



THE COURT OF APPEAL

Record Number: 01/2022

**Kennedy J.
Ní Raifeartaigh J.
Burns J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOHN O'DONOGHUE

APPELLANT

JUDGMENT of the Court delivered on the 6th day of June, 2024 by Ms. Justice Tara Burns.

1. This is an application by the appellant seeking his legal costs in respect of his trial before the Circuit Criminal Court and his successful appeal before this Court resulting in his acquittal on all charges which he faced. The appellant was not legally aided before either Court having not made such an application.

Background

2. The appellant was convicted before the Circuit Criminal Court, by unanimous verdict of the jury, of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997 and violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act, 1994. He was acquitted of a charge of production of an article capable of inflicting serious injury contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 and a charge of threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997.
3. On 16 December 2017, Mr William O'Driscoll Senior, and seven of his male relatives, had stayed overnight at Kealy's Yard, Bothar Buí, Rathkeale, County Limerick having travelled from Newry for an engagement party. That morning, the appellant, accompanied by several of his relatives, arrived at this location in a car and a people carrier. Different versions of events exist in relation to what next occurred which is reflected by the evidence of members of the O'Driscoll family called on behalf of the respondent; the case put on behalf of the

appellant by questions asked of the O'Driscoll family in the course of cross examination; and evidence of eye witnesses called on behalf of the appellant.

4. It is apparent that some form of a melee occurred involving the families and evidenced by a broken hurley stick found in the yard where the O'Driscoll family were staying. It is not in dispute that Mr. O'Driscoll Snr sustained very severe injuries. How he came to sustain the injuries was at issue in the case with Mr. O'Driscoll Snr asserting that he sustained them as a result of the appellant attacking him with a machete, whereas the appellant, through his Counsel, asserted that the injuries were sustained by Mr. O'Driscoll Snr as a result of Mr. O'Driscoll's son (James O'Driscoll) attempting to attack the appellant and Mr. O'Driscoll Snr getting caught up in this attack.
5. The successful ground of appeal argued before this Court was that the failure by the investigating guards to harvest CCTV evidence from a house outside of which the s. 4 assault was alleged to have occurred, resulted in the appellant being deprived of a realistic prospect of a defence. This was in circumstances where the appellant had complained to the guards, the day after the events in question, that he was the subject of an assault by Mr. O'Driscoll Snr whom he alleged had hit him with a hard object. The appellant did not relate to the guards the version of events which was subsequently put to James O'Driscoll during cross examination to the effect that it was he who caused his father's injuries in an attempt to assault the appellant. The evidence further established that it was likely that the house in question had operational CCTV cameras which had captured the event; that the guards had called to this house seeking CCTV; and that they had not returned.
6. This successful ground of appeal did not form part of the original grounds of appeal. Instead, after the appeal had been assigned a hearing date in July 2023 of 28 November 2023, the appellant sought to rely on additional grounds of appeal by motion dated 6 November 2023. The motion was listed to be heard with the appeal.
7. This Court determined that there were significant failings regarding the investigation into the existence of CCTV and that the trial judge's reasoning in relation to this issue did not engage with the significance of the facts which were established on the evidence. Accordingly, we were satisfied that the appellant had been deprived of a realistic prospect of a defence and that the trial judge had been incorrect not to accede to an application made pursuant to *The People (at the suit of the Director of Public Prosecutions) v. PO'C* [2006] 3 IR 238.
8. Accordingly, we quashed the convictions recorded against the appellant.

Jurisprudence in Relation to Costs in a Criminal Case

9. A presumption that costs follow the event does not arise in criminal proceedings. However, in *The People (DPP) v. Bourke Waste Removal Ltd* [2013] 2 IR 94, the Court of Appeal held

that the fact of an acquittal was not a neutral event but rather the starting point of the Court's consideration in relation to the question of costs, which was to be considered in conjunction with other relevant circumstances. Hardiman J., stated at paragraph 23 of its judgment:-

*"While we agree that the discretionary factors mentioned by Charleton J. in *The People (DPP) v. Kelly* [2007] IEHC 450 and by Cooke J in *The People (DPP) v. McNicholas* (Unreported, Central Criminal Court, 20th December 2011) are highly relevant to the exercise of the court's costs jurisdiction, we would respectfully not follow those decisions insofar as they suggest that the event is a purely neutral factor. We are rather of the view that the event is the starting point (albeit far from being the only relevant factor) of the court's consideration of the issue of costs, save, of course, that the special presumption embodied in the *lex specialis*, that is *r. 1(3)*, [namely that costs follow the event] has no application in the criminal sphere."*

Hardiman J approved the relevant considerations which Charleton J. elucidated in *The People (DPP) v. Kelly* and Cooke J. referred to in *The People (DPP) v. McNicholas* but set out four abridged considerations which he stated were particularly relevant to a case of the nature at issue, namely a competition case.

10. As the instant case is not a competition case, we will return to the more extensive relevant considerations set out by Charleton J. in *The People (DPP) v. Kelly* which were approved of by Hardiman J. in *The People (DPP) v. Bourke Waste Removal Ltd.* Charleton J. stated at paragraphs 18 – 21 of his judgment:-

"18. The matter of the identification of the relevant factors, and the application of discretion based on them, is therefore peculiarly a matter for the trial judge. I do not regard the trial judge in a criminal case, who is called upon to decide a defence or prosecution application for costs, as being bound only to consider the evidence admitted before the jury. The issue as to costs being discretionary, and not being an issue as to whether the prosecution have discharged the burden of proof on them beyond all reasonable doubt, the exercise of that discretion requires the trial judge to inquire into the conduct of the prosecution and the defence within the wider context as to whether it was reasonable to bring the prosecution and as to whether it is correct, the prosecution having failed, not to follow the normal rule and order costs in favour of a successful defendant...."

19. *It is therefore important to examine the conduct of the prosecution and, in so far as that is possible, to examine the conduct of the defence in the case to determine how the discretion as to costs ought to be exercised....*

...

Relevant questions

21. *In considering the discretion as to costs, it seems to me, having considered the authorities, that without attempting to lay out a definitive list, the trial judge might usefully ask the following questions:*

(1) *Was the prosecution justified in taking the case through it being founded on apparently credible evidence?*

(2) *Did anything within the investigation by the Gardaí give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused? I use this test, in distinction to a matter that might raise a reasonable doubt because, firstly, the trial judge must distance himself or herself from the evidence and, secondly, it is for the jury to judge whether there is any reasonable doubt about the guilt of the accused.*

(3) *Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?*

(4) *Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury? Then one might go on to consider the reason for such acquittal by the trial judge, whether as to a failure in technical proofs or if it was one of the rare cases of inherent weakness in evidence that had actually been offered.*

(5) *If there had been an acquittal by direction of the trial judge, was this one based upon a decision that required the exclusion of evidence, and if so, whether that exclusion was based upon a serious, as opposed to a mistaken, abuse of the accused's rights? This is not a circumstance to apply the rule as to the exclusion of evidence based on a mistake that accidentally infringes some constitutional right of the accused. What might be considered here is deliberate abuse by the servants of the State.*

(6) *What answer had the accused given to the charge when presented with an opportunity to answer it? The purpose of a Garda investigation is not to provide an opportunity to an accused person to state what his defence is; Kevin McCormack v. The Judge of the Circuit Court and the D.P.P. [2007] I.E.H.C.123. The purpose of any fair investigation, however, is to seek out the truth; sometimes according with an initial police view as to who is guilty and oftentimes contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he*

or she is expected to deal with the preliminary outline of the case inculcating the suspect and allow him or her an opportunity, if he or she wishes, the chance to say what the answer to it is or might be, in a case based on circumstantial evidence.

(7) What was the conduct of the accused in the context of the charge that was brought, specifically in terms of who he was associating with and on what ostensible basis? Sometimes an accused can be partly responsible for attracting suspicion by dealing with and having close relations with those who are closely linked to criminal activity. Such a relationship may be explained in evidence in an apparently reasonable way, but at other times the course of dealings may be left untreated in any reasonable way in the evidence. Suspicion can arise against an accused in other ways, such as by running away or apparently destroying what might be relevant evidence.

(8) What was the conduct of the accused in meeting the case at trial?

(9) Whether any positive case was made by an accused such as might reasonably be consistent with innocence and whether any right was exercised to testify as to that case or whether an opportunity was used under the Prosecution of Offences Act, 1974 to communicate with the Director of Public Prosecutions as to the nature of that defence?

(10) Have the prosecution made any serious error of law or fact whereby the case became on presented on a wrong premise? The same question is applicable to the defence."

Consideration of the Relevant Questions

(1) Was the prosecution justified in taking the case through it being founded on apparently credible evidence?

11. It is not in dispute that the appellant was at the scene of this event; that he arrived at the scene in the company of several men; that they had arrived in a car and a people carrier; and that Mr. O'Driscoll Snr suffered extremely serious injuries from the events in question. While the appellant asserted to the investigating guards that he had been the victim of an assault perpetrated by Mr. O'Driscoll Snr, the version of events put to witnesses during the trial was that it was James O'Driscoll who caused the injury to the injured party. This was not outlined by the appellant in the course of his garda interviews and only came to light during the cross examination of James O'Driscoll when he was recalled to give evidence at the request of the appellant. In light of the apparently credible evidence of Mr. William O'Driscoll Snr and his family; the medical evidence relating to Mr. O'Driscoll Snr's injuries; and the failure by the appellant to outline to the guards how he asserted Mr. O'Driscoll Snr sustained his injuries, the prosecution was justified in taking the case against the appellant.

(2) Did anything within the investigation by the Gardaí give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused.

12. Nothing within the garda investigation, as notified to the respondent, gave rise to the existence of a serious inherent doubt as to the guilt of the accused. Even though the appellant had indicated to the investigating guards that it was he who was assaulted, and it was noted that he had a bandage on his hand, Mr O'Driscoll Snr had sustained injuries of the most serious kind. The appellant failed to outline to the guards how he asserted Mr. O'Driscoll Snr sustained these injuries.
13. The Court was critical of the failure by the investigation team to conduct a proper investigation into the existence of CCTV footage at the location of the incident, particularly in light of the fact that the guards were on notice of the appellant's allegation that he had been assaulted, and was of the view that this failure resulted in the appellant being deprived of a realistic prospect of a defence, as the CCTV most likely would have depicted the events at issue. However, that does not equate with the investigation giving rise to a serious inherent doubt as to the guilt of the accused. Furthermore, the respondent was unaware of the issue which arose with respect to the possibility of CCTV of the incident until it unfolded in the course of the defence evidence when an engineer and the householder of the house in question was called to give evidence.

(3) Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?

14. No. This does not arise. The appellant asserted that he had been assaulted rather than him having perpetrated an assault, and had a bandaged hand. However, he did not provide the account to the investigating guards which was later put to witnesses in the course of cross examination.

(4) Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury? Then one might go on to consider the reason for such acquittal by the trial judge, whether as to a failure in technical proofs or if it was one of the rare cases of inherent weakness in evidence that had actually been offered.

15. This Court has determined that the *PO'C* application should have been successful not because of a failure in technical proofs, nor because of inherent weaknesses in the evidence but rather because of a serious deficit in the garda investigation relating to the existence of CCTV. What the CCTV would have depicted is unknown, however the absence of it deprived the appellant of a realistic prospect of a defence.

(5) If there had been an acquittal by direction of the trial judge, was this one based upon a decision that required the exclusion of evidence, and if so, whether that

exclusion was based upon a serious, as opposed to a mistaken, abuse of the accused's rights? This is not a circumstance to apply the rule as to the exclusion of evidence based on a mistake that accidentally infringes some constitutional right of the accused. What might be considered here is deliberate abuse by the servants of the State.

16. This does not arise.

(6) What answer had the accused given to the charge when presented with an opportunity to answer it?

17. This appellant asserted it was he who had been subject to an assault. However, he did not provide the details of how he asserted Mr. O'Driscoll Snr obtained his injuries until the currency of the trial.

(7) What was the conduct of the accused in the context of the charge that was brought, specifically in terms of who he was associating with and on what ostensible basis?

18. It is important to note that as a result of the decision of this Court, the appellant's convictions in respect of assault causing serious harm and violent disorder have been quashed. However, it is not in dispute that on the morning in question the appellant arrived at the location in the company of several family members and that a melee of some description occurred.

(8) What was the conduct of the accused in meeting the case at trial?

19. As is the appellant's right, he put the respondent on full proof of all issues in the matter.

(9) Whether any positive case was made by an accused such as might reasonably be consistent with innocence and whether any right was exercised to testify as to that case or whether an opportunity was used under the Prosecution of Offences Act, 1974 to communicate with the Director of Public Prosecutions as to the nature of that defence?

20. The appellant did not give evidence in the matter and did not provide the details of how he asserted the injured party received his injuries until the injured party's son was recalled to so that the appellant's case could be put to him.

(10) Have the prosecution made any serious error of law or fact whereby the case became on presented on a wrong premise? The same question is applicable to the defence.

21. No. The investigation team did however fail to conduct a proper investigation into the existence of CCTV footage at the scene which most likely would have depicted the events at issue.

Discussion and Determination

22. The issue that arose in the instant case which resulted in this Court overturning the conviction of the appellant on the two charges which he had been convicted of, related to the failure by the investigating guards to conduct a proper investigation with respect to the CCTV footage which appears to have been available of the incident. The failure to do so resulted in the appellant being unable to avail of a realistic prospect of a defence.
23. However, it is important to add that whilst the appellant is entitled to the presumption of innocence in respect of the two charges he had been convicted of, the finding of this Court does not involve the Court determining the factual issues which arose in the case and most certainly does not equate with the Court rejecting Mr. William O'Driscoll Senior's version of events or accepting the appellant's. What is not in dispute is that the appellant was at the scene of this incident in the company of several men who arrived with him in two cars; that some form of a melee took place at this location; and that Mr O'Driscoll Snr sustained very significant injuries in the course of this incident. The cause of how he sustained those injuries was in dispute in the trial and the appellant now stands acquitted of that charge.
24. While it is necessary to start from the position that the appellant stands acquitted of all of the charges which he faced, it is also appropriate to have regard to the fact that two of those charges did not result in an acquittal because of a jury verdict or because of a successful *Galbraith* application on the grounds of insufficiency of evidence, but rather because this Court was of the opinion that the *PO'C* application which had been brought in relation to the failure of the investigating guards to conduct a proper CCTV investigation, should have been successful.
25. Having regard to our consideration of the questions proposed by Charleton J. in *DPP v. Kelly*, we are of the opinion that the prosecution against the appellant was justified and that nothing in the garda investigation raised an inherent doubt about his guilt. While indicating that he had been assaulted, and noting that his hand was bandaged, he failed to give his account of what he asserts occurred until witnesses were cross examined in the course of the trial. Had a proper CCTV investigation taken place, what actually occurred could have been established, but in the absence of this, the appellant was deprived of a realistic prospect of a defence.
26. We are not of the view that the appropriate avenue for the appellant to have ventilated the issues arising with respect to the absence of CCTV evidence was by way of judicial review. As the Superior Courts have indicated time and again, matters of the nature arising in the instant case can appropriately, and often are best dealt with, by trial courts. The appellant

could have proceeded by way of judicial review, but not having done so does not now preclude him from seeking his costs before the trial court and on appeal.

27. We also are of the view that the issue of the appellant having spent two years in custody is not a matter of relevance with respect to our decision on costs. It is asserted that over this two year period, the appellant was deprived of making a livelihood. No evidence has been placed before the Court as to the nature of the appellant's employment or business or how funding the defence of this case has impacted on him, or indeed whether he himself funded his legal costs.
28. The failure of the guards to carry out a proper CCTV investigation does not result in a requirement to grant the appellant his costs in this matter.
29. Accordingly, exercising our wide discretion in this matter, and starting from the basis that the appellant has been acquitted on all charges relating to this matter but also having regard to the very particular facts and circumstances of this case which have been recited extensively in the preceding paragraphs, we have determined not to grant the appellant his costs in the trial court.
30. We also are not minded to grant the appellant the costs of his appeal to this Court. In light of the verdict of the jury recording a conviction against the appellant on two charges, we are of the view that in this case, there was no reality, and perhaps very good policy reasons (which we will not determine), for the respondent not conceding the appellant's appeal. In addition, the successful ground of appeal did not come into the arena until three weeks before the appeal. There is no reality to the suggestion that the respondent would have conceded the appeal on the basis of a proposed new ground at that stage.
31. We therefore will not grant the appellant his costs before the court of trial nor his costs of his appeal before this Court.