THE COURT OF APPEAL

112/2021

The President
McCarthy J.
Kennedy J.

IN THE MATTER OF SECTION 23 OF THE CRIMINAL PROCEDURE ACT 2010

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
APPLICANT

AND

J.P.C

RESPONDENT

Judgment of the Court delivered on the 29th day of July 2022 by Ms. Justice Isobel Kennedy.

Introduction

1. On the 13th May 2021, the respondent was arraigned on a single count of robbery, a jury was empanelled and a decision was taken to proceed with a *voir dire* concerning an informal identification parade. Following this *voir dire*, the trial judge directed the jury to acquit the respondent. The applicant now seeks to appeal to this Court, with prejudice, pursuant to the provisions of section 23 of the Criminal Procedure Act, 2010, hereinafter "the 2010 Act."

The jurisdiction to appeal with prejudice

2. S. 23 of the Criminal Procedure Act 2010, as amended by the Court of Appeal Act 2014, provides (to the extent relevant to the issues on this appeal) as follows:

> "(1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General as may be appropriate, may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to—
>
> (i) the Court of Appeal, or
>
> (ii) in the case of a person who is tried on indictment in the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution",

(2) [Not relevant]

(3) An appeal referred to under this section shall lie only where—

(a) a ruling was made by a court-

(i) during the course of a trial referred to in subsection (1), or

(ii) [Not relevant]

which erroneously excluded compelling evidence, or

(b) [Not Relevant]

(4) [Not relevant]

(5) [Not relevant]

(6) [Not relevant]

(7) [Not relevant]

(9) [Not relevant]

(10) [Not relevant]

(11) On hearing an appeal referred to in subsection (1) the Court of Appeal may—

(a) quash the acquittal and order the person to be re-tried for the offence concerned if it is satisfied—

(i) that the requirements of subsection (3)(a)(i) or (b), as the case may be, are met, and

(ii) that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,

or

(b) if it is not so satisfied, affirm the acquittal.

(11A) [Not relevant]

(12) In determining whether to make an order under paragraph (a) of subsection (11) or (11A), the Court of Appeal or the Supreme Court, as the case may be, shall have regard to—

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and

(d) any other matter which it considers relevant to the appeal.

(13) (a) The Court of Appeal or the Supreme Court, as the case may be, may make an order for a re-trial under this section subject to such conditions and directions as it considers necessary or expedient (including conditions and directions in relation to the staying of the re-trial) to ensure the fairness of the re-trial.

(b) Subject to paragraph (a), where the Court of Appeal or the Supreme Court, as the case may be, makes an order for a re-trial under this section, the re-trial shall take place as soon as practicable.

(14) In this section "compelling evidence", in relation to a person, means evidence which –

(a) is reliable;

(b) is of significant probative value, and

(c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond reasonable doubt of the person's guilt in respect of the offence concerned."

3. The evidence in the *voir dire* was confined to three witnesses. At the conclusion of the *voir dire*, the judge adjourned proceedings to consider the evidence and the law and ruled the following day, finding that it was contrary to fairness and natural justice to admit the evidence.

4. Following the ruling, counsel for the applicant referred the judge to the decision of this Court (Birmingham J. as he then was) in *The People (DPP) v CC and MF* [2016] IECA 263 and indicated to the court that the remaining evidence in the case would bolster the excluded evidence and that it would amount to potentially compelling evidence in terms of s. 23 in the event of the within application being made to this Court.

5. With admirable candour, counsel explained to the judge that, in his opinion, absent the impugned evidence arising from the informal identification parade, there would be insufficient evidence to secure a conviction. Counsel referred the judge to ss.14 of the 2010 Act and to extracts from the CC decision, with particular reference to the following at para.11 thereof:-

> "It may mean that if in a particular case evidence is excluded, and as a result a directed acquittal is inevitable, the prosecution will nonetheless be obliged to call all the other relevant evidence in the case in order to preserve their position under s.23 of the Act of 2010, as amended……..By any standards, that is not a satisfactory situation, and it is a matter which calls for legislative intervention."

6. The defence was strongly opposed to any further evidence being heard and the judge, erroneously in our view, did not permit any further evidence ruling:-

"I think going through the procedure to keep section 23 open brings the entire trial process into disrepute, and I'm not happy to stand over that.."

7. We believe this was an error on the part of the judge in that while the evidence may not have been sufficient to sustain a conviction without the evidence of the informal identification, nonetheless, in terms of the ss. as it stood prior to the amendment in 2022, (more of which hereunder), the prosecution may have found it necessary to call the evidence. In any event, the legislature has now intervened as explained below.

8. The application in this case is brought on the basis that the trial judge erroneously excluded compelling evidence within the meaning of s. 23(14) of the 2010 Act. The Director initially sought to rely on the further amendment to the 2010 Act where s. 17 of the Criminal Procedure Act 2021 substituted the following for s. 23(14):-

"In this section –

'compelling evidence', in relation to a person, means evidence which-

(a) Is reliable,

(b) Is of significant probative value, and

(c) Is such that, when taken together with-

(i) all the other evidence adduced in the proceedings concerned, and

(ii) to the extent that such evidence has not been adduced, the relevant evidence proposed to be adduced in the proceedings,

a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned;"

9. The Director argued that this Court could take account of *inter alia* material outlined by counsel for the applicant at the commencement of the *voir dire* at trial as constituting "relevant evidence proposed to be adduced in the proceedings." The Criminal Procedure Act 2021 commenced on the 28th February 2022 and the trial judge's ruling was handed down on the 20th May 2021. In view of the provisions of s. 23 (1) of the 2010 Act and, in particular, where the relevant portion provides:-

"23.— (1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director […]

may, subject to subsection (3) and section 24 , appeal the acquittal in respect of the offence concerned…"

The Director proceeded in terms of the 2010 Act and did not seek to rely on the substituted provision.

10. Therefore, the issue for this Court is a net one and that is whether the trial judge erroneously excluded compelling evidence.

Background

11. Briefly, to set the context to the impugned informal identification parade, on the 5th August 2020, Mrs. B left her home to attend the Post Office. It is alleged that when she returned to her home, a male approached her at her back door, shouted at her and took her purse and its contents. She gave description to the Gardaí on reporting the incident, including that she saw the perpetrator's eyes and that he was wearing a black hoodie. Subsequently, the respondent was arrested and detained pursuant to s. 4 of the Criminal Justice Act 1984. During his detention, he was invited to participate in an identification parade and having consulted with his solicitor, he indicated that he would not be participating.

12. Following this decision by the respondent, a Sergeant unattached to the investigation was asked to organise an informal identification parade at the Garda Station. At approximately 8:30pm, the Sergeant assembled 15 males all of whom were photographed and from which he then selected 7 of a similar age, height and appearance to the respondent to participate in the parade. He stated that the respondent was casually dressed but could not recall the dress. The procedure to be adopted was that Mrs. B would sit with her daughter and would squeeze her hand if she identified the perpetrator.

13. Each foil walked with a Garda through a door, which opened as each person came in, and then proceeded down a corridor, at the end of which, sat Mrs. B. The respondent was the third person to be brought onto the corridor. The witness squeezed her daughter's hand on two occasions, once, she said as the third person walked out and then as he walked by. She said she recognised him both times and his eyes were a particular feature of note for her. She said she must have spoken to the Sergeant afterwards.

14. Mrs. B's daughter gave evidence that her mother trembled and squeezed her hand as the third person walked out and that as he got closer to them, she squeezed her hand harder. She said that her mother referenced his eyes in the immediate aftermath of the respondent passing them. She also said that this third candidate said something as he passed and that her mother said that that "was his voice." In cross-examination, this witness said that when candidate three got close to her mother, her mother commented on his eyes and when he spoke, she commented on his voice.

15. The Sergeant further confirmed seeing Mrs. B squeeze her daughter's hand when the respondent walked down the corridor.

16. Counsel for defence argued that the evidence of Mrs. B's identification should be excluded on the following grounds:

    "a. When being invited to participate in an identification parade, Mr. C had not been made aware of the consequences of not so doing and an informal form of identification might be made;

b. There was insufficient evidence as to the dress and appearance of the Respondent to facilitate a comparison with the dress/appearance of the other participants in the parade;

c. The Respondent was the only participant in the parade who spoke;

d. Mrs. B identified the Respondent/Accused, before observing all of the participants who came after him in the parade;

e. Because he was aware that the Respondent had been arrested, the circumstances of his arrest and what he was suspected of rendered Sergeant Barnett insufficiently independent of the investigation to conduct an identification parade."

17. On the 20th May 2021, the trial judge ruled on the matter as follows:

> "…all of the parties who are aware that they're being watched behave in a similar fashion, but the accused wasn't aware of this, and he didn't behave in a similar fashion to the other participants because he spoke and conversed, and that caused him to stand out from the other participants. And for that reason I'm absolutely satisfied that it would be inherently unfair to allow an identification which was garnered in such a fashion to be admitted in evidence."

Submissions of the applicant

18. The applicant notes that at the time of the trial, the amendment to s. 23(14) had not been commenced but submits that it applies to the instant case. However, ultimately the applicant did not proceed with this argument and so we do not address it in this judgment.

19. The applicant says that the evidence of Mrs. B was "compelling evidence" within the meaning of s. 23(14) of the 2010 Act. It is contended on the part of the applicant that the identification evidence of Mrs. B of itself was such that a jury properly charged could have been satisfied beyond reasonable doubt of the guilt of the respondent. The witness said the incident occurred on a bright afternoon, that her eyesight was good and that she particularly noted the perpetrator's eyes.

20. For the purposes of s. 23(14)(b), it is submitted that the identification evidence in this case is demonstrably of "significant probative value" where that identification was made in conditions closely resembling a formal identification parade and insofar as the trial judge seems to have formed the view that the evidence was "weak", it is submitted that he erred.

21. The applicant acknowledges that a formal identification parade is the optimum method of identification, but that the absence of a formal identification parade is not in issue in the instant case, the respondent having refused to participate in such a parade. In these circumstances, it is said that, as per *The People (DPP) v O'Toole* (Unreported, 26/5/2003) once an informal identification is resorted to, the Gardaí "…. must conduct such

procedures with fairness and must do nothing to influence the witness who is seeking to make the identification …."

22. It is submitted that the trial judge adopted a yardstick of procedural fairness which was unrealistic in the context of an informal identification procedure. The applicant says that the unfairness identified by the trial judge was not one created by the Gardaí or one that the Gardaí could overcome, the respondent having refused a formal identification parade. It is further pointed out that the trial judge found absolutely no fault with the procedure as devised and adopted by the Gardaí.

23. It is said that the trial judge appears to have been influenced by the fact of the respondent being the only participant in the parade to speak. The applicant submits that even if this could be viewed as being the product of procedural unfairness, the causative impact of same, in terms of the identification, is limited in circumstances where the evidence is that Mrs. B had already identified the respondent before he spoke.

24. The applicant also states that in terms of Garda organisation and preparation, the procedures adopted for this informal identification procedure were essentially the same as a formal identification parade save that the participants were moving rather than static. It is pointed out that this precise procedure was also adopted in the cited cases of *The People (DPP) v Mark Carlisle* [2019] IECA 181 and *The People (DPP) v Patrick Maples* 2000 WJSC-CCA 7869. In both cases, no finding of procedural unfairness was made on appeal. It is submitted, in line with these decisions, that the trial judge erred insofar as he expressed the view that an "unofficial identification" should not take place while a person is in custody.

25. The applicant relies on the following passage from the judgment of The Court of Criminal Appeal in *Maples*:

> "The Court declines to cloak the so called "right" to an identification parade as any form of constitutional right. The holding of an identification parade, rather than being any form of "right", is a police procedure, which, of course, once embarked upon must be done in accordance with fair procedures. Such fair procedures are exemplified in the garda document, as to the conduct of identification parades, which in this case had been given to the accused when he was first taken into custody. Certainly, in the particular circumstances of this case, there was no obligation on the gardai to go any further in explaining to the accused the consequences of a failure to stand on a formal identification parade. Any such intimation might, indeed, have been construed as a threat or inducement by the accused. Further, it should be noted that in this case the accused had had the benefit of legal advice from his solicitor on at least one occasion prior to the invitation to stand on the identification parade. He knew how that parade would be conducted…"

26. The *Carlisle* case is similarly relied on. The principal complaint in that case was that the accused was the only participant not wearing shoes in the identification parade and that

this marked him out. This Court considered this rendered the process "sub-optimal" but not procedurally unfair. In this way, the Court was particularly influenced by the "instantaneous" nature of the identification.

27. The applicant concludes that any procedure short of a formal identification parade cannot measure up to the standards of fairness that such a parade entails and so where such a parade has been rendered impossible, procedures that do not measure up to that standard are, nevertheless, admissible in evidence. It is submitted that the measures adopted in the instant case were demonstrably as fair as could reasonably be achieved.

Submissions of the respondent

28. In terms of the strength of the evidence, the respondent notes that in circumstances where Mrs. B gave a description to Gardaí of seeing the perpetrator's eyes but "couldn't even say what colour (the perpetrator's) eyes were" such evidence did not enjoy the reliability and significant probative value required by s. 23(14) in both of its incarnations.

29. In addressing the applicant's submissions on the informal identification parade, the respondent relies on *The People (DPP) v Mekonnen* [2012] 1 IR 210 wherein it is stated that where such a method is used "…the onus is on the prosecution to show why second best, in the particular circumstances, is the best available."

30. It is noted that the respondent was not informed that the consequences of his refusal might be that an informal process would be conducted and the manner of such a process.

31. *The People (DPP) v Rapple* [1999] 1 ILRM 113 is also relied on insofar as it held that when the Gardaí have a basis to depart from a formal parade, they do not have a carte blanche.

32. It is submitted that the trial judge in the circumstances was entitled to hold that the process was unfair, especially where there was no evidence given of why this process was nominated and why this particular process was necessitated by the refusal by the respondent to participate in a formal parade.

33. The respondent notes that in the *Carlisle* case, the court rejected the relevant ground of appeal as there was no evidence that the presence or absence of footwear had any impact on the identification, however, it is submitted that, by contrast, in this case, the respondent was the only individual in the parade who spoke which is significant as Mrs. B had heard her assailant speak during the attack. She attended a parade in which she anticipated meeting her assailant and the respondent's was the only voice she heard.

34. It follows that it is the respondent's submission that the trial judge was well within his margin of discretion in declining to admit the evidence as he was of the view that the respondent "stood out" from the foils.

35. In conclusion, the respondent submits the following points:

"(a)Section 23(14) requires the court to consider the evidence in its context. No context was provided such as would enable this Court to conduct the DPP's appeal;

(b) There is no basis to interfere with the Learned Trial Judge's assessment and find the evidence 'reliable' and of 'significant probative value';

(c) There is no basis to suggest the Learned Trial Judge's assessment that the identification procedure adopted was unfair thereby compelling the court to exclude the evidence."

Discussion

36. We do not intend to rehearse the evidence adduced or the law relating to an application pursuant to s. 23 of the 2010 Act. In the present case, the applicant relies on s. 23 (3)(a) and so this Court must determine whether the ruling made by the trial judge erroneously excluded compelling evidence. Whilst the appeal is on a point of law, it is necessary to consider the evidence and, of course, the ruling of the trial judge. We say at this point that we are entirely satisfied that the trial judge erroneously excluded compelling evidence for the reasons stated hereunder.

37. In accordance with the statute, the excluded evidence must be compelling evidence. In that regard, compelling is for the present purposes defined as evidence that is reliable, of significant probative value and that when taken with all the other evidence adduced, a jury might reasonably be satisfied to the required standard of the person's guilt.

38. The alleged incident occurred on a sunny afternoon, where Mrs. B turned and saw her assailant and noted his eyes and clothing. Her identification of him took place approximately one week later. She squeezed her daughter's hand when she first saw the third candidate, and then again as he passed by, that identification was copper fastened in her mind by his voice.

The Procedure Adopted for the Informal Identification Parade

39. Insofar as the procedure adopted is impugned, this parade took place following the respondent's refusal (as is his right) to take part in a formal parade, after he had received the benefit of legal advice. The absence of a formal parade is not in issue in the present case and quite properly so, as while a formal identification parade is the optimum method of identification, where a person refuses to participate, an informal parade may be conducted by the Gardaí. The overriding issue in those circumstances is one of fair procedure. Therefore, in principle, the evidence is admissible as per *The People (DPP) v O'Toole.*

40. In *The People (DPP) v Mekonnen*, the Court of Criminal Appeal considered the procedures adopted in an informal parade conducted in Busarás and referred to much of the jurisprudence on identification. As stated, the overriding concern is that of fair procedure,

once "the recourse to informal identification procedure is justified" as per *Mekonnen* at para. 25.

41. The informal parade was conducted in a Garda Station, but the procedure for an informal parade is a matter for the Gardaí, in light of the circumstances presenting at the time and this fact will not of itself render the process procedurally unfair. The trial judge did not find fault with the procedure adopted by the Gardaí and acknowledged that they did their best in the circumstances.

42. The focus of the judge's concern rests with the evidence that the respondent was the only person who spoke during the parade. However, we are satisfied that this issue was not of such central significance as the identification had already taken place, indeed had been twice made *before* the respondent spoke.

43. Insofar as the argument is made that the respondent should have been informed of the potential consequences of not participating in a formal parade, we do not believe this is a valid argument. If such information was given to a suspect, then it could be said that such might induce him/her to agree to a formal parade where otherwise he/she might not. As said in *Maples*:-

> "The holding of an identification parade, rather than being any form of "right", is a police procedure, which, of course, once embarked upon must be done in accordance with fair procedures. Such fair procedures are exemplified in a garda document, as to the conduct of identification parades, which in this case had been given to the accused when he was first taken into custody. Certainly, in the particular circumstances of this case, there was no obligation on the gardai to go any further in explaining to the accused the consequences of a failure to stand on a formal identification parade."

44. We observe also that the respondent had, as we said, the benefit of legal advice prior to refusing to participate in a formal parade.

Conclusion

45. Therefore, we are satisfied that the requirements of ss.14(a) and (b) have been fulfilled. Concerning (c), the evidence adduced was that of the identification parade, on the basis of that evidence alone, we are satisfied that a jury might reasonably be satisfied to the required standard of the guilt of the respondent in respect of the offence concerned and so we allow the appeal, and we will quash the acquittal of the 20th May 2021.

46. Having regard to the matters referred to in s. 23(12) of the 2010 Act, we will order a re-trial pursuant to ss. (11)(a) of the Act.