



THE COURT OF APPEAL

Record Number: 58 2018

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

MARTIN WILSON

RESPONDENT

JUDGMENT of the Court (ex tempore) delivered on the 7th day of December 2018 by Mr. Justice McCarthy.

1. This is an appeal by the Director of Public Prosecutions pursuant to s. 23 of the Criminal Procedure Act 2010 (as amended) against an acquittal of the accused by the direction of the trial judge at Dublin Circuit Court on the 7th February 2018 on a charge of robbery and related charges. There is no doubt but that the injured party, a taxi driver, Mr. Rogers was robbed on the 30th October 2015 at Glenshane Close, Tallaght, County Dublin and, in substance, the issue is whether or not the accused was the culprit.
2. The accused was put into the charge of the jury and by agreement certain issues as to the admissibility of evidence were dealt with on the voir dire before the case was opened by the prosecutor. The issues to be determined were as follows:-
 - (a) The admissibility of any evidence of identification of the Respondent by gardai;
 - (b) The lawfulness of the seizure of the Respondent's suit while he was being detained on another matter; and
 - (c) The admissibility of evidence arising from the informal identification process that took place in the CCJ.
3. The salient evidence may be summarised as follows:-
 - (i) The injured party picked up the man in question (i.e. the culprit) outside the Black Forge pub on the Drimnagh Road at 20.25 on the evening of the offence. The Respondent lives in this general area.
 - (ii) The injured party described the man as being short and of medium build (a description which was not inconsistent with that of the accused person before the court). There was also evidence that the culprit and the Respondent were intoxicated at the relevant time.
 - (iii) The injured party described this individual as wearing a distinctive shiny grey suit. There was strong evidence showing that the Respondent had a similar suit at the relevant time. A similar suit was seized by the gardai during the investigation.
 - (iv) Upon reaching the passenger's stated destination he refused to pay the fare. The passenger gave the injured party a bus ticket while the injured party was seeking payment for the fare. The passenger stated that the bus ticket was in fact a €50 note. The injured party retained this bus ticket and gave it to gardai after the robbery.
 - (v) The prosecution intended to adduce evidence tending to show that the Respondent had used this ticket on a bus on the same evening. The person identified as being the Respondent boarded the bus at an area of Tallaght close to where his mother lived. The person identified as being the Respondent could be seen on the CCTV footage from the bus drinking and falling asleep, apparently intoxicated. It was submitted by the prosecution that the evidence reasonably identified the Respondent as being a suspect in the matter then under investigation. Also, the gardai were able to identify the Respondent as being the culprit from CCTV footage.
 - (vi) The CCTV footage obtained by the gardai during the investigation showed a man wearing such a suit at various relevant locations during the night in question. The Respondent was wearing a similar suit when arrested a week later. The clothing was ultimately seized by the gardai.
 - (vii) The Respondent failed to attend for a formal identification procedure. As a result, an informal process took place in the CCJ. The injured party identified the Respondent as being the culprit.
4. So far as the question of the admissibility of evidence of identification was concerned, the parties were referring to the evidence of three gardai who viewed CCTV footage from a bus, the Black Forge public house and the Eleanora public house (adjacent to which

the prosecution allege the accused hired Mr. Roger's taxi). The basis of objection to this evidence was primarily that its prejudicial effect exceeded its probative value because of the implication the accused was of bad character by virtue of the circumstances in which they came to know him.

5. It had been anticipated from his witness statement that the injured party, who had the opportunity of seeking to identify the culprit in what might be terms and informal identification, actually in this building, would give evidence to the effect that the accused was the culprit. But in the event he expressed considerable doubt as to that identification (as I inferred it primarily because of the lapse of time); that turn of events was not anticipated but it deprived the prosecution of some direct evidence of strong character. The case against the accused was accordingly based on circumstantial evidence, which, of course, can be of great strength as here. An appeal under the provisions in question lies, *inter alia*, in the following circumstances (as appears from a perusal of s. 23(3)(b)):

"A direction was given by a court during the course of a trial referred to in ss. (1) directing the jury in the trial to find the person not guilty where:-

(i) the direction was wrong in law; and

(ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

6. There was ample evidence in this case upon which a jury could be satisfied beyond a reasonable doubt of the accused's guilt. Having regard to the state of the evidence the trial judge, even absent any other factor, was accordingly wrong in law to direct an acquittal. The error was compounded by a second: he so directed an acquittal before any evidence had been heard by the jury and, in particular, as is the appropriate procedure, on application only at the conclusion of the prosecution case. He fell into error in doing so merely after the conclusion of the issues of admissibility and, indeed, thereby failed to afford one of the parties an opportunity to place her case before the jury.

7. We therefore allow this appeal and direct a re-trial.