THE COURT OF APPEAL

Record Number: 48/20
Neutral Citation Number: [2021] IECA 88

Birmingham P.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

KARL VOGELAAR

APPELLANT

JUDGMENT of the Court delivered on the 25th day of March 2021 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant was found guilty of two counts of robbery contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Background

2. The two counts in respect of the appellant relate to robberies which occurred on 4th November 2016. The first robbery occurred at Tully's Bookmakers in Wheaton Hall, Drogheda. Evidence was given that at around 8:45 pm three masked men entered the premises. There was one employee, Mr Connolly, in the shop at the time. One of the men was described as holding a hand gun and he was extremely aggressive. This man was followed by a second man and the third man remained outside the premises in order to keep

watch. The gun was pointed in Mr. Connolly's face and the offender shouted "where is the money?", a shot was fired into the air and Mr. Connolly was struck at this stage with a fist to the right side of his face. The two men in the shop grabbed the money taken out by Mr. Connolly, around €1,600 in total. Following this, the man with the gun put the gun to Mr. Connolly's knee. The raiders took the hard drive from the CCTV. The male with the gun asked for the key of the poker machine. Mr Connolly told him he had had enough and at this stage he was struck a second time to the right side of his face, causing him pain. At this stage the men left the premises and left the scene in a car.

3. The second robbery took place some ten minutes later at Tully's Bookmakers in Ballsgrove, Drogheda. There was also only one employee, Mr Faulkner, on the premises at the time. In a similar manner, the three men entered the premises and one of the three brandished a silver hand gun and grabbed Mr. Faulkner aggressively, demanding money. The sum of €1,735.00 was taken from the shop. The men left the scene in a car which the gardaí were able to recover soon after the robberies. It is accepted that this was the getaway vehicle. Several items were found in this vehicle, including a portion of a black leggings which was found in the driver's door pocket of the vehicle. The inside of this item was analysed and was found to contain the DNA profile of the appellant along with the partial DNA of two other unknown persons. The other items found in the vehicle were the hard drive from the CCTV from the first robbery, cartridge casings, and a second modified portion of a legging. The two leggings were found in driver's side pocket of the vehicle.

4. The appellant was arrested on the 25th July 2017 and following a five-day trial he was convicted of two counts of robbery on the 9th July 2019.

Grounds of appeal

5. The appellant puts forward the following two grounds of appeal:-

(1) The learned trial judge erred in fact and in law in deeming the arrest and detention of the appellant lawful in all the circumstances of the case;

(2) The learned trail judge erred in fact and in law in not acceding to the appellant's application for a directed acquittal.

Ground One

6. This ground is concerned with the trial judge's ruling on the lawfulness of the appellant's arrest and subsequent detention. This Court indicted on the date of the hearing of the appeal that we consider this ground unstateable and dismissed Ground 1. Consequently, this judgment will address Ground 2 only.

Ground Two

7. This ground is concerned with the trial judge's failure to accede to the application for a directed acquittal at the close of the prosecution's case. The application made by counsel for the appellant was founded on the fact that the only evidence linking the appellant to the robberies was a pair of leggings found in the vehicle, which the respondent contended connected the appellant to the robberies. The inside of the legging material was found to contain DNA matching that of the appellant along with other partial DNA profiles.

8. In refusing the application the trial judge ruled as follows:-

> " I heard applications for directions in respect of both defendants from Mr Nicholas and from Mr Heneghan. And Mr Heneghan said that the only thing that links his client Mr Vogelaar to the crimes was his DNA found on one of the leggings. I've reviewed the evidence and you know that I omitted to or refuse to admit into evidence last week in relation to association. However, the bar is low and I think this is a classic case for a jury to consider and weigh up the evidence, all of which is circumstantial...

So, yes, the evidence in this case is entirely circumstantial. It is a matter for -- it ought to be a matter, I believe, for a jury to decide as to how tenuous it is and whether they have doubt and whether they have reasonable doubt. It's obviously not open for the jury to speculate. There's nobody more aware than I am as to the need to be ultra-cautious in what I will ultimately have to say to the jury in my charge but it is not for me to emphasise the pros and cons of either the prosecution case or the defence cases in this instance. And I think I've observed the jury going about their work. I think they've been attentive and what I've heard in evidence will have been digested fully by them and what prosecution counsel and the two defence counsel will have to say to them will, I have no doubt, be fully digested and considered by them in the course of their deliberations and I have no doubt that they will arrive at a fair and just determination and verdict in this case in due course. So, the application for a direction in each case is denied."

Submissions of the appellant

9. The appellant refer to *The People (DPP) v. Wilson* [2017] IESC 54 where the Supreme Court considered the circumstances in which DNA evidence can be proffered as evidence of guilt:-

"The first issue concerns the potential connection between a DNA sample found at what one might loosely call a crime scene and the potential guilt of the accused. The term 'crime scene' is used loosely for it may involve the actual scene of the alleged crime but also may involve some other location where there is evidence of a connection with the crime. DNA may, for example, be found in a car which can be associated with a crime.

For the purposes of this aspect of the analysis it is appropriate to assume, but for the purposes of the argument only, that it can be shown that the DNA found in a

particular location is in fact DNA which comes from the accused. **But even if that is so to what extent can it be said that this tends to establish the guilt of the accused?** Here there may be a range of circumstances stretching from those where there is a very high likelihood that the DNA found at a particular aspect of the crime scene must be that of the perpetrator of a crime to those which only demonstrate, at least in and of themselves, a tangential connection. For example, the sole DNA found on a murder weapon where there was evidence that the accused was not wearing a glove and used his or her hands to deploy the weapon concerned falls into a very different category from the finding of DNA on, for example, a cigarette butt located at the scene of a crime but where there is no direct evidence that the perpetrator discarded a cigarette at the time of the crime and no evidence to suggest that the cigarette butt on which the relevant DNA sample was found was necessarily discarded in the course of the commission of the relevant crime and by a participant in that crime. Doubtless a whole range of intermediate examples could be given where the connection between the relevant DNA sample and the identity of the perpetrator of the crime might be established to a greater or lesser degree.

In passing it is appropriate to emphasise that the Court is not here concerned with the admissibility of such evidence. Clearly even evidence of a tangential connection may be relevant in the overall context of a particular case but would be unlikely to provide sufficient evidence, without more, to allow for a safe conviction. The extent to which the DNA evidence concerned provides evidence of guilt will depend on all the circumstances of the case. It follows that there will undoubtedly be cases where, even should it prove possible to establish that the DNA sample concerned is that of the accused, the connection of the DNA sample to the perpetrator, having regard to the circumstances in which the sample concerned was found, may fall short,

> **or, indeed, a long way short, of providing sufficient evidence,** certainly in and of itself, to establish guilt."

10. The appellant submits that much like the cigarette butt example used in *Wilson* the appellant's DNA was found on a moveable item connected with the crime scene but there was no evidence of when the legging was placed in the vehicle nor that the appellant had ever been in the vehicle. The appellant argues that there was no other evidence whatsoever.

11. The appellant says that this evidence was further weakened by the finding of DNA from two or more people other than the appellant on the legging. In support of this proposition the appellant refers to *The People (DPP) v. O'Callaghan* [2013] IECCA 46. *O'Callaghan* concerned DNA of the accused found on a balaclava which had been worn during the course of a robbery. The balaclava had been recovered and a sample of DNA had been obtained which consisted of a mixture of DNA from more than two people. The major profile of DNA matched that of the appellant. The appeal was allowed on the basis that there was no evidence as to when any of the DNA samples were deposited. The Supreme Court in *The People (DPP) v. Wilson* [2017] IESC 54 commented on *O'Callaghan* as follows:-

> "This case highlights the fact that there was a DNA sample relating to the accused person found on a balaclava, the balaclava was found near the crime scene, there was also evidence that other persons had worn the balaclava but there was no evidence to connect the accused person directly with the crime scene. There was, of course, evidence to connect him with the balaclava but that does not mean that he had been wearing it at the particular time when the robbery was committed. Thus, although there was a DNA match, it did not amount to proof of guilt."

Submissions of the respondent

12. The respondent accepts that the primary evidence linking the appellant to the two offences was DNA evidence but it is clear from *The People (DPP) v. Wilson* [2017] IESC

54 that a jury may convict an accused where the primary evidence linking him or her to the crime is DNA evidence. Whether more is required is dependent on the circumstances of the case. The respondent refers to the Court's discussion in *Wilson* of the range of circumstances in which DNA found at the scene can establish guilt :-

> "Here there may be a range of circumstances stretching from those where there is a very high likelihood that the DNA found at a particular aspect of the crime scene must be that of the perpetrator of a crime to those which only demonstrate, at least in and of themselves, a tangential connection."

The assessment is firstly the extent to which it can be said the identification of a sample of an accused at the crime scene can be probative of guilt.

13. The respondent accepts that small traces of DNA from unknown persons were found on the legging but the respondent submits that the evidence of Dr McGrath made it clear that about 90% of the DNA was attributed to the appellant and came from direct contact whereas the remaining 10% did not necessarily come from direct contact and could be background DNA or resulting from casual contact. The respondent refers to *The People (DPP) v. Marlowe* [2019] IECA 263 where the sole evidence to link the accused to the crime was DNA evidence. In *Marlowe* there was evidence before the trial court of the percentage of the major component versus the minor component of the DNA material involved. The Court held that the case at hand could be distinguished from *The People (DPP) v. O'Callaghan* [2013] IECCA 46 because evidence had been given of the percentages of DNA and of the potential significance of such proportions for example in determining whether such disposition had taken place in the course of wearing the item. In light of *Marlowe*, it is submitted that the evidence was such that the jury could rationally conclude that the legging was worn by the appellant and that the other minor contributions of DNA were from persons who had not worn the legging.

14. The respondent submits that the case was properly left to the jury and the jury were entitled to convict the appellant of the offences in question.

Discussion and Conclusion

The Evidence

15. Certain matters arose on the evidence as follows:-

(1) It was common case that two armed robberies occurred within 15 minutes of each other;

(2) Three raiders were involved in each robbery;

(3) Face coverings were worn by the raiders of different types; the victim to the first robbery described a 'hockey mask' and a black mask, the third raider remaining at the entrance to the shop. The victim of the second robbery observed a white mask and a 'rubber bandit' style plastic bag with holes for eyes.

(4) The CCTV hard drive was taken by the raiders during the first robbery;

(5) A shot was discharged during this robbery;

(6) The getaway vehicle was discovered some two hours later proximate to the locus.

The Contents of the Renault Clio

16. No issue was taken with the evidence that this vehicle was used by the raiders to make their escape. In this vehicle a number of items were recovered. Firstly, two pieces of modified leggings which were found together in the driver's side pocket of that vehicle. Those items were labelled AGB9 and AGB10. AGB10 was described as tubular black fabric with two holes on one side. Samples were taken for the purpose of DNA analyses which targeted the areas with the holes, as it was possible that the item was modified in that manner for the purpose of creating eye holes. A male profile was generated matching a co-accused.

17. That particular item, adapted for use as it was and even absent the DNA, in our view gave rise to the reasonable inference that it was fit for use as a disguise in a robbery.

18. The second modified portion of a legging, AGB9 did not bear holes and was also described as a tubular black fabric. It measured 34 x 11 cm approximately, and was of a different fabric to AGB10. A minitape lift was taken from the inside surface of the fabric from which a mixed DNA profile was generated, with a major male contribution and a minor contribution. The major contribution matched the appellant's DNA profile. There was DNA from at least three people on AGB9, in the region of 90% of the majority profile was attributed to the appellant and the remaining roughly 10% emanated from two additional persons.

19. From the photographs, it may be seen that this second cutting from a legging was cut in a similar fashion to AGB10, albeit without the 'eye holes', again in the opinion of this Court giving rise to a reasonable inference that it had been adapted for use as a disguise in criminal activity as a face and/or hand covering.

20. Additional items were discovered in the vehicle including the CCTV hard-drive from the first robbery, cartridge casings of a specific type and one live round,

21. The sole forensic evidence against the appellant was that of the DNA on the inside of the tubular piece of legging; AGB9.

22. Circumstantial evidence operates cumulatively and if the evidence taken together is sufficient to eliminate all other reasonable possibilities consistent with innocence, then such evidence can provide evidence of guilt to the required standard.

23. A clear statement of the test in a case against an individual based on circumstantial evidence was expressed by O'Higgins C.J. in *The People (DPP) v. Madden* [1977] IR 336 at 349, where he said:-

> "[t]his evidence is circumstantial in nature, a test can also be expressed as to whether it was open to a fact-finding tribunal to hold that such evidence was inconsistent with any credible explanation other than the guilt of this accused."

24. The significance of the DNA evidence will depend on all the circumstances of the case. While no issue of substance is taken by the appellant with the evidence that the DNA was that of the appellant, issue is taken as to whether there was sufficient evidence from which to establish the guilt of the appellant having regard to the circumstances in which AGB9 was found.

25. It is certainly so, that the sole evidence linking the appellant to the crimes was that of the DNA evidence, however, as stated in *The People (DPP) v. Wilson* [2017] IESC 54 , DNA evidence alone may be sufficient to establish the necessary proof, but is dependant on the particular circumstances of any given case.

26. The fact that the vehicle in which AGB9 was found was the vehicle used by the raiders to make their escape is of undeniable significance. As we have observed this vehicle was discovered just two hours after the robberies, some 700 metres away. Inside this vehicle the gardaí located an adapted portion of a legging, adapted by having two holes on one side, (AGB10), which bore one of the accused' DNA. It is of considerable significance that the second modified piece of leggings bearing the appellant's DNA (AGB9) was found in the driver's side pocket of the get-away vehicle alongside the makeshift mask with eye holes (AGB10). The respondent established that the hard drive from the first robbery was found in the vehicle and finally, also found were casings of a specific type which the respondent contended linked the co-accused to a certain type of bullet found during a search of his home. However, the real significance of the casings in our view is that they were found in the getaway vehicle just two hours after the robberies in which a shot was discharged.

27. Certainly, there was no evidence to directly connect the appellant to the vehicle, however, the respondent contends that this serves to strengthen the coincidence of the finding of a modified black legging of tubular shape bearing the appellant's DNA in the vehicle shortly after the robberies. With this submission, we agree.

28. It is important to assess in any given case, not only the item upon which the DNA is found, but also the location of that item and its connection, if any, with other items of evidential value.

29. In our view, the items in the car when taken together were capable of constituting evidence amounting to the paraphernalia of a robbery/robberies. No one item can or should be looked at in isolation. While no single piece of evidence found in any given case may give rise to anything more than suspicion, it is the combination of factors which may elevate suspicion to proof beyond reasonable doubt. As it happens in the present case, it is our view that no single item could be described as an innocent item but while any one item might not have been sufficient if taken on its own, crucially when *all* items which were found are considered together, along with the fact that they were found shortly after the robberies *in* the get-away vehicle, the evidence connecting the appellant to the robberies is significantly strengthened.

30. After careful consideration we find ourselves in agreement with the respondent in the present case that the trial judge did not err in failing to withdraw the case from the jury. When the evidence is considered as a whole, it is apparent that the respondent had discharged the evidential burden and made out a prima facie case. On the conclusion of the respondent's case, there was, in our opinion sufficient evidence, which if accepted by the jury to the requisite standard could lead to a conviction.

31. Accordingly, the appeal against conviction is dismissed.