



THE COURT OF APPEAL

Record Number: 118/2022

**The President.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOHN HAYES

APPELLANT

JUDGMENT of the Court delivered on the 25th day of April 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 11th May 2022, the appellant was convicted of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Background

2. At approximately 7pm on the 14th July 2021, the perpetrator entered Fine Wines off-licence in Corbally, Limerick, wearing a mask. He produced a knife and demanded money from the part-time worker at the till who was alone in the shop at the time. A sum of €370 was taken.

3. Gardaí O'Reilly, O'Leary and McDonagh attended at the scene and viewed CCTV footage of the incident from behind the counter. Gardaí O'Reilly and McDonagh, on viewing the footage, immediately recognised the appellant as the perpetrator.

4. At approximately 9pm on the same date, Garda O'Reilly was on patrol with Garda McDonagh and observed the appellant herein wearing grey pants and black trainers similar to those worn by the perpetrator in the CCTV footage. He arrested him on suspicion of robbery. An initial search of the appellant's person revealed €180 concealed in his trainers. On the 15th July 2021, Garda O'Reilly conducted a further search of the appellant's trainers and found €110 concealed therein.

5. This appeal centres on the recognition evidence of the appellant by two members of An Garda Síochána.

Grounds of Appeal

6. The appellant appeals his conviction on the following grounds:-

"1. That the learned trial judge erred in fact and in law in permitting the Gardaí to give recognition evidence.

2. That the learned trial judge erred in refusing to discharge the jury having regard to the prejudicial evidence by the Garda witnesses.

3. That in all the circumstances the verdict of the jury was unsafe or perverse."

Submissions of the Appellant

7. At the commencement of the trial, an application was made by counsel for the accused to exclude the statements of the three members of An Garda Síochána contained in the book of evidence on the basis that this evidence was prejudicial to the accused and that the prejudicial effect outweighed the probative value. The application was refused and two members of An Garda Síochána were permitted to give the evidence.

8. It was submitted at trial that the proposed evidence that the Gardaí recognised the appellant through their work as members of An Garda Síochána, implied that the appellant was previously involved in criminal activity.

9. Reliance is placed on the decision of *People (DPP) v Larkin* [2008] IECCA 138 in which case, the trial judge admitted recognition evidence from two members of An Garda Síochána where they stated that they had recognised the accused in CCTV footage from their general community policing activity.

10. Further reliance is placed on *People (DPP) v Maguire* [1995] 2 IR 286 as follows:-

"In order to lay the foundation for the admission of identification evidence made by a witness on the basis of a review of CCTV, it is necessary for the witness to indicate the capacity and how well they knew the accused and how they can identify the accused."

11. It is submitted that the defence counsel's ability to test the Garda witnesses' evidence was much restricted by the fact of their roles as members of the Gardaí attached to the Crime Division and where any rigorous testing could lead to evidence of previous wrongdoing on the part of the appellant.

12. The following passage from *Larkin* where Kearns J. (as he then was) refers to the concerns expressed by Barron J. in *Maguire*:-

"His concern related more to the circumstances from which the recognition evidence was derived and the possibility that a jury might assume it was from prior criminal behaviour on the part of the accused. In the course of his judgment Barron J. referred to two cases which graphically illustrate the difficulties which can arise. In R v. Fowden & White [1982] Crim. LR 588 evidence was given by a police officer and a security man of identification of the accused with the person shown on the video film. It was held that it should have been excluded on the ground that its prejudicial effect outweighed its probative value since the identifying witnesses knew the accused from a similar shoplifting case a week later and accordingly the defence was deprived from testing the accuracy of the identification without causing prejudice and embarrassment."

13. In direct examination, when asked, "on viewing the CCTV footage, were you able to recognise anybody?" Garda O'Reilly stated as follows:-

A. *I was, Judge. On viewing the CCTV, I immediately recognised the person in the CCTV footage responsible for the robbery to be John Hayes.*

Q. *On what basis did you recognise him?*

A. *Judge, I've encountered him previously. I've no doubt that he is the male suspect in the footage, robbing John Maloney, in Fine Wines on that date."*

14. In cross-examination, Garda O'Reilly was asked, "and you were asked the basis on which you made that identification ..." the following exchange unfolded:-

"A. *That's correct, Judge.*

Q. *And you said that you encountered Mr Hayes previously?*

A. *That's correct, Judge.*

Q. *Now can you tell the court what you mean by that statement?*

A. *Judge, I've answered the question, Judge. I have encountered him previously. I've answered the question, Judge.*

Q. *Oh, yes, I know you have. Thank you. Thank you Guard. But this is very important that this man is sitting here, and you're giving evidence to say that you recognise him and that you encountered him previously. Now, can you please be specific and tell the Court how you encountered him previously?*

A. *Judge, I'll continue to answer the question with the same answer. I have encountered him previously, Judge.*

Q. *When did you encounter him previously?*

A. *During my time in Limerick as a guard.*

Q. *What time did you encounter him? What time specifically?*

A. *I don't have specific dates, Judge. I'm here four years.*

Q. *You are?*

A. *It was over the course of that tenure.*

Q. *And where did you encounter him?*

A. *I don't know. I don't have specific dates in front of me. I have encountered him previously, Judge.*

Q. *But, Garda, you're coming to court to give this evidence and are you telling this Court that you don't have information in front of you, you don't have specifics of what I'm asking you in terms of recognising and identifying this man? Is that what you're telling this Court?*

A. *Judge, I have recognised the male responsible for the robbery to be John Hayes, and that is my evidence and I have encountered him previously, Judge.*

Q. *...I'd like you to explain to the jury the basis of your knowledge. Can you do that?*

A. *I'm familiar with someone if I have encountered them before. I have encountered John Hayes before. That's how I recognise him to be responsible for the robbery and that's my answer, Judge.*

[...]

A. *I recognise him because I met him before.*

[...]

A. *Knew he was--where he was roughly from. I know he was from this side of the city because that's where I'm based and that's where I've met him before, Judge.*

[...]

A. *I believe I'm familiar with his home address, yes.*

[...]

A. *Because I have encountered him before in around where he lives or around Moyross where he's from.*

[...]

A. *Judge, I've encountered him before and I know he lives at 42 Hartigan Villas, Judge.*

[...]

Q. *...And finally, Garda, I think certainly you've said you're basing your opinion and your recognition on one previous encounter or how many previous encounters?*

A. *Numerous encounters, Judge*

Q. *Numerous?*

A. *Ten.*

Q. *Ten?*

A. *Possibly.*

Q. *That's—that's specific. Now, how can you be so specific?*

A. *Approximately 10."*

15. At this point, an application to discharge the jury was made on the basis that the above evidence of Garda O'Reilly having encountered the appellant over 10 times during the course of his work as a member attached to the Crime Office and no other basis would leave the jury with the impression that the appellant was a man previously known to An Garda Síochána through criminal involvement.

16. This application was refused, the trial judge stating that:-

"[...] back to the question of constraints that the defence complain about, that they're constrained in their cross examination. I have made it abundantly clear that they're not so

constrained but if they come – embark on a cross-examination they have to deal with the answers that are there. The fact that they may feel that they're prejudicial is a matter of opinion in respect of matters."

17. It is submitted that the trial judge erred in law and in fact in so stating and that he ought to have acceded to the application.

18. In cross-examination Garda O'Leary gave the following evidence:-

Q. "And you have given your evidence here then that you recognised the perpetrator on the footage?"

A. I immediately recognised the suspect, yes, Judge, as Johnny Hayes.

Q. And how were you so sure it was the accused man?"

A. Because from my day-to-day duties I know Mr. Hayes. I wouldn't have nominated him if I had any doubt in my mind that that was not Johnny Hayes

[...]

From being in Limerick since 2009.

Q. And just in relation to your day-to-day duties, what do they entail?"

A. A lot of things from – since--I started, from foot beat, routine patrols, from time I worked in -- I worked in all different-- aspects.

[...]

Q. --in terms of your day-to-day duties?"

A. I suppose the last time I met him would have been in February of '21.

Q. And where was that?"

A. Down in St Mary's Park.

Q. And what are the circumstances of that meeting?"

A. Johnny Hayes was in the company of two males that I needed to speak to. On approaching the three males, Johnny kept on walking, informed me that he had covid, which I was thankful of him of informing me, and kept on walking.

Q. And what did you need to speak to those two males about?"

A. That's -- that has nothing to do with this Judge.

Q. Sorry?"

A. That has nothing to do with this investigation.

Q. Well, I just want to know the specifics of your last encounter with John Hayes?"

A. Well, it was in relation to another investigation.

[...]

A burglary investigation."

19. As a result of this exchange, defence counsel sought to again discharge the jury on the basis that they were left with the implication of criminality through the associations by the appellant with others. It is submitted that the defence were seeking to contest the recognition evidence in terms of the frequency and circumstance of contact between the appellant and Garda O'Leary and that, in response, Garda O'Leary volunteered information that placed the appellant into a criminal context.

Submissions of the Respondent

20. The respondent refers to the legal principles in relation to the admissibility of recognition evidence by members of An Garda Síochána in *People (DPP) v Power* [2019] IECA 74, in which case, this Court referring to the *Larkin* decision stated that:-

"It seems that this case and other decisions preceding it pertaining to, for example, the receipt in evidence of CCTV footage date from a time where the availability and consequent introduction of such evidence was a novelty, but it is now of course commonplace in trial after trial. And indeed, if the Gardaí fail to harvest such evidence there may be circumstances in which an accused person is prejudiced to the extent that he cannot receive a fair trial, rare though that circumstance will be. It is also commonplace to introduce recognition evidence from members of An Garda Síochána, either without reference to the circumstances in which the gardaí became acquainted with the accused, especially in cases where it is not possible, say, because the accused has been recognised by the Gardaí because of his engagement in criminality, to adduce evidence of recognition based upon innocuous knowledge. When it is sought to contest recognition evidence, it may well be in such circumstances that either in cross-examination or otherwise evidence will emerge as to, say, the extent or frequency of contact and perhaps even the circumstance. We think that it is now recognised that it would be an affront to common sense if evidence identifying an accused as engaged in the criminal act alleged were to be excluded merely because the identification is made by Gardaí because of their prior acquaintanceship with the accused. It is hard to conceive of circumstances where such evidence could be more prejudicial than probative. We might note, in passing, that in his submissions at trial and in this ground of appeal counsel has repeatedly referred to the fact that the evidence should not be admitted because it is "prejudicial" - needless to say that fact is of no relevance, per se, if it be a fact. It is perfectly obvious, equally, that such evidence is not admissible on what might be termed an open ended basis. Circumstances may arise where, for example, the prosecution might be restricted to calling a lesser number of witness than all of those available to it who recognise the accused (as referred to by Kearns J.). This will be a matter for the discretion of the trial judge on a case by case basis.

21. It is submitted that the probative value of the recognition evidence outweighed the prejudicial effect.

22. It is noted that the jury had an opportunity to view the CCTV footage and that there was no suggestion that the footage was of an unsatisfactory quality. It is further noted that the jury were thoroughly and properly warned by the trial judge in relation to the recognition evidence and the approach to be adopted in their consideration of same.

23. Moreover, it was the respondent's case that the finding of cash concealed in the appellant's trainers, having been arrested shortly after the robbery was consistent with the appellant's involvement in the offence. In addition, the respondent relied on the similarity of clothing worn by the perpetrator and that worn by the appellant on arrest.

24. Insofar as the applications to discharge the jury are concerned, it is submitted that at no point did the evidence mandate the exceptional step of discharging the jury.

Discussion

25. The issue in this appeal concerns recognition evidence and more specifically, recognition evidence by members of An Garda Síochána, having viewed CCTV footage shortly after a robbery. No issue is taken with the quality of the footage, rather, the argument is advanced on three bases. Firstly, that such evidence was more prejudicial than probative and ought to have been excluded by the trial judge upon application being made at the commencement of the trial, secondly, that counsel was severely hampered in cross-examination in seeking to interrogate the evidence of recognition, given that such might lead to evidence demonstrating previous convictions, and thirdly, that the trial judge ought to have discharged the jury following what is said to be prejudicial evidence adduced in cross-examination.

26. This case concerned that of a re-trial and while the submissions refer to the first trial and extracts from that transcript, this Court is only concerned with the re-trial. At the commencement of the trial, an application was made to exclude the evidence of recognition on the basis of the proposed evidence of two members of An Garda Síochána that they recognised the appellant, having encountered him on numerous occasions during the course of their work. The decision of *Larkin* was relied upon by counsel for the appellant, who asserted at trial that while Garda recognition evidence may be admissible, it can only be admitted where such evidence would not prejudice an accused so as to render the trial unfair.

27. In the present case, it was argued that this would simply not be possible as the Garda knowledge of the appellant did not stem from a non-criminal context and so was inherently prejudicial. Concern was also expressed about the ability to properly interrogate their capacity to identify the appellant in cross-examination, as evidence could be elicited which would compromise the trial. This application was refused by the trial judge who permitted evidence to be adduced of recognition by two members of An Garda Síochána. He referred in his ruling, to the circumstantial evidence in the case where a sum of money was found concealed in the appellant's trainers on arrest and cautioned counsel for the Director to exercise care in eliciting the evidence.

28. It was not in dispute that a robbery had taken place on the evening in question, at around 7pm. The issue at trial and before this Court was, as stated, one of the admissibility of recognition evidence of the appellant by members of An Garda Síochána stationed in Limerick, specifically, Mayorstone Garda Station and Henry Street Garda Station.

29. There is no doubt that all prosecution evidence is, by its nature prejudicial; it is for a trial judge, upon application, to determine whether the prejudicial effect of proposed evidence outweighs its probative value. In the present case, the Gardaí viewed CCTV footage shortly after the incident, that footage would appear to have been of decent quality and no issue was taken in that respect.

30. It is clear from the *Larkin* and *Power* decisions that recognition evidence of the type in this case is admissible where the probative value outweighs the prejudicial effect. The fact that the appellant has 244 previous convictions and is therefore, clearly well-known to members of An Garda Síochána, cannot be permitted to provide him with some form of immunity from prosecution. As Kearns J. said in *Larkin*:-

*"If identification evidence is available from police officers and the same can be given in circumstances where the probative value of the evidence outweighs the prejudicial effect, the court sees no reason why such evidence should not be given **It is difficult to conceive of a greater affront to the community's interest in the prosecution of crime than to deny the prosecution the opportunity of calling such evidence...."***

(Our emphasis).

31. Two Gardaí were permitted to give evidence of recognition, thus ensuring that the correct balance was struck, each gave evidence of recognising the appellant in the course of their work in the Limerick area. It is now, as stated in *Power*, "*commonplace*" for such evidence to be adduced from members of An Garda Síochána where the Garda comes to know an individual in the course of Garda duties.

32. It may not be possible for a Garda to give evidence that their knowledge of the accused is gleaned from a non-criminal background, but this in itself does not render the evidence inadmissible. Where such evidence is highly probative, it is difficult to see how recognition evidence could be excluded simply because it is a member of An Garda Síochána who recognises the accused. Indeed, in the present case, it is difficult to conceive of more probative evidence than that of two members of An Garda Síochána, who, on viewing decent quality CCTV footage, immediately recognise the appellant. We do not find that the judge erred in admitting the evidence.

33. Insofar as application was made that the jury be discharged following cross-examination of the Gardaí, it is necessary to look to the evidence given.

34. Garda O'Reilly stated in direct testimony that on viewing the CCTV footage, he immediately recognised the appellant on the basis that he had encountered him previously. He expressed himself very sure of his identification. That, in essence, was as far as the recognition evidence went in direct examination.

35. In cross-examination, he confirmed that he was one hundred per cent sure of his identification and when questioned as to how he came to encounter the appellant previously, he was circumspect in his answers, stating that he had encountered the appellant previously during his time in Limerick as a Guard where he had been stationed for four years. Counsel continued to cross-examine and test the evidence insofar as that was possible in circumstances where the appellant had acquired 244 previous convictions at the time of trial.

36. Counsel contended, in seeking to have the jury discharged, that the evidence given was grossly prejudicial with clear imputations of criminal conduct on the part of the appellant. Moreover, counsel was concerned that the cross-examination was severely constrained given the appellant's background and the risks inherent in cross-examination. The application was refused.

37. The application was renewed following Garda O'Leary's evidence where he indicated in direct testimony that he recognised the appellant from his day-to-day duties in the Limerick area. In cross-examination he was asked about a specific encounter with the appellant who was in the company of two other males with whom the Garda wished to speak, upon being pressed, Det/Garda O'Leary said that the matter concerned another investigation, a burglary.

38. Regarding each of the discharge applications, much of the impugned material came about in the course of cross-examination, where the witnesses were pressed to answer. It is argued that this situation is, in effect, indicative of and underscores the difficulties faced when cross-examining a witness in this kind of circumstance.

39. However, it is clear that counsel robustly cross-examined the witnesses and if she was constrained, such came about as a result of the 244 previous convictions of the appellant. Insofar as the second application is concerned, the Garda gave evidence of meeting the appellant in the company of two males, he was interested in *those* males regarding a burglary but was not interested in the appellant. It is said that the fact the appellant was in their company tarnished the appellant. This does not meet the high threshold to discharge a jury, the evidence was elicited in cross-examination, upon the Garda being pressed and did not point to any criminality on the part of the appellant, indeed quite the contrary.

40. It simply flies in the face of common sense that an individual who has acquired a substantial number of previous convictions, may then seek to exclude highly probative evidence of recognition where the evidence is that of members of An Garda Síochána who have come across him in the course of their duties. Obviously, care must be taken, as it was in the present case, to avoid unnecessarily prejudicial evidence, but the evidence was relevant and probative and the prejudicial effect did not outweigh its probative value.

41. We are not persuaded that the grounds of appeal are made out and accordingly, the appeal is dismissed.