



THE COURT OF APPEAL

Record No. 277/2016

**Peart J.  
Birmingham J.  
Mahon J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**DARREN O'HALLORAN**

**APPELLANT**

**JUDGMENT of the Court delivered on the 7th day of December 2017 by Mr. Justice Mahon**

1. The appellant was convicted on the 21st October 2016 at Limerick Circuit Criminal Court of two offences, namely:

- (i) making a threat to damage property contrary to s. 3(a) of the Criminal Damage Act 1991, and
- (ii) making a threat to kill or cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997.

He has appealed against his convictions.

2. The appellant was sentenced on the 28th October 2016 to four years imprisonment in respect of the first offence, and to a similar term of imprisonment in respect of the second offence. Both sentences were directed to be served concurrently, as between each other, but consecutively to a sentence already being served, as the index offences were committed while the appellant was on bail.

**Background**

3. On the 2nd April, 2015 a person, alleged to be the appellant, telephoned Henry Street Garda Station in Limerick and spoke to Garda Pat Whelan. He threatened Garda Whelan's private residence with the intention that Garda Whelan would be fearful that such a threat would be carried out. Also, on the same date, he threatened to kill or cause serious harm to Garda Whelan with the intention that Garda Whelan would believe that such a threat would be carried out.

4. In the course of making his threats the caller specifically and accurately identified the location and colour of Garda Whelan's private residence (which he threatened to burn down), the type of car he drove and also referred to a white horse that Garda Whelan rode as a hobby and the area in which he rode it. It was clear that the caller possessed detailed knowledge relating to Garda Whelan's private life.

5. The caller also made specific references to an incident on the 25th March 2015, approximately one week earlier, when gardaí including Garda Whelan entered a house on Dublin Road, Limerick for the purposes of executing a bench warrant for the appellant's brother, and while there discovered the appellant hiding in the attic. The reference on the telephone to Garda Whelan riding a white horse had also been made by the appellant when he spoke to him on that occasion. The appellant, on the 25th March, used the words '*clip-clopping around Ardahan on a big white horse around the Christmas*'. Identical words were used by the telephone caller. Ardahan is the location of Garda Whelan's house.

6. Furthermore, in the course of the telephone call the caller identified himself by reference to both his christian name and his nickname, Joey.

7. The telephone in the Garda Station was on loudspeaker mode and the entire conversation was overheard by Garda O'Connell and Sergeant Muldoon, as well as Garda Whelan. Both Sergeant Muldoon and Garda Whelan gave evidence that they recognised the voice of the caller as that of the appellant having had eleven years of interaction with him.

**Grounds of appeal**

8. There were originally two grounds of appeal submitted on behalf of the appellant, namely:-

- (i) the learned trial judge erred in law in ruling as admissible the evidence of voice identification/recognition, and
- (ii) the learned trial judge erred in law by failing to contextualise the Casey warning concerning voice identification/recognition when requisitioned so to do by the counsel for the appellant.

9. At the commencement of the hearing of the appeal senior counsel for the appellant informed the Court that the first ground of appeal was being withdrawn having regard to this judgment of this Court in *DPP v. Crowe* [2015] IECA 9, delivered by Edwards J.

**The decision in Crowe**

10. The appellant in that case appealed his conviction arising from the sending of a menacing telephone message to a member of An Garda Síochána. The telephone call was very short but its content was clear; the garda's life was very clearly threatened. On the following day the garda officer listened and watched a video recording of an interview which had taken place the previous day between gardaí and the appellant. He said he immediately recognised the voice of the appellant as being the same voice that had spoken to him on the telephone. He said he was 100% certain. Both the detective sergeant and the appellant in that case had known each other previously, but there had been no recent dealings between the two and the detective sergeant was puzzled as to why the appellant singled him out by making the telephone threat.

11. Significant differences in the background facts between *Crowe* and the instant case are clear. In the instant case there had been

interaction between Garda Whelan and the appellant just one week previously in somewhat strained circumstances. More importantly, some of the information concerning Garda Whelan's private life (in particular his hobby of riding a white horse) was specifically referenced in their face to face meeting a week earlier and repeated in the course of the telephone conversation. The identification / recognition factors were significantly stronger in the instant case than in *Crowe*.

12. In *Crowe* the absence of any particular rules or guidelines relating to voice identification / recognition was noted by this Court. In that case also, the Court considered the adequacy of the *Casey / Turnbull* warning adapted to the context of voice identification evidence given to the jury describing it as impeccable.

13. The appeal in *Crowe* was allowed and the conviction quashed for reasons particular to that case. In the course of its judgment in that case, the Court stated:-

*"The court considers that counsel for the appellant was correct in acknowledging that there may be no perfect or optimum system, and accordingly it is not for this court to be prescriptive concerning voice identification procedures in future cases. This is the first such case to come before this court and the absence of safeguards in this case, though a matter to be deprecated, may be partly explained by the novelty of the situation presenting itself to the investigating Gardaí in this case. Be that as it may, the Court agrees with counsel for the appellant that the total absence of safeguards meant that minimum standards of fairness were not met in the circumstances of this particular case, and accordingly the conviction cannot be upheld."*

14. In *Crowe* the voice identification evidence was described invariably as weak, infirm, of slight cogency and based largely upon largely upon circumstantial evidence. This Court was satisfied that there was a significant risk of subliminal bias.

15. Also in *Crowe*, the Court lauded the existence of advice and guidelines relating to the use of voice and visual identification procedures in the U.K. which are absent in this jurisdiction.

### **The Casey warning**

16. It is contended on behalf of the appellant that the "Casey" warning given by the learned trial judge in the course of his charge to the jury was insufficient, and more particularly, no effort was made to contextualise it. A requisition was made after the conclusion of the charge by counsel on behalf of the appellant on that basis.

17. The learned trial judge addressed the issue of the voice identification evidence in the course of his charge in the following terms:-

*"...This case clearly involves an issue of aural, voice identification or recognition. The prosecution say that the accused, Darren O'Halloran, was the person that made the telephone call to Detective Garda Pat Whelan on the 2nd April 2015 and allegedly made certain threats. The prosecution case - as part of the prosecution's case they say that Detective Garda Whelan and others recognised the voice as being that of the accused. The accused for his part denies emphatically taking any such call or any such threats at all to the gardaí or to Garda Whelan on the 2nd April 2015. Now, identification whether it is by ear or by eye, is a human process and you will all be aware of the fallibility of such human process. In such cases as this, involving voice identification or recognition, it is appropriate to warn a jury that if their verdict depends totally or substantially on the correctness of such, as in this case the voice identification or recognition, that the jury should bear in mind that there has been instances where responsible witnesses whose honesty is not in question and whose opportunity to hear what they say they heard has been adequate have made positive voice identifications or recognitions which subsequently proved erroneously or wrong. Accordingly, you must be especially careful before accepting such evidence of oral or voice identification or recognition as being correct but that if after careful examination of such evidence and in the light of all the circumstances and with due regard to all other evidence in the case, you are satisfied beyond reasonable doubt as to the correctness of the voice identification, then you are entitled to rely on it and act upon it accordingly. Equally, I must advise you that if after careful examination of this evidence, you are not satisfied beyond reasonable doubt as to the correctness of the voice identification or recognition then the accused is entitled to the benefit of the doubt and you must acquit."*

*In the context of this case and as part of your deliberations, you should examine very carefully and closely the events of the 29th March at the O'Halloran household. You should examine very carefully and closely the events and the circumstances at Henry Street Crime Office on the afternoon of the 2nd April 2015. You should examine very closely and carefully the evidence given in respect of the alleged voice identification or recognition that you have heard. You should consider the fact that there was no formal voice identification procedures or protocols in place at the time nor is there any such protocols or procedures existing today regarding such identification. This does not mean that you cannot act upon the evidence. The above is not an exhaustive list and you must consider all the evidence you have heard in this case and which includes the interviews of the accused. As I said to you at the start of this case, you ladies and gentlemen of the jury, are the sole judges as to the fact in the particular case. Again, it is appropriate to remind you, ladies and gentlemen, that the onus of proof is at all times on the prosecution to prove its case and all the elements of its case beyond reasonable doubt. The defence does not have to prove anything."*

18. In oral submissions made to this Court, counsel for the appellant particularly criticised the charge for its failure to warn the jury that more caution was required in cases of voice recognition than in cases of visual identification. However, neither this criticism, nor any request made in relation thereto, was articulated in the course of Mr. Sammon's requisition following the charge.

19. The warning given to the jury in the charge was very focussed, and appropriately so, on the potential frailty or fallibility of voice identification or recognition evidence. It was emphasised, for example, that *responsible witnesses whose honesty is not in question* have in other cases purported to identify individuals by hearing their voice and were subsequently proved to be wrong.

20. Further criticism made in the course of the oral submissions, and which was the subject matter of the requisition made following the charge to the jury, related to what was suggested as the failure on the part of the learned trial judge to advise the jury specifically in relation to the absence of identifying features in the telephone voice which prompted the witnesses to immediately satisfy themselves that it was the voice of the appellant.

21. It is contended on behalf of the appellant that the learned trial judge's charge ought to have followed the guidelines suggested in *Crowe* but it failed to do so. The warning given to the jury by the learned trial judge included a reference to the importance of their considering *all the circumstances* before making a decision on the voice identification evidence. They were also told to consider the voice identification evidence very much within the context of what had occurred on the 25th March 2015 at the O'Halloran household. That very clearly was a pointer to the fact that certain things said in the course of the telephone conversation had also been said on

that occasion, and in precisely similar terms, and with precisely similar detail, by the appellant, as well as the close proximity in time between that event and the offending telephone call.

22. The issue of voice identification evidence was first considered by an appellate court in this jurisdiction in *Crowe*. Much of the reasoning in this court's judgment in that case was based on a review of a number of decisions in relation to the issue of identification or recognition evidence including the seminal case on the subject, *AG v. Casey (No. 2)* [1963] I.R. 33. In that case, the Supreme Court emphasised the importance of an appropriate warning being given to the jury in relation to identification evidence. They said:-

*"...they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence in the case, they feel satisfied beyond reasonable doubt of the correctness of the identification, they are at liberty to act upon it."*

23. The importance of contextualising the *Casey* warning has frequently been emphasised in identification evidence cases. In *R v. Elliott* (Unreported, Court of Appeal, December 22nd 1997), the Court referred to the contextualising of the warning in the following terms:-

*"...Again, to refer throughout to points which the jury ought properly to consider when weighing the evidence simply in terms of arguments raised by the defence counsel can leave the jury with the impression that they are no more than that, as opposed to constituting matters, which the judge considers the jury should weigh carefully in the course of their task."*

24. In *R v. Turnbull* [1977] QB 224 the issue of the need to suitably address a jury on the issue of identification evidence was addressed in some detail.

25. The construction of a warning relating to identification evidence based on the views expressed in *Casey* and *Turnbull* was approved by this Court in *Crowe*. In that case the Court went on to state that where the prosecution relied (in whole or in part) on voice identification evidence it was appropriate and necessary that the trial judge give a suitably adapted *Casey/Turnbull* direction. In the course of the Court's judgment in *Crowe*, Edwards J. stated:-

*"...an appropriate warning of the Casey / Turnbull type drawing the jury's attention to the inherent dangers in relying on such evidence, and to the specific infirmities in the identification evidence adduced before them, will generally be a sufficient safeguard against the possibility of wrongful conviction..."*

26. In *R v. Hershey* [1997] EWCA Crim 3106, it was stated:-

*"There is not a great deal of authority as to the manner in which a judge should direct a jury in respect of voice identification, particularly where the witness is indicating that he recognises a voice which is known to him. In our judgment, a judge should tailor his directions to the jury on the lines indicated by this Court and in the specimen direction issued by the Judicial Capital Studies Board in respect of visual recognition or identification, but tailored for the purposes of voice identification or recognition. The judge should follow, suitably adapted, the guidelines laid down in R v. Turnbull [1977] QB 224, 63 C.R. App. Rep. 132 and the cases which have followed. Above all, it is vital that a judge should spell out to a jury the risk of a mistaken identification, the reason why a witness may be mistaken, pointing out that a truthful witness may yet be a mistaken witness, and dealing with the particular strengths and weaknesses of the identification in the instant case."*

27. Professor O'Malley's book, *The Judge's Charge in Criminal Trials*, addresses the issue of the contextualisation of the warning to be given to the jury. It suggests that, *inter alia* *"...some factors will stem from the facts of the case itself...the reliability of the identification will depend on the length of time for which the witness heard the perpetrators speak...the distance between them at the time of speaking...the degree of background noise in the area at the time, whether they had both spoke the same language or had the same accents...and the length of time between the witnesses exposure to the voice in the making of the identification. Another factor that will affect the reliability of the identification is where the witness already knows the accused and identifies the accused voice as that of the perpetrators."*

28. The warning aspect of the learned judge's charge in the instant case is undoubtedly on a par with the impeccable charge (as per Edwards J.'s judgment) in the *Crowe* trial. In the latter, the learned trial judge contextualised the warning in the following terms:-

*"...and I want to contextualise the warning for you in relation to the particular recognition, or identification which was carried out by Sergeant Smith. And this is non-exhaustive; you can use your own facilities and your own judgment in deciding which aspects of it might be relevant. I'm simply contextualising the bits that I've seen and made a note of. You should look first of all at the original communication and the circumstances of that, the time of the morning, where the officer was at the time, that it was communication over a mobile phone, it was a communication of 30 seconds duration and you heard how much was on one side and how much was on the other in terms of the conversation. You should consider the kind of communication that it was in the context of the subsequent identification a day or so later, members of the jury, you should consider that that was based upon a 15 second excerpt or some time not much longer than that. You should consider that the sergeant didn't purport to base it on any particular characteristics of the voice that he heard on the video or the audio part of the video replay. You should bear that in mind. He wasn't saying that it was a particular tone, it was a particular accent or a particular type of accent or a particular region of a particular part of the country. He didn't give any features. He just said I heard 15 seconds and I'm satisfied of the 15 seconds I heard on the audio replay of the tape was the same voice as I heard on the mobile phone line 24 hours or so earlier, and you can look at the differences in relation to that and take into account whether they are significant or insignificant..."*

29. The purpose of contextualisation the warning is to concentrate the minds of the jury on the facts of the case and the evidence they have heard so as to prompt them to apply that warning to those particular facts. Its purpose is to direct the jury to consider the evidence they have heard and in the context of the warning given to them by the trial judge as the potential for error in identifying an individual by voice.

30. In the instant case contextualisation was provided by the learned trial judge, albeit in somewhat terse and brief terms. He said in the course of his warning to the jury:-

*"In the context of this case, and as part of your deliberations, you should examine very carefully and closely the events of the 29th of March at the O'Halloran household. You should examine very carefully and closely the events and the circumstances at Henry Street crime office on the afternoon of the 2nd of April 2015. You should examine very closely and carefully the evidence given in respect of the alleged voice identification or recognition that you've heard."*

31. In these few sentences, the learned trial judge was clearly emphasising to the jury that their consideration of the voice identification evidence should be in the context of an examination of what was said by the appellant at the O'Halloran household and what was repeated by the telephone caller on the 2nd April 2015. In this respect, the reference by the appellant to certain personal information about Garda Whelan in the course of their interaction on the 29th March 2015 and what was said in the course of the telephone call are paramount.

32. Following the charge to the jury, Mr. Sammon requisitioned the learned trial judge in relation to the issue of his warning to the jury. His concern related to just two aspects. He said, firstly:-

*"...no evidence has been adduced by the prosecution of any particular peculiarity or anything of that nature in terms of the voice that is alleged to have uttered the criminal threats and within terms of contextualising the warning, I would ask you to consider reminding the jury of that.."*

Secondly, he requested that the learned trial judge would remind the jury of the evidence of what the appellant told the gardaí about his activities at or around the time of the telephone call, in effect alibi evidence.

33. The learned trial judge declined to re-charge the jury in relation to either point. In relation to the contextualisation issue he said:-

*"..I take the view..I have..contextualised everything that I had to in respect of the fact that the gardaí had nothing to equate it with as such. If I can, is that not effectively inviting me to comment on the particular matter? And I don't feel it appropriate for me to comment on it. I feel that the evidence is there, the evidence is clear. I've reminded them very clearly of the cross-examination that took place, the robust cross-examination that took place on the question of there being no..it was compared..there was nothing to compare it with, if I can approach it in that fashion.."*

34. It is important to recognise that the extent of any *Casey/Turnbull* warning and the contextualisation of such a warning will depend on the facts in individual cases. It is important that the warning and its contextualisation is suitably adapted to meet the facts and the evidence in each case. In the instant case, while the recognition of the appellant's voice by the different gardaí was based to a degree on their previous knowledge of him and of speaking with him, the repeating of certain personal details relating to Garda Whelan by the caller of similar information disclosed by the appellant some days earlier was compelling. It was not a case of voice identification based wholly or largely on tone or accent, and hence, the learned trial judge was entitled to exercise his discretion not to re-charge the jury in relation to these issues. Furthermore, the trial had been a relatively short trial and the evidence would have remained relatively fresh in the minds of the jury in the course of their deliberations.

35. In all the circumstances the Court is satisfied that the jury was adequately charged in relation to the subject of voice identification evidence and that the appellant received a fair trial. The appeal is therefore dismissed.