



THE COURT OF APPEAL

**Peart J.
Birmingham J.
Mahon J.
26/13**

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Marcus Kirwan

Appellant

Judgment of the Court delivered on the 27th day of October 2015 by Mr. Justice Birmingham

1. On the 4th February, 2013, the appellant was convicted by a unanimous jury of the murder of David Byrne on the 19th March, 2011. He now appeals against that conviction.

2. In essence, four issues are raised by the appeal. These are:-

1. That the arrest of the appellant was unlawful, with the result that the subsequent detention during which there was an identification procedure was unlawful and the fruits of that detention, including the identification, ought not to have been admitted in evidence.
2. That identification of the appellant from CCTV footage by a member of the gardaí should not have been admitted.
3. That an analysis of contact between two mobile phones, one said to be linked to the deceased and one to the appellant, should not have been admitted in evidence.
4. That CCTV footage from various locations at or proximate to the crime scene ought not to have been admitted.

3. The background facts may be stated briefly. The deceased, David Byrne, was stabbed to death in the car park of Emmett Court Apartments in Inchicore, Dublin. The prosecution case was that the deceased had been lured to a meeting place where the accused and others were lying in wait for him. He was then chased over a Luas bridge by the accused and three others into the car park of the apartment complex, where the murder occurred.

4. The prosecution contended that the evidence led by it, and this would seem to have been accepted by the jury, established the following: that a phone linked to the accused was in contact with a phone linked to the deceased, and that a message was sent to the phone of the deceased which falsely gave the impression of being from a girl called Sinead arranging to meet the deceased at a centre known as the John Bosco Centre having confirmed that the deceased would be alone.

5. CCTV footage from the John Bosco Centre showed four individuals, one of whom, on the prosecution case, was the appellant lying in wait for the deceased, and then chasing him when he arrived. Thereafter CCTV footage from the apartment complex showed the deceased running into the car park followed by the accused who was wearing a grey hoodie. The actual stabbing was not caught on CCTV, but the prosecution case was that the appellant looked in the direction of the camera as he was leaving the scene. The accused was subsequently identified/recognised by Garda Culhane.

6. During the time that the appellant was in custody, following on from his arrest by Detective Sergeant McNulty, he was identified by Sonia Byrne, a resident of the apartment complex, at a formal identification parade. Her evidence was that she had seen the appellant running into the complex at a time when his hooded top had fallen down. There was further CCTV footage which showed four men, one of whom the prosecution said was the appellant, running away from the scene and subsequently arriving at a takeaway in Drimnagh. There the appellant was clearly identifiable. At this stage he was wearing clothing that was identical to that which was visible in earlier footage. In addition, the clothing worn by the other men was similar to that worn in the earlier footage. CCTV footage from the takeaway showed the appellant changing his hooded top after a companion appeared to point out something on the top.

The validity of the arrest

7. This point arises in the following circumstances: the appellant was arrested by Detective Sergeant Michael McNulty on the 21st April, 2011, on foot of a warrant that had been issued under s. 10 of the Criminal Justice Act 1984, he having been previously arrested on the 22nd March, 2011. Detective Sergeant McNulty was in possession of a warrant which had been issued in the Dublin District Court by Judge Malone authorising the arrest of Marcus Kirwan. That arrest took place at approximately 7.15 am on the 22nd March, 2011. It was explained to Mr. Kirwan that he was being arrested for the offence of the murder of David Byrne. Following his arrest he was brought to Kevin Street garda station, where he was processed in the normal way.

8. The background to this arrest was that on the 20th April, 2011, Detective Superintendent O'Gara swore information on oath and in writing in order to obtain an order to arrest Marcus Kirwan in accordance with the terms of s. 10 of the Criminal Justice Act 1984. That information was in these terms:

"The information of Detective Superintendent Gabriel O'Gara of Pearse Street garda station who says on oath:

'I am a member of the Garda Síochána, not below the rank of Superintendent, and I lay this information pursuant to s. 10 of the above Act (Criminal Justice Act 1984) from my own knowledge. I say that the above named, Marcus Kirwan was, on the 22nd day of March, 2011, at 7.35 am arrested by the above first named member of the Garda Síochána (Detective Sergeant Michael McNulty) in the court area and district aforesaid on suspicion of having committed, in the court area and district aforesaid, an offence to which s. 4 of the said Act applies, namely murder

of David Byrne on the 19th March, 2011, at Emmett Court, Inchicore, Dublin 8, contrary to common law, that the said person was taken to and detained in Kevin Street garda station and that he was at 2.57 pm on 23rd March, 2011, released in accordance with the provisions of the said s. 4 without any charge having been made against him. I say that further information as follows: on the 25th March, 2011, a witness was identified and interviewed by gardaí. The witness is a resident in the Emmett Court complex and she witnessed David Byrne being chased by a number of males in the gates of the complex on the night he was murdered. She has provided gardaí with a detailed description of the first male chasing David Byrne and is confident that she will recognise him again. Gardai are satisfied that this male is Marcus Kirwan. It is proposed by gardaí to hold either a formal or informal identification parade in respect of Marcus Kirwan.

Gardaí have identified a taxi driver who picked up a number of males on Knocknarea Avenue, beside Brickfield Park, Drimnagh, Dublin 12 on the 19th March, 2011, shortly before the murder of David Byrne. He dropped fare at a youth centre on Galtymore Road, Drimnagh, Dublin 12. The phone number used to book this taxi was 085 8121132. This is the phone number which was used to set up David Byrne on the night of the murder. The youth club on Galtymore Road has been identified as the John Bosco. This is where David Byrne was lured to by phone number 085 8121132 on the night of the 19th March, 2011, at approximately 10.40 pm when he was set upon and chased by four males. Gardai are satisfied that this is Marcus Kirwan's phone number. Gardai have established that 085 8121132 was topped up at the Centra on Errigal Road, Drimnagh, Dublin 12 on the 15th March, 2011. Gardai have obtained CCTV of this location and have identified Marcus Kirwan as the person who topped up this phone. Gardai have interviewed Alan Kirwan (uncle of Marcus Kirwan). Alan Kirwan provided a phone number for Marcus Kirwan as 085 8121132. He further stated that this used to be his own phone number and he gave it to Marcus approximately two months previously. Gardai have obtained phone records for 085 8121132. These records show a substantial number of text messages between this number and 085 7482628 (David Byrne's phone) in the hours leading up to when David Byrne was set upon and murdered after being chased by four males at the John Bosco youth club. This came to the knowledge of the Garda Síochána since that person was released as to his suspected participation in the said offence, namely the murder of David Byrne on the 19th March, 2011, at Emmett Court, Inchicore, Dublin 8 contrary to common law being an offence of which, at the time of the said arrest, the member of the Garda Síochána by whom he was arrested suspected that person that I (Detective Superintendent O'Gara) hereby apply for an order to arrest that person for the said last mentioned offence."

9. The information was signed by Detective Superintendent O'Gara and was sworn by him on the 20th April, 2011, in Court No. 2 before Judge Malone.

10. An order to arrest was issued by Judge Malone. That order was in these terms:

"District Court area of Dublin Metropolitan District between Sergeant Michael McNulty of the Garda Síochána of Kilmainham garda station and Marcus Kirwan of 127 Cooley road, Drimnagh, Dublin 12, in the court area and district aforesaid:

'Whereas it appears from the information on oath and in writing sworn before me on this day, pursuant to s. 10 of the above mentioned Act, by Detective Superintendent Gabriel O'Gara, a member of the Garda Síochána not below the rank of Superintendent, that the above named person, Marcus Kirwan was at 7.35 am on the 22nd day of March, 2011, arrested by Sergeant Michael McNulty of the Garda Síochána at 127 Cooley Road, Drimnagh, Dublin 12, in the court area and district aforesaid on suspicion of having committed, in the court area and district aforesaid, an offence, to which s. 4 of the said Act applies, namely murder of David Byrne at Emmett Court, Inchicore, Dublin 8, on the 19th March 2011, contrary to common law, that he was taken to and detained in Kevin Street garda station and that he was, at 2.57 pm on the 23rd day of March, released in accordance with the provisions of s. 4 of the said Act without any charge having been made against him and whereas I am satisfied from the sworn information that further information has come to the knowledge of the Garda Síochána since that person's release as to his/her suspected participation in the said offence, murder of David Byrne at Inchicore, Dublin 8, on the 19th March, 2011, being an offence of which, at the time of the said arrest, the member of the Garda Síochána by whom he was arrested suspected that person for which the arrest is now sought. This to authorise you, to whom this order is addressed, to arrest the said person, Marcus Kirwan of 127 Cooley Road, in accordance with the provisions of s. 10 of the Criminal Justice Act 1984 for the said last mentioned offence."

11. The order was dated the 20th April, 2011 and was signed by Judge Malone of the District Court. It is addressed to the said Superintendent Gabriel O'Gara of the Garda Síochána at Pearse Street garda station. Detective Superintendent O'Gara gave evidence of writing on the reverse of the warrant:

"To Sergeant Michael McNulty for legal execution.

signed Gabriel O'Gara,

Detective Superintendent,

20th April, 2011."

12. At trial, the warrant contained the following endorsement: "Executed the within warrant by arresting Marcus Kirwan at 8.07 am on the 21st April, 2011," and that endorsement was signed by Sergeant Michael McNulty. Detective Superintendent O'Gara gave evidence at trial of endorsing the warrant through Sergeant Michael McNulty.

13. Sergeant McNulty for his part gave evidence of receiving the warrant from Superintendent O'Gara on which was written "To Sergeant Michael McNulty for legal execution", and that he had endorsed the warrant by writing on the back of it "Executed the within warrant by arresting Marcus Kirwan at 8.07 am on the 21st April, 2011".

14. In essence the point made at trial, and now repeated on appeal, is that the order of the judge of the District Court authorised Detective Superintendent O'Gara personally to arrest and provided no basis for an arrest by Sergeant McNulty.

15. The point made is that because Mr. Kirwan had been detained on a previous occasion, pursuant to s. 4 of the Criminal Justice Act 1984, he could not be arrested again for the same offence except on the authority of a judge of the District Court who was satisfied on information supplied on oath by a member of An Garda Síochána of Superintendent or higher rank that further information had come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his

arrest was sought. On behalf of the appellant it was submitted that there was no basis upon which anybody other than Detective Superintendent O'Gara could have arrested the appellant.

16. The appellant says that the order of Judge Malone authorised Detective Superintendent O'Gara and Detective Superintendent O'Gara only, and points to the specific statutory authorisation under the Petty Sessions (Ireland) Act 1851 to endorse certain types of warrants for execution by other gardaí, but says that those provisions apply only to warrants "in proceedings" such as bench warrants and committal warrants. At the time of the re-arrest by Detective Sergeant McNulty, Mr. Kirwan had not been charged with any offence, so, it is argued, there were no proceedings in being.

17. On behalf of the DPP it is submitted that there was ample statutory justification for the procedure that was followed. The Director begins her analysis by referring to s. 193 of the Criminal Justice Act 2006, which had amended s. 25(1) of the Petty Sessions (Ireland) Act 1851, by substituting the following paragraph:

"All warrants (except as otherwise provided by law) in proceedings in respect of offences punishable either on indictment or summarily issued by the District Court shall be addressed to the superintendent or an inspector of the Garda Síochána of the Garda Síochána district within which the place where the warrant is issued is situated or the person named in the warrant resides:".

18. The Director argues that a statutory authority can be traced to s. xvi of the Police Constabulary Ireland Act 1836. The relevant portion of that section is as follows:

"And when any warrant, order, or command of any magistrate shall be delivered or given to any such head constable or sub-constable he shall, if the time will permit, show or deliver the same to the Chief Constable under whose immediate command such head constable or sub-constable shall then be, and such chief constable shall nominate and appoint by endorsement thereon such one of more of the constables under his orders, and such assistant or assistants to him or them as such Chief Constable shall think proper, to execute such warrant, order or command."

19. However, to this point the appellant retorts that the section envisages the person to whom the warrant is issued bringing it up the chain of command and that the person to whom it is brought, being a person senior to the individual to whom the warrant was issued, then has the power to nominate subordinates to execute the warrant.

20. The DPP says that the fact that a Superintendent was entitled to endorse warrants addressed to him or her under the Petty Sessions Act is confirmed by the 1926 District Court Rule and later iterations thereof. Attention is drawn to what Sandes *in Criminal Practice, Procedure and Evidence in Eire*, 2nd Ed., (London, 1939) has to say on the topic:

"All warrants and proceedings as to offences punishable either upon indictment or upon summary conviction and issued for execution in any District Court area must be addressed to the Superintendent or other proper officer of the civic guard acting for the place in which the District Court is held or to any other persons authorised by statute to execute such warrants (Petty Sessions Act, s. 25(1), r. 39, District Court Rules) and execution may be affected in any place for which superintendent or other officer acts either by him or any other member of the civic guard appointed by him to execute the warrant (Petty Sessions Act, s. 26(1), r. 40 of the District Court Rules)."

21. At trial, and again in this Court, the Director has also placed reliance on s. 194 of the Criminal Justice Act 2006, which is in these terms:-

"A warrant for the arrest of a person or an order of committal of a person may, notwithstanding s. 26 of the Petty Sessions (Ireland) Act 1851, be executed by a member of the Garda Síochána in any part of the State."

22 In response the appellant says that this section has no relevance, that it was designed to deal with the situation which had pertained under s. 26 of the 1851 Act, which provided for the execution of warrants within counties and that this section was concerned only with the removal of geographical limitations. The appellant says that the DPP is seeking to have the section construed as if it read "a warrant for the arrest of a person . . . may . . . be executed by any member of the Garda Síochána in any part of the State". Whereas the correct interpretation is that a member of the Garda Síochána authorised to execute a warrant may do so in any part of the State.

23. The reference in s. 194 to s. 26 of the Petty Sessions (Ireland) Act 1851 suggests strongly that the motivation for the section was to address geographical limitations. However, while that is so, the operative part of the section, on its face, is broad enough to permit any warrant to be executed by any member of An Garda Síochána, anywhere in the State. Section 194 was the section on which the trial judge placed reliance and in the view of the Court he was correct to do so. The trial judge could have found authority for the procedure followed in the statutory powers under the Petty Sessions Act available for the endorsement of warrants for execution. A warrant issued by a judge in court following an application made to him is a warrant issued.

24. There is a further point, even if there was any doubt as to whether the Petty Sessions (Ireland) Act or s. 194 of the Criminal Justice Act 2006 did not provide sufficient authorisation for the procedure that was followed, that would not avail the appellant. As the submissions of the appellant specifically acknowledged, the garda practice from time immemorial has been that warrants are issued to a Superintendent who in turn endorses them for execution, a practice rooted in the 1851 Act, and earlier legislation. That being so, as the submissions of the appellant specifically acknowledge, it is entirely understandable that an assumption was made that a similar practice could be used with s. 10 warrants. The submissions go on to say that the decision of the gardaí to seek to endorse the warrant for execution is understandable for historic reasons, but close scrutiny reveals that there is no statutory authority to do so. Even if there was substance in the suggestion that close scrutiny reveals that there was no statutory authority for following the procedure that was followed, it is manifestly clear that neither Detective Superintendent O'Gara nor Sergeant McNulty was engaged in a conscious and deliberate violation of the constitutional rights of Marcus Kirwan. On the contrary, to use the language of the appellant, they were adhering to a practice that had existed from time immemorial. In those circumstances the case would fall four square within the pronouncements of the Supreme Court in the case of *DPP v. J.C.* [2015] IESC 31, judgment delivered on the 15th April, 2015. In this case, to use the language of Clarke J. in *J.C.*, there was a high constitutional value to be attached to ensuring that all potentially relevant evidence, including the visual identification evidence arising from the identification parade conducted while Mr. Kirwan was in custody following on his arrest, was available to the jury. In following a long established practice, at worst the gardaí could be said to have been inadvertent. Indeed, many would feel that to describe their actions as inadvertent would be harsh in the extreme. However taking the view of matters most favourable to the defence and so categorising the actions of the gardaí, there is still no basis for excluding the evidence of what occurred at the garda station. Accordingly, the Court will reject this ground of appeal.

Identification on CCTV footage by a garda

25. On the 20th March, gardaí were in possession of CCTV footage from the Emmet Court apartment complex. Detective Sergeant McNulty, who was one of the leaders of the investigating team arranged for that footage to be viewed by a number of members from Kilmainham and Sundrive Road garda stations. In particular, he asked that any members of the gardaí who were working in Sundrive Road garda station at that time should come over to the incident room in Kilmainham garda station and view the footage. A number of gardaí from Sundrive Road garda station, perhaps three or four members from Sundrive, came over, including Garda Culhane who was assigned to mountain bike duties there.

26. There are really three layers to the challenge. First of all, it is said that there is an inherent prejudice in a situation where a garda gives evidence of identifying/recognising an individual. It must inevitably cause jurors to speculate or conclude that the person being recognised was someone who was known to the gardaí. Secondly, it is said that the procedure was an unnecessary one. At the time Garda Culhane and his colleagues were requested to view the footage, Mr. Kirwan had already been nominated as the suspect. The third ground of objection is that the procedure that was actually followed was rendered unfair and unsatisfactory by reason of the failure to create a contemporaneous record of what occurred, so, there was no record as to how Garda Culhane made his identification, whether it was after initial hesitation or otherwise. It is known that there were other gardaí who viewed the footage who failed to make an identification; however, no record was kept of the identity or number of gardaí who failed to make an identification. That, it is said, is fundamentally unfair.

27. Legs one and two of this challenge can be considered together. The appellant says that traditionally a distinction has been drawn between identifying in a sense of nominating a suspect and offering the witness a chance to identify someone who has already been nominated as a suspect. That traditional distinction is very valid when it is a question of a witness selecting a photograph from a bundle, the "mug shot" scenario. There, there is a clear distinction to be drawn between a situation where the shopkeeper is asked to view a large number of photographs in order to put the gardaí on the trail as it were, and a situation where the gardaí are satisfied that they know the identity of the culprit, but invite the shopkeeper to view a bundle of photographs that includes their suspect. In the latter case the procedure is inherently unsatisfactory. There may be cases where such a procedure cannot be avoided, but ordinarily the prejudicial effect of being seen to have one's photographs on garda files will be considerable.

28. The present situation is quite different. The CCTV footage that was available to be viewed showed the culprits at or near the crime scene. Whether any of the culprits are identifiable or recognisable at the crime scene is enormously significant. It is not simply a question of identifying a suspect or offering confirmation in relation to a person already nominated. The question is whether the suspect is actually shown on the CCTV at the crime scene at the moment when the crime was committed.

29. So far as the point that is made that any identification/recognition by a garda is inherently prejudicial is concerned, the authorities recognise that the prejudicial effect and the probative value have to be considered. In this case, the probative value of a witness saying that the footage enabled them to make a recognition of someone from CCTV at the crime scene at the time of the crime was very considerable indeed. Here, every effort was made to minimise any element of prejudice that arose. It was explained to the jury that Sundrive Road was Garda Culhane's first posting and that the duties assigned to a new member of the district were those of routine patrolling while on beat duty, pedal bike duty, station duties and also car duties. In the presence of the jury, Garda Culhane stated that he had got to know Marcus Kirwan from his routine patrolling of the area, and that he had got to know people living in the area.

30. In the Court's view, the probative value of identification/recognition by Garda Culhane clearly exceeded the prejudicial impact of the evidence.

31. There remains the question of the failure to keep contemporaneous records. Such records ought to have been kept. However, the extent of the significance of the absence of records has to be seen against the fact that Garda Culhane in the course of a *voir dire* on this issue indicated that he had made his identification "on careful analysis" having watched it a number of times. Thus, the defence were aware that this was not an instant identification and could make such use of that fact as they wished.

32. Furthermore, the court was told that one of the Sundrive Road gardaí who had failed to make an identification was Garda Quinn, also a community garda, and that there were other gardaí who failed to make an identification. However, the fact that individuals failed to make an identification is of limited relevance. There might be any number of reasons why an identification was not made. The gardaí involved may not have known Mr. Kirwan or may never have had dealings with him or they may have known him, but despite knowing him did not feel confident to make an identification based on the extent and quality of the footage that was available. The defence's interest in all of this was that it established that Garda Culhane was alone in purporting to make an identification, and that he was in that sense an outlier.

33. They were in a position to do that and to do it effectively. In these circumstances the arguments in relation to the admissibility of the CCTV footage fail.

The CCTV footage

34. As is evident from the discussion of other grounds of appeal, the gardaí "harvested" a considerable quantity of CCTV footage from a number of different locations. These were subsequently merged into what has been described as a montage and presented to the jury. The montage comprised footage from St. John Bosco's youth club, where it was alleged that the appellant and others lay in wait, footage from the Luas stop at Drimnagh, where it is alleged that the appellant and others pursued the deceased across a bridge towards Emmett Court, footage from Belbulbin Road, where the prosecution contended that the appellant could be seen entering the Drimnagh takeaway after killing the deceased, footage from Emmett Court, which the prosecution contended showed the appellant and others pursuing the deceased, and footage from Emmet Court apartments and footage from Crowe's Off Licence, where it was suggested the deceased had gone before the killing.

35. The defence submits that there was inadequate evidence of the provenance of the footage for it to be admitted in evidence.

36. In support of that proposition, the defence referred to excerpts from a number of leading text books on evidence as well as referring to a number of Irish and other authorities. The defence says that the DPP has blithely assumed that the CCTV footage is real evidence in every case. The defence protests that there has been a failure to engage with the issue as to whether what was available was real evidence or whether there was an element of human intervention. The defence says that before the evidence could be admitted there had to be, at an absolute minimum, some evidence to confirm that the product sought to be shown was the result of an automated process.

37. The respondent, for her part, submits that the provenance of each and every piece of CCTV footage was properly proved, that the operation of the CCTV system is self explanatory and that CCTV footage is automatically recorded evidential material and

therefore cannot be regarded as hearsay. In the Court's view, the arguments made on behalf of the DPP are well founded.

38. There may have been a point in time when CCTV footage was so new and so unusual that some element of explanation as to what was involved was required. However, that day is well past. CCTV cameras are now ubiquitous. Almost every investigation of any significance by the gardaí involves accessing CCTV footage and footage is now played during a very large number of trials. The footage that is generated by the cameras is real evidence. Ordinarily no evidence is required as to how a CCTV camera operates and how the footage is generated any more than evidence is required as to how a traditional camera operates or for that matter how the internal combustion engine operates. The Court has no hesitation in rejecting this ground of appeal.

Admissibility of XRY phone analysis

39. Grounds 2 and 3 of the notice of appeal, as originally formulated, contended that the trial judge erred in law in holding that the telephone records relating to mobile telephone number 085-8121132 and mobile number 085-7482628 (phone 1132 and phone 2628) tendered by the prosecution were inadmissible. However, those grounds were not argued. Instead, the defence has focused on Ground 4 which was that the trial judge erred in law in holding that XRY telephone analysis tendered by the prosecution was admissible.

40. The argument is advanced in circumstances where the gardaí came into possession of two mobile phones, phone 2628, the phone of the deceased, and phone 1132, linked to the appellant through the evidence of Orla Kelly, Probation Officer, who testified that the appellant had provided her with this number as a contact number some three weeks before the murder. During the course of the trial, retired Detective Garda Supple gave evidence that he had been trained in mobile telephone analysis and he had analysed the phones using XRY.

41. The evidence was that using the XRY analyst process allows for the extraction of nearly 90% of the information stored in a mobile phone device. The defence protests that there was no evidence of the functioning of the XRY software. Detective Garda Supple accepted that he did not know how the software operated. Detective Garda Supple conceded "I have no knowledge of the ins and outs of the software itself". Moreover there were discrepancies between what emerged on the XRY analysis that emerged from a manual examination by Detective Garda Orla O'Brien.

42. The defence also says that the prosecution efforts to link the appellant to phone 1132 through the probation officer were inadequate.

43. The written submissions comment that it is common knowledge, in respect of which a court does not require evidence, that mobile telephones used by young people often change hands and are often handed around groups. The DPP responds with some force that the observations in relation to people frequently swapping SIM cards is entirely speculative and that there was no evidence before the judge or jury to suggest that that was what had occurred in this case. The Court is of the view that there was absolutely no requirement on the part of the prosecution to call a software engineer or by some other means to set about explaining how the software worked. Retired Detective Garda Supple was trained in the forensic examination of mobile phones and deployed the XRY system as a tool in that regard.

44. Neither is there any substance in the point about the failure to put phone 1132 in the hands of the appellant on the night of the murder. The fact of contact between the phone linked to the appellant and the phone of the deceased of the kind described formed part of the circumstantial evidence jigsaw. Accordingly, the Court is quite satisfied that the trial judge did not err in allowing the results of the XRY analysis by Mr. Supple to be presented to the jury.

45. For these reasons, this appeal is dismissed.