



THE COURT OF APPEAL

[61/19]

The President

Edwards J.

Kennedy J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)

RESPONDENT

AND

KEVIN COADE

APPELLANT

JUDGMENT of the Court delivered on the 13th day of June 2023 by Birmingham P.

Introduction

1. On 25th February 2019, following a trial in Cork Circuit Criminal Court, the appellant was convicted of the offence of burglary. He was subsequently sentenced to a term of seven years imprisonment, with the final two years of the sentence suspended, the sentence dated from 2nd August 2018. He has appealed against conviction. The notice of appeal indicates that the conviction is challenged on the following grounds, which are paraphrased:

- (a) the trial judge erred in law and in fact in refusing the appellant's application to exclude the evidence of identification arising from the viewing of CCTV footage by Mr. Michael Finn, in circumstances where there was a failure to hold an identification parade by Gardaí, with no reasonable explanation as to why such a failure occurred, and in circumstances where the trial judge permitted the Director, having closed her case on the issue of admissibility of the CCTV footage in the *voir dire* on that issue, to call further evidence, which was not contained within the book of evidence;
- (b) the trial judge erred in law in refusing the application for a direction; and,
- (c) the trial judge erred in law and in fact in failing to give a *R v. Lucas* [1981] QB 720 "Lucas" direction to the jury, notwithstanding a requisition made by counsel on behalf of the appellant.

There was a fourth ground included in the notice of appeal, but it has been indicated that the appellant is no longer proceeding on that ground.

Background

2. The background to the trial was to be found in events that occurred on 25th July 2018. On that occasion, a burglary took place at premises situated at 1, Annmount, Friars Walk, Cork, the home of Mrs. Nora Power. This house is located in a narrow avenue or terrace off Friars Walk, and the appellant's home at the time was at 2, Friars Walk – he essentially resided two doors down

from the injured party. The appellant had been a close neighbour of Mrs. Power for at least four or five years.

3. On 25th July 2018, the injured party went for a walk with another woman, Mrs. Eileen Breen, one of her neighbours. They went for their walk at about 8.45pm, and when they returned, they found Mrs. Power's house being burgled as two men left the scene. The two men ran from the house, *via* Annmount, turned left onto Friars Walk, which brought them in the direction of Ballyphehane, and past a local public house, the Friars Walk Tavern, which had CCTV cameras outside the premises.

4. CCTV footage was harvested from the pub, which showed two men, one of whom was wearing shorts and the other of whom was carrying bags; on the prosecution case, the latter was the appellant. The time on the CCTV at that point was shown as 9.17pm, though the CCTV was running about three minutes slow. On 1st August 2018, this CCTV footage was shown to another resident of the area, Mr. Michael Finn, who was also a local public representative.

5. As the burglars were making their way from the scene in the direction of the Friars Walk Tavern, they came across three men who did their best to stop them. There was a degree of confrontation in particular with the man carrying the bags (the man who, on the prosecution case, is the appellant). At that point, a Canadian tourist who was on the other side of the road also saw the two men, and she tried to take a photograph of the man with the bags. There was another person in the vicinity, Mr. Eoghan Finn, who lives in the area and is a nephew of Mr. Michael Finn.

6. The appellant was arrested and interviewed on 2nd August 2018. For the most part, he exercised his right to silence. However, of some significance is that he was told there were witnesses and asked whether he would stand in an identification parade and he answered that he would. In fact, no identification parade was conducted. Also of note is that the appellant was spoken to by Gardaí at his home at approximately 11.15pm on the night of the burglary. He was asked where he had been between 8.30pm and 10.30pm that evening, and he told Gardaí that he had been assisting a man who was doing some work at his house and that that man had been there until 9.30pm. He said that then he, the appellant, had left to go to Ballyphehane Park.

7. The prosecution put in evidence that CCTV footage from the Friars Walk Tavern was viewed by Gardaí for the period 8.30pm to 10.30pm. Garda evidence was that, while watching, they did not see any person wearing a yellow top or a yellow Liverpool jersey, which is what the appellant was wearing when he returned to his home with his son later that night. The prosecution interest in this was to establish that the account given by the appellant to Gardaí was false.

8. One of the witnesses who saw the burglars or who had contact with them was Mr. Richard Ormond from Wexford. He gave a description of the man with the bags, referring to the fact that he was very gaunt, with pointy features, that he was wearing generic tracksuit-type clothing, that his hood was up, and that he was in his late 30s or early 40s. Mr. Ormond's statement to Gardaí referred to the fact that the man was about 5ft 8ins in height, very slight, with clothes hanging off him. Mr. Ormond observed that he got a fairly good view of the man. Another witness, Mr. Eamon Nolan, also from Wexford, was one of the three men who had a confrontation with the burglars on the night in question. In his evidence-in-chief, he said he saw the face of the man, and described it as very gaunt, with a bit of stubble, and noted that his eyes looked very sunken. In his statement, he referred to the fact that he had got a good look at the face and described the man as being in

his late 30s, 5ft 10ins in height, and very slim. The next witness was Mr. Eoin Lettice, who was in company with Mr. Ormond and Mr. Nolan. Unlike the other two men, Mr. Lettice was from Cork. In Mr. Lettice's examination-in-chief, he referred to the fact that the man had an unshaven or stubbly face and was gaunt in appearance. Ms. Anne Murray was visiting from Canada. She described the man the prosecution contends is the appellant as 20ish/30ish with scraggly facial hair and a slender face. She stated that he had a crowbar. She followed him to try to take a photograph, and she stated that he raised the crowbar at her in a gesture she believed to be threatening, and then he ran up the road at speed. Mr. Eoghan Finn was also a witness. He was on his way to visit his grandmother who lived at 6, Annmount. Mr. Eoghan Finn had stopped at Friars Walk to talk to someone. At one point, the burglar was directly across the road from him.

The Identification Parade Issue

9. In circumstances where the prosecution proposed to rely on the identification evidence of Mr. Michael Finn, who had viewed the CCTV footage, a *voir dire* was conducted at trial. At one point, there were exchanges between the Court and prosecution counsel, with the judge asking why an identification parade had not been conducted. Counsel indicated she did not have the answer and asked to call Detective Garda Cormac Crotty. The essential issue raised in the *voir dire* was a contention that, in circumstances where the accused had indicated a willingness to stand in an identity parade, and where there were a number of eyewitnesses who could have been asked to view a parade, that a parade should in fact have been held.

10. As to the witnesses who might have been considered for the viewing of a parade, some had had a better opportunity than others to make an identification, some were better candidates than other would-be identifiers, and some would be more available and others less available. All of these issues were canvassed to some extent in the course of the *voir dire*. In that regard, it is to be noted that Detective Garda Crotty was asked why, in a situation where the appellant had, as it was put, sought an identification parade, that it was not granted. The following exchange took place:

"Detective Garda Crotty: . . . I suppose, after the interviews were concluded, we were aware that the three gentlemen who had confronted him -- my understanding was they weren't available. We had the Canadian lady who was also gone from Cork. As you mentioned, my lord, the two elderly ladies, we didn't consider even bringing them because they were quite shocked.

Judge: Yes, I accept that.

Detective Garda Crotty: And the people who had identified him knew him -- was more recognition identification as opposed to visual identification."

The judge then ruled on the matter as follows:

"Very good. The law, as [counsel for the appellant] says, is quite clear. The primary duty is to organise an identification parade. The reason for that is that there is in-built in that protection for the accused, in that there is an independence as to the selection of the members of the ID parade, who gets involved and who's put on the parade and there's a

record kept of it. I think *Duffy* is the original underpinner of that. Now, in this case, the incident is alleged to have occurred on the 25th of July.

. . .

[Mr.] Ormond and [Mr.] Nolan, now, there is no doubt that what happened as people went down Friars Walk, was sudden, unannounced and as one fella said, 'There was a commotion, we thought we were getting involved in a domestic.' But two of the lads got involved and got put off by the presentation of the crowbar and they communicated with each other one to the other to desist. I admit that one of them, I think it was [Mr.] Lettice, either [Mr.] Lettice or [Mr.] Nolan said that they had a good view of the face and [Mr.] Finn, who is from the area, had a very good view of the face, was looking up.

Now I have the evidence of Garda Crotty who told me why in his view the identification parade was not undertaken, even though it was consented to by the accused. He says, that in view of what the Wexford people said, in view of the old ladies, the girl in Canada and the possibility of recognition, that they did not think it was possible, probable or likely to put forward an identification parade. In the circumstances, I think the guards were justified in these particular circumstances given the events, the time – I think they were justified in moving to a secondary form of identification, and that form has to be presented to the jury in a manner that is least prejudicial to the accused, but I do think it can go before the jury."

11. While the judge permitted the identification from Mr. Michael Finn to go before the jury, it was not a total win for the prosecution. There were two Gardaí who had viewed the relevant CCTV footage and were in a position to give recognition evidence, but the judge refused to permit this to happen, commenting:

"In a case like this, there is no doubt but if the State go for the secondary identification, they cannot bolster the secondary identification."

Prosecution counsel responded, "I accept that, judge".

12. At trial, and again before this Court, there has been reference to the case of *DPP v Mekonnen* [2011] IECCA 74. However, it must be pointed out that what was in issue there was not a failure to hold a formal identification parade, but instead, an informal identification made by the complainant in the area of Busáras where there was an expectation that the suspect might be going to take a bus. That choice of a formal identification parade, as against an informal identification opportunity, has been considered by the courts on a number of occasions. Locations which have been at issue in that context have included the surrounds of courthouses and labour exchanges/social welfare offices. As *Mekonnen* reiterated, the courts have indicated a clear preference for a formal identification parade, and it is easy to understand why that would be so. In a case of an identification made on the occasion of an informal opportunity, there would be little record of how many others were present and whether they were of a similar age, appearance, social background and were similarly attired.

13. However, the question of whether one can resort to available CCTV footage raises different issues. In the case of CCTV footage, jurors can see for themselves what was viewed by the witness, and as a minimum, they will be in a position to make an assessment of how good or otherwise the opportunity available to the person was when asked to view the footage. In some

cases, there will be downsides associated with utilising available CCTV footage. Those in a position to identify a person may be members of An Garda Síochána, which presents its own difficulties, difficulties that are capable of being overcome, and have been overcome, but which are there, nonetheless. However, in this case, the person who was available to see whether he recognised anyone on the footage was a neighbour of the suspect, someone who had lived close by him for several years, and somebody who had dealt with him on occasions in relation to constituency matters. It seems to us that, in those circumstances, there is no reason to regard the CCTV footage viewing as necessarily inferior to what would occur at an identification parade.

14. The starting point for consideration of this general issue is the difficulty associated with identification/recognition and the awareness that mistakes can and have been made. The other difficulty with classic identification by somebody who has witnessed a crime, or indeed been a victim of a crime, is that individuals vary enormously in their ability to identify or even to recognise. By the same token, some people are very good at giving a description of someone they have met, while others will struggle to provide any kind of a description, even of someone they know very well and perhaps deal with on a daily basis. If the aim is to secure reliable recognition evidence, it does not seem to us that that objective is more likely to be achieved and the risk of wrong recognition minimised if individuals who have had a fleeting encounter are brought to a Garda station to view a parade, as distinct from letting someone view footage of an incident which has been recorded. In the circumstances of this case, we believe the judge was correct to admit the evidence of Mr. Michael Finn and it was not necessary that that evidence should be excluded by reason of the fact that no identification parade was organised.

The Application for a Direction

15. There was a direction application at trial based on a number of strands. These were as follows:

- (i) this was an identification case with all the attendant difficulties;
- (ii) the burglary would have needed 10 to 15 minutes at minimum, having regard to the fact that the premises were ransacked, and it could also be established that the burglary took place between 8.58pm and 9.19pm actual time or between 8.55pm and 9.16pm by reference to CCTV footage. In light of the evidence of Mr. Ray Kelleher, who indicated in his evidence-in-chief that the appellant was in his house most of the time that he was there, it was established that Mr. Kelleher was there well after 9pm, not having finished his dealings with the appellant's home until about 9.16pm as *per* the CCTV, so, it was argued, there was really no opportunity for the appellant to have committed the burglary;
- (iii) the frailties of an individual's recollections were laid bare by the evidence of Mr. Kelleher whose timings in relation to certain matters were shown to be in error, as was his evidence in relation to the route that he took home, and these were errors on the part of a witness whose honesty was not in issue;
- (iv) there was conflict or inconsistency between the evidence of Mr. James Sheehan, another neighbour who knew the appellant and gave evidence of having seen him at 8.50pm when he was wearing baggy tracksuit bottoms of Adidas brand with

three light blue stripes at the side. Mr. Sheehan also gave evidence of seeing the appellant once more at 10.15pm when he was wearing what appeared to be the same tracksuit bottoms. However, there was Garda evidence that at about 10pm the accused was wearing a navy tracksuit with three white stripes.

16. As we have referred to, at the close of the prosecution case, there was an application for a direction. At the risk of repetition, the direction application was focused on the fact that this was an identification/recognition case with all the difficulties attendant on that. Attention was drawn to other aspects of the evidence which it was said amounted to inconsistencies in the prosecution case, including the fact that, if one had regard to the evidence of Mr. Kelleher, the opportunity that would have been available to the accused to commit a burglary would have been very limited. That was particularly so if one accepted that, as appeared to be the case, the burglary must have taken a not insignificant period of time, given that the premises had been gone through and had indeed been ransacked. Again, attention was drawn to the different descriptions of an individual wearing a generic tracksuit and an Adidas tracksuit, and one with three white stripes and three blue stripes.

17. The prosecution submitted that the case against the appellant was strong, and that Mr. [Michael] Finn's evidence had been convincing. In that regard, when ruling on the identification/recognition *voir dire*, the judge had commented on the good quality of the footage, and noted that somebody who knew the person shown on the footage would be in a position to make a recognition of that person. Having heard the application for a direction, the judge commented that he was of the view that there was sufficient evidence to allow the case go to the jury. We agree with his conclusions in that regard, in that the issues raised in support of the application for a direction were properly matters to be considered by the jury.

The Application for a Lucas Direction

18. While it is said that the prosecution case relied heavily on visual identification, and specifically on the evidence of Mr. Michael Finn, the appellant points out that there was another strand to the prosecution case, relating to the fact that the appellant had given an incorrect account to Gardaí on the night of the burglary, and that in doing so, had told lies.

19. The background to this issue is to be found in the fact that there was evidence at trial from Garda Jeremy Hurley of meeting with the appellant and taking a memorandum of interview from him at 11.10pm on the evening of the burglary. There, he recorded questions and answers. In the course of the exchanges, Garda Hurley asked a question as to whether the appellant had left his home at 2, Friars Walk, at any point between 8.30pm and 10.30pm, and if so, where he went. Garda Hurley noted the appellant's answer as being that the appellant said he went to a location called Reendowney Place at about 9.30pm to collect his son, and that he had walked straight out Friars Walk to get there. He said his son was not actually at that location, that he went to the park and found his son there, by the park, and that they came back up straight to his house on Friars Walk. He said he got home about 10.15pm. While being interviewed, the appellant was wearing a yellow Liverpool jersey and navy Adidas tracksuit pants. The appellant confirmed that these were the clothes he had been wearing when he went to collect his son. He also indicated he had a black jacket with him which had no hood.

20. This evidence from Garda Hurley becomes potentially significant when considered in light of the evidence of Detective Garda Maurice O'Connor, who gave evidence that he had reviewed footage from the Friars Walk Tavern which showed Friars Walk and would have shown the route the appellant would have had to take between his home and Reendowney Place. He had viewed the footage on the camera from 8.50pm until 10.17pm in CCTV times. Having viewed all of the footage, he could say and give evidence to the effect that there was no sign of a man wearing a yellow top and blue tracksuit bottoms before 10.17pm, at which point a male wearing clothing of that description came across the camera, travelling from the Ballyphehane area towards the Annmount direction. The person so dressed was with a child on a bicycle. The matter was touched on by prosecution counsel in the course of her closing remarks. She said:

"So, that is effectively the State's case against Mr Coade, right. Centrally and importantly, it's the identification by Mr [Michael] Finn of Mr Coade, and as I say, that's a matter for you to assess yourself and then secondly, what Mr Coade told the gardaí and how that just doesn't bear out on the CCTV footage that you will have an opportunity to see yourself."

21. It is the case that in the course of her closing remarks, prosecution counsel drew attention to what the appellant had to say when spoken to by Garda Hurley, and reminded the jury that they had heard evidence from Detective Garda O'Connor. Having done that, she then indicated that central and important in the context of the prosecution case, was the identification by Mr. Michael Finn of the appellant. Secondly, there was what the appellant told Gardaí and how that was not borne out on the CCTV footage that they would have an opportunity to view themselves. In the course of his closing remarks, defence counsel dealt with the issue in these terms:

"They [the State] say to you, actually look, he must have given an incorrect account of his movements. I don't know. He certainly was seen up around, I suppose, further along Friars Walk heading towards where his mother's house is in Reendowney. He told the guard he was going to pick up his young fella. I think he told the guards later that, 'Well, I was actually going up to pick up my young fella.' The guards say, 'Well I've looked at the footage and there's no fella with a Liverpool shirt the whole night.' But bear in mind, he actually told the guard when he was up at the house, he actually had a kind of a dark coat over him, so maybe he left that up at his mother's, I don't know. The State wants you to take the conclusion that he must be lying. They want you to take the most sinister view of that very minor fact. But you see, people can make mistakes. You saw Mr Kelleher make a mistake himself about it, and he was doing his best, about which way he had gone home. You don't actually have to adopt the most sinister view possible and say oh, this man is trying to -- and he was correct because he said, 'Well, do you know I think it was about half 9.' Well, when you bear in mind the timeline of the CCTV, 9.16.50, when you see Mr Kelleher's truck coming back down at three minutes was actually about 20 past 9, so my client was closer to the truth than the gardaí are trying to say to you, 9 o'clock, a lot closer actually. So, you know, should you convict on that basis? I'd say absolutely not. Look at the ID and look at the evidence. Is it sufficient? I'd respectfully submit to you, you'd have to have a reasonable doubt in this case."

22. In the course of his charge to the jury, the judge did not address the question of a *Lucas* direction. This gave rise to the following exchange between defence counsel, by way of requisition, and judge:

"Counsel for the appellant: One other matter, my friend, I think, Judge has relied upon a potential lie so to speak in terms of, I think you should give the jury a *Lucas* warning, Judge, because there's an issue arising in terms of my client's movements on the night. Evidence is given that no man is seen going up with a yellow jersey between 10 to 9 and 20 past 10.

Judge: Well there's no evidence that anyone told any lie.

Counsel for the appellant: Yes, Judge, but then put in as part of the memo, Judge, now taken on the night is that my client's movements should have brought him back -- brought him that way. So, if my friend --

Judge: I don't see there's any *Lucas* warning in this case."

23. This was a case where the trial judge might have decided to warn the jury against jumping to conclusions if they were of the view that the accused had told lies, though it must be doubtful whether a full and elaborate modified *Lucas* direction would ever have been required. There is no doubt that the prosecution was interested in the fact that the accused had given an account to Gardai on the night of the burglary which appeared to be inaccurate. It must be said that the issue was dealt with by prosecution counsel with something of a light touch. The defence position was not to accept that lies had been told, or even that lies might have been told, but to suggest there was an innocent explanation for what was said. If it was indeed the case that what was being said was wrong, then it was argued that it had not been established that lies had been told. Instead, it was the defence suggestion that any apparent conflict between what was said to Gardai and what had been viewed on CCTV was explicable, either in terms of the accused having made a mistake, or perhaps in terms of an error on the part of the Gardai when viewing the CCTV. In these circumstances, it seems understandable that the judge's immediate response, by way of interjection, was that there was no evidence that anybody told lies.

24. The question arises as to what precise use the prosecution was seeking to make of the conflict between the account given and the CCTV footage. The conflict did not go any way towards providing direct evidence of guilt so it would seem that the prosecution's interest was that the false account, if it was a false account, damaged the accused's credibility. It is true that the guiding line between evidence of guilt and damage to credibility may sometimes be a fine line, indeed it might be said that this is such a case. However, we are not of the view that the state of the evidence was such that it mandated the giving of a modified *Lucas* direction. When the issue was raised by way of requisition, there having been no attempt to raise it before closing speeches or before the judge's charge, it seems to us that it left the judge with a discretion to exercise. He might have decided to give the warning, perhaps in short form or diluted form, but he decided not to do so. We do not believe the judge is to be faulted in that regard. In these circumstances, we are not prepared to uphold this ground of appeal.

Decision

25. In summary, the position is that we have not been persuaded to uphold any of the grounds of appeal argued. We have not been persuaded that the trial was unfair or the conviction unsafe.

26. In the circumstances, we must dismiss the appeal.