



THE COURT OF APPEAL

Record No. 171/2016

**Mahon J.  
Edwards J.  
Hedigan J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**KEITH HUGHES**

**APPELLANT**

**JUDGMENT of the Court delivered on the 6th day of February 2018 by Mr. Justice Mahon**

1. The appellant has appealed his conviction of two offences committed on the 22nd May 2015 at a bookies premises in Bridge Street, Dundalk in Co. Louth. The two offences are:-

(i) robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and

(ii) possession in a public place of an article which had a blade or was sharply pointed contrary to s. 9(1) of the Firearms and Offensive Weapons Act 1990, as amended by s. 30 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

2. The appellant was sentenced on the 16th June 2016. In respect of both offences he received concurrent sentences of six years imprisonment with the final one year suspended, on conditions, for a period of two years post release.

3. On the 22nd May 2015 the appellant was alleged to have entered the premises Bar One Racing in Bridge Street, Dundalk. He confronted an employee in the premises, Paul McCourt, and stole a cash sum of €235. He was armed with a knife on the occasion. The entire incident was caught on CCTV footage. The premises was one of a number of premises within the same business group with its CCTV footage being operated and controlled centrally at its offices in the Ramparts, Dundalk.

4. Shortly after the incident, gardaí arrived at the Bridge Street premises to investigate. Garda Smyth then attended the premises at the Ramparts for the purposes of viewing and downloading the relevant CCTV images and there met one of the owners, Karen Savage [also referred to as Karen Ahearn]. He was given permission to do so but did not do so. He gave evidence that he noted the time and date and the sequence of events as they appeared on the CCTV footage and he said he was satisfied that they co-related with the version of events that had been provided to him shortly after the incident had occurred. He also said that he had secured the downloaded CCTV footage in a locker under his sole control pending the trial. The relevant CCTV footage was viewed by the jury in the course of the trial.

**The grounds of appeal**

5. Four separate grounds of appeal are argued on behalf of the appellant. They are summarised as follows:-

(i) the CCTV was admitted without proof;

(ii) issues relating to the admission of a photograph downloaded from the CCTV footage and the rejection of an application to recall Ms. Savage to the witness box;

(iii) the refusal to grant a direction at the close of the prosecution's evidence in relation to identification evidence, and

(iv) the charge to the jury in relation to identification evidence.

**Proof of the CCTV footage**

6. Other than Garda Smyth's own evidence, no other witness gave evidence as to witnessing the downloading of the CCTV footage by Garda Smyth. There was evidence that the relevant CCTV footage was downloaded from a premises in the Ramparts in Dundalk, a premises linked with the Bridge Street premises in which the offence was committed, and in which the actual recording system for the CCTV cameras in the Bridge Street premises was located and operated. There was evidence from Garda Smyth and from Ms. Savage that she, Ms. Savage, who had authority to do so, gave permission to Garda Smyth to download the footage.

7. In addition to the evidence of Garda Smyth and Ms. Savage, the learned trial judge heard, in the course of a *voir dire*, evidence from Paul McCourt, the shop manager. He confirmed that the CCTV in the Bridge Street premises was controlled in the premises in the Ramparts. Ms. Savage gave evidence to the effect that whilst she was not physically present with Garda Smyth when the CCTV footage was downloaded, she had given him permission to do so and was in an adjoining room in the Ramparts premises while it was being downloaded. Garda Smyth gave evidence that the exhibited date and times on the CCTV footage corresponded with the date and times of the offence as reported to him.

8. The CCTV footage clearly showed a person entering the premises, it showed him in the premises and it showed him leaving the premises. Four separate cameras were operational on the date. There was no evidence of CCTV footage having been interfered with or altered in any way. Its authenticity was not challenged by the appellant. Garda Smyth also confirmed that having downloaded the footage, it was stored by him in a secure locker with only himself having access. When Garda Smyth was asked how the CCTV footage downloaded by him compared with accounts given to him of the incident by Mr. McCourt and other witnesses he said:-

*"On looking - on viewing the CCTV and then viewing the statements, they do match up but - and also in relation to when the call was received in relation to the robbery of - just after taking place, the times and descriptions do match up with the footage. It's quite clear in the footage that a robbery is taking place with the gentleman with the hoodie and you can see he's got a weapon in his hand."*

9. The learned trial judge decided to admit the CCTV footage. He said, in the course of his ruling:-

*"... Indeed, Ms Savage gave her recollection of events that she did indeed give her permission to Garda Smyth to download this CCTV footage and that she was present, albeit perhaps not in the same room, but in the same building at the time that this took place. Garda Smyth indeed, his recollection tallies with that whereby he is of the view that he was on his own when he downloaded this footage. In addition thereto, it is clear that Garda Smyth noted the time, the date, but not only that, the sequence of events as appeared on the CCTV footage and was satisfied, indeed, that they correlated with the version of events that had been given to him some time earlier after he had attended at the scene of this incident. In all the circumstances, I'm absolutely satisfied that this footage was properly obtained by Garda Smyth."*

*The question then arises as to whether or not it was adequately maintained and secured thereafter...Garda Smyth has given his evidence that after indeed he obtained it, it was secured in a locker that he has only the key to, he had accessed it to make copies for the DPP and indeed for the defence and thereafter his evidence was that no other person had a key to that locker and he was the only person who has access to it....I'm satisfied, as I say, firstly, that the footage was properly obtained and thereafter properly maintained and secured, such that I am satisfied it is admissible during the course of this trial."*

10. The Court's attention was drawn to the case of *R v. Robson* [1 WLR 1972]. In the course of his judgment in that case, Shaw J. said:-

*"It may be difficult if not impossible to draw the philosophical or theoretical boundary between matters going to admissibility and matters going properly to weight and cogency; but, as I have already said, it is simple enough to make a practicable demarcation and set practical limits to an enquiry as to admissibility if the correct principle is that the prosecution are required to do no more than set up a prima facie case in favour of it. If they should do so, the questioned evidence remains subject to the more strident test the jury must apply in the context of the whole case namely that they must be sure of the authenticity of that evidence before they take any account of its content. There is, so it seems to me, no danger of injustice to an accused in such a procedure, for nothing could be more damaging to, if not destructive of, a prosecution case than to have part of the evidence on which it relies exposed in the face of the jury as fabricated and contrived."*

11. In this case there was no evidence that, nor indeed was it suggested, the CCTV had been in any way *fabricated* or *contrived*. There was what might be described as a technical breach in relation to proof that it was the original CCTV footage. That arose because Garda Smyth downloaded the footage while on his own and in circumstances where no one specifically pointed out to him that it was the CCTV footage in question. There was however very strong, indeed overwhelming, evidence that the CCTV was indeed an accurate recording of what had occurred in the betting shop. Importantly, it was established beyond any doubt whatsoever that it accurately represented what had happened. Furthermore, the footage was of reasonably good clarity.

12. The Court is satisfied that the learned trial judge properly admitted the CCTV footage in the circumstances, and this ground of appeal is therefore dismissed.

#### **The still photograph and the application to recall Ms. Savage**

13. A further issue arose in the course of the trial in relation to still photographs said to have been taken from the CCTV footage referred to, respectively, by Ms. Savage and Garda Smyth in the course of their evidence on Day 2 of the trial. The still photograph referred to by Ms. Savage in her evidence was not made available to the jury while the still photograph referred to by Garda Smyth was shown to the jury. That photograph was said to have been taken from the CCTV footage and it showed a male wearing a hoodie and carrying a knife inside the betting premises. Ms. Savage had not made any reference to a still photograph in her statement made on the eve of the trial.

14. Ms. Savage's evidence to the jury was relatively brief, consisting of just two pages of transcript. It was broadly similar to evidence given by her in the *voir dire* on the previous day. In the course of her examination by Mr. Seagrave B.L., Ms. Savage described how on the 22nd May 2015 she was working in The Ramparts premises in which the CCTV system for Bar One was operated from. She said that she was telephoned by a member of the staff in Bar One and informed of the incident. She said:-

*"It was the staff members working on the day. So, once they phoned me and told me exactly what happened, I went down to them to make sure they were okay. I also took a picture, a still picture down to the garda."*

15. Ms. Savage did not identify the garda to whom she gave the still picture. She went on however to refer to her contact with Garda Smyth in relation to the incident, and explained how Garda Smyth had asked her could he download the CCTV footage, and that she gave him permission and made arrangements for him to do so.

16. Ms. Savage was not asked any other question in relation to the still photograph referred to by her, nor was she cross-examined in relation to that, or indeed, any other matter.

17. Garda Smyth subsequently gave evidence. He described his contact with Ms. Savage in relation to the downloading of the CCTV footage. In the course of his evidence he confirmed that he had taken a still photograph from the CCTV footage and he explained in detail how that had come about. This was the photograph in the Book of Evidence. Coloured copies of the photograph were provided to the jury and a copy was seen by this court.

18. Garda Smyth had not referred to his printing a still photograph in his pre trial statements. At the court's direction a statement of additional evidence was served on the defence, albeit after the relevant evidence had been heard by the jury

19. Following the conclusion of Garda Smyth's evidence, and the showing of the CCTV footage to the jury, Mr. McCullough B.L. made an application to the learned trial judge requesting that any reference to a still photograph be excluded because, he said, *"This is the first time we have heard that Garda Smyth produced that still"*. Later, in the course of his application to the learned trial judge, Mr. McCullough said:-

*"And I think, Judge, you may recall that the witness, Ms Savage, mentioned producing the photograph and bringing it to the bookie shop, when she went down from The Ramparts to Bar One in Bridge Street. So, I'm unsure as to where this photograph actually originated."*

20. The learned trial judge pointed out to Mr. McCullough that the defence had chosen not to cross examine Ms. Savage. He ruled that there was no prejudice to the appellant insofar as the exhibit in the original Book of Evidence was concerned. Garda Smyth was then re-called and gave evidence in relation to the printing off of the still photograph which had been shown to the jury. Immediately following the conclusion of Garda Smyth's evidence, Mr. McCullough applied to the learned trial judge to re-call Ms. Savage as a witness. He said:

*"She did mention in the course of her evidence that she presented a photograph in the course of events that the Court has been listening to, and I would like to address that matter with her before the jury. In light of the late provenance of the still from the CCTV being furnished to the defence, clearly I could not cross-examine her regarding anything of that nature in the absence of having any indication where this material came from until right now, and in those circumstances I might ask to recall Ms Savage."*

21. The learned trial judge was clearly reluctant to accede to this application. He repeatedly referred to the fact that there was only one photograph in the case, and that was the one referred to by Garda Smyth, and which had been shown to the jury.

22. The learned trial judge ruled in relation to the application as follows:-

*"..Well, firstly, having looked at the description of the exhibits, it's clear that the CCTV is referred to with sample still, and when you look at the sample still it is clear that that comes from camera two at 10.07.14.28. So, it's quite clear from the book of evidence that that is a still that was generated from the CCTV footage, and indeed that has been clarified by Garda Smyth. The issue of the fact that this witness referred to a photograph in her evidence, and that the defence chose not to cross-examine her about it, well in my view, that was an issue that could have been raised when she was in the witness box and indeed could have been cross-examined about it because if she referred to a photograph - certainly there was no mention from her that it was a still from the CCTV or otherwise, and if the defence had any concerns about it, that was the time to cross-examine her. So, I'm not satisfied that it is necessary at this stage to recall her in relation to this matter."*

23. In the court's view, the learned trial judge was entitled, in the particular circumstances, to refuse the application to re-call Ms. Savage. A still photograph produced to the jury had been exhibited in the Book of Evidence, and its provenance was established by the evidence of Garda Smyth to the satisfaction of the learned trial judge. This was the only photograph shown to the jury. The photograph referred to by Ms. Savage in her evidence was not produced to the jury. The possibility that this un-seen still photograph referred to by Ms. Savage in the course of her evidence might have proved exculpatory of the appellant is simply speculation.

24. The court is satisfied that the learned trial judge was entitled to admit into evidence the still photograph referred to by Garda Smyth and to refuse the application to re-call Ms. Savage for the reasons stated by him. This ground of appeal is therefore rejected.

#### **Refusal to grant a direction at the close of the prosecution case**

25. On the third day of the trial, and following the close of the prosecution case, Mr. McCullough, counsel for the appellant, sought a direction. He based his application on the contention that there was no other evidence identifying the appellant as being the offender other than what was in the CCTV footage. He pointed to there being *no evidence with regard to the persons who were on the premises..no identification parade.. and no attempt to identify..other than by way of the CCTV*. However, this was not quite the position as there was evidence from a cleaning lady, Ms. Meehan, who was in the premises at the time to the effect that the man who entered the shop was approximately 5ft. 8ins. in height. She estimated his height by reference to her own smaller stature. While it was submitted that the appellant was taller than 5ft. 8ins. no specific measurement as to his height was given.

26. In the course of his submissions, Mr. McCullough also referred to the comments of Barron J. in the case of *DPP v. Maguire* [1995] 2 I.R. 286, at p. 292, as follows:-

*"It is clearly unsatisfactory to ask a jury to identify an accused from a video film without producing any evidence in support of such identification. There may be cases where no one can be found who can or was prepared to come to Court to identify an accused. In such cases, where the trial judge is satisfied that no such evidence is available, then the matter can be left to the jury. That appears to have been the case here. There was apparently no evidence to identify the applicant as one of the two persons shown on the video film".*

27. Mr. McCullough submitted to the learned trial judge that:-

*"There is inherent weakness in particular with regard to the fact that there's absolutely no other corroborative evidence in the case with respect to the CCTV, and the jury is being asked to act as the judges on a bald presentation of the video evidence from the bookie's shop."*

28. In reality, *Maguire* is simply authority for the fact that where CCTV evidence is the only evidence of identification available, reliance on it solely as evidence of identification has to be approached with particular care. It is not authority for the contention that CCTV footage alone cannot properly be considered by a jury as real evidence and used by them for identification purposes.

29. The learned trial judge ruled against the application. She said:-

*"This is an application for a direction based on the principles as set out in R v. Galbraith and in circumstances where it is contended by the defence that the jury should not be allowed to bring in a verdict where the only evidence before it is based on CCTV footage and photograph stills from that footage. From the very outset, the prosecution has set out its stall insofar as the case opened to the jury was that the prosecution would be solely relying on the CCTV footage and photographs in circumstances where there was no other identification evidence available to it. The defence contend that such evidence is not sufficiently robust, is of poor quality and vague and therefore seek to have the case withdrawn from the jury. Certainly, I cannot accept that the footage is of poor quality. Indeed, from my experience in these matters, the quality and clarity is far superior to what often comes before the courts in such cases. It is clear from the decision of the Court of appeal in DPP v. Maguire, a case again where the prosecution were relying on video footage and photographs and where no evidence was given by any other person that identified the accused, that a jury was entitled to act upon such evidence clearly where the appropriate warning and guidance was given to it. Whilst it may be*

*unsatisfactory to require a jury to identify an accused from footage or photographs, where no other evidence of identification is available, this of itself does not require a trial judge to withdraw the case from the jury. In all the circumstances, I am satisfied, given the appropriate warning and direction as to how this evidence is possible treated, that the jury will be in a position to bring in a proper verdict. In the circumstances, therefore, I must refuse the application."*

30. In the Supreme Court case of *DPP v. AMcD* (14th December 2016) McKechnie J., in the course of his judgment, summarised the legal principles applicable to CCTV footage as evidence in trials as including:-

*(i) CCTV footage, as a matter of principle, should be regarded as real evidence and not as hearsay; evidence as to its operation and functionality is therefore not required to establish this;*

*(ix) As with any piece of admissible evidence, its weight, value and credibility are matters for the jury; and*

*(x) Because of its potency, care must be exercised to ensure the overall integrity of such evidence.*

31. It is noteworthy that the learned trial judge expressed the view that the CCTV was of good quality, and that based on her experience as a trial judge, the clarity of the footage was superior to what was often available in evidence. The learned trial judge had had the opportunity of viewing the footage in its entirety and was in an excellent position to express this view. While this Court has not viewed the CCTV footage, it has had the opportunity to view the black and white and colour still photographs taken from the CCTV footage. It is clear that these still photographs are of reasonably good clarity. There is undoubtedly a likeness as between the man seen in these photographs and the appellant in person. While this is simply the Court's observation it does serve to support its view that, at a minimum, the decision by the jury that the man in the CCTV footage was indeed the appellant was not surprising.

32. The leading authority on the principles governing an application for a direction are to be found in *R. v. Galbraith* [1981] 1 WLR1039. In his judgment in that case Lord Lane said:-

*"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*

*(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*

*(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

*(b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by a jury."*

33. In the instant case, despite the absence of identification evidence from anyone in the betting shop at the time of the offence, other than the evidence of Ms. Meehan, it could not be said that there was no evidence of identification or that identification evidence which was so weak or vague that the decision to allow the trial continue is undermined. The jury had what might reasonably be described as strong CCTV evidence. High quality CCTV images adduced as real evidence can sometimes represent better evidence than oral testimony evidence given by witnesses concerning something that occurred out of court, particularly where an identification issue exists, because there is an objective quality to it and the jury have the opportunity to evaluate it first hand.

34. This ground of appeal is therefore dismissed.

### **The charge to the jury**

35. The learned trial judge addressed the jury for some length on the issue of identification evidence. The following extracts from that portion of her charge serve to confirm the strength of her directions on this subject. She said, *inter alia*:-

*"Now of course ladies and gentlemen in this case it is you yourselves, all 12 of you, that are in fact being invited to make the identification. So it is you that will be making the identification if you feel you're in a position to make such identification and again as I say because of that there are certain further matters I want to bring to your attention. Firstly, you are the people here that are being asked to identify the accused. And in doing that, in other words, you're being invited to identify the accused as the person in the CCTV footage and indeed in the photo still. And in doing that you should bear in mind the dangers and difficulties of identification by one human being, or indeed in your case 12 human beings, and the features of another. So in other words you have to be cautious, all 12 of you, in going about examining all of the evidence and going about your examination of the CCTV footage and indeed in then examining the characteristics of the accused you see here in court. So you have to give, of course, careful examination of the CCTV footage to the still and careful examination to the characteristics of the accused as you see him here in court because that's what you are being asked to do. You're being asked to look at the CCTV and the still and then you are being asked to look at the accused and it is a matter for you to make your determination as to whether or not it is the same individual that is in the CCTV footage that is indeed before the Court here today. So in doing that, ladies and gentlemen, you must bear in mind that photographs can give different impressions of the same person. And indeed, ladies and gentlemen, you will have seen photographs whether they be of yourselves or indeed of other people where you might say, "well, gosh, that doesn't look like me at all." Or indeed you may look at a photograph of somebody else that you know, a photograph perhaps that you took, or somebody else took and said, "oh gosh, that's so and so, I wouldn't have known it only that somebody told me. It doesn't look like me at all." So these are all the kinds of things as I say you know, you need to approach this using your common sense. These are things that you must bear in mind in approaching this evidence and how you go about assessing it and as I say, you must look at the footage, look at the stills and then as I say look at the characteristics of the accused as you see him here in court today. You must also of course bear in mind that the footage is from 12 months ago. So that's perhaps something else that you might also want to bear in mind."*

36. She also said:-

*"As I said to you, ladies and gentlemen, so you must compare obviously the accused appearance with that of the individual in the CCTV footage and the photo still. Bearing that in mind of course and bearing in mind the warning that I have now given you as to how you are to approach these matters, clearly ladies and gentlemen if, having considered the warning that I have given you, if having looked at the CCTV again or indeed the stills and if having, as I say, examined carefully the characteristics of the accused here in court, and you are satisfied of course beyond reasonable doubt that it is the accused, well then clearly you're entitled to act upon that. So whilst I'm indicating to you that you must proceed with caution if having taken that caution, if having considered all the matters that I have told you must consider, if you are still satisfied beyond reasonable doubt that it's the accused in the case, then as I say, you must proceed to convict. Equally, ladies and gentlemen, of course if you have any doubt in your mind as to whether or not it is the accused that is in the footage or indeed in the photo still if you've any question mark in your mind as to whether or not it's him, that is clearly a doubt and he must get the benefit of that doubt. So, unless you're satisfied beyond reasonable doubt that it is the accused that's here in court that features in the footage and the still, unless you're satisfied beyond a reasonable doubt you cannot convict."*

37. Following the conclusion of the learned trial judge's charge to the jury, Mr. McCullough requisitioned on the issue of the identification evidence and the fact that it was entirely reliant on the CCTV footage. He suggested that the jury should be addressed in relation to the lack of an identification parade. The learned trial judge responded in the following terms:-

*"...we have heard nothing about an identification parade, one way or the other, so far and I'm certainly not going to introduce it at this late stage. I don't think it's appropriate and as I say, I've already given my ruling on the matter. In relation to Ms Meehan's evidence, if I have in any way confused the jury I have absolutely no difficulty in recharging them in that regard. In relation to the other submission from Mr McCullough, I would agree with Mr Segrave, it's a novel submission and I think the jury are quite clear about what's required of them in terms of if they have any reasonable doubt, then clearly the accused gets the benefit of it and I'm satisfied that that was the impression that they were left with. So, in those circumstances, the only matter that I propose to deal with is the issue of Ms Meehan's evidence."*

38. The learned trial judge then recharged the jury on the issue of Ms. Meehan's evidence. She again reminded them that the appellant was entitled to the benefit of any reasonable doubt they might have.

39. The Court is satisfied that this ground of appeal should also fail.

### **Conclusion**

40. As none of the grounds of appeal have succeeded, the appeal is therefore dismissed.