arguing that the prosecution failed to prove the clear chain of custody the appellant refers to *Whelan v. DPP* (Unreported, ex tempore, High Court, Ó'Néill J., 2nd February 2009) where the Court held that there was a significant gap in the evidence relating to the issuing of a certificate of analysis. The Court stated as follows:-

" [I]f a person may be convicted essentially on the basis of a piece of paper, it is of crucial importance that the steps that are taken to produce that result are taken properly and, to use a famous and popular phrase, with openness and transparency.

Otherwise, the only means accused persons would have of defending themselves would be to attempt to call evidence to prove or demonstrate that steps were not taken properly. That is why, when it is possible to convict substantially by means of certificate evidence, the necessary preliminary steps must be proven. In other words, it is not tolerable to have substantial gaps in the evidence leading to the tendering of the certificate."

16. The appellant further refers to *The People (DPP) v. Hawkins* [2014] IECCA 36 where Charleton J. held that the chain of evidence was dependent on the standard of proof in criminal cases, that the jury should be satisfied of the provenance of relevant exhibits beyond reasonable doubt and that such facts are proven beyond a reasonable doubt.

Submissions of the respondent

17. The respondent says that there was no inconsistency in relation to the evidence concerning the appellant's DNA sample, that is BG1. The relevant information on the FTA

card corresponded with the information which had been provided throughout the trial by other witnesses including the appellant's date of birth and other relevant details which dispelled any concerns that the card examined related to anyone other than the appellant.

18. Alternatively, even if there were any inconsistencies, it is submitted that the trial judge was correct in admitting the evidence. The respondent refers to *The People (DPP) v. McDermott* (Unreported, Court of Criminal Appeal, 17th June 2002) where the Court accepted that there was an inconsistency in the evidence but as it was an inconsistency in a peripheral matter the prosecution case was not fatally damaged as there was ample evidence with which the jury could have been satisfied on the matter they required to be satisfied of in this regard.
19. The respondent further refers to *The People (DPP) v. Hawkins* [2014] IECCA 38 where Charleton J. stated that *Whelan v. DPP* (Unreported, ex tempore, High Court, Ó'Neill J., 2nd February 2009) was not authority for the proposition that wherever there is a gap in the proof by the prosecution of the physical custody of an exhibit that evidence resulting from this should be excluded. Charleton J. stated that it was not necessary to call every person who at any stage had handled items of physical evidence.

Discussion

20. There is no issue concerning the procedure adopted by Garda Geraghty in respect of the taking of a buccal swab. The sealed bag was, on his evidence, labelled and handed to the exhibits officer who conveyed the exhibit to Forensic Science Ireland for examination. The swab in a sealed container was itself contained in a sealed bag assigned an ID number by the laboratory. The sealed bag was then opened by Dr Clarke. She confirmed that she opened the bag and noted that fact on the bag itself. The empty bag was returned to the exhibits officer. However, the bag which was ultimately exhibited at trial did not contain the number and letters BG1 and so it appears that the bag which originally contained the forensic kit, which included the buccal swab, was missing.
21. Secondly, Mr Colgan, SC for the appellant complains that Garda Geraghty ought to have been recalled and the FTA card put to him to enable him to identify the writings on the card. There was no evidence adduced concerning the information on the card and Mr Colgan says as this was not done and as the original bag containing the exhibit was missing, the chain of evidence was fundamentally flawed and fatal to the respondent's case. Thus, it is said the trial judge erred in failing to exclude the evidence.
22. Mr McGillicuddy, BL for the respondent invites us to accept that the forensic kit used by Garda Geraghty contained the FTA card and says this may be gathered from Garda Geraghty and Dr Clarke's evidence. The original card was destroyed pursuant to the Act but a photocopy of the card was received in evidence as part of the voir dire. This showed the card to contain the name Graham Corbally, the Garda who took the sample; Garda Geraghty, the appellant's date of birth, the location of the sampling, being Finglas garda station, that the person from whom a sample was taken was male, the laboratory ID number and the date received there being the 27/01/17. That information was also given in evidence.

23. In her evidence Ms McCahey explained the nature of an FTA card and her involvement and said:-

"Q. And when that refers to an "FTA"., what does "FTA" mean?

A. "FTA" is the name of the company that produce the FTA cards, which are the cards used to *take* DNA samples. (our emphasis).

Q. So, the DNA sample is actually on the card; is that correct?

A. Correct.

Q. And that is contained within that plastic bag that you received on that date?

A. Correct.

Q. And I think you've outlined then in relation to your duties, that in relation to that FTA card, you then provided that to Dr. Hilary Clarke on the 27th January 2017; is that correct.

A. That's correct."

In cross-examination, when asked as to the precise nature of an FTA card, the witness said:-

"A. The FTA card is a DNA sample contained on a piece of cardboard-on a piece of paper, with the details of the suspect or injured party's name, the date of sampling, their PULSE ID, the PULSE ID of the case, and the name of the person who took the sample.

Q. ...And was that card there?

A. It was.

Q. And where is that card now?

A. I received that card from Garda O'Leary and transferred it directly to Dr Hilary Clarke, so in what we call a "person-to-person transfer"

She went on to explain that the FTA card is a card with information contained thereon and:-

"A. -in the top left-hand corner there's a section for which a cotton bud swab has been taken from a cheek and placed onto the card.

Q. Okay.

A. The swab then, in general, is also included inside the package in a separate envelope.

Q. Okay. And, we don't have these at the moment? Do you know of---

A. I don't have them. I would have handed that directly to Dr Clarke.

Q. Okay. And that was on the 27th January you handed that to Dr. Clarke?

A Yes."

Dr Clarke stated in respect of the FTA card:-

"A. ...It's just a paper card on which you rub a swab around the inside of a person's mouth, you transfer it onto the card and that is what we use to generate a DNA sample from."

Conclusion

24. The following may be said; Garda Geraghty did not give evidence that he completed the FTA card, moreover, it appears that the original bag containing the swab and kit was not before the court. The question which arises is whether these deficits give rise to an issue concerning the integrity of the evidence.

25. In this regard Hardiman J. in *The People (DPP) v. McDermott* (Unreported, Court of Criminal Appeal, 17th June 2002), stated the following at para. 3 :-

"However the question is: is this an inconsistency significant to this case such as it makes it impossible for the jury rightfully to be satisfied that the material analysed by Ms Hughes was the material seized by the Gardaí who came up to the accused in the car park as described."

26. In *The People (DPP) v. Hawkins* [2014] IECCA 36, the Court of Criminal Appeal considered the issue of maintaining the chain of evidence and said that it was not necessary to call every person who handled or had custody of evidence. In giving the judgment of the Court, Charleton J. referred to the decision of Ó'Néill J. in *Whelan v. DPP* (Unreported, ex tempore, High Court, Ó'Néill J., 2nd February 2009) and said:-

"That was a case in which there was no proof, beyond the appearance of a common name, that the items in the bag produced during the course of the prosecution case had come from the accused man. Such an approach is not acceptable. Neither is it necessary, however, to call every person who at any stage had handled, or who had custody of, items of physical evidence. The standard to be applied is the standard that failed in the Francis Whelan case, namely proof of facts relevant to the charge beyond reasonable doubt. This was made clear in an *ex tempore* judgment of this Court in *the People (DPP) v. Michael McDermott* (Unreported, ex tempore, Court of Criminal Appeal, Hardiman J, 17th June, 2002)."

27. On examining the evidence adduced concerning the chain of custody of BG1, Garda Geraghty took the swab using the appropriate equipment on the 18th January 2017, he labelled the item BG1 and gave it to the exhibits officer who in turn on the 27th January

2017 handed it to Ms McCahey of Forensic Science Ireland. On the same date Ms McCahey handed it directly to Dr Clarke.

28. Ms McCahey stated without contradiction that she received the FTA card from the exhibits officer and transferred it directly to Dr Clarke. She also said that the swab is, in general, included in the package in a separate envelope. Ms McCahey placed a sticker on the bag she received from the exhibits officer bearing the laboratory ID, which ID was also on the FTA card itself.
29. Further additional information was contained on the FTA card which corresponded with the evidence given by the witnesses, which included details in respect of the appellant and the taking of the sample.
30. Whilst it may be prudent to expressly state who transferred the material from the swab onto the FTA card, what is quite clear from the evidence is that there was no break in the chain of evidence regarding the sample. This is confirmed by the evidence of Ms McCahey and Dr Clarke. Ms McCahey received the bag from the exhibits officer, labelled the bag and handed it directly to Dr Clarke.
31. The details on the FTA card corresponded with the evidence given by the witnesses, and on the evidence, the card was clearly included in the kit furnished to the forensic science laboratory.
32. Insofar as the absence of the original evidence bag is concerned, this did not, in our view, impact on the integrity of the evidence. Again we look to the actual evidence adduced, the bag was conveyed by the exhibits officer to the laboratory, evidence was given of it being received there and labelled with the laboratory's ID and handed directly by way of person to person transfer to Dr Clarke. We have no hesitation in concluding that the trial judge properly exercised her discretion in permitting the evidence.
33. Any possible concerns regarding the completion of the FTA card or the absence of the evidence bag, being the matters relied upon by the appellant were foursquare within the jury's consideration, to assess and weigh and conclude if the required standard of proof had or had not been reached by the respondent. This was not a case where there was an absence of proof that the swab analysed was the swab taken from the appellant, on the contrary, the necessary witnesses and the necessary evidence were adduced in order to prove the chain of evidence.
34. Consequently, the appeal is dismissed.